

## Grounded: How DOJ Merger Analysis Left Consumers Stranded

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*The Department of Justice has bungled airline merger oversight. Consumers are now in a holding pattern with an oligopoly that delivers higher prices, fewer choices, and turbulent service. Over three decades, fifty-plus airline mergers have shrunk the industry from ten major carriers to four. This Article delivers a comprehensive analysis of the DOJ's analytical failures in applying the Clayton Act to airline mergers—adding a needed dimension to legal scholarship that has dissected everything from deregulation to labor disputes while the government's enforcement strategy remained grounded. Part I traces aviation's regulatory evolution from the early days of industry protectionism through Congress's 1989 handoff of merger oversight to the DOJ. Part II exposes the DOJ's analytical nosedives at every stage—from market definition to remedies—showing how airlines systematically delivered empty promises that the DOJ accepted. Part III charts a path forward, recognizing that structural market damage now demands redirection to protect 2.9 million daily passengers from an industry increasingly leaving them stranded.*

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## INTRODUCTION

A family vacation should require three simple steps: pick a destination, choose your dates, book a flight. For the Lawrences, planning their Summer 2025 getaway to Universal Studios should be straightforward. Emira teaches in NYC—her salary clears the federal poverty line but barely rewards her for molding future minds. Kemani works for the government, enjoying steady schedules and pension benefits. Together with their two children, they represent the average American family navigating today’s travel landscape on a tight budget.

Like most families, their travel budget faces headwinds from modest salaries, student loans, and inflation. The Lawrences have one priority: the cheapest flight available. They live in Queens—ten minutes from JFK, twenty minutes from LaGuardia. Options should abound.

They do not.

First stop: JFK. Which carriers serve Orlando? Only JetBlue. Did United and American not fly this route before? Not anymore. Next: LaGuardia. Available airlines? JetBlue again. Real price competition options require a detour to New Jersey. Even then, only United flies to Orlando from Newark. The fare? Barely cheaper than JetBlue’s.

The Lawrences hit turbulence reviewing their budget. They cancel some vacation plans to offset flight costs, then book the cheapest departure from Newark. But tickets mark just the first expense. Airlines no longer offer complimentary checked bags, Wi-Fi, legroom, entertainment, or even guaranteed family seating.

Budget constraints force a 5:30 AM departure. The family wakes at 3 AM, drives to Newark with clothes compressed into a single suitcase, and endures two flight delays. They arrive in Orlando more exhausted than when they started.

The Lawrences’ ordeal is not bad luck—it is the predictable result of decades of regulatory failure. This Article examines how the Department of Justice (DOJ) has systematically failed to protect consumers from oligopolistic market power in aviation. While antitrust laws exist to preserve competition, the DOJ has permitted wave after wave of consolidation, leaving passengers stranded with higher prices, fewer choices, and degraded service.

The numbers tell the story. For forty years, the DOJ has served as gatekeeper for airline mergers. Under its watch, the industry has experienced over fifty mergers. Between 2001 and 2013, the U.S. shrank from ten major

passenger airlines to four.<sup>1</sup> In 40 of the largest 100 airports, a single airline controls the majority of air travel.<sup>2</sup>

This consolidation harms 2.9 million daily passengers. Limited choices, inflated prices, and degraded service are not anomalies—they are features of a market the DOJ failed to protect.

This Article examines the DOJ's analytical missteps in applying the Clayton Act to airline mergers. The airline industry is well-traveled territory in legal scholarship. For decades, scholars have explored industry facets from deregulation<sup>3</sup> to labor challenges.<sup>4</sup> While existing scholarship has examined aspects of DOJ merger enforcement in aviation,<sup>5</sup> this Article contributes by systematically analyzing each component of the Clayton Act framework—from market definition through remedies—across recent consolidations that have reshaped the industry. This comprehensive approach reveals how failures at each enforcement stage have compounded to harm consumers in an increasingly consolidated market. This examination contributes not only to the understanding of airline industry dynamics but also to mounting evidence that U.S. merger policy is broken.<sup>6</sup>

Part I provides the backstory of merger oversight in the airline industry. It traces the early days of flight and regulatory oversight through the 1970s deregulation push. The turbulence from this period led Congress to assign the DOJ responsibility for merger review. Part II explores how the DOJ has failed to navigate this responsibility. It explains the analytical course

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<sup>1</sup> Jonathan Spira, *26 Airlines that Went Out of Business in the First Two Decades of the 21<sup>st</sup> Century*, FREQUENT BUS. TRAVELER (Feb. 29, 2024), <https://www.frequentbusinesstraveler.com/2024/02/26-airlines-that-went-out-of-business-in-the-first-two-decades-of-the-21st-century/>.

<sup>2</sup> Luke Goldstein, *The Second Wave of Airline Concentration*, THE AM. PROSPECT (Dec. 15, 2023), <https://prospect.org/infrastructure/transportation/2023-12-15-second-wave-airline-concentration/>.

<sup>3</sup> See, e.g., GANESH SITARAMAN, WHY FLYING IS MISERABLE AND HOW TO FIX IT (2023); Trevor H. Fry, *For Everything Else, There's Taxes: Why Credit Card Rewards Should Stop Being Priceless*, 66 B.C. L. REV. 121, 122 (2025) (exploring how deregulation contributed to the growth of airline credit cards); Daniel H. Rosenthal, *Legal Turbulence: The Court's Misconstrual of the Airline Deregulation Act's Preemption Clause and the Effect on Passengers' Rights*, 51 DUKE L.J. 1857, 1858 (2002) (discussing deregulation's impact on tort claims); Michael E. Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy*, 4 YALE J. ON REG. 393 (1987) (discussing early results of deregulation).

<sup>4</sup> See, e.g., Scott L. Cummings & Andrew Elmore, *Mobilizable Labor Law*, 99 IND. L.J. 127, 146 (2023); Katherine Van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485 (1990); Beth S. Adler, *Deregulation in the Airline Industry: Toward A New Judicial Interpretation of the Railway Labor Act*, 80 NW. U. L. REV. 1003 (1986).

