Delayed Flights and Delayed Rights: It is Time for the United States to Follow the European Union’s Lead and Enact More Regulations to Protect Airline Passengers

Hannah Foote
Southern Methodist University, Dedman School of Law

Recommended Citation
Hannah Foote, Delayed Flights and Delayed Rights: It is Time for the United States to Follow the European Union’s Lead and Enact More Regulations to Protect Airline Passengers, 88 J. AIR L. & COM. 919 (2023)

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
DELAYED FLIGHTS AND DELAYED RIGHTS: IT IS TIME FOR THE UNITED STATES TO FOLLOW THE EUROPEAN UNION’S LEAD AND ENACT MORE REGULATIONS TO PROTECT AIRLINE PASSENGERS

Hannah Foote*

ABSTRACT

Since Congress passed the Airline Deregulation Act of 1978, travelers have benefitted from airline deregulation through discounted prices and greater access to air travel, but these benefits have largely been offset by the reality that many airline passengers are unsatisfied with the airline industry’s customer service, or lack thereof. This Comment argues that the United States should follow the European Union’s lead and, in accordance with Regulation EC 261, require airlines to compensate passengers when their flights are delayed or canceled. The concentrated aviation industry has created a market that does not adequately protect airline passengers, and the courts have not provided passengers with an adequate venue for relief. Enacting legislation similar to Regulation EC 261 would make airlines accountable, improve service at a marginally low cost, and generate a more uniform standard of airline passenger rights, creating more transparency and certainty for both airlines and passengers.

TABLE OF CONTENTS

I. INTRODUCTION ........................................ 920
II. AIRLINE PASSENGER PROTECTION
   IN THE U.S. ........................................... 924
   A. HISTORY: FROM REGULATION TO Deregulation
      OF THE AIRLINE INDUSTRY ......................... 924

DOI: https://doi.org/10.25172/jalc.88.4.7

* J.D. Candidate, SMU Dedman School of Law, 2024; B.A., Political Science, Bethel University, 2020. The author thanks her husband, family, and friends for their constant support and encouragement.
In late December of 2022, thousands of travelers were left stranded for days after Southwest Airlines (Southwest) canceled more than 16,700 flights over the span of several days. A prime example is April Proveaux and her family of five. The Proveauxs were stranded in Denver, without luggage, for a total of four days. Southwest Airlines told the Proveauxs that their luggage had already flown to another destination, which did not make sense to the Proveauxs because seemingly no flights had taken off. In Denver, the temperature reached a chilly –3 degrees, but the Proveauxs, departing from the sunny state of California, had already packed their winter coats in their now-missing luggage. The Proveauxs “had only the warm-weather clothes they’d put on that morning in


3 Id.

4 Id.
After finally returning home to Memphis, the Proveauxs waited in line with dozens of other people looking for their luggage. The Proveauxs learned something shocking—their bags had been in Denver the entire time. At this point, April Proveaux never expected to see their luggage again, but thankfully, Southwest eventually delivered their bags to their door. During their four days stuck in Denver, the Proveauxs spent $1,500.

Another passenger affected by this Southwest fiasco was Skyler Lenz, a resident of Denver, Colorado. Skyler planned a trip to New York City with his family to celebrate his wedding anniversary and his daughter’s birthday. The family left Denver for New York City on December 21 and “planned to fly home on Christmas Eve.” On December 24, the Lenz family prepared to head toward the airport, but when Skyler checked his Southwest Airlines app, he discovered that Southwest had canceled their flight. Skyler immediately called Southwest’s customer service line but was on hold for hours. Lenz could not reach an agent, so he used the Southwest Airlines app on his phone to book another flight. The only available flight was on December 28. Eventually, Southwest canceled that flight as well, so the family rented a car and drove twenty-six hours to Denver. The Proveaux and Lenz families are only two examples among the thousands of other passengers and families affected by Southwest’s massive cancellations.

“While a massive winter storm caused the initial flight cancellations,” Southwest Airlines’ unprecedented problems seemed to be the result of a mixture of various unfortunate events, including “staff shortages caused by the COVID-19 pandemic, as well as employees out sick with [the flu] and respiratory

---

5 Id.
6 Id.
7 Id.
8 Bowman, supra note 2.
9 Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
16 Neuman & Ludden, supra note 10.
17 Id.
18 See id.; Radde, supra note 1.
19 Radde, supra note 1.
syncytial virus (RSV).” Most notably, Southwest Airlines’ outdated software systems turned what should have been a slightly tricky problem into a disaster that lasted days longer than other airlines that had resumed their usual operations. Indeed, “[i]t took Southwest eight days to recover . . . while other major airlines were up and running quickly after the storm passed.” The cancellations caused an angry outcry from passengers and inspired a media frenzy that called on the airline to take accountability.

The U.S. Department of Transportation (DOT) launched an investigation into the cause of the massive disruption after Southwest Airlines reported a $220 million loss in the fourth quarter of 2022 and predicted even more future losses. NPR reported that “[a]bout half of those losses [came] directly from the flight cancellations,” and the rest of the reported losses came from compensating airline passengers who purchased tickets from a different airline. During a Senate hearing over the travel nightmare, a top Southwest Airlines executive apologized to everyone affected by the flight disruptions, “which caused a tremendous amount of anguish, inconvenience and missed opportunities for [Southwest’s] customers and employees.” The Southwest executive promised various ways in which the company was moving forward to make things right with the passengers and prevent any future similar situations. Such measures included making immediate updates to Southwest Airlines’ scheduling software as well as “ongoing assessments and funding to address icing issues at airports prone to freezing conditions.”

During this hearing, various aviation and government actors expressed competing views regarding the proper “role of government in regulating commercial aviation and addressing

20 Neuman & Ludden, supra note 10.
21 Id.
23 See generally id.
24 Radde, supra note 1.
25 Id.
27 Id.
28 Id.
affordability concerns.”

Airline ticket prices have risen over the past year and even remained high during and after the winter travel disaster. Indeed, federal data reported that in December 2022, airline ticket prices “averaged more than 28% as high [as December 2021].” Texas Senator Ted Cruz stated: “Some Democrats on this committee were proposing the government step in with overly complex, anticompetitive[,] and frankly unnecessary regulations that would collectively have the result of making flying unaffordable for many Americans.”

Others who testified at the hearing pushed “for more consumer choice by other means.” The president of Flyers Rights, a passenger advocacy group, referred to the airline industry as an “oligopoly.” Noting that the aviation industry “consist[s]” of four major airlines, the Flyers Rights president “criticized what he described as the government’s laissez-faire approach to deregulation.”

A senior fellow at the Brookings Institution, Clifford Winston, argued that “privatizing U.S. airports in major metropolitan areas could . . . for more international carriers to serve domestic passengers,” thus giving passengers more choices and hopefully easing flight congestion. Winston further urged that airlines have to be held accountable, or else they won’t have the incentive to reduce or correct their mistakes.

