Re-Regulation and Airline Passengers' Rights

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I. INTRODUCTION

Airline passengers increasingly expect basic airline service as a matter of law and entitlement rather than as a function of busi-

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ness and market forces. Unprecedented access to air travel, generated in large part by low fares, has aggravated, distorted and reinforced this expectation. The tragic events of September 11, 2001 ("September 11"), during which terrorists hijacked four commercial jetliners and navigated two into New York City's World Trade Center Twin Towers and one into the Pentagon, necessarily have amplified the role of law and government in the deregulated airline market. While the law affords Americans a relatively unfettered ability to travel, it has not, as a practical matter, secured pleasant or hassle-free travel in the modern deregulated era. From 1999 through the current Congressional term, passenger and government outrage with airline service and accountability energized federal legislators, themselves airline passengers, to present more than three dozen proposals collectively referred to as the "Passengers' Bill of Rights" (the "PBOR"). This Article examines and criticizes these popular and legislative impulses to secure better airline travel experiences within the United States by operation of law.

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1 A fourth airliner crashed in rural Pennsylvania after several passengers counter-attacked the hijackers onboard. JERE LONGMAN, AMONG THE HEROES: UNITED FLIGHT 93 AND THE PASSENGERS AND CREW WHO FOUGHT BACK (HarperCollins 2002); see infra text accompanying note 263. See generally Robert A. Brazener, Annotation, Liability of Air Carrier for Damage or Injury Sustained by Passenger as a Result of Hijacking, 72 A.L.R. 3d 1299 (1997).

2 United States v. Guest, 383 U.S. 757, 758 (1966) (establishing that "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution"). But see William Mann, Comment, All the (Air) Rage: Legal Implications Surrounding Airline and Government Bans on Unruly Passengers in the Sky, 65 J. AIR L. & COM. 857 (2000) [hereinafter Mann, Airline and Government Bans on Unruly Passengers]; John A. Glenn, Annotation, Validity, Under Commerce Clause of Federal Constitution, of State Tolls or Taxes On, Or Affecting, Interstate or Foreign Air Carriers or Passengers, 31 L. Ed. 2d 975 (1999).

3 For convenience, notwithstanding differences among air travel providers, the terms "airline(s)" and/or "carrier(s)" are used throughout this Article to refer to both major air travel providers that route their flights within a hub-and-spoke system (see Part III.D.1, infra) and low-fare, specialty carriers such as Southwest Airlines and JetBlue, which offer point-to-point networks of flights.

4 The subject legislation joins modern governmental and popular-culture efforts to buttress perceived entitlements rather than constitutionally-secured rights with legislation bearing the historically-significant title "Bill of Rights," including, inter alia, Consumers' Bill of Rights, Health Care Bill of Rights, Patients' Bill of Rights, Taxpayer Bill of Rights, Veterans Bill of Rights, etc. Greenfield At Large, Are Some of the 'New Rights' the Wrong Stuff? (CNN television broadcast, June 19, 2001) ("Are these the same kind of rights our forefathers fought and died for? . . . sometimes it seems that every interest group has a proposal to create a new bill of rights.").

The PBOR legislation will not improve airline service under any circumstances. These legislative efforts to codify passenger service rights are largely motivated by normative conceptualizations of good and bad airline service and practices. In the aggregate, the PBOR legislation, coupled with the still-evolving reality presented by the novel terrorism of September 11, represents an important point in the history of deregulated commercial airline travel. The PBOR proposals represent an unfulfilled Congressional appetite to regulate airline conduct and redefine the relationship between carrier and passenger. To the extent that they promote government interposition between carrier and passenger with respect to basic service issues, the PBOR initiative establishes important, but unwanted and unhelpful precedent. While substantial commentary exists as to the economic benefits, weaknesses and imagined consequences of the deregulated airline system, this Article examines the ser-

the European Commission's "Airline Passenger Service Commitment" and "Airport Voluntary Commitment on Air Passenger Services"); see also Elchiro Sekigawa, Japan Tackles Flight Rights of Mentally Ill Passengers, AVIATION WK. & SPACE TECH., July 15, 2002, at 44.

6 Strong impulses to regulate the domestic airline industry have remained constant notwithstanding the social, political, and economic transformations resulting from September 11. As Representative Peter DeFazio (D-Or.) notes:

This was an industry that was tremendously mismanaged before 9/11 . . . Remember the big subject before 9/11 was passenger rights because people felt so abused . . . We need to begin to think about whether we're going to have to regulate this industry again.


7 Zachary Garsek, Comment, Giving Power Back to the Passengers: The Airline Passengers' Bill of Rights, 66 J. AIR L. & COM. 1187, 1190 (2001) (surveying 1999 legislation, reporting related Congressional testimony and suggesting that, if voluntary airline efforts are "fruitless, the state of customer service in the airline industry has disintegrated to the point that some government regulation is necessary."); Brent D. Bowen & Dean E. Headley, The Airline Quality Rating 2001, at 7 ("Given the complexity of the problem, lack of desire by the airlines to help themselves and the consumer, and the need to better utilize public resources, government intervention seems necessary and appropriate.").

vice-oriented initiative of the PBOR legislation as one negatively implicating and undermining the efficacy and future of commercial airline deregulation policy. In the course of such examination, this Article also evaluates the continued vitality of deregulation principles in light of the severe and increasingly restrictive air travel environment brought about by the events of September 11.

Broadly, this Article documents a four-year period during which the meaning of "passengers' rights" has changed as dramatically as its import. The PBOR initiative began as a pro-active one, arising in a stimulated economic environment wherein aggrieved consumers and government officials sought to expand the range of services for airline passengers as a matter of law. Now, post-September 11, the term "passengers' rights" connotes a defensive attitude mindful of, and in some instances receptive to, a necessary narrowing of airline travelers' liberties in the name of national security interests. In the end, a central message is apparent: passengers' rights is as important an issue as ever and, more specifically, as a movement, may eventually serve to undo economic deregulation policy if the airlines do not fully account for service and security problems in the industry. Part II sets forth the origins and details the terms of the proposed laws. Part III examines the issues driving passengers rights legislation by: (a) analyzing the proposals as a running commentary on the state of deregulated airline travel; (b) tracing the social and cultural deterioration in the relationships among airlines, their passengers and the federal government; (c) questioning whether any set of laws or legislation can resolve identified service problems better than or as well as market forces; (d) developing and juxtaposing airline practices, infrastructure realities, and

market and labor dynamics as themes recommending calibrated change and/or modernization; and (e) discussing the new role passengers should or must play in today's anxious airways and airports. Part IV concludes that the events of September 11 and the resulting and/or contemporaneous economic stall do not, and should not, mask real infrastructure and service-related issues that must be addressed, with or without the threat of pending legislation. In that context, the examined service-related proposals represent nothing more than an ineffective governmental attempt to regulate by shame. While the PBOR legislation likely will not become law in the short term, U.S. airlines, in the long term, risk losing the benefits of deregulation if they fail to improve service and security appreciably, whether they are blameworthy or not.

II. PASSENGERS' BILL OF RIGHTS

A. THE IMPETUS AND HISTORICAL ATTEMPTS

In January 1999, Marti Sousanis, like thousands of post-holiday travelers, arrived at a crowded airport ready to go home. After waiting several hours in multiple lines at Detroit Metropolitan Airport, she boarded Northwest Airlines flight 992 to San Francisco. Despite an announcement reporting that the flight was on time, the airplane sat on the tarmac for a seemingly interminable period. A blizzard covered the Detroit airport with over a foot of snow and stranded Sousanis's flight and more than two dozen other airplanes for up to eleven hours. Conditions on the planes became nightmarish as the hours passed.

9 AIR TRANSP. ASS'N, State of the Airline Industry: A Report on Recent Trends for U.S. Air Carriers 8 (2002) ("The delay problem has temporarily receded since September 11, due to the reduction in flights. However, as airlines return to their pre-September 11 schedules, the number and duration of flight delays will increase."); see also Al Frank, American Airlines CEO: Don't Forget Old Problems, STAR-LEDGER (New Jersey), Feb. 20, 2002 ("We will find ourselves headed for gridlock once again if we don't keep pushing to modernize and expand the capacity of our nation's aviation system in the air and on the ground.").

10 See infra text accompanying note 48.

11 Complaint, Sousanis v. Northwest Airlines et al., No. C-99-2994 (N.D. Ca. 2000). A day earlier, Sousanis boarded flight 992 in Detroit, but that flight was cancelled following an aborted takeoff. Id. ¶ 7; see also Matt Leising, The (Not-So) Friendly Skies, THE LEGAL INTELLIGENCER, May 27, 1999, at 4.

12 In January, 2001, Northwest agreed to a settlement, paying $5 million among 700 class action plaintiffs based on the length of time each person was delayed. Michael Katz, Airline Peanuts, FORBES, Feb. 19, 2001, at 53 (quoting plaintiffs' lead counsel, "We've been working on this for two years and they were on the plane for 11 hours. That's the nature of our legal system.").
Food and water ran out and toilets overflowed. Passengers "became physically ill, . . . [and were] exposed to the growing odor of [a] concentrated number of humans in an enclosed small space." The crew of flight 992 was uncaring. Each time Sousanis tried to stand to relieve her chronically-pained back, the flight crew threatened her with arrest and told her to obey an unrelenting "fasten seatbelt" sign. Horror stories such as this served as the anecdotal flagship of a legislative fleet of passengers' rights legislation considered by the United States Congress.

Notwithstanding numerous substantive flaws, the PBOR legislation enjoys broad support. The need to improve airline service attracts the attention of government representatives (irrespective of party affiliation) who, like their constituents, rely upon commercial airlines. Narratives of terrible airline service resonate with representatives who must travel from Washington, D.C. to their districts. Federal legislators, as recognizable passengers on public airplanes, often are drawn into the cause by irritated co-passengers demanding accountability and explanations. The PBOR proposals represent a well-intentioned but impossible and poorly designed effort to resolve the hostility between carrier and customer.

1. The Origin of Passengers' Rights Proposals

The modern passengers' rights movement revisits and, in many circumstances, recycles historical efforts and impulses, all of which have died in the legislative process. Through preventative and punitive means, the various proposals share a common

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13 Ex Parte Amended Class Action Complaint, Koczara et al. v. Wayne County et al., No. 99-900422 (MI Cir. Ct. Wayne County 1999), ¶ 19.


15 The executive branch considered the issue of passengers' rights, too. Press Release, Vice President Gore and Secretary of Transportation Slater Announce Airline Passenger Fair Treatment Initiative (Mar. 10, 1999). Indeed, presidential hopefuls have embraced the notion of passengers' rights. Candidates Offer Differing Visions, J. Com., Nov. 8, 1988, at 1A (discussing Governor Michael Dukakis's (D-Mass.) support of airline passenger legislation and stronger airline antitrust enforcement).
objective to require airlines to better apprise their passengers of existing, and purportedly new, travel rights.

The earliest proposals were presented in 1987. Such legislation concerned, among other issues, airline delays, truth-in-advertising, and flight cancellations. This early legislation encouraged easy access to travel-related information and accounted for the inadequate capacity of the national air traffic system. For example, then-Representative (now current Secretary of the Department of Transportation ("DOT")), Norman Y. Mineta (D-Cal.), introduced the "Air Passenger Protection Act of 1987," which directed the DOT Secretary to, among other things, establish: (1) a twenty-four hour toll-free airline consumer hotline; (2) regulations preventing air carriers from changing the requirements of a frequent flyer program to the detriment of program participants without reasonable notice; and (3) an advisory committee to report to the Secretary and the Congress about the appropriate capacity level in the air traffic control system. This proposal, along with an identical Senate version, died in conference but ultimately led to the current practice whereby the DOT compiles and publishes data relating to on-time performance and mishandled baggage. Non-governmental entities also developed passengers' rights proposals. For example, in 1987, a private group, "Airline Passengers of America," developed a passengers' bill of rights to address poor airliner service. It demanded: (1) the decongestion of hubs; (2) the enactment of consumer protection legislation aimed at increasing information available to passengers; (3) a government obligation to provide, through the news media, real-time reports of delays; and (4) the availability of and timely resolution of DOT complaint forms.

Later, in 1989, legislators presented several other intrusive proposals meant to interpose the federal government between bottom-line-driven airlines and their passengers. At one end of the spectrum, Representative Fortney "Pete" Stark (D-Cal.) articulated a proposal hardly worthy of federal legislation – an "Airline Passenger Bill of Rights" requiring airlines, for exam-

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ple, to make available, upon request, a fare not including food or beverage. At the other end of the legislative spectrum, and potentially more significant, Senator Howard Metzenbaum (D-Ohio) introduced the “Airline Reregulation Act of 1989” (the “Reregulation Act”). This Reregulation Act would have established an independent federal executive agency called the “Aviation Policy Board” that would have been empowered, “[i]n order to protect the public interest, . . . to regulate the air fares and air routes of United States air carriers.” With respect to consumer rights, the Reregulation Act also would have: (1) obligated the DOT Secretary to issue regulations requiring U.S. airlines to disclose on each ticket jacket a statement that the ticketed passenger could obtain an on-time performance record of the carrier; (2) required the DOT Secretary to establish a twenty-four hour toll-free consumer hotline to provide consumer information on air carrier performance records, the rights of consumers and responsibilities of air carriers, and dispute resolution assistance; and (3) commanded the creation of regulations prohibiting air carriers from canceling flights on the basis of any economic reason (unless the carrier provided adequate notice of cancellation and arranged for alternative services for passengers).

Such affirmative proposals generally sought to improve passengers’ bargaining power with airlines.

Other proposals arose from a need to diminish the inequitable (not to mention inconvenient) consequences airline passengers endured during the 1980s and 1990s as a result of merciless competition among major airlines in the deregulated marketplace. An extraordinary, accelerated, and disturbing trend toward airline market concentration through consolidation and/or bankruptcy occurred during that period and motivated Congress to insulate airline passengers from these business realities. For example, proposals such as the “Airline Bankruptcy Passenger Protection Act of 1989” required several airlines to prepare and adhere to a plan for providing air transportation to passengers holding a ticket for travel on other airlines, which, subse-

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22 Id. § 107.

23 Id. § 201.
quent to the ticket purchase date, filed for bankruptcy. Likewise, in 1990, Representative Don Ritter (R-Pa.) introduced the “Airline Passenger Defense Act of 1990,” calling for the establishment of an “Office of Airline Passenger Advocacy” within the DOT to enforce regulations respecting oversales, smoking, baggage liability, and carrier-owned computer reservations systems. While marketplace convulsions in the 1980s and 1990s arguably produced a more economically stable and mature industry, it also strained passengers’ trust of air carriers and perpetuated the mistaken notion that federal legislation, rather than market forces, would introduce and maintain sound service in the airline industry.

In the aggregate, early passengers’ rights proposals introduced the attitude of legislating airline accountability. For example, the aforementioned “Airline Passenger Defense Act of 1990” proposed a new section within the Deregulation Act, to be entitled “Airline Passenger Consumer Protection.” That section would have provided that, with respect to delays, “[t]he on-time performance of any regularly scheduled flight of an air carrier may not be 30 percent or less in any consecutive 3-month period.” Similarly, in 1991, the “Airline Consumer Protection and Competition Emergency Commission Act of 1991,” proposed “an assessment of the adverse condition of the United States air passenger industry.” Also introduced was the “Airline Competition and Passenger Protection Act of 1991” which would have required certain airlines to submit to the DOT Secretary a monthly report showing the percentage of its passengers who missed a connection at all of that airline’s hub operations and to provide a list (with a statement of reason(s)) of flights that were late in arrival, along with a statement of the reasons for delay. In the 1997-98 Congressional session, legislators introduced other proposals (mimicked by modern legislation), including the “Aviation Consumer Right to Know Act of 1998,” the “Airline Competition and Lower Fares Act,” and the “Air-

26 Id. § 1703(a).
In the summer of 1998, a private organization, the American Society of Travel Agents, presented its own “Air Traveler’s Bill of Rights” advocating terms similar to the modern proposals:

- truth in advertised prices, schedules and seat availability;
- equal access to unbiased, comparative travel information and all fare and service options;
- a comfortable seat, reasonable space for carry-on luggage, healthful meals, and clean sanitary facilities, regardless of class of service;
- timely and courteous assistance in making connections;
- use of all, part or none of the segment of any ticket purchased;
- timely, complete and truthful information and courteous assistance regarding delays, cancellations, and equipment changes;
- timely and courteous assistance for disabled and unaccompanied children;
- appropriate in-flight medical emergency assistance; and
- access to the courts and state consumer laws to resolve disputes with airlines.