<sup>5</sup> See, e.g., Daniel J. Gifford & Robert T. Kudrle, *U.S. Airlines & Antitrust: The Struggle for Defensible Policy Towards a Unique Industry*, 50 IND. L. REV. 539 (2017) (exploring the DOJ's evolving policy towards airline mergers); Roger W. Fones, *Airline Consolidations & Competition Law—What's Next?*, 10 FIU L.R. 447 (2015) (comparing U.S. and international airline merger policy); Jonathan Baker, *Mavericks, Mergers, & Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135 (2002) (using airlines to illustrate the deficiencies in coordinated competitive effects analysis).

<sup>6</sup> Robert H. Lande et al., *The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act Section 7*, 103 TEX. L.R. 785 (2025); Peter Carstensen & Robert H. Lande, *The Merger Incipency Doctrine and the Importance of "Redundant" Competitors*, 2018 WIS. L. REV. 781 (2018); Orelly Ashenfelter et al., *Did Robert Bork Understate the Competitive Impact of Mergers?*, 57 J.L. & ECON. 567 (2014).

corrections the DOJ missed while evaluating potential harm from airline mergers—and how airlines have repeatedly led regulators off course with illusory promises of consolidation benefits. Part III charts a path forward. The DOJ’s merger analysis has lost its bearings and further concentrated the airline industry, leaving consumers with no real destination choices. Routes remain, however, to prevent further consolidation and steer clear of additional competitive harm.

#### I. THE RISE & FALL OF COMMERCIAL AIRLINE REGULATION

Since the beginning of flight, Congress has adopted different regulatory schemes aimed at providing oversight of the airline industry. Such regulation began in the days when the government relied on airlines for airmail carriage in the early 20th century and has continued into the modern era of passenger flight. The degree and scope of government oversight have waned over time. Yet with each approach to overseeing the industry, one common goal remained: ensuring competition. As this Part details, however, despite that common north star, federal enforcement often wavered off course.

This regulatory odyssey reveals three distinct philosophical eras. First, the Civil Aeronautics Board era (1938-1978) embodied protective paternalism, with the government acting as industry guardian. Second, the initial deregulation movement (1978-1985) embraced market fundamentalism and an evangelical belief in competitive forces. Third, the Reagan-era Department of Transportation’s oversight (1985-1988) represented unchecked market ideology that completely abandoned competitive safeguards. Each era’s excesses created the conditions that necessitated the next, but none achieved the elusive balance between competitive markets and effective oversight that airline competition requires.

##### A. *Protective Paternalism: The Civil Aeronautics Board Era*

The first regulatory era saw the government acting as an industry guardian. Born from Depression-era distrust of unregulated markets, governmental regulators treated airlines as essential infrastructure requiring protection from competitive pressures.

The 1929 stock crash reduced demand for mail carriage services, triggering smaller airlines to consolidate. The airline industry lobbied for regulation, fearing it would fail “under the impact of cut-throat and destructive practices.”<sup>7</sup> These lobbying efforts proved effective. In 1938,

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<sup>7</sup> See Edgar S. Gorrell, President, Air Transp. Ass’n of America Rationalization of Air Transport, Address Presented at the Seventh Annual Convention of the National Association of Aviation Officials (December 1-3, 1937), in 9 J. OF AIR L. 43 (1938), <https://scholar.smu.edu/cgi/viewcontent.cgi?article=3986&context=jalc>.

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Congress transferred authority to regulate entry into the market and minimum standards of service<sup>8</sup> to the Civil Aeronautics Board (CAB).<sup>9</sup>

Congress founded the CAB on the same principle as the Sherman Act and Clayton Act: protecting competition.<sup>10</sup> Yet the CAB's congressional mandate was not competition at all costs. Rather, Congress directed the CAB to promote competition only to the extent necessary to serve national commerce and defense interests.<sup>11</sup> As Congress put it, the CAB should ensure "enough competition to serve as a spur to the eager search for progress, but not so much as to raise costs materially through the duplication of facilities."<sup>12</sup> This caution may well have been a product of the times. After all, Congress enacted the CAB when there was a deep-rooted distrust of competition without government oversight.<sup>13</sup>

To implement this protective approach, the CAB received sweeping authority to develop an air transport system, to regulate that system, to promote efficient service, and to ensure safety.<sup>14</sup> The CAB's regulatory might was most notable in its policies regarding market entry and the extension of routes.

The Civil Aeronautics Act required common carriers to obtain a certificate from the CAB for commencing operations.<sup>15</sup> These certificates permitted

<sup>8</sup> See Richard H. K. Victor, *Contrived Competition: Airline Regulation and Deregulation, 1925-1988*, 64 BUS. HIST. REV. 61, 66 (1990).

<sup>9</sup> See *id.*; see also Civil Aeronautics Act, S. 3659, 75th Cong. at 1-2 (1938) (available at <https://maint.loc.gov/law/help/statutes-at-large/80th-congress/session-2/c80s2ch482.pdf>); Originally, the Civil Aeronautics Board was called the Civil Aeronautics Authority. See generally *From Civil Aeronautics Authority (CAA) to FAA*, FED. AVIATION ADMIN.: ABOUT FAA, HISTORY (November 16, 2021), [https://www.faa.gov/about/history/photo\\_album/caa\\_to\\_faa](https://www.faa.gov/about/history/photo_album/caa_to_faa); Emergency Railroad Transportation Act of 1933, Pub. L. 73-68, 48 Stat. 211 (1933); The Banking Act of 1933, Pub. L. 106-569, 48 Stat. 162 (1933); 49 U.S.C. §§ 301-327 (Supp. 1934).

<sup>10</sup> Victor, *supra* note 8, at 86 ("The act represented neither the 'public interest' concept that had evolved from *Munn v. Illinois* nor the simple 'capture' of policy by industry. Rather, the Civil Aeronautics Act was a muddled attempt to guide competition toward a socially optimal mix of service, innovation, and economic growth.")

<sup>11</sup> Section 102, 49 U.S.C. § 1302 (d).

<sup>12</sup> Federal Aviation Commission, "Report of the Federal Aviation Commission," Senate Document No. 15, 74th Cong., 1st sess., Jan. 1935, 52-53, <https://www.jstor.org/stable/3115845>.