Indeed, the Southwest Airlines disaster exemplifies that while travelers initially benefitted from airline deregulation through discounted prices and democratization of air travel, the reality that many airline passengers are unhappy with the airline industry’s customer service, or lack thereof, has overshadowed the benefits. The government has provided Americans with a relatively

---

29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
37 Id.
38 See generally Airline Deregulation: When Everything Changed, NAT’L AIR AND SPACE MUSEUM (Dec. 17, 2021), https://airandspace.si.edu/stories/editorial/airline-deregulation-when-everything-changed [https://perma.cc/S2RW-USXP] (“Since deregulation, travelers have benefited from low fares and more frequent service on heavily traveled routes; on other routes, fares have risen. But in exchange for low fares, passengers have had to sacrifice convenience and amenities. What would you be willing to sacrifice for a cheaper fare?”).
unrestricted ability to travel; however, “[I]t has not, as a practical matter, produced pleasant or hassle-free travel in the modern deregulated era.”

Air transportation is not just a business—it is a public utility needing regulation in the public interest. The United States must follow the European Union’s lead and, in accordance with Regulation EC 261, require airlines to compensate passengers when their flights are delayed or canceled. The concentrated aviation industry has created a market that does not adequately protect airline passengers, and the courts have not provided passengers with an adequate venue for relief. Enacting legislation similar to Regulation EC 261 would make airlines accountable, improve service at a marginally low cost, and generate a more uniform standard of airline passenger rights, creating more transparency and certainty for both airlines and passengers.

II. AIRLINE PASSENGER PROTECTION IN THE UNITED STATES

A. HISTORY: FROM REGULATION TO DeregULATION OF THE AVIATION INDUSTRY

The present-day protections for airline consumers are the result of “a long history of regulating the aviation industry.” “In 1938, Congress established the Civil Aeronautics Board (CAB), beginning the regulatory era that [lasted] until the late 1970s.” The CAB closely monitored airlines and established the rates airlines could charge and the routes airlines could fly. “Airlines could not add or abandon routes or change fares without CAB approval.”

The CAB mainly focused on economic regulation, so in 1958 Congress formed the Federal Aviation Administration (FAA) to regulate aviation safety, including the growing problem of aircraft

42 Id.
43 See TIMOTHY M. RAVICH, INTRODUCTION TO AVIATION LAW 290 (2020).
44 Id.
traffic congestion. The FAA imposed high-density rule slot controls, which divided an airport’s schedule into increments, allowing the FAA to control “the number of airplanes scheduled to depart or arrive within a given time period.”

Transferring safety regulations to the FAA was just the start of many more changes to come. Eventually, Congress passed the Airline Deregulation Act of 1978 (ADA) to “phase[] out the CAB’s regulatory authority.” The ADA freed the airlines of some federal regulation by significantly limiting the government’s power to control most of the business practices of airlines. This shift transformed aviation into a market-driven commercial industry. As new air carriers joined the market, each offering “competitive fares with regular frequency on choice routes,” a larger and more diverse group of air travelers emerged. As air travel became more routine and accessible, “passengers’ awe with airplane travel was replaced with a no-nonsense expectation of getting to a destination cheaply, quickly, and safely.”

B. The Current Three Levels of Airline Passenger Protection

The rights of U.S. airline passengers are primarily created through three different sources: federal laws, regulations, and the airline’s policies. To a large extent, airline passengers’ rights are defined by Congress, which has the authority to do so under its constitutional power to “regulate Commerce with foreign Nations, and among the several States.” To ensure that states would not undo federal deregulation with their own regulations, the ADA included a preemption provision prohibiting state and local governments from regulating the “price, route, or service of an air carrier.”

Thus, the federal government “determines the extent to which airline consumer rights are codified in law, authorizes federal

45 Schoonover, supra note 41, at 525.
46 Id.
47 Id. at 526.
48 Id. at 527.
50 Ravich, supra note 39, at 961.
51 Id.
52 Id.
53 Tang, supra note 49.
54 Id.; U.S. Const. art. I, § 8, cl. 3.
55 Tang, supra note 49 (citing 49 U.S.C. § 41713(b)(1)).
agencies to enforce those rights, and directs or authorizes federal agencies to define and enforce passenger rights that are not specifically enumerated in legislation. The House Committee on Transportation and Infrastructure and the Senate Committee on Commerce, Science, and Transportation are the congressional committees that oversee the Department of Transportation (DOT), which is the “principal department responsible for executing and enforcing airline passenger rights laws” established by Congress.

The DOT may also develop regulations “based on [its] more general statutory authority, giving [the DOT] broad powers to prescribe regulations, standards, and procedures related to air travel.” Specifically, the DOT holds significant power to protect consumers from unfair or deceptive practices and to ensure safe and adequate service in air transportation. This authority lies with the Secretary of Transportation rather than with the FAA. However, the DOT’s authority does not cover all matters related to air travel. For example, the Transportation Security Administration (TSA), not the DOT, oversees aviation security and airport security screening. Although the DOT’s statutory authority generally serves “as the basis for rulemaking,” it is also occasionally utilized for “direct enforcement actions.” Lastly, the DOT enforces regulations that guarantee non-discriminatory access to air travel for individuals with disabilities and prohibit airlines from engaging in “unlawful discrimination based on race, gender, religion, or national origin.”

The last source of airline passengers’ rights is found within each airline’s contract of carriage. Contracts of carriage are “the legal agreement between the airline and its ticket holders,” and they usually outline the “rights, duties, and liabilities” of both parties. In the past, before tickets were electronic, airlines used to print their contracts of carriage on the back of the passenger’s

---

56 Id.
57 Id.
58 Id. at 2; see 49 U.S.C. § 40113(a) (setting out the general authority of the Secretary of Transportation).
61 Tang, supra note 49, at 3.
62 Id.
63 Id.; see 14 C.F.R. § 382.1.
64 Tang, supra note 49, at 4.
65 Id.
In today’s digital age, most contracts of carriage can be accessed on the airline’s website.\textsuperscript{66} Prior to deregulation, instead of having contracts of carriage, airlines had tariffs, which required the CAB’s approval.\textsuperscript{68} If an airline violated its approved tariff, the CAB could take action against the offending airline.\textsuperscript{69} Now, following deregulation, the “federal government no longer has control over airlines’ prices or routes, and contracts of carriage are not subject to federal review or approval.”\textsuperscript{70} Nevertheless, if a condition in a contract of carriage “conflicts with federal laws or regulations,” that condition “may not be enforceable by the airline.”\textsuperscript{71} Thus, federal aviation regulations directly affect the provisions in an airline’s contracts of carriage.\textsuperscript{72} For example, federal regulations set the “compensation guidelines” when an airline involuntarily bumps a passenger from a flight due to overbooking.\textsuperscript{73} Additionally, the DOT prohibits airlines from limiting a passenger’s choice of forum.\textsuperscript{74} A contract of carriage cannot limit a passenger’s ability to bring a claim in a court of their choice of “competent jurisdiction, including a court within the jurisdiction of [the] passenger’s residence in the United States (provided that the carrier does business within that jurisdiction).”\textsuperscript{75} However, this rule only applies to U.S. airlines on domestic flights, as the venue and liability provisions of the Warsaw or Montreal Conventions govern international flights.\textsuperscript{76}