Fundamentally, these public and private proposals sought to improve the content and frequency of communication between airline passengers and carriers, such as those passengers might claim when using other forms of transportation. From a passenger service perspective, all of these proposals implicated the viability of an economically deregulated airline industry and questioned whether passenger service would improve if and only

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33 Consider:

As a [New York] taxi rider, you have the right to (1) direct the destination and route used; (2) travel to any destination in the five boroughs of the City of New York; (3) a courteous, English-speaking driver who knows the streets of Manhattan and the way to major destinations in other boroughs; (4) a driver who knows and obeys all traffic laws; (5) air-conditioning on demand; (6) a radio-free (silent) trip; (7) smoke and incense-free air; (8) a clean passenger seat area; (9) a clean trunk; (10) a driver who uses the horn only when necessary to warn of danger; and (11) refuse to tip, if the above are not complied with.

if the airlines lost the benefits of economic deregulation and were re-regulated or otherwise supervised by the government.

2. Service, Competition, and Preemption

The specific and untenable goals of the modern passengers’ rights initiative are to improve passenger service and calibrate marketplace competition. To obtain these goals, the PBOR legislation concentrates primarily on four specific issues: (1) delays; (2) overbooking; (3) access to and refund of fares; and (4) market stability. Collectively, these issues identify a core grievance leveled against commercial airlines – a purposefully ineffective or nonexistent ability to communicate truthfully. In other words, the airlines lie and escape accountability by virtue of their indispensability to travelers. Passengers have no option but to endure weather-related delays, but they have lost patience for situations created or aggravated by airlines offering false or no explanations, such as when a passenger holding a confirmed ticket is bumped from an overbooked flight. While weather accounts for more than two-thirds of flight delays nationally, it “does not cause mishandled baggage, and congestion does not

34 The considered proposals also addressed retrieval of lost baggage, redemption of frequent flyer miles, and provision of in-flight emergency services. With respect to the legal implications of airlines providing in-flight emergency services see Julie A. Buffington, Comment, Airlines, Defibrillators, and Enhanced Medical Kits: Filing a Void or Creating a Duty?, 64 J. AIR L. & COM. 497 (1999).

35 Statement by U.S. Senator Ron Wyden on the Airline Passengers Fairness Act, at http://www.senate.gov/~wyden/feature/airline1.htm (“We’re not talking about a federal mandate for fluffier pillows or a Constitutional right to a bigger bag of peanuts – just the right to basic information and the ability to make decisions for yourself.”) (last visited August 1, 2002).

36 Don Phillips, 21 Days, 18 Flights: A Journey of Discovery Finds Miles of Discontent in the Coach Cabin, WASH. POST, June 13, 1999, at H01 [hereinafter Discontent in the Coach Cabin] (observing “that passengers do not trust airlines. In fact, many frequent fliers assume the airline is lying to them, no matter what an airline employee says”).

37 In 2000, weather caused approximately seventy percent of all airline delays, whereas traffic contributed fourteen percent. Yet, one industry observer notes: [e]ven clear skies and functioning airports can cause fits. One day, Newark’s [air traffic controllers’] request for a five-to-ten minute hold on 15 arrivals from the west mushroomed into an airborne gridlock. This rolling-snowball-turned-avalanche began with airplanes holding in Cleveland Center’s airspace. To ease the strain, over-worked Cleveland controllers turned to Chicago and Indianapolis Centers, asking them to also hold Newark-bound flights. Now some 70 airplanes were affected. Then Chicago Center asked Minneapolis Center to hold Newark flights. All of these orbiting airplanes forced controllers to re-route flights headed to or from
prohibit giving timely information on delays," as Senator John McCain (R-Ariz.), former Chairman of the Senate Commerce, Science and Transportation Committee, noted. The deregulated airlines historically have had few legal, as opposed to business, incentives to offer anything but a deaf ear.

The existing law has exacerbated the communication problem between carrier and passenger and fueled passenger and government outrage. Unlike other industries, airlines are immune from state regulations and consumer laws. The Airline Deregulation Act of 1978 ("Deregulation Act"), eliminated the federal government’s control over airfares and routes and authorized the DOT to oversee and enforce air travel consumer protection requirements. The Deregulation Act contains a preemption clause mandating: "No state . . . shall enact or enforce any law, rule, regulation, standard, or other provision . . . relating to rates, routes, or services of any air carrier." Congress designed this preemption clause to assure uniformity under the Deregulation Act and to effectuate federal, economic deregulation policies in an environment insulated from state regulation. The preemption clause and its underlying policy thus confront allegedly aggrieved airline passengers with significant legal obstacles both in tort and contract suits. A savings

Atlanta, Boston, Chicago and Philadelphia. Within a mere 20 minutes some 250 airplanes were facing delays of one sort or another.


39 See infra note 127 and accompanying text.

40 49 U.S.C. §§ 41712-13 (2001). See Paul Mann, Passenger Rights Movement Expected to Bounce Back, AVIATION WK. & SPACE TECH., Oct. 25, 1999, at 54, 58 (quoting Oregon Senator Ron Wyden, "Movie theatres can’t cancel a show if only a few people show up for the movie, but airlines can cancel flights when they determine they don’t have enough passengers . . . That’s patently unfair.").


44 See, e.g., Christopher S. Morin, Flying the Not-So-Friendly Skies: Charas v. TWA's Definition of "Service" Under the ADA's Preemption Clause Exposes Airlines to Tort Liability, 65 J. AIR L. & COM. 497 (2000); see also John T. Houchin, Harris v. American
clause that purportedly sustains common law and statutory remedies does not support claims alleging deceptive fare advertisements, for example. However, the contemporary legal framework has shifted in step with the popular concern about a cultural and behavioral decline in commercial air travel. Specifically, in 1995, the United States Supreme Court resolved, in American Airlines, Inc. v. Wolens, that preemption under the Deregulation Act does not preclude state breach of contract claims against airlines. On at least this basis, passengers' rights proponents mistakenly argue that such proposals, once codified as law, will, as enforceable parts of each airline's contract of carriage, improve airline passenger service and/or establish consequences for service deficiencies. Aside from security-related efforts in the wake of September 11, such a strategy represents a significant governmental intrusion into the service practices and conduct of airlines that, in any event, will not guarantee wanted change in airliner service.


The PBOR proposals represent the product of unreflective, fed-up, opportunistic, and emotionally-charged legislators exercising their significant law-making powers in order to force changes more appropriately produced, if at all, by the free market. Importantly, as the overview in this section shows, the airlines' actual or alleged failure to rectify service-related issues jeopardizes the life of policies favoring economic deregulation.
In early February, 1999, many members of Congress, aggrivated by the January delays in Detroit (discussed in Part II.A., supra) introduced the PBOR legislation, of which only one proposal expressly provided for notice to passengers of any such rights.\footnote{Passenger Entitlement and Competition Enhancement Act of 1999, H.R. 780, 106th Cong. (1999).} Several proposals responded directly to the January 1999 delays. One plan guaranteed passengers a complete refund and right to exit an airplane that did not take off within two hours of the scheduled departure time or park within two hours of landing.\footnote{Airline Deregulation and Disclosure Act of 1999, S. 603, 106th Cong. (1999).} An alternative proposal required airlines to allow passengers to exit an airplane that remained at its gate “more than 1 hour past its scheduled departure time.”\footnote{Omnibus Airline Passenger Fair Treatment Act of 1999, H.R. 2200, 106th Cong. § 4(b)(2) (1999); Air Travelers Fair Treatment Act of 2000, S. 2891, 106th Cong. (1999) (same); see Move Toward Re-Regulation of Aviation Industry Gains Momentum, \textit{WORLD AIRLINE NEWS}, Feb. 2, 2001 (summarizing bill).} A third proposal solicited regulations ensuring “access to necessary services and conditions, including food, water, restroom facilities, and emergency medical services for all passengers.”\footnote{Passenger Entitlement and Competition Enhancement Act of 1999, H.R. 780, 106th Cong. (1999) (requiring airlines to submit an “emergency plan” to the DOT); Airline Deregulation and Disclosure Act of 1999, S. 603, 106th Cong. (1999).} Other proposals sought to improve, or provide in the first place, legal standards of communication between airlines and passengers.

Several PBOR proposals would produce potentially dangerous consequences insofar as they promote timely air travel at the expense of passenger safety. Multiple proposals demanded truth-in-scheduling and required airlines to notify passengers of delays, diversions or cancellations.\footnote{See, e.g., Airline Competition and Passenger Protection Act of 1991, H.R. 2037, 102d Cong. § 1703(b) (1991) (obligating an airline to notify ticketed passengers before boarding of known delays in excess of one hour of (a) the approximate length of the delay; (b) the reasons for the delay; and (c) the opportunity for a refund for the purchase price of the ticket).} While some simply required airlines to make an announcement, others were more punitive, imposing financial penalties on an airline for anything less than

\(\text{ers question “whether the industry isn’t secretly hoping for reregulation” by resisting passengers’ rights legislation: “It was, after all, the airlines themselves who invited the government to impose regulation in order to save them from competition, and only United among the then trunk carriers supported deregulation in 1978.”). \textit{See discussion infra} Part III.A, generally, and text accompanying note 117, specifically.}
Representative Bud Shuster (R-Pa.), for instance, proposed a bill that imposed financial liability on airlines for "an excessive departure or arrival delay," thereby offering airlines the perverse incentive to try to fly on-time even if to do so wagers passenger safety. Under this far-fetched scheme, except for delays caused by air traffic control, airlines would be required to pay twice the value of a ticket price for delays between two and three hours. Proposals such as this not only mandate ridiculous operational requirements of airlines, but also inject government regulation into purely free market matters.

The PBOR proposals threaten the policy underpinnings of the Deregulation Act by targeting airline business practices in the form of communication regarding fares, refunds and ticket use. Multiple proposals shared a common goal to help passen-

54 Compare Airline Passenger Fairness Act, S. 383, 106th Cong. (1999) (requiring airlines to provide "reasonable prior notice" of delay of any scheduled flight (except with respect to matters of national security) and to provide an accurate and truthful reason as to each and any delay, diversion or cancellation) with Aviation Consumer Right to Know Act of 1999, H.R. 908, 106th Cong. (1999) (requiring an announcement about the expected length of the delay) and Omnibus Airline Passenger Fair Treatment Act of 1999, H.R. 2200, 106th Cong. (1999) (imposing duty to provide "accurate explanation" on both domestic and foreign carriers) and Passenger Entitlement and Competition Enhancement Act of 1999, H.R. 780, 106th Cong. (1999) (requiring "sufficient and accurate notice, based on information reasonably available to the carrier").

55 Jim Abrams, Unfriendly Skies, Las Vegas Rev.-J., Mar. 11, 1999, at 1D (quoting the Congressman, "We have struck a raw nerve.").

56 Airline Passenger Bill of Rights, H.R. 700, 106th Cong. (1999). The proposal defines "excessive departure or arrival delay" as a period of time in excess of 2 hours –

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

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

Id. § 2. The penalty for a delay between two and three hours would be 200 percent of the ticket purchase price, plus another 100 percent for each additional hour (or portion thereof) beyond a three hour delay. Id; see also Biztravel.com, Your Flight Arrives On Time or We Pay You Back, Wall St. J., June 5, 2000, at A9 (advertising guaranty of $100 refund if flight arrives thirty minutes late, $200 if one hour late, and the full ticket price if two hours late or cancelled).

gers understand the various sources of published fares and related conditions, and to ensure full access to all offered fares regardless of the medium used, e.g., Internet or paper advertisement. The proposals also sought to regulate airline service options by safeguarding a clever consumer practice of purchasing so-called “hidden tickets.” For example, a ticket for travel from point A (a hub airport) through B and finally to C often is cheaper than a ticket from A to B. Savvy passengers purchase the less expensive ticket and deplane at B. Currently, airlines prohibit this practice and assess an additional charge on passengers and ticket agents who sold the ticket. Yet, some legislation directed airlines to allow such practice, including one bill that required airlines to refund the full price of an unused ticket, upon request made within forty-eight hours after purchase.

The initial PBOR legislation also purported to add law to areas already regulated. Specifically, the proposals sought to prevent overbooking and flight cancellation for business purposes. In this regard, Senator Shuster’s proposal established efforts to disclose and penalize patterns of airlines engaging in “economic cancellations,” that is, cancellations “for reasons other than safety.” Senators Ron Wyden (D-Or.) and McCain, meanwhile, focused upon habitual airline overbooking and the consequent bumping of ticketed passengers. The Wyden-McCain proposal

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62 While not legally prohibited from overbooking flights, airlines must establish boarding priority rules and a sequence in which confirmed passengers will be bumped if an insufficient number of volunteers come forward. 14 C.F.R. § 250.3(a) (2001).
required airlines to inform passengers, upon request, whether a flight was oversold.63 Another plan required airlines to provide an involuntarily "bumped" passenger with alternative transportation to the final destination within two hours of the originally scheduled arrival time or else give a refund or voucher for future travel.64

Last, the proposed legislation sought to empower passengers by regulating the business environment encountered by new airlines, to patrol market competition, and to establish regulatory reactions to further industry consolidation. One bill, the “Airline Competition and Fairness Act of 1999,”65 followed earlier-proposed legislation by focusing on the unfair competitive practice of "low cost carrier" tactics or "predatory pricing" whereby a dominant air carrier66 matches the fares of a new entrant, low-cost airline and increases its own capacity of flights to match the prices and routes offered by the new entrant.67 The unmistakable intent of this tactic is to drive new entrants out of a particular market and then to return fares and service to prior levels.68

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66 Airline Competition Preservation Act of 2000, H.R. 4978, 106th Cong. § 2(e)(1) (2000) (defining “dominant air carrier” as an airline that, “with respect to a hub airport . . . accounts for more than 50 percent of the total annual boardings at [an] airport in the preceding 2-year period or a shorter period.”).
67 Airline Predatory Pricing Prevention Act of 1993, S. 770, 103d Cong. § 2(c)(4) (1993). This act offered two indicators of predatory pricing:
(A) The pricing by the air carrier for air transportation in the city-pair market at issue is below the direct operating costs of the air carrier in providing such transportation.
(B) Decreases in the pricing by the air carrier for such air transportation are occurring when market forces have led to sustained downward development of air fares deviating significantly from ordinary seasonal pricing movements and resulting in widespread losses among all air carriers for providing such air transportation.
68 Predatory tactics are difficult to distinguish from allowable competition. Frank H. Easterbrook, Predatory Strategies and Counterstrategies, 48 U. CHI. L. REV. 263, 266-67 (1981) (“A plaintiff charging predation will classify a reduction in price, an expansion in output, the building of a new plant, and so on as proof of the defendant’s villainy. Unless we have some powerful tools to separate predation from its cousin, hard competition, any legal inquiry is apt to lead to more harm than good.”); see also Phillip Areeda & Donald F. Turner, Predatory Pricing
In other words, "the major carriers [respond to new market entrants] with strategies of price reductions and capacity increases designed not to maximize their own profits but rather to deprive the new entrants of vital traffic and revenues."\(^6\) The proposed bill would require the dominant air carrier to maintain its lowered fares and increased capacity for two years. In addition to prohibiting and safeguarding against these predatory pricing tactics, other proposals, including the "Airline Competition Preservation Act of 2000," focused on the remarkable consolidation in the airline industry.\(^7\) A related proposal, the "Airline Merger Moratorium Act," boldly called for a one-year hiatus on all mergers while the issue of market consolidation was studied.\(^7\) In the end, however, the airlines met all of this legislation with steadfast and coordinated resistance.\(^7\)