<sup>13</sup> Victor, *supra* note 8, at 70. Congress not only passed the Civil Aeronautics Act but also the Emergency Railroad Transportation Act of 1933; the Banking Act of 1933; and the Motor Carrier Act of 1935 for the trucking industry. See Act to Amend the Civil Aeronautics Act of 1938, S. 2690, 82nd Cong. (1951-1952) (available at <https://www.congress.gov/bill/82nd-congress/senate-bill/2690/text>), amendment to make unlawful certain practices of ticket agents engaged in selling air transportation, and for other purposes; see also Emergency Railroad Transportation Act of 1933, Pub. L. 73-68, 48 Stat. 211 (1933); The Banking Act of 1933, Pub. L. 106-569, 48 Stat. 162, (available at <https://www.govinfo.gov/content/pkg/COMPS-255/pdf/COMPS-255.pdf>); 49 U.S.C. §§ 301-327 (Supp. 1934).

<sup>14</sup> U.S. Congress, Senate, Subcommittee on S. 3659, Committee on Interstate Commerce, Civil Aviation and Air Transport, 75th Cong., 3d sess., April 1938, 1-2. (Civil Aeronautics Act), <https://maint.loc.gov/law/help/statutes-at-large/80th-congress/session-2/c80s2ch482.pdf>.

<sup>15</sup> U.S. Congress, Senate, Subcommittee on S. 3659, Committee on Interstate Commerce, Civil Aviation and Air Transport, 75th Cong., 3d sess., April 1938, 1-2. (Civil Aeronautics Act).

operations on specific routes rather than geographic areas more generally.<sup>16</sup> Congress grandfathered routes for airline carriers that operated before the creation of the CAB, known today as “legacy carriers,” like Delta, American, and United Airlines.<sup>17</sup> Any new routes required approval.<sup>18</sup> In making certification decisions, the CAB applied greater scrutiny to legacy carriers than smaller carriers seeking growth opportunities.<sup>19</sup> The CAB would “award routes to the weaker of two or more applicants in order to balance the strength of the various certificated airlines.”<sup>20</sup> To the CAB, such decisions advanced its concept of “healthy competition”<sup>21</sup>—a philosophy that prioritized industry stability over pure market forces.

The CAB’s certification policy increased competition on existing routes. By the mid-1950s, the number of routes without competition dropped from forty to sixteen over a period of several months.<sup>22</sup> However, competition between carriers still languished. From 1950 to 1975, the CAB received 79 applications for new market entrants; none were granted.<sup>23</sup> Instead, under the CAB, the airline industry operated as a regulated oligopoly. The largest airlines in the 1970s were the same as in the 1930s, though the combined market share of the four largest airlines dropped from 82% in 1939 to 58.6% in 1972.<sup>24</sup>

Whether this interest in protecting competition extended to CAB’s merger policy is debatable. The CAB had broad authority over airline mergers, which included approval and denial.<sup>25</sup> The Civil Aeronautics Act of 1938 gave the agency primary jurisdiction over airline mergers—authority reinforced by the Federal Aviation Act.<sup>26</sup>

<sup>16</sup> Aerovias Sud Americana, Inc., Certificate Renewal, 1A Av. L. Rep. ¶ 22320 (C.A.B. Oct. 29, 1959). These routes that were awarded during the CAB era, ultimately would morph into the “city-pairs” that are utilized to determine geographic market in present day.

<sup>17</sup> See U.S. Congress, Senate, Subcommittee on S. 3659, Committee on Interstate Commerce, Civil Aviation and Air Transport, 75th Cong., 3d sess., Section 401(a), April 1938, 1-2. (Civil Aeronautics Act), <https://maint.loc.gov/law/help/statutes-at-large/80th-congress/session-2/c80s2ch482.pdf>; see also Congressional Record May 18, 1938, Vol. 83, Part 6 (2024), <https://www.congress.gov/bound-congressional-record/1938/05/18/house-section>.

<sup>18</sup> See SEVERIN BORENSTEIN & NANCY L. ROSE, THE ECONOMIC REGULATION AND ITS REFORM: WHAT HAVE WE LEARNED? HOW AIRLINE MARKETS WORK...OR DO THEY? REGULATORY REFORM IN THE AIRLINE INDUSTRY, Univ. Chicago Press 67 (June 2014).

<sup>19</sup> *Id.*

<sup>20</sup> G.E. Hale & Rosemary D. Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 109 U. PA. L. REV. 311, 320 (1961).

<sup>21</sup> Braniff Airways, Houston-Memphis-Louisville Route, 2 C.A.B. 353, 386 (1940).

<sup>22</sup> Victor, *supra* note 8, at 71. (“In a series of fourteen decisions over the next eighteen months, the CAB reduced the number of noncompetitive city pairs-cities served by only one carrier in the top 100 markets from forty to sixteen. In all, competition was introduced or strengthened in 559 city-pair markets.”)

<sup>23</sup> See Paul S. Dempsey, *The Rise and Fall of the Civil Aeronautics Board – Opening Wide the Floodgates of Entry*, 11 TRANSP. L. J. 91, 115 (1979).

<sup>24</sup> Sitaraman, *supra* note 3, at 43.

<sup>25</sup> U.S. Congress, Senate Subcommittee on S. 3659, Committee on Interstate Commerce, Civil Aviation and Air Transport, 75th Cong., 3d sess., April 1938, 1-2. (Civil Aeronautics Act).

<sup>26</sup> *Id.*

Although the DOJ maintained concurrent jurisdiction under antitrust laws, the two were not co-equal enforcers. The CAB's approval of a merger could immunize the deal from DOJ action. However, such immunity was not automatic. If the CAB made specific findings that the merger was consistent "public policy" as defined by the Federal Aviation Act,<sup>27</sup> the DOJ could not challenge the deal. This gave the CAB power to override the DOJ's antitrust concerns entirely.

Unfortunately, this shared oversight minimized the importance of competition in merger evaluations. The CAB's "public interest" standard undermined traditional antitrust concerns. The standard appeared protective of competition, allowing the CAB to block mergers that would harm competition or "jeopardize another carrier."<sup>28</sup> In actuality, it opened the door for non-competitive concerns.