C. \textbf{The Rising Concern for Airline Passenger Rights}

As Timothy Ravich explains, “[a]irline deregulation was premised on an expectation that an unregulated industry would attract entry and increase competition among airlines, thereby benefitting consumers with lower fares and improved customer service.”\textsuperscript{77} The arrival of low-cost carriers like Frontier Airlines

\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} \textit{Id.}
\textsuperscript{70} \textit{TANG, supra note 49, at 4.}
\textsuperscript{71} \textit{Id.}
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{See 14 C.F.R. § 253.10.}
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{See Jessica Rapoport, Warsaw, Montreal, and the U.S. Department of Transportation: Consumer Protection for Forum Selection, 77 J. AIR L. & COM. 247, 261 (2012).}
\textsuperscript{77} \textit{Ravich, supra note 43, at 291.}
and Spirit Airlines indicated a rise in competition within the commercial airline sector; however, “the quality of passenger service has deteriorated significantly since 1978.” Indeed, the post-ADA deregulated environment has dramatically affected passengers.

Before the enactment of the ADA, the CAB had the authority to approve or even set airlines’ prices. The CAB based ticket prices on a complicated cost-based formula. Although the exact formula changed multiple times throughout the CAB’s authority, airlines generally had “little incentive to reduce costs” because the CAB’s cost-based formula assured a fixed rate of return for airlines. Additionally, the CAB limited the number of airlines in the industry and reduced competition by allowing only one airline on a route unless there was sufficient demand for another airline to fly the same route. Consequently, the airlines primarily compete with one another through the quality of service that each airline provides to their passengers. After deregulation, airlines turned to competing mainly through price, not service.

Indeed, in the past fifty years, airlines have capitalized on their new freedom by pushing the boundaries of passengers’ willingness to tolerate reduced service and amenities in exchange for cheaper prices and a wider array of flight times and routes. “Airlines have ‘unbundled’ their offerings,” wherein they charge separate fees for services that were once “bundled” into the ticket price. These services, including checked baggage, priority boarding, and seat changes, are now offered as separate add-ons. Thus, while airline ticket prices have dramatically decreased since deregulation, the prices are arguably “artificially low” because they do not account for such various additional fees.

Additionally, “because the CAB used a cost-plus basis for approving fares, airlines could afford to maintain a significant amount [of unoccupied seats].” This surplus capacity made it relatively easy for airlines to handle issues arising from flight

78 Id. at 294.
80 Id.
81 Ravich, supra note 43, at 290.
82 Id.
83 Id.
84 Id.
86 Ravich, supra note 39, at 964.
88 Id.
89 Ravich, supra note 43, at 296.
delays or cancellations, as it was not that difficult to find empty seats on another flight to rebook passengers.\textsuperscript{91} Now, in a deregulated environment where ticket prices are lower and “profitability is not guaranteed,” airlines need their planes to fly at or near full capacity to make a profit.\textsuperscript{92} As a result, “the lack of spare capacity can make it difficult for carriers to accommodate passengers in [the] event of flight disruptions” such as flight delays, overbookings, or cancellations.\textsuperscript{93}

Under U.S. law, air carriers may delay or cancel flights with basically no legal consequences.\textsuperscript{94} “[A]irlines are not required to compensate passengers when flights are delayed or cancelled,” but under certain conditions, compensation is required when passengers are involuntarily bumped from an oversold flight.\textsuperscript{95} Additionally, there is no U.S. law or regulation requiring airlines to offer passengers an alternative flight or provide reimbursement for food and hotel rooms in the event of a cancellation or delay; however, some airlines will provide these accommodations because they agreed to do so in their contracts of carriage.\textsuperscript{96}

Before the ADA, when the CAB regulated ticket prices and routes, “airlines generally had comparable price structures,” making it easier for airlines to enter into agreements with each other for rerouting passengers in the event of flight delays, flight cancellations, or flight overbookings.\textsuperscript{97} Now, the prices offered by competing airlines on a specific route may differ significantly.\textsuperscript{98} Furthermore, “depending upon the date of purchase, the passenger’s ability to change flights without penalty, and other factors,” the ticket price paid by each passenger on a flight “may vary widely.”\textsuperscript{99} Even though some airlines do still have agreements with other carriers that allow for passengers to be rebooked on a competing carrier’s flight if there is a delay or cancellation, it is less likely for low-cost carriers to enter into such agreements.\textsuperscript{100}

\textsuperscript{91} Id.
\textsuperscript{92} Id. at 5.
\textsuperscript{93} Id.
\textsuperscript{95} Id.; See Bumping & Oversales, U.S. Dep’t of Transp. (Apr. 15, 2021), https://www.transportation.gov/individuals/aviation-consumer-protection/bumping-oversales [https://perma.cc/6P4A-6KV7].
\textsuperscript{96} See U.S. Dep’t of Transp., supra note 94.
\textsuperscript{97} Tang, supra note 49, at 5.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
Thus, if an airline, especially a low-cost carrier, cancels a flight, it is unlikely that the carrier will rebook its passengers onto another carrier because of the high cost associated with doing so. Overall, deregulation has made it less likely for airlines to reroute passengers on a competing airline as the lack of extra capacity on planes and the wide variability in ticket prices make it more difficult and costly.

Before the ADA, the airline industry operated on a “linear route system,” where passengers primarily flew directly from their departure city to their final destination without any intermediate stops. Following deregulation, major airlines implemented the “hub and spoke system” to try and maximize seat occupancy and profitability. In this system, a carrier selects an airport (the hub) to be the central airport that its flights are routed through; thus, the hub normally becomes the primary intermediate stop between passengers’ originating and final destinations (the spokes). Passengers traveling from a spoke city to another spoke city are first flown to the hub before taking another flight to their final destination. The consolidation of flights at hub airports amplifies the impact of delays as “[h]ubs require the prompt arrival of large numbers of airplanes in short time periods known as ‘waves.’” Thus, if there are delays at the spoke airport, it sets off a chain reaction of delays since the same airplane and crew are needed for the following flight at the hub. Likewise, disruptions at the hub airport “affect spokes, as [late] departures from hub airports cause passengers to arrive late to their final destinations.”