C. THE AIRLINES' RESPONSE AND COMMITMENT

The airlines doggedly resisted passage of the legislation, trumpeting the virtues of self-regulation over re-regulation and

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taking carefully-crafted public actions intended to demonstrate that the proposals were unnecessary and overbroad.\textsuperscript{73} The airlines collectively rejected the proposals and spent approximately three million dollars in opposition lobbying.\textsuperscript{74} They contended that the proposals represented re-regulation of commercial air transportation. They also argued that government meddling in industry affairs would accelerate the airline industry down the metaphorical slippery slope into full-fledged regulation.\textsuperscript{75} Even airline employees apparently opposed the legislation through, for instance, letter writing campaigns.\textsuperscript{76} Through their trade association, the Air Transport Association ("ATA"), the airlines assaulted passengers' rights legislation as a distraction from the purported real problems facing air travel—antiquated technology and inadequate airport and runway capacity.\textsuperscript{77} Notwithstanding these arguments, the airlines made certain promises to improve their own behavior.\textsuperscript{78}

On June 17, 1999, the ATA announced a collaborative approach whereby the major U.S. airlines agreed with Congress to enter into an "Airline Customer Service Commitment" ("Commitment") and to develop a "Customer First" plan.\textsuperscript{79} In return,
Congress backed away from its efforts to convert passengers' rights bills into law.\(^{80}\) Participating airlines committed to voluntarily develop, by December 15, 1999, their own "Customer Service Plan" modeled around twelve points:

- offer the lowest fare available;
- notify customers of known delays, cancellations, and diversions;
- deliver baggage on time;
- support an increase in the baggage liability limit;
- allow reservations to be held or canceled;
- provide prompt ticket refunds;
- properly accommodate disabled and special-need passengers;
- meet customers' essential needs during long on-aircraft delays;
- handle "bumped" passengers with fairness and consistency;
- disclose travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration;
- ensure good customer service from code-share partners; and
- be more responsive to customer complaints.\(^{81}\)

However, the DOT Inspector General noted that:

the Commitment does not directly address underlying reasons for customer dissatisfaction, such as extensive flight delays, baggage not showing up on arrival, long check-in lines, and high fares in certain markets . . . [U]ntil these areas are effectively addressed by the Airlines, the Federal Aviation Administration ["FAA"], and others, there will continue to be discontent among air travelers.\(^{82}\)

The airlines implemented some improvements. The entire industry satisfied one of the twelve points by agreeing to in-


\(^{81}\) Jim Landers, *Airline Industry Unveils Customer Service Pledge*, Dallas Morning News, June 18, 1999, at 1A. On June 7, 2001, the ATA airlines incorporated these points into their respective contracts of carriage. The fourteen ATA-member airlines joining in the Commitment were: Alaska, Aloha, American, American Trans Air, America West Airlines, Continental, Delta, Hawaiian, Midwest Express, Northwest, Southwest, TWA, United, and US Airways. See discussion infra Part III.C.

crease carrier liability for lost baggage from $1,250 to $2,500. Following that, each airline separately attempted to communicate more effectively with its consumers. As a starting point, the airlines and the ATA exhibited their plans on the Internet. Some carriers created notification systems capable of contacting passengers by phone, computer, or pager to advise of flight changes. To deal with delays, one airline purchased and used mobile stairs to deplane delayed passengers and mobile ticket counters to manage crowded lines. Other airlines reported on their websites the on-time percentage of scheduled flights. Finally, several airlines publicized their well-received efforts to remove seats from their airplanes in order to expand leg-room.

Though innovative and responsive in some ways, the airlines' collective and individual plans were discounted as "legalistic gobbledygook which do nothing to protect passengers" and reflect only "vague promises to enforce policies already in place." Representative John Dingell (D-Mich.) further dismissed the airlines' plans, stating, "[v]oluntary commitments are only that –

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83 14 C.F.R. § 254.4 (2001). This law originally was proposed as part of the Airline Passenger Defense Act of 1990, supra note 25.
84 E.g., AIR TRANSP. ASS'N, Customers First, at http://www.customers-first.org/index-a.htm (last visited Aug. 1, 2002).
87 See, e.g., John Schmeltzer, More Room with a View, American Creating More Seat Space, CHI. TRIB., Feb. 4, 2000, at 1 (discussing the "More Room in Coach" campaign). In contrast, Southwest Airlines requires obese passengers to buy two tickets instead of one. Judd Slivka & Kelly Ettenborough, Southwest Policy for Obese Criticized, ARIZ. REPUBLIC, June 20, 2002. See also Jane Wooldridge, The Real Skinny: Only Pygmies Fit, MIAMI HERALD, July 21, 2002, at 1J. One commentator notes that such a policy aggravates the relationship between passenger and carrier:

Wonderful. Already we’re wanded and probed and occasionally disrobed at airports as part of the post-9/11 security measures. Now we’ll be gauged for size by airline employees. * * * The saddest part about all this is that airlines could easily adjust to suit consumer needs if they weren’t so greedy.

Harry Shattuck, Is Greed Behind Pinch on Big Folk?, Miami Herald, July 21, 2002, at 1J.
promises to do better.” Nevertheless, Congress afforded the airlines approximately one year to voluntarily effectuate the Commitment, during which the DOT was legally charged with monitoring and reporting these efforts. As it turned out, the year only fueled the passengers’ rights initiative.

D. The Final DOT Report and 2001

On February 12, 2001, Kenneth M. Mead, the DOT Inspector General, issued the long-anticipated “Final Report on Airline Customer Service” (“Final Report”). The Final Report stated that “[o]verall, we found the airlines were making progress . . . [but] we find the airlines’ commitment does not directly address the most deep-seated, underlying cause of customer dissatisfaction — flight delays and cancellations, and what the Airlines plan to do about them in the areas under their control.” This language and the Final Report, generally, energized Congress to act with greater resolve with respect to enforceable passengers’ rights legislation, activating another round of proposals and stimulating popular debate concerning the troubled state of airline travel. The day after the Final Report published, Senator McCain introduced the “Airline Customer Service Improvement

92 Bowen & Headley, supra note 7, at “Observations About the Industry” (“Even with a promise to do better, industry performance quality . . . declined in 2000. With Congress again considering the passage of an Airline Passengers’ Bill of Rights it seems that the airline industry is its own worst enemy.”).
94 Id. at 5.
95 See, e.g., Alexandra Marks, Will a ‘Passenger Bill of Rights’ Really Work?, CHRISTIAN SCI. MONITOR, May 22, 2001, at 3; Adam Bryant, 7 Ways to Fix Air Travel, NEWSWEEK, Apr. 23, 2001, at 38 (offering the following plans to alleviate air-traffic and airline service woes: (1) construct more runways at existing airports; (2) use an auction to set the rates for landing fees at major airports; (3) improve customer service, i.e., “customers before cargo;” (4) improve air traffic navigation with modern technology such as Global Positioning Satellite; (5) create an independent, nonprofit corporation to operate air traffic control in place of the FAA; (6) “stop the merger madness;” and (7) encourage passengers to choose a carrier based on quality of service not just fare or frequent flyer accounts); Paul Mann, Congress Bearish on Big Carriers, AVIATION WK. & SPACE TECH., Mar. 12, 2001, at 66; DOT Report on Airline Service Hits a Congressional Nerve, CONG. DAILY, Feb. 13, 2001 (quoting Senator Wyden: “You don’t need more money to start telling people the
Many other plans followed, each of which restated themes presented in the 1999 and 2000 proposals: communication and ticket use; fair treatment; competition; congestion; and maintenance of market status quo. Unlike the initial proposals, however, the bills proposed in 2001 were more forceful insofar as they required the airlines to incorporate the service plans into their respective contracts of carriage. Though eventually making some concessions by agreeing to seventeen additional customer-service points, the airlines continued to

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102 The additional points are: (1) incorporate original twelve customer service commitments into each airline’s respective contract of carriage; (2) establish internal performance measurement systems; (3) cooperate with DOT/Inspector General audit; (4) set realistic targets for reducing chronically delayed/cancelled flights; (5) make on-time performance data accessible to customers (on website, Bureau of Transportation Statistics link, or through 800 number); (6) develop system to track baggage; (7) establish toll-free number (or local number) for mishandled baggage information; (8) petition for rulemaking to increase denied involuntary boarding compensation; (9) petition DOT to change the calculation and reporting of the rate of mishandled baggage by air carriers to take into account passengers who do not check luggage; (10) establish airline/airport/FAA task force to recommend ways to coordinate efforts to help passengers who are required to remain overnight due to delays, cancellations or diversions; (11) establish task force to recommend ways to coordinate emergency contingency plans with local airports and FAA to deal with lengthy delays; (12) establish task force to review and recommend a plan to help ensure that airport display monitors are accurate; (13) make lowest fare available on airline telephone reservation system also available at airline ticket offices and airport ticket counters; (14) establish system that will enable passengers to know whether their flight is delayed or cancelled before they depart for the airport; (15) establish focus groups from the disabled and special needs community to review and make recommendations on services provided to passengers with disabilities; (16) conduct
oppose the legislation, proclaiming their voluntary plans as successful in light of an increasingly incapable aviation infrastructure and warning that the uniformity of the PBOR legislation would generate unwanted costs that would be passed on to consumers. Nevertheless, legislators moved forward and nearly set the rejuvenated PBOR legislation for a vote. Then the events of September 11 occurred.

The following discussion examines the issues informing the PBOR legislation and the contours of modern airline travel along a theme that the importance of such proposals is not lost or diminished by the events of September 11 and, a fortiori, that a new era of regulation may arrive.

III. DISCUSSION

A. Whither Deregulation?

Broadly, the legislative and popular movement toward legally enforceable passengers' rights implicitly asks two questions: (1) whether the promises of economic deregulation are broken; and (2) whether such promises ever actually were capable of being fulfilled. Thus far, airline deregulation scholarship and the governing law have approached this inquiry by focusing principally on economics - a business assessment comparing the relative and related social costs and benefits of deregulation with those of the pre-1978 regulatory structure. In this economic context, airline deregulation analyses have studied the impact

annual review of regional code-share partners' customer service plan (except ATA member airlines or their affiliates); and (17) clarify terminology used in customer service plans to advise passengers what to expect during "extended periods of time" and "emergency." S. 319, 107th Cong. (2001).

105 Hearing on Airline Customer Service Commitments: Status Report Before the House Transp. & Infrastructure Comm., 107th Cong. (2001) (statement of Glenn R. Zander, President and Chief Executive Officer, Aloha Airlines, Inc.) ("The imposition of 'one-size-fits-all' mandatory customer service requirements will stifle innovation, choke new entrants, and cause even healthy customer friendly carriers to undertake inappropriate, expensive and counter productive actions simply because the bureaucracy demands them.").


105 CONSUMERS UNION, DEREGULATED (2002) (reasoning that "[b]roken promises, deceptive marketing, and dreadful service have become accepted business practices in an increasingly Wild Wild West marketplace" and recommending consumer protections in the nature of a truth-in-airfares disclosure and a passenger bill of rights).
and extent of the Deregulation Act on airline management, infrastructure, industry health and trends, market entry, and labor. Surprisingly, these discussions have not emphasized the deteriorating state of passenger service – airport or in-flight relations between passenger and carrier – in practical, non-economic terms. Rather, commentators have discussed service in the deregulated environment as a function of access, that is, in terms of the number of destinations airlines serve, the commensurate reduction in service for small communities, and competitive fares or carrier alternatives. The PBOR legislation provides a new and recent context in which to examine the practical consequences of airline deregulation and to reassess the still-pending question of what amount of government activism in the airline industry, if any, will promote competitive, free market policies. The social regulatory impulses informing passengers’ rights legislation represents a significant shift in deregulation policy.

After the Great Depression and for several decades thereafter, Americans recoiled from the idea of free market competition as a vehicle for generating and sustaining, among other public utilities, a national air transportation system. In 1938, the Civil Aeronautics Board ("CAB") was created and charged with economic regulation of the burgeoning airline industry, which initially was in the business of transporting mail, not passengers.

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108 See, e.g., Herbert D. Kelleher, Deregulation and the Troglodytes – How the Airlines Met Adam Smith, 50 J. Air L. & Com. 299, 304 (1985) [hereinafter Kelleher, How the Airlines Met Adam Smith] ("Deregulation has produced substantial societal benefits in the form of lower fares, increased service, diversity of service and price alternatives, reduced industry concentration, more efficient allocation of resources and, in the long run, a more healthy, efficient and innovative airline industry.").


110 The CAB was referred to as the “Civil Aeronautics Authority” until 1940. In 1984, the Congress dissolved the CAB and transferred its remaining functions to the DOT. The Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-793, 98 Stat. 2857 (1984).

111 Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938). For early commentary considering the interplay between regulation and competition under the CAB’s governance, see Howard C. Westwood & Alexander E. Bennett, A Footnote to the Legislative History of the Civil Aeronautics Act of 1938 and Afterword, 42 Notre Dame Law. 309, 311 (1967); Samuel B. Richmond, Regulation and
The CAB strictly monitored airlines and the substantial competitive impulses among them.\textsuperscript{112} The CAB's authority reached interstate air travel and included the exclusive power to grant operating permits, approve and assign routes and services to certain communities,\textsuperscript{113} set air travel prices,\textsuperscript{114} and control market entry and anti-competitive practices.\textsuperscript{115} Such regulation was thought necessary to protect the fledgling airline industry, prevent airlines from engaging in destructive and cannibalistic competition, and facilitate and ensure growth of a nominal commercial aviation industry. In fact, in this controlled environment, the airline industry consisted of an oligopoly of only four carriers.\textsuperscript{116} Relatively free from the modern and market-borne pressures of competition, early airline travel was the private preserve of the well-to-do and the nascent, government-protected air carriers generally focused on providing quality service to these few. Over time, however, the bases presented in support of government regulation and positive federal guardianship of a viable, but restrained airline industry, eroded as a more mobile society arose.

Deregulation impulses overtook regulatory schemes as the modern era of mass airline transportation evolved.\textsuperscript{117} In 1974, Senator Edward M. Kennedy (D-Mass.), then-Chair of the Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, set out to investigate the CAB's regulation. Senator Kennedy sought the advice of (now United

\textsuperscript{114} Id. § 1002(d), 52 Stat. at 1018-19.
\textsuperscript{115} Id. § 408(a), 52 Stat. at 1000-02.
\textsuperscript{116} American, Eastern, Transcontinental & Western Air (later TWA), and United Air Lines comprised the "Big Four" or the so-called major or trunk carriers.
\textsuperscript{117} Unlike the impulses recommending deregulation, the PBOR legislation is an outgrowth of passenger dissatisfaction. James W. Callison, \textit{Airline Deregulation - Only Partially a Hoax: The Current Status of the Airline Deregulation Movement}, 45 J. AIR L. \& COM. 961, 964 n.4 (1980) ("The impetus for change came almost entirely from the academics and politicians; the public never did call for deregulation of the airline industry. Various public opinion polls had shown that the airlines consistently ranked at the very top among all industries in terms of consumer satisfaction and confidence.").
States Supreme Court Justice) Stephen Breyer, a Harvard Law School professor, who was retained to head the subcommittee.\textsuperscript{118} Ultimately, on October 24, 1978, President Jimmy Carter signed into law the Deregulation Act. This act, by amending the Federal Aviation Act of 1958, freed the airlines of federal regulation, and allowed, by-and-large, a market-driven commercial aviation system.\textsuperscript{119} As a direct result, an ever-broadening base of air travelers availed itself of abundant air transportation options made possible by the creation of numerous air carriers, each operating at competitive fares with regular frequency on choice routes. In the aggregate, culturally and sociologically, airline travel became familiar and passengers' awe with airplane travel was replaced with a no-nonsense expectation of getting to a destination cheaply, quickly, and safely.