In practice, competition consistently took a back seat to financial stability and service continuity. The 1971 American-Trans Caribbean Airways merger exemplified this approach: despite increased concentration in Caribbean routes, the CAB approved the deal to strengthen American's financial position and ensure continued service to Caribbean destinations.<sup>29</sup> Similarly, in 1972, the CAB approved the Delta-Northeast Airlines merger despite reduced competition on several routes, prioritizing Northeast's financial instability and service reliability to smaller communities.<sup>30</sup> In both cases, competition concerns were secondary to broader economic and service goals.

By the 1970s, criticism of the CAB's regulatory approaches began reaching a fever-pitch.<sup>31</sup> Some bemoaned the CAB's certification process as creating barriers to new market entrants.<sup>32</sup> Others argued that the CAB's approach to rate-setting resulted in artificially high fares.<sup>33</sup> Still others voiced concerns about the tension between the CAB's regulatory approach to mergers and antitrust concerns.<sup>34</sup>

Perhaps most loud, though, were the voices of those urging a fundamental shift in United States' regulatory policy.<sup>35</sup> The CAB's protective approach had created the very problems it sought to avoid—high fares, limited service, and insulation from competitive pressure. Industry concentration persisted despite the agency's balancing efforts, while consumers bore the cost of

<sup>27</sup> Federal Aviation Act, § 412(a), 49 U.S.C. § 1382(a) (1970).

<sup>28</sup> *Id.*

<sup>29</sup> American-TransCaribbean Merger Case, CAB Docket No. 21828, CAB Order No. 70-12-161. (December 18, 1970) (approved by the President, December 31, 1970)

<sup>30</sup> CAB Docket No. 23315, CAB Orders Nos. 72-5-73 (April 24, 1972), 72-5-74 (April 24, 1972) (approved by the President, May 19, 1972).

<sup>31</sup> See e.g., Robert L. Thornton, *Deregulation: The C.A.B. and Its Critics*, 43 J. AIR. L. & COM. 641 (1977).

<sup>32</sup> *Id.* at 656-57.

<sup>33</sup> Sitaraman, *supra* note 3, at 51; Edward M. Kennedy, *Airline Regulation by the Civil Aeronautics Board*, 41 J. AIR L. & COM. 607, 610 (1975).

<sup>34</sup> Sitaraman, *supra* note 3, at 53.

<sup>35</sup> See e.g. Andrew Downer Crain, *Ford, Carter, and Deregulation in the 1970s*, 413 J. ON TELECOM. & HIGH TECH L. 413, 415 (2007).

regulatory stability. These failures would fuel a pendulum swing toward the opposite extreme: pure market ideology.

### B. *Market Fundamentalism: Kahn's Deregulation*

By the 1970s, regulatory philosophy underwent a dramatic reversal. Where the CAB era had emphasized protection and stability, the deregulation movement embraced market fundamentalism, believing competitive forces would automatically optimize outcomes for consumers and the industry alike. Competition was not just preferred; it was seen as a panacea to cure the ailments of regulatory paternalism.

By the early 1970s, growing criticisms of the CAB found support across the political spectrum, coinciding with a period when the airline industry was struggling financially. The energy crisis of 1973-74 drove up fuel costs. New airplane designs created extra capacity. Stagflation drove down consumer demand.<sup>36</sup>

A Baptist and Bootlegger coalition<sup>37</sup> arose, urging reform in the name of consumer protection. Liberals latched onto a growing body of research in the 1960s and 1970s suggesting that the CAB's rate regulation was driving up consumer costs.<sup>38</sup> They worried governmental regulation invited "regulatory capture"—meaning industry members had outsized influence in regulated industries.<sup>39</sup> Democratic Senator Ted Kennedy, along with then-Professor Stephen Breyer, fell squarely in this camp. Together, they held a series of congressional hearings in 1974-75, which culminated in a 1975 report calling to eliminate the CAB.<sup>40</sup>

Conservatives used the same scholarship to push for reducing government intrusion in private business. They found support from a growing economic movement, which became known as the Chicago School.<sup>41</sup> Economists, building on the seminal work of Stigler and Friedland, argued that market forces would generate better outcomes than government planning.<sup>42</sup> The Chicago School contended that regulation was creating less competitive and

<sup>36</sup> See Van Wezel Stone, *supra* note 4, at 1489.

<sup>37</sup> A Baptist and Bootlegger coalition is a group that generally are on opposing sides but can agree on a common rule.

<sup>38</sup> See Christopher Lydon, *Nadar Unit Sues C.A.B. on Role in Airline Rates*, NY TIMES (Nov. 2, 1971), <https://www.nytimes.com/1971/11/02/archives/nader-unit-sues-cab-on-role-in-airline-rates.html>; see e.g., RICHARD E. CAVES, AIR TRANSPORTS AND ITS REGULATORS (Harvard Univ. Press 1962); see e.g., Michael E. Levine, *Is Airline Regulation Really Necessary?*, 74 YALE L.J. 1416 (1965).

<sup>39</sup> Richard D. Cudahy, *Whither Deregulation: A Look at the Portents*, 58 N.Y.U. ANN. SURV. AM. L. 155, 161 (2001).

<sup>40</sup> See Jonathan L. Rubin, *The Premature Post-Chicagoan: Alfred E. Kahn*, 25 ANTITRUST 75, 76 (Summer 2011).

<sup>41</sup> See *Chicago School*, in 2 GALE ENCYCLOPEDIA OF AMERICAN LAW 353, 353 (Donna Batten ed., 3d ed. 2010).

<sup>42</sup> Stuart H. Altman & Sanford L. Weiner, *Regulation as Second Best*, in COMPETITION IN THE HEALTH CARE SECTOR: PAST, PRESENT, AND FUTURE 421-47 (1978).