D. LEGISLATIVE REMEDIES

On several occasions, federal legislators proposed consumer protection legislation to deal with issues of delays and flight cancellations, but many of these early efforts failed. The first
such congressional bill was the Airline Reregulation Act of 1989, which would have required carriers to disclose their “on-time performance” and “prevent[ed] carriers from cancelling flights on short notice for economic reasons.”\textsuperscript{111} Subsequent proposals focused on improving airlines’ punctuality by requiring “better on-time performance on regularly scheduled routes.”\textsuperscript{112} As more carriers started using the hub and spoke system, legislators became particularly concerned about the growing number of missed connections.\textsuperscript{113} Consequently, lawmakers proposed legislation to establish airport pricing schemes that would disincentivize airlines from scheduling flights during busy periods.\textsuperscript{114} Many of the early passengers’ rights proposals centered around holding airlines accountable by requiring more frequent and meaningful communication between airlines and their passengers.\textsuperscript{115} Despite these efforts, “[n]one of the proposals passed,” and “[d]elays continued to be a problem.”\textsuperscript{116}

The issue of airline passenger rights reached a peak after a 1999 blizzard created a nightmare situation in which “almost two dozen airplanes and more than 7,000 passengers were stranded on airplanes at Detroit’s Metropolitan Airport for up to eleven hours” with no food or water.\textsuperscript{117} In response, Congress introduced various legislative proposals to address and safeguard the rights of airline passengers in such circumstances.\textsuperscript{118} One such proposal mandated airlines to provide passengers with a full refund as well as the right to exit the airplane if their flight failed to depart “within two hours of the scheduled departure time or park within two hours of landing.”\textsuperscript{119} Another proposal “required airlines to allow passengers to exit an airplane that remained at its gate ‘more than 1 hour past its scheduled departure time.’”\textsuperscript{120} A third proposal called for regulations ensuring airlines provided passengers with access to “necessary services,” such as “food,

\textsuperscript{111} See Schoonover, supra note 41, at 532.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Ravich, supra note 39, at 948.
\textsuperscript{116} See Schoonover, supra note 41, at 532-33.
\textsuperscript{117} Ravich, supra note 43, at 376.
\textsuperscript{118} See Ravich, supra note 39, at 948.
\textsuperscript{119} Ravich, supra note 43, at 377.
\textsuperscript{120} Ravich, supra note 39, at 948 (quoting Omnibus Airline Passenger Fair Treatment Act of 1999, H.R. 2200, 106th Congr. § 4(b)(2) (1999)).
water, restroom facilities, and emergency medical services” in the event of delays.\textsuperscript{121} 

Unsurprisingly, “airlines lobbied against the proposed bills.”\textsuperscript{122} The airlines were concerned about congressional mandates to improve customer service and promised to do better on their own.\textsuperscript{123} The airlines argued that enacting new rules would result in “re-regulation,” which “would be a return to the bad old days.”\textsuperscript{124} Congress never passed these various bills and instead accepted the airlines’ promises to voluntarily improve conditions for passengers on delayed flights.\textsuperscript{125} The Air Transport Association and its member airlines signed the Airline Customer Service Commitment of 1999 (Commitment).\textsuperscript{126} It required each airline to prepare a Customer Service Plan to introduce policies for handling and communicating with delayed passengers.\textsuperscript{127} The Commitment implemented twelve “customer service promises,” which, among other things, required carriers to treat bumped passengers fairly, provide passengers with access to essential needs during long aircraft delays, and promptly inform passengers of delays, cancellations, and diversions.\textsuperscript{128} 

As much of the public and many doubtful lawmakers had presumed, the airlines’ voluntary promises produced no real improvement in airline service.\textsuperscript{129} Therefore, Congress went forward with legislation and, in 2001, introduced another Airline Passenger Bill of Rights that “would have required airlines to develop plans for delay situations” and “inform passengers about the reasons for the schedule change.”\textsuperscript{130} Additionally, the bill provided that passengers who experienced tarmac delays were to be given access to “food, water, and restroom facilities” and included several different factors that would result in allowing passengers to deplane.\textsuperscript{131} The September 11, 2001 terrorist attacks occurred several months after the introduction of the bill, and airline security

\textsuperscript{121} \textit{Id.}
\textsuperscript{123} \textit{See id.} at 406–07.
\textsuperscript{125} \textit{See id.}
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} \textit{See id.} at 408.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{See Ratch, supra note 43, at 378; Johnson, supra note 122, at 409-10; see generally Airline Passenger Bill of Rights Act, H.R. 1734, 107th Cong. (2001).}
\textsuperscript{130} Schoonover, \textit{supra} note 41, at 534.
\textsuperscript{131} \textit{Id.} (quoting H.R. 1734).
and anti-terrorism measures overtook concerns about airline service.\footnote{132} Finally, in December 2009, the DOT issued a new rule: “Enhancing Airline Passenger Protections” (the Rule).\footnote{133} The purpose of the Rule was “to mitigate hardships for airline passengers during lengthy tarmac delays and otherwise to bolster air carriers’ accountability to consumers.”\footnote{134} The Rule “requires the carriers to adopt contingency plans for lengthy tarmac delays, respond to consumer problems, post flight delay contingency plans on their websites, and adopt, follow, and audit customer service plans.”\footnote{135} For domestic flights, the Rule requires that passengers be given the opportunity to deplane if the aircraft does not take off within three hours of the aircraft’s doors closing.\footnote{136} Similarly, after an aircraft has landed, passengers must be given the opportunity to deplane within three hours.\footnote{137} The Rule has a four-hour time limit for international flights.\footnote{138} An air carrier’s failure to follow these requirements subjects the air carrier to civil penalties of up to $25,000 per passenger.\footnote{139} Notably, air carriers are not required to let passengers disembark within the applicable time period if the pilot-in-command determines that “there is a safety related or security related reason why the aircraft cannot leave its position on the tarmac to deplane passengers.”\footnote{140} Seemingly, it would not be safe to let passengers disembark in the middle of a taxiway.

When proposed, the Rule raised concerns regarding potential unintended negative consequences.\footnote{141} Indeed, there was skepticism and predictions that, instead of benefiting passengers, the Rule’s implementation would increase the frequency of flight delays and cancelations.\footnote{142} Opponents of the Rule raised several objections.\footnote{143} They argued that while the Rule allowed pilots to extend the permitted time on the tarmac for safety or security reasons, it failed to consider the scenario where an aircraft would be able to depart within a very short amount of time but would

\footnote{132}{Id. at 534−35.}  
\footnote{133}{Id. at 8.}  
\footnote{134}{14 C.F.R. § 259.1.}  
\footnote{136}{14 C.F.R. § 259.4(c)(1).}  
\footnote{137}{Id. § 259.4(c)(3)(i) (referring to domestic flights).}  
\footnote{138}{Id. § 259.4(c)(2).}  
\footnote{139}{49 U.S.C. § 46301(a)(1).}  
\footnote{140}{§ 259.4(c)(3)(ii).}  
\footnote{141}{See Henry & Gardner, supra note 135, at 641.}  
\footnote{142}{Id.}  
\footnote{143}{See id. at 641-43.}
have to return to the gate simply because it was over the allotted time.\textsuperscript{144} Additionally, objectors pointed out that “at certain large airports, taxi times between the gate and the runway could take more than thirty minutes and, therefore, departing planes [would] not be able to wait very long before the pilot must decide whether to taxi back and deplane passengers.”\textsuperscript{145} The fear was that, to avoid any possibility of paying the Rule’s potentially large fines, airlines would start preemptively canceling flights when there was uncertainty about the ability to depart within three hours.\textsuperscript{146}