As the number of airline passengers increased, the deregulated commercial aviation market experienced a number of convulsions that contributed to the current transition in passenger attitude. Most notably, commercial airlines in the 1980s and 1990s engaged in the very cannibalistic behavior that the CAB, pre-deregulation policy and deregulation opponents shunned.\textsuperscript{120} At another level, the provision of non-essential, in-flight passenger services declined or was altogether abandoned ("no frills") as the number of amazingly low fare offerings increased.\textsuperscript{121} The business objective of mass access to air transportation anchoring deregulation policy was attained, but potentially at the cost of passenger care and at the risk of passenger resentment. The tangible economic benefits of deregulation, vis-à-vis low airfares and frequent flight offerings, masked passenger inconveniences, which, until recently, seemed to be


\textsuperscript{119} But see Peter C. Carstensen, Evaluating “Deregulation” of Commercial Air Travel: False Dichotomization, Untenable Theories, and Unimplemented Premises, 46 Wash. & Lee L. Rev. 109, 116 (1989) (clarifying: “dichotomization [between regulation and deregulation] is false . . . ‘Deregulation’ has in fact meant eliminating a few, specific controls while retaining all others. Air travel today, [for example,] as in the past, is totally dependent on the existence and effective operation of such industry specific controls as the FAA’s air traffic system.”).

\textsuperscript{120} See, e.g., Wesley G. Kaldahl, Let the Process of Deregulation Continue, 50 J. Air L. & Com. 285, 295 (1985) (“The public has not benefited. There is less nonstop service, most lengthy trips require stops at intermediate hubs, and fares are widely inconsistent and tend to favor the few chosen markets.”) (emphasis in original).

an acceptable price for, or condition of, such benefits. Airline management effectively cultivated a passenger culture that came to accept service limitations, including reduced seat pitch and meager in-flight meals (if even provided). Airline passengers increasingly have come to view themselves for what airline economic deregulation policy has always understood them to be — variables in an equation based on the profit-driven axiom that "airplanes are marginal costs with wings."

The service-oriented PBOR proposals mandate service and behavioral rather than economic regulation. The proposals suggest that the commercial airline industry has come full circle, from regulation to deregulation and potentially back again, albeit with some mutation. The various proposals do not necessarily purport to re-regulate the commercial aviation industry in pure economic terms (i.e., fares and routes), but they promise to regulate airline conduct. Moreover, the PBOR legislation revisits concerns that deregulation opponents raised over two decades ago and, in doing so, suggests that the mature airline market may not have evolved as planned or prognosticated. As a former pilot remarked:

In the past, the airlines’ goal was to get people out of trains and buses and into airplanes. With larger, faster airplanes and deregulation, this goal was achieved. We are well aware of the results. With low fares and giveaways, and even with full loads, the

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122 LAURENCE E. GESELL, AIRLINE RE-REGULATION 17 (Coast Aire Publications 1990) (hypothesizing that "there has been an increase in finance-oriented managers during the airline deregulatory process . . . that . . . results in negative welfare interests.").


airlines are struggling. It should not be cheaper to fly than to take surface transportation. I suggest reinstating the Civil Aeronautics Board to promote air transportation and control prices. Let the FAA do its job of regulation. People will continue to fly even at increased fares. It should be a pleasure to fly, not an ordeal.\textsuperscript{126}

Regulatory opponents, however, argue that the provision of qualitatively-sound service is a function of marketplace forces and competition, not legislative mandate.\textsuperscript{127} As one aviation consultant aptly noted: "[i]t's very hard to legislate care and feeling and empathy."\textsuperscript{128} Importantly, then, the passengers' rights legislation represents a critical point at which regulatory and deregulatory impulses interface. Indeed, the traumatic events of September 11 suggest that some form of regulation, which was merely \textit{desired} by passengers' rights proponents, now may be required. To be sure, where passengers' rights legislation focused on improving airline conduct, recent anecdotal evi-


\textsuperscript{127} One commentator assessed the remarks of a former United Airlines CEO as follows:

He says, "We're in the service business. And if we don't find ways to provide that level of service, passengers will obviously find other airlines that can." Now, that's not just spin; that's a pretty good point. 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.

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This is all about members of Congress and how they're treated by the airlines . . . This is about them. This is about their inconveniences, and they're taking it out on the country — not the first time.

\textit{CNN Crossfire, Is It Time for Congress to Give Airline Passengers More Rights?} (CNN television broadcast, Feb. 15, 2001). \textit{But see} James Higgins, \textit{The Industry You Love to Hate}, WKLY. STANDARD, Mar. 19, 2001, at 24 ("the problem isn’t that airlines have an incentive to antagonize their customers, but that the airlines \textit{lack} an incentive \textit{not} to antagonize their customers") (emphasis in original).

\textsuperscript{128} Katie Culbertson, \textit{ATA Fights Image Problem Caused by Bill of Rights}, IND. BUS. J., Mar. 29, 1999, at 9a. One industry player contends:

At this advanced stage in the game, it is clearly preferable that the \textit{marketplace}, rather than the government, determine America’s future and the future of the industry. While the government continues to hold an important position pertaining to safety, other issues are best left to free enterprise and open competition, just as the proponents of deregulation intended.

Kaldahl, \textit{supra} note 120, at 297 (emphasis in original).
dence suggests a need for more forceful regulation in the other direction – passenger conduct relative to air carriers.

B. CULTURAL DEVOLUTION

The PBOR legislation arises, in part, from tense and antagonistic airport and flight-cabin environments. The tragedies of September 11 only inflame this reality. The promise of deregulation of readily-accessible air travel, coupled with infrastructure inadequacies, has produced an experience that often negates expected temporal and cost benefits of commercial air travel.¹²⁹ A decline in airport and in-flight culture may be traced to a conflict borne of deregulation policy “between the demand for convenience and the demand for value.”¹³⁰ Economically liberated by the Deregulation Act of 1978, airlines effectuated and maximized their new liberties by testing passengers’ willingness to cope with less service and amenities in exchange for low fares and myriad flight offerings. Indeed, passengers occupied themselves primarily with getting from one point to another at the least expensive rate, generally without concern for creature comforts.¹³¹ In its early stages, economic deregulation prompted carriers to offer low fares with reduced or no in-flight service or conveniences beyond those necessary or required. Consumers immediately benefited from unprecedented “fare wars” and welcomed value over convenience. Airline passenger service became a relatively undifferentiated product and often included nothing more than “pure transportation.”¹³² No-frills airlines such as People Express, for example, embraced deregulation

¹²⁹ See discussion infra Part III.D.2.
¹³⁰ THOMAS PETZINGER, JR., HARD LANDING 290-91 (1995). An initial consequence of September 11 in terms of economics and social mobility is the airline industry’s reassessment of business models favoring value over convenience: (Moderator): . . . Are we going to look back and laugh that there was ever any luxuries aloft when Americans flew? Robert Crandall: . . . The public has been offered a choice, in effect, between quite high levels of convenience and service on the one hand and very low prices on the other. And the public has clearly come down in favor of the lowest possible price. . . . And I think the answer is, yes, over time, I think the public will find that air travel is less accessible, less ubiquitous and less service-oriented, perhaps more efficient and more price-oriented, but less convenient, less easy to use that has been the case in the past.
¹³² Id. at 115.
policy and democratized air travel, making commercial flight more approachable to the largest cross-section of an increasingly mobile population than ever before. A sort of (air)bus culture resulted. Over time, however, passengers have found intolerable aspects of bottom-line, deregulation policy they initially sustained.

The PBOR legislation suggests that, confronted by delays, cancellations, diversions, and reduced market choice, modern airline passengers, and the government officials among them, are unable to find either convenience or value in the commercial airline system. Moreover, the proposed PBOR legislation indicates that passengers also are unwilling to make any more (or more significant) sacrifices in order to obtain a low fare. The outcry for passengers’ rights also implies that passengers have become so accustomed to the benefits of air travel as to overlook all that is involved in airplane transportation. The awe and civility with which early airline passengers approached commercial airliner travel plainly is missing in today’s traveler, replaced instead with knee-jerk cynicism. Yet, the proposed preventative legislation does not, and cannot, reconstitute convenience or value that the deregulated airline market fails to offer, because this legislation does nothing to temper passenger behavior and expectations. The passengers’ rights legislation, with its singular focus on airline behavior, collectively fails to establish laws capable of, or a universally-applicable policy for, reforming the social and cultural deterioration in the relationship among the government, passengers, and airlines with respect to commercial air travel.

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133 See discussion infra Part III.D.2.
134 Paul D. Winston, Planes Should Fly, but Old Ways Won’t, Bus. Ins., Sept. 24, 2001, at 41 (opining that “improvement can come without undue federal control, but only if we stop settling for terrible customer service. Our grudging tolerance for the poor quality of air travel permits that condition to persist.”); Frances Fiorino, Passengers Enraged, but Does Industry Care, Aviation Wk. & Space Tech., June 14, 1999, at 122 (quoting “1998 Airline Quality Rating”: “consumers are near the breaking point with dissatisfaction”). Petzinger, Jr., supra note 130, at 339 (discussing “a principle as old as passenger flight itself: people will tolerate many sacrifices to fly, but they will not tolerate surprise. They may sit with their knees to their chest for a low fare, but they will not stand for a lost bag.”).
135 Discontent in the Coach Cabin, supra note 36, at 101 (recording that “[a]lthough passengers assume an airline is lying when things go wrong, when everything goes smoothly and flights arrive on time, they don’t complain.”).
136 René J. Francillon, Softies and Gripers - The Airline Customer Service Improvement Act Versus Historical Reality, Airliners, Sept./Oct. 2001, at 30 [hereinafter Francillon, Softies and Gripers] (asserting that passengers themselves are the enemy and
A population of travelers responding to travel-related and other pressures in markedly antisocial ways has replaced the generally exclusive and affluent culture that occupied early, prederegulation airports and flight cabins. Modern airline passengers hurry to airports often only to wait in congested concourses or on parked planes.\textsuperscript{137} Even the most passive of passengers manifest frustration with the hustle of modern air travel. Not surprisingly, airline passenger civility and decency have declined noticeably as passengers engage in inappropriate and dangerous conduct toward their fellow travelers and airport and flight personnel.\textsuperscript{138} Passengers are angry and violent, whether en route to

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\textsuperscript{137} Paul Mann, \textit{Airlines Treat Patrons 'Like Cattle,' Feds Say}, \textit{Aviation Wk. \\ & Space Tech.}, Aug. 7, 2000, at 52.

\textsuperscript{138} Hopeful passengers have imagined a code of conduct, which, while short of a legally enforceable passengers’ bill of rights, identify prevalent issues confronting commercial airline travelers:

Dear Ann Landers:

A lot of people are traveling this summer, and my friends and I came up with a list of suggestions that we would like to call ‘Airline Etiquette.’ I hope you will print our list:

1. Be courteous to the crew and fellow passengers. One rude person in a small area makes for a very unpleasant trip for everyone.

2. If there is no room in the overhead for your carry-on luggage, put your bag in the foot space in front of your legs. If you have a hang-up bag, ask the flight attendant where it should go.

3. Do not bring an overstuffed carry-on bag that won’t fit in the assigned space. Bring only important, necessary items with your.

4. Do not lean your back seat any farther than absolutely necessary. Most airlines have so little leg room that you head will be on another passenger’s lap.

5. If you must recline your seat, be sure to put it in the upright position when food is served. The person behind you will appreciate it.

6. If the person next to you spills a drink, offer them your napkin, and press the call button for the flight attendant. Your seatmate will have his hands full.

7. Be considerate of the passenger in front of you. Do not bump or kick the seat. Don’t slam the tray table. Use care when removing items from the seat pocket.

8. On long flights, be quiet when the cabin lights are dimmed. You may want to have a loud conversation, but other people are trying to sleep.

9. Keep the volume down on personal entertainment devices such as CD players and videogame players, or use headphones.
the airport (i.e., "road rage"), while waiting in line at the terminal counter (i.e., "ground rage"), or once airborne (i.e., "air rage"). Anecdotal evidence suggests that any air traveler is capable of manifesting outrageous conduct: both sexes, any nationality, the business traveler in first class or the holiday traveler in economy, celebrities, politicians, television

10. Please demonstrate good hygiene. Airplanes are stuffy. Take a shower, and put on clean clothes before getting on board. The person next to you will be grateful.

Letter from Fellow Travelers in Queen Creek, Ariz. to Ann Landers, MIAMI HERALD, July 27, 2002, at 9E.

Air rage is a general intent crime defined and punishable by federal law as follows:

An individual on an aircraft in the special aircraft jurisdiction of the United States who, by assaulting or intimidating a flight crew member or flight attendant of the aircraft, interferes with the performance of the duties of the member or attendant or lessens the ability of the member or attendant to perform those duties, attempts or conspires to do such an act, shall be fined under title 18, imprisoned for not more than 20 years, or both.


140 See, e.g., ELLIOTT HESTER, PLANE INSANITY: A FLIGHT ATTENDANT’S TALES OF SEX, RAGE AND QUEASINESS AT 30,000 FEET (St. Martin’s Press 2002).

141 Air rage is not a phenomenon peculiar to U.S. airline travel. For example, the United Kingdom’s Civil Aviation Authority estimated that air rage incidents occurred an average of once out of every 870 flights. Air Rage Incidents Four Times a Day, BIRMINGHAM POST, Feb. 19, 2000, at 8; see also Off-Duty SAA Steward Goes Berserk on Plane, THE STAR (South Africa), Feb. 26, 2000, available at http://www.iol.co.za/index.php?setid=lclickid=13 (reporting a drunk attendant on board a Bangkok to Johannesburg flight who, for thirty minutes, “tore down the aisles, swearing and taking swipes at passengers . . . biting some on their arms and hands . . . and forcing himself on a Chinese woman and kissing her,” until restrained by fellow passengers).

142 Joan Fleischman, Miami Lawyer Yanked Off Flight to Colorado, MIAMI HERALD, Mar. 27, 2002, at 4A.

Some instances of travel rage leave little to the imagination, as when a businessman defecated on an in-use service cart or, post-September 11, when a banker on an airborne international flight tried "to talk to the captain" by applying several "kung fu" kicks to the reinforced cockpit door. Even when not traveling, a segment of passengers appears preoccupied with terrible travel experiences, creating and contributing to a bitter Internet culture, e.g., AirlinesSuck.com, AirTravelComplaints.com, AmericanAirlinesSucks.org, NorthWorstAir.org, Passengerrights.com, SkyRage.com, Ticked.com, TravelProblems.com and Untied.com. Aside from psychological impulses, travel phobias, and other motivators of air rage, the range of inappropriate and threatening behavior passengers exhibit may be connected to the operation (or lack thereof) of a saturated deregulated commercial airline system.