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less efficient markets.<sup>43</sup> To them, law should follow economic theory—as they defined it.<sup>44</sup>

The push to reform the CAB even found support from John Robson, the chairman of the CAB from 1975 to 1977.<sup>45</sup> In Senate hearings, he urged deregulation and elimination of the CAB during the Ford administration.<sup>46</sup> President Carter subsequently tapped Alfred E. Kahn, an economics professor and advisor to the president, as chairman of the CAB, where Kahn served from 1977-78.<sup>47</sup> Kahn became the reluctant face of airline deregulation.<sup>48</sup>

On March 4, 1977, President Carter issued a call to Congress to change course in the commercial airline industry.<sup>49</sup> Based on Kahn's counsel, President Carter pushed Congress to ensure the government played a smaller role in the airline industry.<sup>50</sup> Deregulation, in President Carter's vision, would retain the CAB but lessen its chokehold on industry growth.<sup>51</sup> His reimagined version of the CAB would lower barriers to entry and ensure greater flexibility to exit the market, thereby allowing carriers to expand their networks, promote competitive pricing, and ensure service to small communities.<sup>52</sup>

Congress responded by passing the Airline Deregulation Act of 1978.<sup>53</sup> The Act was hardly the modest adjustment envisioned by President Carter.<sup>54</sup> Instead, the Act marked the beginning of the end of the CAB. The Act mandated: (1) phasing out the CAB by 1985; (2) eliminating the CAB's

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<sup>43</sup> Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PENN. L. REV. 925, 926-27 (1978).

<sup>44</sup> See e.g., *id.*

<sup>45</sup> Carole Shifrin, *CAB's Robson Urges Cut in Regulation of Airlines*, WASHINGTON POST (Apr. 18, 1977), <https://www.washingtonpost.com/archive/business/1977/04/19/cabs-robson-urges-cut-in-regulation-of-airlines/f6fbcf10-28bd-447a-a70b-325e0c8343c0/?isMobile=1>.

<sup>46</sup> See Rubin, *supra* note 40, at 75.

<sup>47</sup> *Kahn Scheduled to Become Head of C.A.B.*, NY TIMES (May 3, 1977), <https://www.nytimes.com/1977/05/03/archives/kahn-scheduled-to-become-head-of-cab.html>.

<sup>48</sup> *Id.*; Nancy L. Rose, *After Airline Deregulation and Alfred Kahn*, 102 AM. ECON. REV. 376, 376 (2012).

<sup>49</sup> See Message from the President of the United States, Proposals for the Reduction of Federal Regulation of the Domestic Commercial Airline Industry, 95th Cong., 1st Sess., House Doc. No. 95-92 (Mar. 4, 1977) (“One of my Administration’s major goals is to free the American people from the burden of over-regulation. We must look, industry by industry, at what effect regulation has – whether it protects the public interest, or whether it simply blunts the healthy forces of competition, inflates prices, and discourages business innovation. Whenever it seems likely that the free market would better serve the public, we will eliminate government regulation.”).

<sup>50</sup> See *id.* (“A financially responsible firm which meets applicable safety standards should be denied entry only if the Civil Aeronautics Board can show that entry would be detrimental to the public interest.”).

<sup>51</sup> See *id.*

<sup>52</sup> See *id.*

<sup>53</sup> S.2493 - 95th Congress (1977-1978): Airline Deregulation Act, S.2493, 95th Cong. (1978), <https://www.congress.gov/bill/95th-congress/senate-bill/2493>.

<sup>54</sup> See Message from the President of the United States, Proposals for the Reduction of Federal Regulation of the Domestic Commercial Airline Industry, 95th Cong., 1st Sess., House Doc. No. 95-92 (Mar. 4, 1977).

control over fares and route entry; and (3) dividing antitrust authority between the Department of Transportation and the Department of Justice.<sup>55</sup>

To Kahn, the gradual phaseout of the CAB was too little, too slow.<sup>56</sup> Even before the Act's passage, Kahn began liberalizing airline regulation through administrative decisions. He allowed several carriers to enter markets simultaneously, permitted airlines to adjust fares within certain parameters without pre-approval, and reduced barriers for commuter airlines to serve smaller markets.<sup>57</sup> These decisions enabled swift action once Congress passed the Airline Deregulation Act in October 1978.<sup>58</sup> Within one month of the Act's enactment, Kahn's CAB awarded 238 new routes.<sup>59</sup>

Kahn shared some views aligned with the Chicago School. He feared governmental regulation in particular industries facilitated cartelization.<sup>60</sup> But unlike hardline factions of the Chicago School, Kahn understood antitrust oversight still had a serious function to play in merger oversight and curbing anticompetitive conduct.<sup>61</sup> Consider National Airlines, an acquisition target during Kahn's tenure at the CAB.<sup>62</sup> A bidding war ensued between Pan Am, Texas International, Eastern Airlines, and Air Florida.<sup>63</sup> The CAB, with Kahn at the helm, expressed concerns that the proposed combinations would concentrate routes. With the DOJ echoing these fears, the CAB initially blocked or delayed these acquisition attempts.

Kahn's tenure at the CAB lasted one year. But his outsized influence ensured that within three years of the Act—well ahead of the 1985 deadline—the CAB was dismantled.<sup>64</sup>

Early trends were frequently cited by deregulation advocates, including Kahn, as evidence that the deregulation was working as intended. Dozens of new carriers entered the market, including People Express, Midway Airlines,

<sup>55</sup> *Id.*

<sup>56</sup> See generally Downer Crain, *supra* note 35.

<sup>57</sup> Sitaraman, *supra* note 3, at 56-61; *Transition Period Seen for Airlines by C.A.B. Chairman*, NY TIMES (Feb. 3, 1978), <https://www.nytimes.com/1978/02/03/archives/transition-period-seen-for-airlines-by-cab-chairman.html>.

<sup>58</sup> S. 2493, Airline Deregulation Act.

<sup>59</sup> Sitaraman, *supra* note 3, at 61; Improved Authority to Wichita Case, et al., CAB Order 78-12-106 (1978), at 4, n.1.

<sup>60</sup> Alfred Kahn, Talk to the New York Society of Security Analysts, (Feb. 2, 1978), at 28.

<sup>61</sup> See, e.g., *id.* at 345 (“[w]hile prepared to defend enthusiastically the deregulations with which I have been involved, I feel equally strongly that they have greatly accentuated the importance of antitrust enforcement.”); ALFRED E. KAHN, LESSONS FROM DEREGULATION: TELECOMMUNICATIONS AND AIRLINES AFTER THE CRUNCH 47 (2004) (“Deregulation shifts the major burden of consumer protection to the competitive market, and therefore, in important measure, to the enforcement of the antitrust laws.”); Alfred Kahn, *Market Power Issues In Deregulated Industries*, 60 ANTITRUST L.J. 857, 858 (1991) (“Manifestly, withdrawal of the regulatory protections entails a correspondingly accentuated reliance on vigorous antitrust enforcement.”).