Overall, research and data show that these concerns have not come to fruition.\textsuperscript{147} Since the Rule was implemented, “[t]he number of tarmac delays exceeding three hours has declined by over 93%,”\textsuperscript{148} Flights that previously “experienced frequent tarmac delays of over 120 minutes were canceled” or proactively removed from the schedule by the airlines.\textsuperscript{149} By 2014, the remaining tarmac delays were caused by external factors such as inclement weather and no longer by “over-ambitious airline scheduling.”\textsuperscript{150}

On April 25, 2011, DOT issued another rule “to strengthen the rights of air travelers in the event of oversales, flight cancellations, and delays; to ensure consumers have accurate and adequate information when selecting flights; and to improve responsiveness to customer complaints.”\textsuperscript{151} Additionally, the FAA Extension, Safety, and Security Act of 2016 (Act) “alter[ed] how tarmac delays are measured.”\textsuperscript{152} Unlike the 2009 Rule, which measured the delay from the time that passengers last had the chance to deplane to the point at which the air carrier allowed passengers to deplane, the Act requires that the tarmac “delay be measured from the time the main aircraft door is closed in preparation for departure to the point at which the air carrier ‘shall begin to return the aircraft to a suitable disembarkation point.’”\textsuperscript{153} Thus, depending upon how long it takes to move the aircraft from its position on the tarmac to a gate at the terminal, the Act allows

\textsuperscript{144} Id. at 642.
\textsuperscript{145} Id.
\textsuperscript{146} See id. at 642-43.
\textsuperscript{147} See id. at 643 (“While there [was] only seven months of data available on the subject, the [Tarmac Delay Rule] was being hailed a success.”).
\textsuperscript{148} P. Paul Fitzgerald, A Re-Examination of Tarmac Delays Causes and Solutions, 84 J. Air L. & Com. 53, 57 (2019).
\textsuperscript{149} Id.
\textsuperscript{150} Id.
\textsuperscript{151} Id., supra note 49, at 9.
\textsuperscript{152} Id. at 8.
\textsuperscript{153} Id. at 6 (quoting 49 U.S.C. § 43201(b)(3)(C) (2021)).
passengers to endure a longer delay before they are allowed to deplane.\textsuperscript{154} There is still no U.S. rule that requires airlines to compensate passengers when flights are delayed or canceled, but damages for flight delay in the course of international travel are compensable under the Montreal Convention of 1999, which provides for damages up to about $6,000.\textsuperscript{155}

III. AIRLINE PASSENGER PROTECTION IN THE EUROPEAN UNION

A. REGULATION EC 261

Under EU law, there are repercussions for delays and cancellations.\textsuperscript{156} “For flights to, from, and within European Union Member States, the rights of passengers are governed not only by the [carrier’s] Conditions of Carriage, but also by a [comprehensive] pro-consumer regulation.”\textsuperscript{157} The European aviation industry was “liberalized through a series of packages” beginning in the 1980s, which “increase[ed] competition among airlines result[ing] in lower fares for air passengers.”\textsuperscript{158} To protect the standard of service for passengers, the EU adopted Regulation 261/2004 (EC 261), which established common rules throughout the EU on compensation and passengers assistance in the event of denied boarding, flight cancellation, or long flight delays.\textsuperscript{159} EC 261’s preamble sheds some light on the purpose and intention behind the regulation. Indeed, the preamble notes that “the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delays.”\textsuperscript{160} EC 261 further reasons that the “[c]ommunity should therefore raise the standards of protection . . . both to strengthen the rights of passengers and to ensure that air carriers operate under harmonised conditions in a liberalised market.”\textsuperscript{161}

\begin{thebibliography}{1}
\bibitem{delayed_flight} Id.
\bibitem{ritorto} See Ritorto & Fisher, supra note 72, at 574.
\bibitem{delayed_flight_preamble} Id.
\bibitem{delayed_flight_preamble} Id. at 276; see (EC) 261/2004, supra note 40, at 1.
\bibitem{delayed_flight_preamble} Id. 261/2004, supra note 40, at 1.
\bibitem{delayed_flight_preamble} Id.
\end{thebibliography}
If a flight is canceled, overbooked, or delayed by at least five hours, EC 261 requires that air carriers allow passengers to choose: a full refund of their ticket, another comparable flight to their final destination “at the earliest opportunity,” or another comparable flight to their final destination “at a later date.” Additionally, such passengers are entitled to financial compensation based on the length of the flight: (a) €250 for flights of 1,500 kilometers or less, (b) €400 for all other internal EU flights and all other flights 1,500–3,500 kilometers, and (c) €600 for all other flights over 3,500 kilometers. Notably, the air carrier may reduce such compensation by 50% when passengers are offered rerouting to their final destination on an alternative flight and the arrival time of such flight does not exceed the scheduled arrival time of the originally booked flight by (a) two hours for all flights of 1,500 kilometers or less; (b) three hours for all internal EU flights and all other flights 1,500–3,500 kilometers; or (c) four hours for all flights over 3,500 kilometers. While the actual text of the regulation requires airlines to compensate passengers only for canceled or overbooked flights, the European Court of Justice (ECJ) has extended this entitlement, allowing passengers to claim compensation for all delays over three hours. EC 261 does not explicitly mention tarmac delays; however, according to the European Commission, the right to care under Article 9 applies by implication to passengers on board the aircraft stranded on the tarmac. Thus, in the event of a qualifying tarmac delay, the operating carrier must provide meals and refreshments. Moreover, if a tarmac delay exceeds five hours, passengers have a right to reimbursement of the ticket price under Article 8(1)(a).

Compensation is not required if the airline (i) “inform[s] [passengers] of the cancellation at least two weeks before the scheduled time of departure;” (ii) “inform[s] [passengers] of the cancellation between two weeks and seven days before the scheduled time of departure” and offers an alternative flight that departs “no more than two hours before the scheduled time of departure” and arrives at the “final destination less than four

162 Id. art. 6 para. (1) (c) (iii); id. art. 8 para. 1.
163 Id. art. 7 para. 1.
164 Id. para. 2.
167 See id.
168 (EC) 261/2004, supra note 40, art. 8 para. 1(a).
hours after the scheduled time of arrival;” or (iii) “inform[s] [passengers] of the cancellation less than seven days before the scheduled time of departure” and offers an alternative flight that departs “no more than one hour before the scheduled time of departure” and arrives at the “final destination less than two hours after the scheduled time of arrival.”