Of course, unlawful or disruptive behavior does not arise in a vacuum, but often may be an unintended consequence of airline operations. Increasingly, passengers feel neglected or purposefully mistreated by the deregulated airlines, which appear unable or unwilling to both manage dense traffic patterns and

145 TV Producer Jailed for "Air Rage" at http://www.thisislondon.co.uk.
149 Martin Merzer et al., Crew's Ax Stops Cockpit Intruder, MIAMI HERALD, Feb. 8, 2002, at 1A (reporting that the co-pilot subdued the panicked passenger by hitting him in the head with the blunt end of an ax).
150 See generally, Marilyn Adams, More Fliers Land on the Internet to Air Complaints, USA TODAY, Apr. 18, 2000, at 12B.
151 See Keith L. Alexander, Raising a Glass or Two - No More - To Safety in Flight, WASH. POST, July 25, 2001, at E01 (discussing Senator Dianne Feinstein's (D-Cal.) letter to airline executives threatening to introduce legislation if the airlines did not "voluntarily" limit the number of alcoholic drinks served to passengers).
152 See discussion infra Part III.D.1.
provide quality service.\textsuperscript{153} Passengers increasingly analogize their air travel experiences to hostage situations while, reciprocally, flight crews regard passengers as "the enemy."\textsuperscript{154} Moreover, historically, bitter relations between airlines and labor, and even the government and labor, have directly impacted air travelers in the nature of, for example, choreographed slow-downs and sick-outs.\textsuperscript{155} Passengers are a natural target for labor to manifest the frustrations they harbor toward their carrier-employer.\textsuperscript{156} Surprisingly, the PBOR legislation does not addresses labor as an element in the deterioration of passenger service even though some members of Congress blamed organized labor as a cause in fact of commercial air transportation woes.\textsuperscript{157}

Ironically, while face-to-face interaction between passengers and crews is a source of conflict, computers and other technologies intended to improve airline service and to hasten the travel processes also contribute to passenger frustration by reducing the amount of personal contact between passengers and the airline corporate giants.\textsuperscript{158} As a result, the processes accompanying

\begin{itemize}
  \item Bowen & Headley, supra note 7, at 6 ("Qualitative assessment of consumer experiences indicates an increasing frequency of consumer/employee confrontations that clearly stem from management policies and practices that encourage misinformation regarding flight status information and flight delays."); *Airline Crews Demand More Action to Curb Passenger Rage*, MIAMI HERALD, July 7, 2001, at 2A (quoting a passenger, "It’s air rage because the airlines aren’t doing their jobs to secure those attendants... If they would give out information in a timely manner, you wouldn’t see air rage."); Gesell, supra note 122, at 17.
  \item Doug Gamble, *Remember the “Friendly Skies?”*, SACRAMENTO BEE, Aug. 15, 1999, at I2 (stating that "there is no private-sector business with more open hostility between server and customer than that which exists with the airline industry.").
  \item \textsuperscript{156} Ina Paiva Cordle, *We’re Not Asking for the World*, MIAMI HERALD, June 3, 2001, at 6E (quoting an American Airlines flight attendant, "When I see they are not willing to pacify us, and we’re not asking for a huge chunk of change, it makes me ask: ‘Do I want to do a good job for them?’").
  \item \textsuperscript{157} Delays Spur Growing Interest in Antitrust Immunity for Carriers, AIRLINE FIN. NEWS, Feb. 19, 2001, at 1 (referring to Senator Trent Lott’s (R-Miss.) statement that labor “was a major part of the problem” in causing delays).
  \item \textsuperscript{158} E.g., Ruwantissa Abeyratne, *E-Commerce and the Airline Passenger*, 66 J. AIR L. & COM. 1345 (2001). See also Marilyn Adams, *Tech Takes Bigger Role in Air Service,*
commercial airline flight, from reservations to enplanement and beyond, create miserable experiences. For example, in arranging air travel, passengers confront an intentional, almost punitive, lack of uniformity of fares varied only by special conditions and restrictions. Then, once aboard a flight, whatever the fare eventually paid, passengers strain into seats whose slight seat pitch is a source of popular culture comedy (and potentially a contributor to a serious medical condition). In all, airline passengers may perceive themselves on the outside of a national blame game, whereby:

[the airlines point to the air traffic control system and the shortage of airport runway capacity. The airports point to the need for airspace redesign, new technologies, and to airline schedule practices. The FAA and DOT point to airline practices like flight bunching in which 50 percent of all arrivals and departures are scheduled to arrive or depart in two minutes exactly on the hour or the half-hour. The customer points to all of the above and just wants it fixed.]

In any event, the terrorism of September 11 ushered in a new reality that, among other things, invigorates the finger-pointing among government, industry, and passengers, and exacerbates distrust between carriers and their consumers.

C. CONTRACT AS PANACEA

The PBOR legislation is important and questionable because it intends to achieve qualitatively-sound commercial airline service by legislative mandate. In 2001, armed with statistical and anecdotal evidence of deplorable airline service, Congressional passengers’ rights proponents contended that the airlines’ voluntary “Customer Service Plans” effected in 1999 had failed entirely. Consequently, passengers’ rights advocates zealously

USA TODAY, July 18, 2001, at 1B (observing that “[t]oday, you can book a domestic flight, check in, upgrade from coach to business class, reserve a window or aisle seat, get a boarding pass and check luggage—all without speaking to a human.”).

Carstensen, supra note 119, at 144 (“It appears...that almost every seat on a flight has its own unique price.”).


See discussion infra Part III.E.
asserted that real relief for passengers would result only if such plans were codified to require the airlines to adopt and incorporate into their respective contracts of carriage the twelve points enumerated in the 1999 Airline Customer Service Commitment. Legislators reached this infirm conclusion on the supposition that the deregulated airlines disregard passenger service, focusing instead on obtaining and maintaining passenger volume not on the basis of service, but with the allure of nothing more than "pure transportation" at fares as low or beneath those of competitors. Succumbing to the threat of the PBOR becoming enforceable law, the ATA airlines incorporated the twelve service terms into their respective contracts of carriage by May, 2001.

Such contract rights are no rights at all because they now exist (and were advocated in the first place) in an environment in which breaches are not only contemplated but expected. As such, proponents of the PBOR quixotically imagine legal solutions to purely business problems, thereby raising more expansive concerns about whether the legislative directive of service-based contract rights represents the first of future governmental intrusions into the service-related aspects of the deregulated airline marketplace. In promoting service through contract, the PBOR legislation overlooks the further and substantial inconvenience aggrieved passengers will face in pursuing enforcement of any newly created rights in an already over-burdened court system. The notion that contract will improve commercial airline service is specious.

At first glance, contract, as a vehicle for securing otherwise transient airline promises to improve service, is appealing for several reasons. Principally, decisional law of the United States Supreme Court holds that the Deregulation Act does not preempt breach of contract claims. As such, state court resources

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163 See discussion supra Part II.B; see also Tom Ramstack, Senate Panel Lands on Airlines: Industry Defends Customer-Service Efforts in Wake of Report, WASH. TIMES, Feb. 14, 2001, at B9 (quoting Senator Wyden, "I've heard this bottomless pit of excuses now for 18 months. . . . I hope we can get enforceable rights for passengers in the legislation this time.").

164 Jean Braucher, Contract Versus Contractarianism: The Regulatory Role of Contract Law, 47 WASH. & LEE L. REV. 697, 699 (1990) ("[C]ontractarians neglect the implications of the fact that contracts are not self-enforcing. . . . They see contract as a device by which parties control their relations and achieve their desires by consent. Their approach thus misconceives contract because all law, including contract, is regulatory.").

are available to allegedly aggrieved passengers.\footnote{Matthew Azoulay, Note, American Airlines, Inc. v. Wolens: The Supreme Court's Reregulation of the Airline Industry, 5 Widener J. Pub. L. 405, 407 (1996) (arguing that "the Court failed to recognize that a state is 'enforcing or enacting' law when one of its courts determines that a party has breached a contractual obligation. Consequently, the majority's holding will subject airlines to the demands of various state courts thereby imposing burdensome and costly standards on the airline industry.").} Next, contract theory makes airlines directly accountable to their passengers in ways that other legal mechanisms do not and cannot. That is, "[u]nlike DOT regulations, which are enforced by government and may result in administrative or civil enforcement actions against an air carrier, contracts of carriage confer upon customers, enforceable rights directly against an air carrier."\footnote{FINAL REPORT, supra note 93, at 35; see 49 U.S.C. § 41707; 14 C.F.R. § 253 (2001) ("[A]n air carrier may incorporate by reference in a ticket or written instrument any term of the contract for providing interstate air transportation.").} Furthermore, in contrast to existing regulations, the twelve service terms now incorporated into several airlines' contracts of carriage specifically address and emphasize communication between carrier and passenger. In this regard, the contractual terms contemplated by the PBOR legislation — promising notification of known delays, cancellations, and diversions, etc. — exceed the requirements of existing regulations governing overbooking,\footnote{14 C.F.R. § 250 (2001); see generally, Note, Federal Preemption of State Law: The Example of Overbooking in the Airline Industry, 74 Mich. L. Rev. 1200 (1976).} lost baggage,\footnote{49 U.S.C. § 41704 (1994); see also 14 C.F.R. § 254 (2001); Terry L. Turner, Carry-On Baggage - Are the Regulations Doing Their Job?, 63 J. Air L. & Com. 565 (1998).} handicap access,\footnote{49 U.S.C. § 41705 (2001); see also 14 C.F.R. § 382 (2001).} and smoking prohibition.\footnote{49 U.S.C. § 41706 (2001); 14 C.F.R. § 252 (2001); see also Alan Stephens, Annotation, Validity, Construction, and Application of Nonsmoking Regulations, 65 A.L.R. 4th 1205 (2000).} While responsive to some pre-, in-, and post-flight practices and procedures, these existing regulations do not squarely address communication between carrier and passenger. Last, inasmuch as DOT regulations governing airline issues generally would take years to promulgate,\footnote{On average the DOT takes 3.8 years to pass regulations. Subcomm. on Aviation Hearing on GAO Report on the FAA Rulemaking Process, 107th Cong. (2001). See also Paul Mann, Mead Gingerly Backs Legislative Reforms, Aviation Wk. & Space Tech., Feb. 19, 2001, at 44.} the incorporation of service terms into an airline's contract of carriage represents immediate (government-inspired) action, if not result. Notwithstanding these niceties that recommend contract
as a guardian of good airline service, incorporation of the Customer Service Plan into the airlines’ contracts of carriage raises basic problems of contract law and represents an inefficient allocation of private, public, and judicial resources.

The paramount insufficiency of the contract-based legislation is the inadequacy of remedy and the associated costs of pursuing any recovery. When passengers purchase tickets for air travel they do not imagine their final destination as a court of law. Passengers merely want to get to wherever it is they are going, safely. As such, it is doubtful that hurried airline passengers in the deregulated environment seeking “pure transportation” will involve themselves in an examination and comparison of the several airlines’ contracts of carriage. Even then, passengers diligent in learning about airline offerings might become frustrated by the lack of uniformity and subtle differences among options offered by the several carriers, notwithstanding broad contractual obligations to provide as much information as possible. Similarly, unsuspecting passengers may not realize that some (non-ATA) airlines never agreed to incorporate the twelve points into their contracts of carriage.

As a practical matter, enforcement of any service-related contract rights may be more expensive, in terms of time and money, than the value of any breach. Moreover, the legislative mandate of contract will not cure all problems associated with air travel such as when an unaccompanied minor bound for Detroit

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179 Keith L. Alexander, Passenger Rights Expanded, WASH. POST, June 8, 2001, at E01 (quoting Senator Wyden, “The airlines are saying the passengers can try to protect themselves in court. But it’s going to be a long time before they get a remedy.”).

174 Discontent in the Coach Cabin, supra note 36, at H01 (“In other words, a satisfying flight is one in which a passenger gets through the system fast.”).

175 Compare AMERICA WEST AIRLINES, INC., CONTRACT OF CARRIAGE – DOMESTIC U.S. 300-1 (2001) (“Fares not available via our telephone reservations system may include discounts offered on internet web sites, tour, package fares or other distribution channels.”) with DELTA AIRLINES, INC., DELTA DOMESTIC GENERAL RULES TARIFF 165 (2001) (“A recording on our telephone reservation line will alert you that lower fares may be available on our Web site.”).

176 See, e.g., SPIRIT AIRLINES, CONTRACT OF CARRIAGE § VI(a) (2001) (“Spirit Airlines is not responsible or liable for making connections, or for failing to operate any flight according to schedule, or for changing the schedule of any flight.”).

177 Solomon, supra note 37, at 19 (“And how do you set a dollar value on a missed wedding, funeral or special occasion?”); see also Jayne O’Donnell, Airline Chiefs Vow Customer-Service Plans Will Improve, USA TODAY, June 8, 2001, at 2B (quoting travel industry lawyer, “The judge is going to say ‘What are your damages? . . . You had a long-distance phone-call to relatives, dinner in the airport—your damages are about $15.’”).
from Los Angeles, and known to the flight crew, ended up in Orlando — without her luggage.\textsuperscript{178} While difficulty in enforcing rights is no argument for denying the legal recognition or creation of such rights, the PBOR legislation, rhetorically clothed in the historically-significant title “Bill of Rights,” nevertheless is misleading and bound to exacerbate an already hostile passenger culture.\textsuperscript{179} Passengers likely and falsely will feel empowered. An aggrieved air traveler may eagerly try to exercise through litigation imagined, newly-created rights only to be further disappointed that the precise, but limited scope, of the passengers’ rights bills penalize airlines more than they empower passengers. This frustration may compound whatever antagonistic feelings passengers already have, presuming that they will complain to the air carrier itself before seeking judicial relief (although the proposals do not make such consultation a condition precedent to bringing suit). Practical and legal burdens passengers might confront outweigh the presumed benefits of the PBOR service-related contract rights. In any event, courts may be ill-equipped to manage service-related passenger woes.

The persistent plaintiff-passenger likely will confront a court system limited in terms of effectively translating and appraising miserable air travel experiences into dollars and cents.\textsuperscript{180} Indeed, some carriers have expressly insulated themselves from damages arising from service flaws.\textsuperscript{181} Inasmuch as they will be difficult to enforce by law, service-related contract terms effectively would have no more force than airline policy. Moreover, the proposals fail to establish standards or legal mechanics a

\textsuperscript{178} George Lewis, America West Loses Track of Child at http://www.msnbc.com/news/601174.asp (quoting the father, “I don’t understand how she can get lost. You lose luggage, you lose keys, you don’t lose a child.”). See generally, Julia Hall, Air Travel From the Perspective of a Child: Why Did My Mother Pay for This?, 66 J. AIR L. & COM. 1681 (2001).

\textsuperscript{179} See supra text accompanying note 4 and supra discussion Part III.B.

\textsuperscript{180} See Lopez v. Eastern Airlines, Inc., 677 F. Supp. 181, 183 (S.D.N.Y. 1988) (awarding bumped wedding guest $450 for “inconvenience, loss of time, anxiety and frustration”); see also Smith v. Piedmont Aviation, Inc., 567 F.2d 290, 292 (5th Cir. 1978) (affirming $1,000 award to plaintiff-groomsman “for inconvenience, inability to reach wedding rehearsal on time, missing part of the rehearsal dinner, being required to drive an automobile in mountainous territory, and the cost of automobile rent”). See O’Donnell, Airline Chiefs Vow Customer-Service Plans Will Improve, supra note 177, at 2B.

\textsuperscript{181} See, e.g., AMERICAN AIRLINES, INC., CONTRACT OF CARRIAGE (2001) (promising to provide notice of known delays, cancellations and diversions and disclaiming “we are not responsible for any special, incidental, or consequential damages if we do not meet this commitment.”).
court might use to compensate travelers. Unlike the standard of strict liability that might apply in a tort case, it is not clear whether violation of any given contract term — for instance, delay — would allow an allegedly aggrieved passenger relief in court without the imposition of any burden of proof or special evidentiary standards. In circumstances where an airline is not responsive or is perceived as insufficiently responsive, angry airline passengers likely will not be made whole by courts of law. They will instead be confronted by an array of affirmative defenses or summary resolution on the basis that the terms of any contract of carriage are excusable and/or impossible to perform. Increased security issues arising from September 11, not least of which are the possible needs to restrict some information from the traveling public and institute longer pre-flight security checks, makes the point.