<sup>62</sup> James Russell, *They're Just Wild About National*, NY TIMES (Dec. 24, 1978), <https://www.nytimes.com/1978/12/24/archives/theyre-just-wild-about-national-3-airlines-have-made-bids-to-buy-it.html>.

<sup>63</sup> *Id.*

<sup>64</sup> Sitaraman, *supra* note 3, at 64.

Muse Air, and New York Air,<sup>65</sup> while existing intrastate carriers like Southwest expanded to interstate routes.<sup>66</sup> Market concentration declined in many city-pair markets as these new entrants gained presence.<sup>67</sup> Average inflation-adjusted fares fell 10-20% in the first five years,<sup>68</sup> with some routes seeing reductions close to 50%.<sup>69</sup>

Yet market concentration remained a stubborn challenge. The initial boom of new entrants into the market caused legacy carriers minor financial troubles as they sought solid ground post-deregulation.<sup>70</sup> In 1978, the largest airlines still controlled 71% of the market.<sup>71</sup>

Any initial gains proved short-lived. Kahn's vision of deregulation with antitrust oversight was quickly overwhelmed by two forces: airlines' strategic shift to hub-and-spoke networks that concentrated market power at major airports, and the Reagan administration's embrace of pure market ideology—the complete abdication of government oversight.<sup>72</sup> This unchecked market fundamentalism would prove far more destructive to competition than the protective paternalism it replaced, unleashing the regulatory extremism that would define the next era.

### C. *Unchecked Market Ideology: Deregulation's Extremist Turn*

The Reagan administration transformed Kahn's measured deregulation into unchecked market ideology. This acute turn showed the dangers of regulatory philosophy untethered from competitive realities.

In 1985, with the official disbandment of the CAB, the authority to police airlines for antitrust purposes transferred to the DOJ and the Department of Transportation (“DOT”).<sup>73</sup> Congress assigned the DOT primary responsibility for evaluating proposed airline mergers from 1985 to 1989,<sup>74</sup> after which the DOJ would assume responsibility. Rather than following Kahn's path of a deregulated airline industry, still subject to antitrust oversight, the DOT instead charted a new course: Reaganomics.<sup>75</sup> As this

<sup>65</sup> Andrew Goetz & Paul Dempsey, *Airline Deregulation Ten Years After: Something Foul in the Air*, 54 J. AIR L. & COM. 927, 936 (1989).

<sup>66</sup> *Id.* at 937.

<sup>67</sup> *Id.*

<sup>68</sup> See Alfred E. Kahn, *Airline Deregulation—A Mixed Bag, But a Clear Success Nevertheless*, 16 TRANSP. L.J. 235 (stating prices declined 3.5 annually from 1976 to 196) [hereinafter *Mixed Bag*]. But see Brenner, *supra* note 71, at 198 (pointing out the 2.6% per passenger mile price decline was the same as the rate pre-deregulation).

<sup>69</sup> *Mixed Bag*, *supra* note 68, at note 15.

<sup>70</sup> *Id.*

<sup>71</sup> See generally Melvin A. Brenner, *Airline Deregulation—A Case in Public Policy Failure*, 16 TRANSP. L.J. 179, 184 (1988).

<sup>72</sup> See Jefferson Decker, *Deregulation, Reagan-Style*, THE REGULATORY REVIEW (Mar. 13, 2019), <https://www.theregreview.org/2019/03/13/decker-deregulation-reagan-style/>.

<sup>73</sup> See U.S. General Accounting Office Letter to Chairman Marvin S. Cohen, (January 4, 1980) (“[CAB] authority over domestic mergers and interlocking relationships will be transferred to the Department of Justice . . . authority to provide subsidies for air service to small communities will be transferred to the Department of Transportation.”).

<sup>74</sup> 49 USC Appendix § 1551(a)(7).

<sup>75</sup> Decker, *supra* note 72. Reaganomics is the economic policy of President Regan to expand the deregulation in all areas, not only airlines.

section discusses, this redirection placed the airline industry on a track toward significant antitrust concerns.

When President Reagan took office in 1980, deregulation was part of his broader ideological commitment to reducing government.<sup>76</sup> Reagan believed a free market with little to no government interference was best for consumers.<sup>77</sup> His administration focused on removing even more governmental constraints on business. Antitrust oversight was no exception.<sup>78</sup>

The DOT translated the Reagan administration's vision into reality. In evaluating mergers, Congress directed the DOT to apply a two-step analysis. The first mirrored section 7 of the Clayton Act:<sup>79</sup> the DOT was to evaluate whether "the effect of [the deal] ... may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint of trade."<sup>80</sup> If so, the DOT could move to step two: approval only after an explicit finding that transportation benefits outweighed the anticompetitive effects of the merger.<sup>81</sup> Once approved, the DOT was authorized to grant antitrust immunity to the transaction.<sup>82</sup> The DOJ could file advisory documents with the DOT about potential competition concerns, but it held no independent authority to block a deal.<sup>83</sup>

The DOT never got past the first step. The agency believed the airline industry was sufficiently contestable so that mergers rarely posed competitive risks.<sup>84</sup> Potential competition would discipline merged firms if they tried to raise prices or reduce quality.<sup>85</sup> This philosophy ignored market concentration and barriers to entry that other carriers would face when competing with newly merged entities.<sup>86</sup> As Kahn explained, the DOT "simply confused deregulation, ideologically, with total laissez-faire."<sup>87</sup>

Consider the Northwest/Republic merger. In January 1986, Northwest announced an \$884 million deal to acquire Republic Airlines.<sup>88</sup> The eighth and ninth largest U.S. carriers had overlapping hubs at Minneapolis-St. Paul, and if approved, would become the third largest airline,<sup>89</sup> controlling nonstop

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Goetz & Dempsey, *supra* note 65, at 937.