Passengers are also entitled to what EC 261 describes as “assistance” and “care” in cases of cancellation and delays of two hours for flights up to 1,500 kilometers, three hours for trips up to 3,500 kilometers, and four hours for flights greater than 3,500 kilometers.”

Airlines must provide passengers reimbursement for reasonable meals and refreshments and two free telephone calls, e-mails, or faxes. For flights delayed overnight or passengers rescheduled on a flight the next morning, the airline must provide hotel accommodations. In that situation, airlines are also required to provide reasonable transportation between the hotel and the airport so that passengers can make their flights.

Regardless of the cause of the cancellation or delay, airlines must provide “care” to passengers under Article 9. However, a carrier does not have to pay compensation under Article 7 if it proves there were extraordinary circumstances that, even if the carrier took all reasonable measures, were unavoidable and caused the cancellation. The ECJ extended the defense of the extraordinary cause to delays and defined such circumstances as “events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control.” Such extraordinary circumstances include “political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings, and strikes that affect the operation of an operating air carrier,” but as detailed below, aircraft collisions and technical failures have not been considered extraordinary circumstances.

---

169 Id. art. 5 para. 1(c).
170 See id. art. 5 para. 1(b) (“assistance”); id. art. 6 para. 1; id. art. 9 (“care”).
171 (EC) 261/2004, supra note 40, art. 9 paras. 1(a), 2.
172 Id. para. 1(b).
173 Id. para. 1(c).
174 See generally id. art. 9.
176 Joined Cases C-402/07 & C-432/07, supra note 175, ¶ 70.
177 (EC) 261/2004, supra note 40, at 2; see C-549/07, Wallentin-Hermann v. Alitalia – Linee Aeree Italiane SpA, 2008 E.C.R. I-11079, ¶ 25; Case C-394/14,
In *Siewert*, the ECJ held that the collision of mobile boarding stairs with an aircraft was not an extraordinary circumstance because mobile stairs are essential to air passenger transport, so air carriers are regularly faced with situations arising from the use of this equipment, making a collision between an aircraft and mobile boarding stairs “an event inherent in the normal exercise of the activity of the air carrier.” The ECJ noted that the extraordinary circumstances defense would have applied if the damage to the aircraft was due to an act external to the airport’s normal services, “such as an act of terrorism or sabotage.” Furthermore, in *Wallentin-Hermann*, the ECJ held that technical problems could not be regarded as extraordinary circumstances when such problems “come to light” during aircraft maintenance or are caused by the failure to properly maintain an aircraft. Additionally, “compl[y]ing with the minimum rules on maintenance of an aircraft cannot in itself” prove that the carrier took “all reasonable measures” to prevent the event and thus does not “relieve the carrier of its obligation to pay compensation.” Overall, the ECJ has urged that the main purpose of EC 261 is to guarantee “a high level of protection for passengers” and to mitigate “serious trouble and inconvenience” for passengers, so the ECJ has narrowly construed and limited the “extraordinary circumstances” defense.

IV. WHY THE UNITED STATES SHOULD USE EC 261 AS A MODEL

A. THE MARKET DOES NOT ADEQUATELY PROTECT AIRLINE PASSENGERS

Economists contend that markets are powerful tools for protecting consumers because consumers will boycott companies that engage in wrongdoing, leading to a decline in the company’s profitability. Indeed, many critics of consumer regulation argue that markets provide sufficient consumer protection, making

---


178 *Case C-394/14, supra note 177, ¶¶ 19-20.*
179 *Id. ¶ 19.*
180 *Case C-549/07, supra note 177, ¶ 25.*
181 *Id. ¶ 43.*
182 *See id. ¶ 6 (citing (EC) 261/2004, supra note 40, at 1), 43.*
the need for further legislation, regulation, or rules obsolete.\textsuperscript{184} Such critics have further reasoned that because airlines are in the service industry, airlines have to prioritize providing the best service to customers because if not, passengers will find a different airline that does.\textsuperscript{185} As a television commentator said in a 2001 broadcast, “Why in the world would the airlines intentionally aggravate their customers? Congress doesn’t need to tell restaurants to serve tasty food. Restaurants that serve bad food go out of business.”\textsuperscript{186} But the problem with the aviation industry is that airlines actually do not have much incentive to provide their passengers with great service because consumers have very few options when booking a flight.\textsuperscript{187} While markets do provide some protection to consumers, the market has to be competitive to properly provide such protection.\textsuperscript{188}

The deregulated airline market was proclaimed to be “one that would be perfectly contestable.”\textsuperscript{189}

The contestable market assumption is that there are no significant . . . barriers to entry [and] [b]ecause there are no barriers to entry, the market, even in the absence of actual competition, is threatened (\textit{i.e.}, contested) by a prospective new entrant. Hence, the market is expected to behave in a perfectly competitive way.\textsuperscript{190}

Throughout the early years of deregulation, the aviation industry was “flooded with new entrants and aggressive competition.”\textsuperscript{191} But, from 1983 to 1993, “mergers, acquisitions, and bankruptcies le[d] to increased concentration” in the industry.\textsuperscript{192} “In the mid-late 1990s . . . another wave of expansion occurred that featured new entrants such as Frontier, Jet Blue . . .[and] Spirit.”\textsuperscript{193} The addition of these new carriers, as well as the continued growth of

\textsuperscript{184} See id.
\textsuperscript{185} See Ravich, \textit{supra} note 43, at 380.
\textsuperscript{186} \textit{Id.} (quoting CNN Crossfire, \textit{Is It Time for Congress to Give Airline Passengers More Rights?} (CNN television broadcast Feb. 15, 2001).
\textsuperscript{187} See McCorvey, \textit{supra} note 26 (“Paul Hudson, president of the Flyers Rights passenger advocacy group, called the industry an ‘oligopoly’ consisting of four major airlines . . .”).
\textsuperscript{189} Ravich, \textit{supra} note 39, at 990.
\textsuperscript{190} \textit{Id.} (alteration in original) (quoting Laurence E. Gesell & Martin T. Farris, \textit{Airline Deregulation: An Evaluation of Goals and Objectives}, 21 TRANSPI. L.J., 105, 115 (1992)).
\textsuperscript{191} Thorson, \textit{supra} note 188, at 516.
\textsuperscript{192} Andrew R. Goetz & Timothy M. Vowles, \textit{The Good, the Bad, and the Ugly: 30 Years of US Airline Deregulation}, 17 J. TRANSPI. GEOGRAPHY 251, 254 (2009).
\textsuperscript{193} \textit{Id.}
airlines like Southwest, caused a decline in larger airlines’ market share.\textsuperscript{194} Unfortunately, the twenty-first century “has been very difficult for the U.S. airline industry,” and many airline carriers have struggled to operate at profitable levels, resulting in countless airlines filing for bankruptcy.\textsuperscript{195} Overall, the airline market is not contestable as new entrants are not likely because there are substantial barriers to entry, including the hub and spoke structure, “limited airport facilities and capacity, significant information costs, and high-fixed costs associated with industry entry and airline operation.”\textsuperscript{196}