The proposed legislation also leaves important legal and procedural issues unresolved. As a practical matter, it is unclear whether airlines would be permitted to change contract provisions without giving notice to their passengers. In addition to facilitating class action suits and potentially opening the proverbial flood gates, the proposals do not limit the scope of potential plaintiffs who might enforce these new rights as a matter of standing. That is, as drafted, third-parties with only an attenuated relationship to a contract for travel may nonetheless bring suit because an airline had something to do with the travel plans of another (i.e., if a friend is delayed in arriving for a special occasion). In terms of remedy, the proposals collectively fail to address whether airlines could seek contribution and/or indemnification from airport or government authorities if service-related contract terms are breached because of ground and/or flight operations beyond the control of the air carrier. In addition, the proposals are silent as to whether the government and its departments would enjoy sovereign immunity if sued. The proposals also fail to provide any limitations or mechanisms that

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182 See, e.g., NATIONAL AIRLINES, CONTRACT OF CARRIAGE § 29 (2001) ("Carrier reserves the right, to the extent not prohibited by federal law, to change, delete, or add to any of the terms of this Contract without prior notice. All changes must be in writing and must be available for public inspection at each of the Carrier's ticket offices.").

temper potential damage awards flowing from breaches of promised services. As such, although contract assuredly is a free-market vehicle through which parties allocate their relative rights and liabilities, its likely effectiveness in maintaining or enhancing service is difficult to assess. This is particularly true given a set of already existing passengers’ rights rules.

Educating passengers about existing rights may be a better approach to improving airline service than creating new ones. For example, so-called “Rule 240,” a vestige of older regulations, requires an airline to provide alternative travel or arrange for transportation on another airline at no additional cost if it cancels, delays or causes a missed connection. The fact that this and other cooperative and long-standing rules have not soothed passenger and government dissatisfaction forecasts the likely ineffectiveness of any new legal imperatives. Importantly, extra-legal issues such as inadequacies in the air traffic infrastructure complicate the legal enforceability of any of the contract-based proposed bills. As the following discussion shows, it is doubtful that any set of laws will meaningfully reduce or eliminate the practical inefficiencies of modern air travel by focusing on a qualitative assessment of airline service without also assessing infrastructure realities.

D. Demand Management

The substantive underpinnings of the PBOR legislation center around asserted service deficiencies flowing from airline management and suggest the need for so-called “demand management.” In promoting passengers’ rights, legislators often have identified airline business practices as a substantial source of air travel service problems notwithstanding a concededly inadequate infrastructure. This section details the issues and related arguments surrounding so-called demand management.

184 *Lopez, 677 F. Supp.* at 183 (noting that the trier of fact “must resist the overwhelming temptation to recall the angst created by last second cancellations or alterations of flight plans which jeopardize long cherished plans to participate in some pleasurable and unique experience.”).

185 See discussion *infra* Part III.D.1.

186 Alfred E. Kahn, *Surprises of Airline Deregulation, 78 Am. Econ. Rev.* 316, 320 (1988) [hereinafter Kahn, *Surprises of Airline Deregulation*] (“Most of us probably did not foresee the deterioration in the average quality of the flying experience, and in particular the congestion and delays that have plagued air travelers in recent years.”).

187 On April 5, 2000, Congress enacted the “Wendell H. Ford Aviation Investment and Reform Act for the 21st Century” (referred to as “AIR-21”), a $41 bil-
1. (Over)Scheduling and Infrastructure

The PBOR initiative highlights a critical imbalance between pre-September 11 deregulated airline management practices and infrastructure realities. Industry and government statistics corroborate passengers’ common perception that domestic commercial airline traffic is approaching, and sometimes reaches, gridlock. Consumer complaints steadily increase from year to year and, in 2000, a record one-in-four of flights were delayed, cancelled, or diverted, with the average delay exceeding fifty-two minutes. These realities are linked, in part, to the evolution of the so-called “fortress hub” at which one airline accounts for at least the simple majority of an airport’s total departures and arrivals (e.g., Delta at Atlanta, Northwest at Detroit, (the former) TWA at St. Louis, and US Airways at Pittsburgh). As a result, over seventy percent of commercial airline traffic is concentrated at the nations’ twenty-eight largest facilities, where dominant carriers generally are immune to competitive discipline. The consequences are two-fold: (1) passengers whose travel originates at hub airports pay substantially higher fares than spoke passengers in the form of a “hub premium;” and
(2) structurally, the necessarily integrated hub-and-spoke system is acutely susceptible to a domino or ripple effect, whereby delays at hubs spread like viruses across a national network of flights, thereby directly, substantially, and negatively impacting activities at distant hubs and spokes.\textsuperscript{192} The PBOR legislation squarely confronts the propriety of the several major airlines' hub-and-spoke business models and identifies the airlines' apparent exploitation of an admittedly-wanting infrastructure as a cause of passenger dissatisfaction. Yet, in examining the airlines' operations, passengers' rights proponents also necessarily raise questions about the reasonableness of the demands passengers make of the deregulated airline marketplace.\textsuperscript{193}

The deregulated market prompts airlines to design route and schedule systems that not only account for and anticipate passenger demand, but also proactively match or exceed those offered by competitors. This is so even at the risk of introducing overcapacity or excess supply into the marketplace. As such, the hub-and-spoke paradigm is a byproduct of intense, deregulated competition, which motivates dominant carriers to maximize the number of city-pair permutations in its route system by "bunching [ ] closely-spaced arrivals and departures [in order to push] their hubs to the very limits of the airports' physical capacity, or beyond it."\textsuperscript{194} Naturally, this has generated an often unmanageable volume of traffic in an environment in which a carrier is hard-pressed to help ease airport congestion without risking its corporate life; that is, "if it takes action and reduces flights, . . . competitors [will] fill those slots, resulting in no change in the overall flight scheduling at the airport."\textsuperscript{195} The PBOR legislation purports to remedy or approach remedies to this problematic cycle insofar as the airlines have proved unwilling and/or unable. While an individual airline is justified in meeting the schedule demands of its passengers, legislators contend that the airlines, in collectively failing to temper the num-

\textsuperscript{192} \textit{Flight Delays and Cancellations: Hearing Before the Comm. on Commerce, Science, and Transp.}, 107th Cong. 8 (statement of Kenneth M. Mead, Inspector General, United States Department of Transportation) (illustrating that delay at Atlanta hub comprised thirty-one percent of all system delays on a particular day).


\textsuperscript{194} Brenner, \textit{supra} note 8, at 213; \textit{see also} Kaldahl, \textit{supra} note 120, at 291-92 (asserting that "extreme competitive and economic pressures of deregulation" have led, if not mandated, a reduction in the number of non-stop or point-to-point flights in favor of the formation of the hub-and-spoke route paradigm).

\textsuperscript{195} \textit{FINAL REPORT}, \textit{supra} note 93, at 40.
ber of flights offered relative to infrastructure capabilities, are not providing the efficient travel passengers anticipate.

Proponents of the PBOR specifically contend that commercial air transportation service woes are a result of the airlines’ scheduling habits, which saturate a struggling infrastructure. An FAA publication entitled “Airport Capacity Benchmark Report 2001” supported this contention by juxtaposing airline scheduling patterns with airport capacity. The FAA concluded that airlines appear to systematically schedule more flights than the nation’s airports can handle even under ideal conditions. For example, the FAA reported that the capacity benchmark at New York’s LaGuardia airport was 80-81 flights per hour in good weather, representing traffic at or exceeding airport capacity most of the day. Significantly, according to the FAA, this rate fell to a maximum of 62-64 flights per hour in adverse weather conditions, including “poor visibility, unfavorable winds or heavy precipitation.” As the following illustration shows, in adverse weather, scheduled traffic (the number of departure and arrivals) exceeded base-line capabilities at LaGuardia for twelve hours of the day:

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196 DEPT OF TRANSP., FED. AVIATION ADMIN., AIRPORT CAPACITY BENCHMARK REPORT 2001; see also David Bond, FAA’S CAPACITY DATA TEST AIRLINES, AIRPORTS, AVIATION WK. & SPACE TECH., Apr. 30, 2001, at 52-53.

197 AIRPORT CAPACITY BENCHMARK REPORT 2001, supra note 196, at Table 1; see also Dateline NBC: The Plane Truth, The Waiting Game (NBC television broadcast, Mar. 13, 2001) (reporting that, at Chicago’s O’Hare, over sixty departures often are scheduled in a fifteen-minute span though controllers can permit only half as many in perfect weather).

198 AIRPORT CAPACITY BENCHMARK REPORT 2001, supra note 196, at Table 1.

199 Id. (“Demand at LaGuardia is expected to grow 17% over the next decade. The imbalance between capacity and demand growth is expected to significantly increase delays.”)
At that, the LaGuardia benchmark, like those prepared by the FAA for each of the nation’s major commercial airports, does not consider limitations on airport traffic caused by taxiway and gate congestion, runway crossings, slot controls, construction activity, terminal airspace, and/or weather or congestion problems at other airports.200

Unsurprisingly, the airlines have long refused the contention that their scheduling practices are the cause in fact of airport delays and passenger dissatisfaction.201 To the contrary and to the disgust of proponents of the PBOR, the airlines have portrayed themselves as relative victims of passenger vitriol fueled by the practical consequences of severe infrastructure inadequa-

200 Id.
201 Preble, supra note 16, at 74 (quoting former American Airlines Chairman and President, Robert L. Crandall, “Those who find fault with competitive scheduling practices must recognize that they are repudiating the principles of marketplace economics”). Another airline executive noted:

I submit that the answer to many of the problems plaguing today’s industry is not a re-regulation of the industry or laws governing how big an employee’s smile ought to be, but rather the only thing that has ever altered industry behavior in America: the capitalistic cure known as competition.

cies beyond their control. As one airline CEO suggested by analogy:

If you're in a yellow cab in Lincoln Tunnel and it's stopped, you don't get p—ed off at the cabdriver, because you see it's not up to him. When you're on our airplane and it's a two-hour wait to take off from Newark because the weather's bad in Cleveland and the system's backing up, you think we're responsible.

Following this theme, airlines submit that the government's own data demonstrates that only about eleven percent of delays are related to airline schedules (i.e., "terminal volume"). As such, the airlines reject arguments implicating their operations under the banner of "demand management," opting to assign blame for delays, diversions and cancellations on elements for which the government is responsible. Specifically, airlines (and others) contend that airport infrastructure - outdated radar, insufficient number of runways, over-crowded taxiing areas, etc. - cries for a comprehensive overhaul. The airlines' argument conceives of delays as inherent in the air traffic system and existing a priori airline scheduling, which, in any event, is assert-

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202 Brenner, supra note 8, at 213 ("Given the lag in airport and airway improvement expenditures, part of this congestion was bound to happen with or without deregulation.").

203 Adam Bryant, The View from the Top, NEWSWEEK, Apr. 23, 2001, at 44.

204 Senate Aviation Subcomm. Hearing on Government and Industry-Wide Efforts to Address Air Traffic Control Delays, 107th Cong. 4-5 (2001) (statement of Edward A. Merlis, Senior Vice-President Legislative and International Affairs, Air Transportation Association of America).

205 Compare Senate Aviation Subcomm. Hearing on Aviation Delay Prevention, 107th Cong. 3 (2001) (statement of Edward A. Merlis, Senior Vice-President Legislative and International Affairs, Air Transportation Association of America) ("We prefer to look at this not as an 'overscheduling' issue, but as a failure to provide adequate infrastructure issue; indeed, a failure to even commit to provide adequate infrastructure.") with News Conference, FDCH Political Transcripts, Feb. 12, 2001, Ron Wyden, U.S. Senator Ron Wyden Holds News Conference Regarding Airline Passenger Rights (quoting Senator Harry Reid (D-Nev.), "Sure, part of the problem is the basic infrastructure, but the things that we're dealing with have nothing to do with infrastructure. . . . It has everything to do with airlines having simple good manners and having good business practices.").

206 Zack Van Eyck, Upgrading Airports and Traffic Systems is the Real Need, Airline Executives Say, THE DESERT NEWS (Salt Lake City, UT), June 10, 1999, at A03; see also House Aviation Subcomm. Hearing on Airport Runway Construction Challenges, 107th Cong. 1 (2001) (statement of John Meenan, Senior Vice President, Industry Policy, Air Transport Association of America) ("[I]t is vitally important that the Congress focus on addressing the root cause of the problem - the lack of adequate infrastructure - and not be misled to believe that legislation attacking the symptoms of the problem (i.e., consumer complaints) will produce a satisfactory result.").
edly responsive to passenger demand. As a former United Airlines CEO reasoned: "Some people feel that change should come solely from the airlines. They argue that we should ignore the needs of our customers, cut back on schedules, and reduce travel options. That's like insisting that General Motors cut back on car production because of traffic congestion on aging highways."

As such, the airlines suggest that Congress is targeting airlines when it would be better served attending to underlying infrastructure deficiencies. Though recognizing infrastructure concerns long ago, the government has done little to address such concerns. In 1988, Alfred Kahn set the stage:

This deprivation [of quality of service enjoyed by full-coach-fare-paying passengers] has, however, resulted also from major derelictions by governments. Congestion at major airports at peak travel times (and the consequent inability of passengers to whom time is very valuable to get the delay-free travel they would willingly pay for) obviously means to an economist that the pertinent government authorities have on the one hand failed efficiently to expand airport and air traffic control capacity, and, on the other, to price those scarce facilities at their marginal opportunity costs. No wonder there are shortages.

Indeed, only six of the nations' largest airports completed new runway projects in the last decade and, between 1995 and 2001, "only eight new runways opened at the top 100 airports." This is so, in part, because the current runway ap-

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208 See Jim Burnley, System Problems Delay Flights, Impede Competition, LEGAL TIMES, Apr. 12, 1999, at S26 ("[B]y focusing on customer service issues -- as important as they are -- Congress avoids the hard choices that would have a positive impact on the travelling public and the entire national economy. Instead, legislators propose to fine airlines for travel delays that are caused primarily by the government's own inadequate system.").
209 Paul Stephen Dempsey, Airlines in Turbulence: Strategies for Survival, 23 TRANSPL. L.J. 15, 98 (1995) ("The U.S. government will have to face up to its obligation to provide responsible oversight of this essential infrastructure industry to enable it to rationalize capacity and stabilize pricing."). See also Airport Capacity and Air Service Enhancement Act of 1990, H.R. 5056, 101st Cong. § 2(5) (1990) (declaring that "the intent of Congress in enacting the Airline Deregulation Act of 1978, to encourage competitive air transportation, has been thwarted by the lack of capacity available for competitive entry at the Nation's airports.").
210 Kahn, Surprises of Airline Deregulation, supra note 186, at 321.
211 House Aviation Subcomm. Hearing Concerning H.R. 1407, Apr. 26, 2001, at 3 (statement of James L. Casey, Deputy General Counsel, Air Transport Association of America). Some airlines have considered using regional airports to serve traffic overflowing from major airports. See, e.g., Matthew Brelis, US Airways Scraps
proval process takes in excess of ten years, involving the negotiation and collaboration of almost a dozen local, state, and federal bodies.\footnote{Congestion in the United States Transportation System: Hearing Before Full Senate Comm. on Transp. and Infrastructure, 107th Cong. 13 (2001) (concerning Senator Kay Bailey Hutchinson’s (R-Tex.) bill calling for expedited environmental review.) See also Aviation Delay Prevention Act, S. 633, 107th Cong. (2001). Contra Richard Kassel, Don’t Speed Review Process, USA TODAY, Apr. 20, 2001, at 1A (“Americans want to fly without interminable delays, and we want to breathe clean air and drink clean water. We shouldn’t have to choose between the two.”).} Even without these obstacles, the FAA concedes that “major improvements in providing capacity to meet demand, such as new runways and the fielding of new air traffic control capacity enhancing technology, are not going to be in place for at least the next several years.”\footnote{OFFICE OF THE INSPECTOR GENERAL, DEP’T OF TRANSP., REPORT No. AV-2001-020, EXECUTIVE OVERVIEW, FINAL REPORT ON AIRLINE CUSTOMER SERVICE COMMITMENT (2001), at 5, available at http://www.house.gov/transportation/aviation/issues/service.pdf.} Whatever infrastructure repairs are made will be sufficient to keep up with current traffic, only to be behind the curve again.\footnote{Air Traffic Congestion in the New York City Area: Hearing Before The Comm. on Transp. and Infrastructure, Before the Subcomm. on Aviation, 107th Cong. (2001) (statement of William R. DeCota, Director of Aviation, Port Authority of New York and New Jersey) (“The sobering point is that any increases in capacity at the most delayed airports in the country over the next ten years will be outstripped by growth in flight operations.”). See also Jonathan D. Salant, FAA to Present 10-Year Plan, MIAMI HERALD, June 5, 2001, at 3C (reporting FAA’s proposal of an $11.5 billion, ten-year infrastructure and navigation improvement plan (the National Airspace Operational Evolution Plan (NAS OEP)) calling for new automation and use of secondary airports and providing, \textit{inter alia}: (1) navigation via satellite rather than radar technology; (2) encouraging free flight rather than flights along fixed paths; (3) installation and use of newer weather-related equipment; (4) permitting aircraft to fly closer together than the current requirement of 2,000 feet separation).} At that, capital and “concrete” improvements such as new runways are not possible at every major airport,\footnote{Geography essentially forecloses the possibility of building additional runways at New York’s LaGuardia airport, site of the nation’s most frequently cancelled and delayed flights in 2000. See AIRPORT CAPACITY BENCHMARK REPORT 2001, supra note 196. See, e.g., David Bond, Mica: Curbs on Demand Needed at Key Airports, AVIATION WK. & SPACE TECH., June 18, 2001, at 68.} and, even where possible, sometimes are opposed by communities barking a “not-in-my-backyard” refrain.\footnote{See, e.g., Mark Sappenfield, The Unfinished Story of a Runway, CHRISTIAN SCI. MONITOR, Feb. 12, 2001, at 1; Luis G. Zambrano, Comment, Balancing the Rights of Landowners with the Needs of Airports: The Continuing Battle Over Noise, 66 J. AIR L. &
repairs in the form of taxes and fees appended to fares.\textsuperscript{217} In addition to confronting higher fares or costs as an incident of infrastructure overhaul, passengers and airlines soon may be presented with questionable market-based options intended to ease air traffic gridlock.