<sup>79</sup> Clayton Act § 7, 15 U.S.C.A. § 18.

<sup>80</sup> 49 U.S.C. § 1378 (b)(1)(A) and (B) (1982).

<sup>81</sup> Section 408 Federal Aviation Act as amended, 49 U.S.C. § 1378.

<sup>82</sup> 414 of the Federal Aviation Act as amended, 49 U.S.C. § 1378.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Mark Crane, *Report to the ABA House of Delegates Supporting Enactment of Legislation Transferring Antitrust Enforcement of Airline Mergers from the DoI to the DOJ*, 56 ANTITRUST L.J. 963, 966 (1988).

<sup>86</sup> Mark Crane, *Report to the ABA House of Delegates Supporting Enactment of Legislation Transferring Antitrust Enforcement of Airline Mergers from the DoI to the DOJ*, 56 ANTITRUST L.J. 963, 966 (1988).

<sup>87</sup> Moderator Donald L. Flexner, *Panel Discussion*, 55 ANTITRUST L.J. 205, 210 (1986); Alfred E. Khan, *Surprises of Airline Deregulation*, 78 AM. ECON. REV. 316, 318 (1988).

<sup>88</sup> See Douglas B. Fever, *Merger Planned by Northwest and Republic*, THE WASHINGTON POST (Jan. 24, 1968).

<sup>89</sup> *Id.*

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service in 42 markets and eliminating competition in 26 of them.<sup>90</sup> For Minneapolis/St. Paul passengers, the merger reduced competition on many routes from two carriers to one.<sup>91</sup>

The DOJ immediately presaged the merger raised “a significant probability that it will substantially reduce competition” since Northwest and Republic served as each other’s primary competitors.<sup>92</sup> The DOT ignored these concerns.<sup>93</sup> It approved the merger, maintaining other carriers would simply enter impacted markets if the merged entity raised prices.<sup>94</sup>

Contrary to the DOT’s belief, higher prices did not induce competitor entry.<sup>95</sup> The merger significantly raised prices and reduced service. In Minneapolis-St. Paul, the merged entity controlled 80% of passenger departures;<sup>96</sup> fares increased 18-40%.<sup>97</sup>

This same overconfidence in potential competition colored the DOT’s approach to other mergers. From 1985 to 1988, the DOT did not block a single one of the 27 mergers that occurred.<sup>98</sup> The DOT was either ill-equipped or unwilling to protect consumers from anticompetitive harm.<sup>99</sup>

With vocal discontent over the DOT’s failure to exercise its merger authority,<sup>100</sup> Congress legislated an expedited transfer of merger oversight to

<sup>90</sup> See UPI Archives, *Justice: Northwest-Republic Merger Would Be Anti-Competitive*, UPI (Mar. 31, 1986), <https://www.upi.com/Archives/1986/03/31/Justice-Northwest-Republic-merger-would-be-anti-competitive/3474512629200/>.

<sup>91</sup> Alfred E. Kahn, *Deregulatory Schizophrenia*, 75 CAL. L. REV. 1059, 1062 (1987) [hereinafter Kahn, *Deregulatory Schizophrenia*].

<sup>92</sup> Lori Santos, *Justice Votes No on Northwest-Republic Merger*, UPI (Mar 31, 1986), <https://www.upi.com/Archives/1986/03/31/Justice-votes-no-on-Northwest-Republic-merger/4280512629200/>

<sup>93</sup> In two other mergers, TWA-Ozark; USAir-Piedmont, the DOT ignored concerns as well. TWA competed with Ozark on 80% of their domestic routes, making Ozark TWA’s primary competitor. John Crudele, *T.W.A. to buy Ozark in Bid for More Traffic*, N.Y. TIMES (Feb. 28, 1986), <https://www.nytimes.com/1986/02/28/business/twa-to-buy-ozark-in-bid-for-more-traffic.html>. The DOJ expressed concerns that the merger would hinder competition and increase fares in St. Louis, where the merged entity would control 82% of the passenger service. See *DOT Judge Approves Takeover of Ozark Air*, L.A. TIMES (Aug. 7, 1986, 12:00AM), <https://www.latimes.com/archives/la-xpm-1986-08-07-fi-2165-story.html>. The DOT ignored these concerns and approved the merger with no divestitures or caveats.

<sup>94</sup> Robert E. Dallos, *DOT Approves Northwest-Republic Deal*, LA TIMES (Aug. 1, 1986), <https://www.latimes.com/archives/la-xpm-1986-08-01-fi-19162-story.html>.

<sup>95</sup> Baker, *supra* note 5, at 203.

<sup>96</sup> *Id.*

<sup>97</sup> See Dempsey, *supra* note 23, at 141.

<sup>98</sup> Kim, E. Han, and Vijay Singal, *Mergers and Market Power: Evidence from the Airline Industry*, 83 AM. ECON. REV. 549, 549–69 (1993).

<sup>99</sup> See Testimony of Joel I. Klein, Assistant Attorney General, Antitrust Division of the U.S. Dept. of Justice before the Committee on Commerce, Science and Transportation of the U.S. Senate, (Mar. 12, 1999), at p. 1, <https://www.justice.gov/sites/default/files/atr/legacy/2015/05/05/2294.pdf>.

<sup>100</sup> See 133 CONG. REC. S. 3619-20 (daily ed. Mar. 20, 1987) (remarks of Sen. Metzenbaum citing concerns regarding concentration and dissatisfaction with the DOT’s merger oversight). See also Laura Parker, *Hill Committee Backs Bill to Strip DOT of Airline Merger Authority*, THE WASHINGTON POST (Apr. 8, 1987), <https://www.washingtonpost.com/archive/business/1987/04/09/hill-committee-backs-bill-to-strip-dot-of-airline-merger-authority/0f43d71a-be7a-48f8-99c4-695ba2f42a93/>.

the DOJ by 1988.<sup>101</sup> The DOT still retained an advisory role on mergers<sup>102</sup> and a limited ability to police airline mergers if the antitrust division fails to challenge a problematic merger.<sup>103</sup>