The view of the market as a sufficient regulator does not accurately reflect the U.S. airline industry, which is dominated by four airlines: American, United, Delta, and Southwest.\textsuperscript{197} Together, these four airlines make up about two-thirds of the market.\textsuperscript{198} Additionally, “[a]t most hub airports, one or two airlines dominate the competition and control a large majority of the flights.”\textsuperscript{199} Bad service or not, the big airlines will still be there tomorrow, and consumers will still need to use air travel for business or leisure.\textsuperscript{200} “Travelers do not have many airlines to choose from, and considering the increasing regularity and necessity of air travel, passengers are often left with no choice but to continue to book flights with certain airlines even if that airline has not provided good service in the past.”\textsuperscript{201} The passenger might not be able to pay a higher price for a different airline, or that may be the only airline that offers a flight, or at least a convenient flight, to the passenger’s chosen destination.\textsuperscript{202} “[M]odern airline service has suffered because competition has virtually been evicted from the marketplace . . . .”\textsuperscript{203}

United Express Flight 3411 is a somewhat recent example of the ineffectiveness of the market in the aviation industry. On April 9, 2017, United Airlines needed to bump four passengers so that

\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Thorson, supra note 188, at 517–18.
\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} Hardaway, supra note 103, at 11.
\textsuperscript{203} Ravich, supra note 39, at 987.
several off-duty United employees could fit on the aircraft.204 The airline offered flight vouchers for passengers who were “willing to voluntarily bump themselves from the flight, but nobody took the offer.”205 Consequently, the airline involuntarily bumped four passengers from the flight.206 Dr. David Dao of Louisville was one of the unlucky four.207 He refused to leave the flight, explaining “that he needed to be at work at a hospital the next day and could not miss the flight.”208 Security was called, and Dr. Dao was dragged off the airplane.209 The incident was filmed and “went viral online.”210

In the video, Dr. Dao was forcefully “pulled out of his seat, screaming.”211 During the struggle, Dr. Dao’s face hit an armrest, but security continued to drag his unconscious and bloody body off the plane.212 “The incident was widely covered in the media” and served as the inspiration for a cover of the New Yorker and various comedy skits.213 The United Airlines CEO, Oscar Munoz, issued an initial statement in which he referred to the incident as merely “re-accommodating the customers” and called Dr. Dao “disruptive” and “belligerent.”214 Munoz’s statement furthered the public’s outrage.215

Legislators required executives from United and other airlines to come to Capitol Hill.216 Munoz was called to testify before Congress.217 Munoz delivered a strong apology while promising a “culture shift” and a list of policy changes, which included “additional employee training and limiting the use of law enforcement on aircraft to safety and security issues.”218

The New York Times claimed the issue was a “spiraling crisis” and stated “consumers threatened a boycott of the airline.”219

---

204 RAVICH, supra note 43, at 389.
205 Id.
206 Id.
207 Id.
208 Id.
209 Id.
210 Id.; see also SOVERN, supra note 183, at 9.
211 RAVICH, supra note 43 at 389-90.
212 Id. at 390.
213 SOVERN, supra note 183, at 9.
214 RAVICH, supra note 43, at 390.
215 See ZUMBAICH, supra note 200.
216 Id.
218 ZUMBAICH, supra note 200.
The *Chicago Tribune* wrote that the harm to United’s reputation “may be irreversible.”220 A poll conducted a few days after the incident found that “more than 40 percent of those who have heard about [United] recently also say they would pay more money and endure a layover to avoid flying with the company.”221 United became “the nineteenth most hated company in America.”222

Nonetheless, the public’s anger never “hurt the company’s bottom line.”225 Indeed, even though United’s stock “lost more than $500 million of its value” immediately after the incident, in only a month, United’s stock was “at an all-time high.”224 During United’s annual meeting, not one shareholder “ask[ed] a single question about the incident.”225 Even in its SEC filing, United never referenced the incident as a “risk factor.”226

In November, another poll was conducted—this time, only 14% of those polled were “willing to pay extra to avoid United.”227 If “the flights were evenly priced, consumers were almost evenly split between” United and the other carriers.228 If consumers were staying away from United, as it was originally predicted, it certainly did not show in United’s passenger numbers.229 Indeed, “more passengers flew on United aircraft in each of the second, third, and fourth quarters in 2017 than had flown [United] in the same quarter in the previous year.”220 Even though no one can know what United’s numbers would have been if the incident with Dr. Dao never happened, these statistics at least show that, regardless of the incident, consumers “continued to book United flights in large numbers.”231 United Express Flight 3411 is an example of the


222 *Id.*


225 *Id.*


228 *Id.*

229 *Id.*


231 *Id.*
fact that the market cannot “discipline businesses” if consumers do not have the power to take their business somewhere else. In such situations, regulations “and those who enforce them may be the only” source of change.

B. Consumer Rights Improve Service at a Relatively Low Cost

EC 261 has motivated airlines to perform better—a 2018 study from the College of Europe found “strong evidence” that EC 261 led “to a meaningful improvement in airline service quality” by reducing departure delays and improving “on-time performance.” Another study estimated the financial impact of EC 261 if the law was applied to U.S. “domestic and international flights to and from the 31 largest U.S. airports” during 2016 and found that 0.4% of those flights would have met the EC 216 compensation criteria. “Airlines operating these flights would have been required to compensate passengers a total of $955.7 million,” averaging “$299 per disrupted passenger or $1.08 per passenger.” The study excluded flights that would have met the criteria for the extraordinary circumstances defense under EC 261. Additionally, “[t]he analysis assume[d] that all eligible passengers applied for the compensation” (i.e., no “breakage”), but in the real world, it would be unlikely for every single eligible passenger to submit a claim. Indeed, “[i]ndustry averages for ‘breakage’ (i.e., claims not filed) can be as high as 80%;” thus, the study’s compensation calculation of $1.08 per passenger is the maximum compensation amount that airlines would have been required to pay. This cost pales in comparison to the losses passengers incur. One study found that “[f]light disruptions cost . . . passengers $16.7 billion” per year.