Several of the PBOR proposals revisit historic mechanisms intended to relieve airport traffic problems, namely the granting of limited antitrust immunity and/or so-called “congestion pricing.” A regulatory framework imposing congestion or peak hour pricing means “airlines would be charged higher landing fees at the busiest times at the major hub airports. This market-based approach encourages travelers to fly during off-peak periods and reduces backup and delays.”\textsuperscript{218} The notion of congestion pricing developed in 1968-69 in response to congestion at the three major airports around New York City. The FAA and the CAB implemented a peak-hour take-off fee of $25 for general (as opposed to commercial) aviation aircraft.\textsuperscript{219} In addition, the CAB promoted agreements among airlines to receive antitrust immunity to reduce scheduling competition.\textsuperscript{220} In the same year, the FAA implemented the “High Density Rule” whereby the number of hourly arrivals and departures at LaGuardia was strictly limited.\textsuperscript{221} Now, three decades later, the FAA has recommended the granting of antitrust immunity to the airlines so that they might coordinate schedules to ease congestion, peak-hour pricing (if possible), and a lottery for airport usage.\textsuperscript{222} As a practical matter, congestion or peak hour pricing theoretically would motivate major airlines to reduce the fre-
quency of flights to a particular destination and use larger planes with greater seating capacity.223

The airlines dismiss antitrust immunity as “demand management” that avoids supply or capacity management concerns.224 While in 2001 several airlines rescheduled flights away from peak times at airports where they enjoy a large or the largest share of passenger volume, airlines are otherwise reluctant to do so at airports where they do not enjoy similar market share.225 As such, antitrust immunity likely will be a benefit, if at all, only at non-hub airports, where airlines must compete for take-off and

223 John Schmeltzer, Bigger Planes, Fewer Flights Address Delays, Chi. Trib., May 18, 2001, at 1N. Query how, if at all, Airbus Industries’s proposed long-range airplane (the A380), which will be capable of seating more than 500 passengers, will impact and/or exacerbate security concerns and/or documented conflicts between passengers and crew. See discussion supra Part III.B and infra Part III.E.

224 Senate Aviation Subcomm. Hearing on Aviation Delay Prevention, Mar. 29, 2001, (statement of Edward A. Merlis, Senior Vice-President Legislative and International Affairs, Air Transportation Association of America). See also David Bond, Justice Dept. Backs Slot Auctions at LGA, Aviation Wk. & Space Tech., July 15, 2002, at 37 (reporting the Justice Department’s view of congestion pricing as an inferior market-based option because “[i]f the fee were increased too much, operations would be reduced unnecessarily; if too little, they would not be reduced enough.”). Consider a major airline CEO’s remarks:

Q: Why are you opposed to this idea of congestion pricing, which is a very businesslike, marketplace way of getting people who want to travel at peak times to pay for it and to bring down the number of people traveling at peak times?

A: I don’t think it would have any impact on people traveling at peak times. We already revenue-manage that equation. For example, at LaGuardia at 5 p.m., we’re not selling any $69 leisure fares. All you’re talking about doing is raising the costs further, which we’ll pass along to the consumer. If you’re a businessman going to New York and you need to put in a productive business day, you’re going to leave New York at 5 a.m. or 6 a.m. whether the fare is $10 or $15 higher, because if you waste 3 hours of your day in New York you haven’t accomplished anything. We think it would be simply the raising of the costs of doing business rather than effectively changing the patterns of the use of the air traffic control system.


225 Senate Aviation Subcomm. Hearing on Government and Industry-Wide Efforts to Address Air Traffic Control Delays, May 10, 2001, at 3 (statement of Edward A. Merlis, Senior Vice-President Legislative and International Affairs, Air Transportation Association of America) (“While a number of carriers have been able to smooth out the scheduling peaks at airports where they have the most traffic, it is at airports with large numbers of competitors that the antitrust immunity is necessary to facilitate carrier scheduling coordination to levels below the benchmarks.”).
The ATA expressed the following pointed and yet-unresolved questions that identify some of the issues associated with the concept of congestion pricing:

- To what extent will air traffic controllers, both on approach and en route, shuffle aircraft for which congestion-pricing premiums have been levied on passengers?
- How will congestion pricing be established and who will be responsible for setting it?
- Will congestion pricing serve as an excuse not to expand capacity to meet unmet and growing demand?
- How will traffic from small and midsize communities be able to bear the incremental costs arising from peak hour pricing? To what extent would such a system disenfranchise residents of these communities from the national network?
- To what extent will public policy exemptions – small communities, new entrants, business jets, or government aircraft to name just a few – result in just as much congestion but at higher prices from those not exempted?
- Should a congestion-pricing scheme be revenue-neutral, so as not to build up tempting surpluses that local officials will inevitably seek to siphon off the airport?
- Even if a congestion pricing system is revenue-neutral, should the terms by which grand-fathered airports operate be changed to preclude them from using these funds for non-aviation purposes?
- How will congestion pricing affect feeder traffic flow from small planes and communities that may not be able to afford the peak hour surcharge? Without that feeder traffic and with fewer passengers on the connecting long haul over which the surcharges are spread, to what extent will the scheme have the potential to further increase prices on tickets elsewhere in the network?

Demand management as an incident of passengers' rights not only considers the practices and conduct of airlines, but also evaluates the composition and relative health of the airline industry as a whole.

2. Industry Consolidation and Market Entry

In the noticeable absence of active antitrust enforcement, several of the PBOR proposals consider legal and regulatory mechanisms for abating an unsettling trend toward consolidation in...
the deregulated airline market. Some proposals contemplated allowing the DOT, if three or fewer carriers accounted for seventy percent or more of scheduled air travel, to order an airline to reduce a fare, offer a reduced fare for certain seats on a certain route, and offer rebates if such airline was determined to be charging an "unreasonably high" fare. More forcefully, Senator Reid introduced "The Airline Competition Preservation Act of 2001," mandating a moratorium on all airline mergers and acquisitions. In promoting such legislation, Senator Reid stated:

[N]o one wants the federal government to micro manage private industry. But our airways are not just a private industry – they are a public trust. . . . If these mergers proceed without the competitive protections I am proposing, then the ultimate irony of deregulation will be that we will have traded government concern for the public interest, for private monopoly control in the interests of the industry.

As such, the PBOR legislation is important in that it invokes more than purely service-related issues; it also implicates the functionality of economic deregulation.

Underlying the considered legislation is the predicate that modern airline service has suffered because competition has virtually been evicted from the marketplace and thwarted by unlawful airline management strategies designed to destroy actual competitors and deter potential ones. Before deregulation, government policies insulated the early, few commercial airlines from cutthroat and destructive competition. Sharing the airlines' fear of merciless rivalry in a Darwinistic marketplace, the CAB guarded an oligopoly of air carriers and maintained the status quo by steadfastly restricting market entry. In this envi-

228 Alfred Kahn, Deregulatory Schizophrenia, 75 Cal. L. Rev. 1059, 1060 (1986) (explaining that deregulation policy is not inconsistent with antitrust enforcement: "Preserving equality of competitive opportunity is not, in principle, the same thing as suppressing or supplanting competition."); see also Frank N. Wilner, Unjoining the Twins: Separating Air Traffic Control from Aviation Safety Has Impressive Support but Strong Labor Opposition, Traffic World, Mar. 5, 2001, at 14 (quoting former CAB Chairman Alfred Kahn: "The solitary failure of deregulation is the failure of government to respond. The best way to respond is not a passenger bill of rights but for government to get the hell out of the way.").


232 Carstensen, supra note 119, at 112-13 ("The [CAB] had become a protector of existing airlines by blocking entry, frustrating price competition, and generally
environment, "failure was impossible." The resulting market stagnancy generated by the CAB’s rules, regulations and practices gradually eroded and aviation regulatory reform, if not deregulation, arose. As commercial airline travel became more commonplace, the CAB’s anticompetitive propensities appeared unacceptably to override the public utility of commercial airline transportation. In its place, the Deregulation Act sought to promote free market competition and to encourage “entry into air transportation markets by new carriers,” but not at the cost of “unreasonable industry concentration, excessive market domination, and monopoly power.” The PBOR legislation pointedly suggests that the Deregulation Act has failed to affect this promise.

Ultimately and ironically, over time the Deregulation Act has fostered a mature commercial airline market that may reflect undesired aspects present under the CAB’s governance. In other words, airline deregulation, from the perspective of proponents of the PBOR, may promote the very variety of destruct-

setting rates that allowed airlines very good returns. In the 1960s a general reaction to excessive intervention in price and entry conditions began to grow.

233 PETZINGER, JR., supra note 130, at 15.
235 See Herbert D. Kelleher, Deregulation and the Practicing Attorney, 44 J. AIR L. & COM. 261, 270 (1978) (“In instances in which a new applicant proposes an innovative service which threatens an existing carrier with serious competition, the Board always has struggled with the problem until it found a way to resolve it in favor of the established carrier.”); Edward M. Kennedy, Comment, The American Airlines [sic] Industry and the Necessity of Deregulation, 9 AKRON L. REV. 631, 631 (1976) (“Over the long run, the most damaging authority exercised by the CAB is clearly its power to prevent new entry . . . by new enterprises into the airline industry market itself.”); James C. Kitch, Some Observations on Moss v. CAB, 23 STAN. L. REV. 893, 843 (1971) (asserting that “[t]he CAB is in effect a cartel manager . . . [whose] traditional role in ratemaking is more conducive to preserving industry peace than to protecting the public interest.”).
tive competition around which the CAB navigated. The resulting environment exhibits features inconsistent with theories of perfect market contestability, including: mergers and consolidation, dominance and near-monopolization of hub-and-spoke systems, complex fare structures, frequent flyer programs, predation, manipulation of travel agents and computerized reservation systems, firm strategies centered around acquisition and maintenance of slots and gates, and new entrant casualties. Competition that flourished in the early stages of

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237 Oster & Strong, supra note 68, at 15 n.16 (reporting that a United Airlines subsidiary purchased and briefly used the exchange “1-800-SOUTHWEST” as its reservations number).

238 Several commentators posit that the actual impact of market consolidation “may be less harmful than is generally expected” because [C]onsolidation lowers competition, which tends to reduce welfare. At the same time, consolidation increases traffic densities in the networks of the surviving carriers. Since higher densities reduce costs, this effect tends to raise welfare. If the economies of density are sufficiently strong, the cost effect will overshadow the effect of lost competition, leading to a welfare gain. This outcome is in fact familiar from standard oligopoly models, which show that industry consolidation in the presence of increasing returns can be welfare-improving.

Jan K. Brueckner & Pablo T. Spiller, *Economies of Traffic Density in the Deregulated Airline Industry*, 37 J.L. & Econ. 379, 408 (1994). Another study corroborates this reasoning, surmising that industry consolidation may bring beneficial density gains that off-set the effect of lost competition because if fewer effective competitors exist at the national level, deregulation has not necessarily decreased airline competition: for it is at the route level that airlines compete head to head. For example, four effective competitors at the national level can operate in two very different ways: with each having a monopoly share on one-quarter of the routes or with each having a one-quarter share on all routes. Although the number of airlines is the same either way, the second situation is obviously more competitive because more airlines serve each route. Thus fewer effective competitors at the national level does not necessarily mean that the industry is less competitive.


deregulation diminished significantly in the last two decades, prompting Congressional proponents of the PBOR to suggest that "[m]ost of us would not have voted to deregulate if we thought it would mean a deterioration to only three carriers."\(^{241}\) In fact, ten years after implementation of the Deregulation Act, Alfred Kahn concluded:

> Just as one of the most pleasant surprises of the early deregulation experience was the large-scale entry of new, highly competitive carriers, so probably the most unpleasant one has been the reversal of that trend - the departures of almost all of them, the reconcentration of the industry both nationally and at the major hubs, the diminishing disciplinary effectiveness of potential entry by totally new firms, and the increased likelihood, in consequence, of monopolistic exploitation.

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Were these developments surprises? Yes, to a large extent.\(^{242}\) The very presentation of passengers' rights legislation potentially exposes the deregulation assumption of contestability within the deregulated airline market.

From its beginning, the deregulated airline market was trumpeted as one that would be perfectly contestable. "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 (i.e., contested) by a prospective new entrant. Hence, the market is expected to behave in a perfectly competitive way."\(^{243}\) Actual (or threatened) competition, in turn, was imagined to benefit air travelers in the form of carrier choice and/or competitive fares and services. Yet, significant and myriad mergers, take-overs or bankruptcies typified the first full decade of U.S. deregulation, thus exposing important theoretical assumptions informing deregulation policy.\(^{244}\) As one commen-

\(^{241}\) Janet L. Fix, *Picture of Airline Deregulation Not As Pretty As It Was Meant to Be*, DETROIT FREE PRESS, Feb. 28, 2001, at 26 (quoting Representative Jim Oberstar (D-Minn.)).

\(^{242}\) Kahn, *Surprises of Airline Deregulation*, supra note 186, at 318 (citations omitted).

\(^{243}\) Gesell & Farris, *supra* note 8, at 115; see also Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111, 113 (1984) ("Formally, a market is defined to be perfectly contestable if no price in that market can be in equilibrium when its magnitude is such as to enable an entrant to undercut it and nevertheless earn a profit.").

tator noted, "[t]he vision of the deregulated airline industry as effectively competitive suggested that merger policies developed under the antitrust laws would suffice for whatever mergers and acquisitions might transpire. In this the proponents were wrong." In 1986, eighteen national carriers became eight vis-à-vis notable corporate deaths such as Air California, Air Florida, Braniff, Pan Am, and National, and several mergers such as Northwest and Republic, TWA and Ozark, USAir and Piedmont, Delta and Western, and Texas Air bingeing on Continental, People Express, New York Air and the venerable Eastern Airlines. More recently, in January, 2000, American Airlines announced its (now-consummated) purchase of history-rich TWA, and, in May, 2000, United Airlines and US Airways announced plans to pursue a merger, which eventually was thwarted by the Department of Justice. In any event, the proposed PBOR legislation, some of which purports to freeze current, arguably insufficient, competition levels does nothing to inject competition into the marketplace.

(assuming that "bankruptcy, which functions at a microeconomic level, more adequately serves the entire airline industry than direct government regulation"). The terrorist attacks of September 11 catalyzed the bankruptcy of US Airways, Vanguard, Midway, and Sun Country, and led United Airlines to suggest the possibility of its own bankruptcy filing in late 2002. See infra note 246.


246 See generally, L. Milton Glisson, Is U.S. Domestic Airline Competition on a Flight to Oblivion?, 58 Transp. Prac. J. 217, 218 (1991); Robert L. Thornton, Airlines and Agents: Conflict and the Public Welfare, 52 J. Air L. & Com. 371, 396 (1986) (concluding "[i]f [the DOT] fail[s] to act soon, the number of effective competitors in the airline industry may fall below the point from which deconcentration is possible without a major crisis"); Paul Stephen Dempsey, Antitrust Law and Policy in Transportation: Monopoly IS the Name of the Game, 21 GA. L. Rev. 505, 514 (1987); see also Airline Mergers, supra note 245 at 880 ("The nation may be left with a really small number of large, quasi-monopolistic and not necessarily efficient carriers"). Whether a function of deregulation or otherwise, consolidation in the airline industry finds parallels in other important sectors. See, e.g., Yochi J. Dreazen et al., Why the Sudden Rise in the Urge to Merge and Form Oligopolies?, WALL ST. J., Feb. 25, 2002, at A10 (quoting economist Carl Shapiro, "Twenty [competitors] to four is good. It's four to two that is much more dubious.")

247 Brown & Headley, supra note 7, at 7 ("Continuing decline in industry service quality should be regarded as a primary reason to oppose the current mergers and acquisitions being proposed.").
Less regulation (but not necessarily less antitrust enforcement) and practical efforts likely will resolve market concentration issues more effectively than the PBOR legislation. In terms of regulation, less restrictive laws respecting cabotage that allow non-U.S. air carriers to serve domestic routes may inject needed competition into the deregulated marketplace.248 (Of course, the events of September 11 raise a number of potential issues, including national security, that may militate against liberalized cabotage rights.) Greater privatization of airports also may be more effective than legislation.249 Additionally, infrastructure improvements likely will alleviate concerns respecting predation.250 In all, "demand management" may be epithetic for "re-regulation," and indicative of the mood of federal legislators now and/or when (and if) airline travel resumes to pre-September 11 traffic levels.

E. SEPTEMBER 11, 2001: A NEW ROLE FOR AIRLINE PASSENGERS

Since 1999, passengers' rights issues have come full circle, from an affirmative movement for more rights to a necessary

248 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 n.3 (2001) (noting that "[c]abotage is commonly defined as carriage of passengers and goods between two points within the territory of the same nation for compensation or hire"); Eli A. Friedman, Comment, Airline Antitrust: Getting Past the Oligopoly Problem, 9 U. MIAMI BUS. L. REV. 121, 143 (2001) (contending that "[t]he 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"); RIGAS DOGANIS, THE AIRLINE BUSINESS IN THE 21ST CENTURY 19 (2001) ("The airline industry is a paradox. In terms of its operations, it is the most international of industries, yet in terms of ownership and control it is almost exclusively national"); W. M. Sheehan, Comment, Air Cabotage and the Chicago Convention, 63 HARV. L. REV. 1157 (1950).

249 CONTINENTAL AIRLINES, INC., 2000 ANNUAL REPORT 17 (2001) ("The system is near gridlock and needs to be controlled by a responsive, independent entity like has been done in Canada and is being done in the U.K."); Soon-kil Hong & Kwang Eui Yoo, A Study on Airport Privatization in Korea: Policy and Legal Aspects of Corporatization and Localization Over Airport Management, 66 J. AIR L. & COM. 3, 5 (2000) ("[P]rivatization refers to shifting governmental functions and responsibilities, to the private sector, in whole or in part.").

250 Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992, H.R. 6168, § 2(14), 102d Cong. (1992) (finding that "the opportunities for new entrants and financially weak airlines to compete successfully can be maximized by the development of new airport capacity, particularly terminal facilities and gates").
and relative contraction of such rights. Questions concerning, for example, an airline’s provision of information with respect to delays and cancellations have been superceded by questions concerning passenger privacy rights. Indeed, conceptions of airline service itself have changed. September 11 introduced a transition in the focus of the passengers’ rights initiative from service to security. Passengers now may measure service as a function of security. Yet, more security may mean fewer rights, constitutional and otherwise.

Post-September 11, passengers are subject to unprecedented examination and scrutiny. There exists a perverse differentiation of passengers who (merely) are out of control and/or dangerous (vis-à-vis “air rage”) from actual terrorists. For example, an American Airlines pilot had removed from his plane an Arab-American who was a plain-clothes Secret Service

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251 Nancy Fonti, Long Delays for People Stuck on Planes Spark Calls for Changes, ‘Passengers’ Rights,’ ATLANTA J.-CONST., Jan. 4, 2002, at 1A (quoting ATA president, David Stemple, “The whole passengers bill of rights since Sept. 11 has really gone off the radar screens. . . . We’ve got airlines that are bleeding red ink in barrels. There’s the question of their survivability. It would be hard to press on them any more requirements.”); see also Jayne O’Donnell, Fliers’ Rights Take Back Seat to Security, USA TODAY, Sept. 28, 2001, at 3B.


253 Greg Griffin, Who’s Minding the Customer?, DENVER POST, Nov. 25, 2001, at K-04 (quoting Kevin Mitchell, “Customer service can be defined in many ways. Clearly, after Sept. 11 there’s a blurry line between what is service and what is security. Many people are viewing the two as one and the same.”).

254 E.g., Ruwantissa Abeyratne, Attacks on America – Privacy Implications of Heightened Security Measures in the United States, Europe, and Canada, 67 J. AIR L. & COM. 83 (2002). In 1998, counsel for the American Civil Liberties Union suggested: A passenger “Bill of Rights” should be posted at ticket counters to inform passengers of their rights; such as the right to refuse to present identification if they choose to travel anonymously, their right to refrain from answering intrusive questions or to be subjected to intrusive security measures; the consequences, if any, of exercising these rights; and the way to contact the entity to which complaints of security-related abuses should be directed.


agent allegedly exhibiting suspicious conduct.\textsuperscript{256} As such, the subtext associated with the phrase “passengers rights” has shifted from one portraying the air traveler as a proverbial victim of corporate largess needing legally enforceable rights against an uncaring system to a utilitarian one recommending that travelers’ individual freedoms be restricted for the benefit and safety of the general traveling society.

In the aftermath of September 11, President George W. Bush and Congress encouraged citizens to go about their normal routines, particularly if these routines involved commercial air travel. Vice-President Richard B. Cheney, too, spoke of a new reality that confronted traveling Americans, a sort of “new normalcy.” This “new normalcy” likely will have unforeseen contours: long lines in airport terminals,\textsuperscript{257} multiple security obstacles,\textsuperscript{258} commercial pilots armed with electronic tasers or other weapons,\textsuperscript{259} flight crews trained in self-defense,\textsuperscript{260} airplane

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\item\textsuperscript{256} Pilot, Secret Service Agent Trade Charges (Jan. 5, 2002), at http://www.cnn.com/2002/LAW/01/03/secret.service.agent/index.html; see also Jonathan D. Salant, Officials Debate Use of Ethnicity in Profiling Passengers, MIAMI HERALD, July 5, 2002, at 20A.
\item\textsuperscript{257} Blake Morrison, Federal Officers to Police Airports, USA TODAY, Feb. 13, 2002, at 1A (discussing initial testing with members of Congress and flight crews with a card designed to speed travelers through the security process).
\item\textsuperscript{258} See, e.g., Edward Wong, Bearable Airport Delays but Massive Security Face Travelers in New Era, MIAMI HERALD, July 7, 2002, at 19A; Jane Costello & Nicole Harris, Adapting to Air Travel, 2002, WALL ST. J., Jan. 29, 2002, at B1 (documenting methods passengers employ to hasten security checks, from packing in clear plastic bags and avoiding clothing with metal to piling “dirty, smelly workout gear toward the top of [ ] luggage to deter security personnel from digging further in”).
\item\textsuperscript{259} On July 10, 2002, the U.S. House of Representatives, by a vote of 310 to 113, approved legislation that would allow guns for more than 70,000 commercial airline pilots who agreed to undergo training. Arming Pilots Against Terrorism Act, H.R. 4635, 107th Cong. (2002). In September 2002, the U.S. Senate, by a vote of 87 to 6, similarly voted to allow guns in cockpits to prevent hijackings. Sara Kehaulani Goo, Senate Votes to Allow Pilots to Carry Guns, WASH. POST, Sept. 6, 2002, at A08. President George W. Bush voiced objection to the concept of arming airline pilots. See William B. Scott, Battle Lines Drawn Over Arming Airline Pilots, AVIATION WK. & SPACE TECH., Feb. 18, 2002, at 45.
\item\textsuperscript{260} James Pilcher, Delta to Offer Self-Defense Courses to Attendants, CINCINNATI ENQUIRER, Feb. 13, 2002. See also Frances Fiorino, Airline Crews to be Taught New Defensive Measures, AVIATION WK. & SPACE TECH., Jan. 28, 2002, at 48.
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cabin equipped with video cameras, and passengers prepared to defend themselves and (or from) other passengers.

To be sure, the passive role airline passengers have enjoyed so far likely will have to yield to a more active one. Airlines and passengers, collectively, must effectuate improved service and security. As one commentator suggests: “an individual, not a bureaucracy, can ensure airline safety.” Citizens’ “initial, automatic and perhaps, habitual reaction to crisis is to look to an outside authority to legislate, regulate, and lay blame ... and our policymakers have learned that we prefer, or will be pacified by, the ‘quick fix’ of a machine rather than the more arduous

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262 Bob Keefe, Class Teaches Passengers How to Combat Terrorism in the Air, ATLANTA J.-CONST., Feb. 19, 2002, at 1D (discussing $350 classes offered by Flight Watch America, Inc., which instructs not “self-defense or hand-to-hand combat, [but] . . . awareness, preparation and just plain common sense” and reporting that post-September 11, 2001, eighty-two percent of surveyed airline passengers said they would lead an attack to prevent terrorists from taking control of a plane). See LONGMAN, supra note 1.

263 One author suggests:

[t]he air traveller represents an under-rated human factors issue in a system that has grown very fast and places a high degree of trust in regulatory and enforcement measures to solve many of its problems. The air traveller as an active participant in on-board safety has received little positive acknowledgment.

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The airlines so far have failed to embrace passengers as important participants in maintaining a socially safe on-board environment. Passengers at large are treated as commodities.

Angela Dahlberg, Airlines Need to Turn More of Their Attention to Passenger-Related Human Factors, ICAO JOURNAL, June 2001, at 15. Another commentator writes:

The public will bear the additional expenses needed to improve aviation security, but is this where public responsibility ends? Do the passenger surcharges and user fees that characterize current transportation policy entitle the passenger to share in the security process itself? . . . The idea still prevalent in our laws and policies — that the public will pay more, yet will remain uninvolved in the process — reflects the naïveté of the “welfare state” policies of yesteryear. We are living a myth if we think that we can successfully avoid becoming involved, yet have aviation security improved. Government is not a bottomless pit of funds, nor has it shown itself to be an unbiased champion of our security interests.


task of behavioral change."265 The September 11 terrorist attacks suggest that U.S. airline passengers modify their behavior, not just hope for new sets of laws and/or regulations.

At bottom, the events of September 11 illuminate the reasons why the PBOR legislation cannot work: necessary change must occur at a social and behavioral level, not solely at Capitol Hill. As a matter of business and practical sense, airlines must attract potential passengers (particularly business travelers)266 by marketing and articulating a need to fly, not just the associated convenience and value of commercial flight.267

IV. CONCLUSION

While the flawed PBOR legislation likely will die in committee, again, passengers' rights, conceptually and subsequent to September 11, is as important an issue as ever. In the short term, the PBOR legislation consists of nothing more than a set of normative proposals that do nothing to alter passenger behavior or create business incentives for airlines with respect to service. In the long-term, however, the PBOR legislation crafted over the last few years represents a sort of "fork-in-the-road" at which deregulation proponents and would-be regulators must decide, conclusively, whether deregulation is sustainable with respect to airline service or whether re-regulation of some variety is required.268 Of course,

265 Strantz, supra note 263, at 251.
267 One commentator opines:

Because of Sept. 11, passengers are being treated worse now than before – the lines are longer, the demands on customers are more intrusive, no-frills service has taken on new meaning. But the passengers can't complain – to do so would sound unpatriotic. In the name of safety – and for good reason – the airports are being run in a way that would have been unrecognizable before Sept. 11. Because of this, the airlines are probably safer today than they were back in August. Which is why safety will not be the underlying reason people continue to stay away from airports.

The real reason comes down to something that has been building for years, and that has been reported upon here even before Sept. 11 – something that can be summed up in a slogan protestors used to write on signs they waived at Dwight D. Eisenhower's secretary of state before he went off on far-flung foreign travels: "Is this trip necessary?"

Bob Greene, Safety Isn't the Airlines' Only Worry, CHI. TRIB., Dec. 4, 2001, at 1C.

268 Several commentators note, for example:
[w]e should be particularly careful to consider only changes in the regulatory environment that do not give a public agency continuing domestic regulatory responsibilities or require a series of ongoing judgments about which offerings to the public are or are not in the public interest. Rather . . . we should, for example, consider how we may restructure business incentives . . .

Inasmuch as Congress has entertained the concept of enforceable passengers' rights several times over the last decade, each cycle of legislation more enthused than previous attempts, it is likely that the issue will present again. This may be so unless the airlines affirmatively pursue a campaign to communicate that their services and product are necessary, convenient, and valuable. Until then, it remains to be seen whether "... as long as the temptation to let the government do 'just a little' re-regulating can be resisted, a deregulated airline industry will deliver its product efficiently and economically."

After more than twenty years of airline deregulation, it is time to start thinking about a long-run policy equilibrium. In other words, what remaining steps, if any, should policymakers take to enhance competition in the deregulated environment so that carriers can be free of periodic government interventions and can focus entirely on becoming as efficient as possible?

Morrison & Winston, supra note 191, at 3-4; Jerry Ellig & Wayne H. Winegarden, Airline Policy and Consumer Welfare, 61 Transp. L.J. 411, 430 (1994) (“From a consumer perspective, whatever ails the industry, it isn’t too little regulation.”); see also Paul Stephen Dempsey, Market Failure and Regulatory Failure as Catalysts for Political Change: The Choice Between Imperfect Regulation and Imperfect Competition, 46 Wash. & Lee L. Rev. 1 (1989); Kahn, Airline Deregulation, supra note 8, at 238-39 (“The question for public policy is always whether the imperfections are so severe as to justify comprehensive regulation of the kind that we practiced in the airline industry before 1978”).


As Robert Crandall predicts:

I think all of this federal involvement inevitably will lead to more discussion of whether or not there needs to be some regulation. Particularly, I think you’ll get that discussion if, as a consequence of the economic travail [after September 11], airlines seek to combine themselves. And if they seek to combine themselves so that the number of competing airlines shrinks, there may very well be a debate about whether some regulation to substitute for that now-absent competition is required.

I hope it won’t go back to a regulated system. I think the deregulated system works better. It does not fulfill all the same social objectives, but it gives a materially better economic result.


Kelleher, How the Airlines Met Adam Smith, supra note 108, at 318. As one prominent, former airline executive suggests:
Given the importance of the nation’s airline industry, we must all hope that the marketplace will guide the airlines to solutions consistent with the continued availability of convenient, competitively priced transportation services for cities across America. As the industry works out its problems, the government should stand back and let the market do its job — while avoiding actions that will make things worse.

Comments