232 Id. at 45.
233 Id.
236 Id.
237 Id.
238 Id. at 11.
239 Id. at 8.
Unsurprisingly, airlines have criticized EC 261’s broad scope and generous compensation scheme as “excessive;” however, EC 261’s level of compensation has proven to be an “effective [financial] incentive for airlines to increase reliability” and has created a market for claim agencies, “which supports enforcement of the regulation.”241 Since “compensation has to be actively sought by the affected passengers,” awareness and enforcement of the regulation are crucial components of its success.242 In the European Union, Claims Management Companies (CMCs) help aggrieved passengers receive relief by “acting as intermediaries” between the claimant and the airline.243 The CMCs charge a contingency fee to manage all of the paperwork and represent the passenger throughout the entire claim process.244 If the CMC successfully recovers compensation for the passenger, the CMC will take a percentage of the compensation while giving the rest to the passenger claimant.245 Although “the role of CMCs was not specifically written into [EC 261],” researchers have noted that “CMCs have become an integral mechanism” in helping passengers get their compensation from the airline.246 Although airlines argue that the EC 261 compensation scheme imposes significant costs on the airline industry, the “relatively generous compensation amounts” under EC 261 make the CMC’s “business models possible,” which overall incentivizes compliance and increases enforcement.247

C. MOVING TOWARDS A GLOBALIZED STANDARD

When implementing a legal framework to protect air passengers, many other countries have looked to EC 261 as a model.248 Thus, adopting EC 261 in the U.S. would create a more globalized standard for air passenger rights.249 The aviation industry would benefit from a more homogenous regime of air passenger rights as the current situation is challenging for both passengers

---

241 Gnutzmann & Śpiewanowski, supra note 234, at 3-4.
242 Id. at 3.
243 Fox & Martín-Domingo, supra note 158, at 287.
244 Id. at 287-88.
245 Id. at 288.
246 Id. at 287.
247 Gnutzmann & Śpiewanowski, supra note 234, at 3.
249 See id.
and airlines. Passengers, especially those traveling internationally, often need to examine various sources to determine the scope and extent of their rights and remedies, which can be a frustrating and time-consuming task. Furthermore, because airlines have different obligations depending upon the flight’s destination, airlines must train their employees on all of the applicable rules in the various regimes, increasing compliance costs for the airlines. Overall, a uniform regime of airline passenger rights would provide clear and consistent guidelines for passenger rights across all airlines and jurisdictions, reducing confusion for passengers and airlines.

D. THE COURTS DO NOT PROVIDE AN ADEQUATE REMEDY

Because the DOT’s powers are limited to “investigat[ing] consumer complaints,” “bringing enforcement actions,” and imposing civil sanctions on airlines that violate its regulations, the DOT does not provide passengers with direct redress when an airline violates a regulation or breaches its Contract of Carriage. Furthermore, “the DOT’s regulations and interpretative rules create no private right of action.” Thus, passengers who wish “to enforce their rights in court can only do so through state law.”

The ADA preempts state laws related to airline “rates, routes, and services”; however, the Federal Aviation Act allows for “common law causes of actions against airlines.” Determining which state laws are or are not preempted by the ADA has been the source of frequent litigation. In American Airlines, Inc. v. Wolens, the Supreme Court held that the ADA “stops [s]tates 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.”

The lack of success in litigation undertaken by passengers seeking damages for tarmac confinements and flight delays further
exemplifies the necessity for additional regulation to protect airline passengers. For example, after severe weather in Dallas-Fort Worth left thousands of passengers trapped in their aircraft for over nine hours, two passengers filed separate putative class action lawsuits against American Airlines claiming false imprisonment, intentional infliction of emotional distress, negligence, breach of contract, and intentional misrepresentation or fraud.259

These plaintiffs, faced with the legal and financial resources of a large corporation, endured “a gauntlet of one to three years of defendant airline motions practice, followed by discovery and more motions practice.”260 Each plaintiff filed in state court, but American Airlines removed the actions to federal court.261 Due to the substantial financial and time commitment required by federal civil litigation, the plaintiffs moved to remand to state court, but their motions were denied.262 Furthermore, the federal courts refused to certify the class actions.263

American Airlines filed motions to dismiss the plaintiffs’ claims, arguing that they were preempted by the Federal Aviation Act and the ADA.264 In Ray, the Eighth Circuit affirmed the district court’s holding that the plaintiff’s contract and fraud claims were preempted.265 Additionally, even though the plaintiff’s tort claims were not preempted, the Eighth Circuit affirmed the district court’s grant of summary judgment in favor of American Airlines on the claim of false imprisonment because the plaintiff did not affirmatively ask to leave the aircraft and on the negligence claim because the plaintiff failed to claim any physical injury.266

In Hanni, the court held that federal law did not preempt the negligence, breach of contract, and conversion claims; however, the court granted summary judgment to American Airlines on

261 See Ray, 609 F.3d at 921; Hanni, 2008 WL 1885794, at *3.
264 See Ray, 609 F.3d at 921; Hanni, 2008 WL 1885794, at *3.
265 See Ray, 609 F.3d at 921.
266 See id. at 924–26.
those claims.\footnote{Hanni v. American Airlines, Inc., No. C 08-00732 CW, 2010 WL 289297, at *13–16 (N.D. Cal. Jan. 15, 2010).} The court found that the negligence claim failed because there was no evidence of physical or emotional injuries, the conversion claim failed because the airline “did nothing more than move [p]laintiffs’ personal property from their point of origin to their destination,” and the breach of contract claim failed because, even though American Airlines’ contract of carriage created an obligation to provide vouchers for overnight accommodations, the plaintiffs never asked for the vouchers.\footnote{Id. at *14–16.}

Overall, as evidenced by the judicial response to the claims described above, the existing legal landscape presents significant challenges for passengers seeking judicial recourse for flight delays. Regulation that provides airline passengers with fixed compensation is needed as it “would avoid most litigation and provide passengers and airlines with a fair, efficient, uniform, and transparent system of” relief.\footnote{Hudson, supra note 260, at 19.}

V. CONCLUSION

Ultimately, better protections for airline passengers are long overdue. Deregulation was meant to increase the competitiveness of the airline industry while giving passengers more choices about the prices they paid.\footnote{See Ravich, supra note 43, at 291.} It succeeded in expanding the accessibility of air travel but at the expense of making it a far more unpleasant experience.\footnote{See id. at 294.} The issue of airline passenger rights has been before the legislature countless times without any meaningful resolution.\footnote{See Schoonover, supra note 41, at 532.} As the Southwest shutdown demonstrated, every time an airline cancels hundreds of flights in a day, thousands of people are left stranded or scrambling to salvage their travel plans with little guidance or assistance from the airline itself.\footnote{See Bowman & Ludden, supra note 2.} This lack of accountability is unacceptable.

Transportation is not just a business—it is a public utility that needs to be regulated in the public interest. The United States must follow the European Union’s lead and, per Regulation EC 261, require airlines to compensate passengers when their flights are delayed or canceled. The concentrated aviation industry has created a market that does not adequately protect airline
passengers, and the courts have not provided passengers with an adequate venue for relief. Enacting legislation similar to Regulation EC 261 would make airlines accountable, improve service at a marginally low cost, and generate a more uniform standard of airline passenger rights, creating more transparency and certainty for both airlines and passengers.