This regulatory odyssey—from protective paternalism through market fundamentalism to unchecked ideology—set the stage for the DOJ’s inheritance of a highly concentrated industry. Much of the competitive gains from early deregulation reversed. DOT-approved mergers harmed competition, solidifying the industry into an oligopoly.<sup>104</sup> By mid-1987, the leading four carriers controlled 66.5% of total revenue passenger miles.<sup>105</sup> Most tellingly, at airports where a single airline controlled more than 60% of gate space, fares increased 21-35% over three years—significantly higher than the Consumer Price Index<sup>106</sup>—and consumers paid almost 38% more per passenger mile than at unconcentrated airports.<sup>107</sup>

Consumer choice also suffered. Many of the new entrants quickly fell into peril, ultimately needing to be bailed out via merger or bankruptcy.<sup>108</sup> Airlines that did survive offered fewer departures on overlapping or competing city pairs post-merger.<sup>109</sup> The number of destinations served by four or more airlines fell 52%.<sup>110</sup>

By transferring merger authority to the DOJ in 1988, critics hoped the industry would finally face rigorous antitrust enforcement like any other

<sup>101</sup> Witnesses for both the Department of Transportation and the Department of Justice testified in favor immediately ending Transportation’s merger authority so that the interstate and overseas airline transportation industry would be treated just like any other industry. *Antitrust Enforcement Improvement Act of 2000: Hearings on H.R. 4321 Before the Comm. on the Judiciary House of Rep.*, 106th Cong. 2nd. Sess. (2000).

<sup>102</sup> See Statement of Michael W. Reynolds, Acting Assistant Secretary for Aviation & International Affairs, U.S. DOT before the Aviation Subcommittee of the Transportation & Infrastructure Committee, U.S. House of Representatives (May 14, 2008), available at <https://www.transportation.gov/testimony/dots-role-airline-industry%E2%80%99s-ongoing-restructuring>.

<sup>103</sup> See *id.*; see also 49 U.S.C. § 41308. The DOT retains other antitrust powers. It can grant antitrust immunity to international alliances. 49 U.S.C. §§ 41308-41309. It also has authority under section 411 of the Federal Aviation Act to regulate “unfair methods of competition.” This includes addressing practices that violate the antitrust laws and practices that “are not yet serious enough to violate the antitrust laws but may well do so if left unchecked.” See, e.g., Delta Air Lines, Inc., Order No. 2004-6-17, DOT-OST-1998-4776-0009 (U.S. Dep’t of Transp. June 21, 2004), <https://www.transportation.gov/sites/dot.gov/files/docs/2004-6-17.pdf>.

<sup>104</sup> See generally Kim & Singal, *supra* note 99, at 550 (detailing how the government did not contest mergers, which led to increased airfare); see also *Deregulatory Schizophrenia*, *supra* note 92, at 1062 (criticizing the DOT for “blithely dismissing objections by the Department of Justice”).

<sup>105</sup> Barry E. Hawk, *Airline Deregulation After Ten Years: The Need for Vigorous Antitrust Enforcement and Intergovernmental Agreements*, 34 ANTITRUST BULLETIN 267, 275 (Summer 1989).

<sup>106</sup> See John Cushman, *Study Notes Fare Rises at Hub Airports*, NY TIMES (Jan 28, 1989).

<sup>107</sup> *Id.* at 3.

<sup>108</sup> *Id.*

<sup>109</sup> Gregory J. Werden et al., *The Effects of Mergers on Price and Output: Two Case Studies from the Airline Industry*, 12 MANAGERIAL & DECISIONS ECONOMICS 341, 347 (1991).

<sup>110</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GOA REPORT TO CONGRESS REQUESTS, RCED 9-102 AIRLINE COMPETITION: HIGHER FARES AND REDUCED COMPETITION 4 (July 11, 1990) available at <https://www.gao.gov/assets/rced-90-102.pdf>.

sector.<sup>111</sup> This hope was misplaced. The DOJ inherited a concentrated oligopoly and failed to prevent further consolidation—ultimately recreating the very market dominance that deregulation had promised to destroy.

II. THE DOJ’S FAILED OVERSIGHT

Congress’s 1988 decision to transfer airline merger oversight to the DOJ marked a clear break with the past. Gone were the CAB’s protective shields and the DOT’s permissive approach. Airlines would finally face the same rigorous antitrust scrutiny as any other industry.

Four decades later, that promise lies unfulfilled. Four airlines now control 80% of U.S. passenger flights,<sup>112</sup> price competition has withered,<sup>113</sup> and “examples of clearly abusive pricing are ... too frequent and too blatant to ignore.”<sup>114</sup> The DOJ’s merger analysis has enabled, rather than prevented, this consolidation.

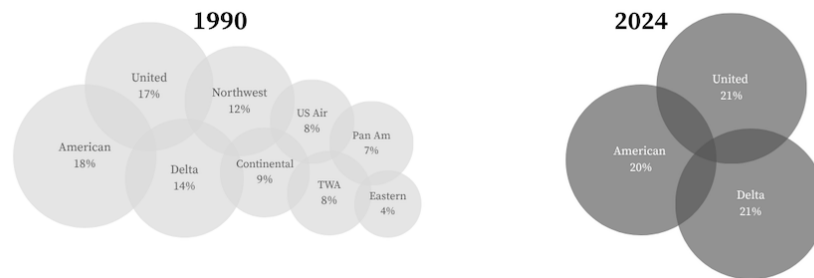


Figure 1: Airlines with over 4% market share in 1990 versus today<sup>115</sup>

<sup>111</sup> See *Testimony of M. Scocozza, Ass’t Secretary, DOT, Before the Subcomm. on Aviation of the Sen. Comm. on Commerce, Science and Transp.* at 6 (Apr. 23, 1987) (“the airline industry is mature and highly competitive and should be treated like any other industry in our economy...”); accord *Statement of R.B. Andewelt, Deputy Ass’t Att’y Gen., Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Sen. Judiciary Comm.*, at 12 (Mar. 25, 1987).

<sup>112</sup> *Leading Airlines in the U.S. by Domestic Market Share 2024*, STATISTA RESEARCH DEP’T (May 12, 2025), <https://www.statista.com/statistics/250577/domestic-market-share-of-leading-us-airlines/>.

<sup>113</sup> Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL’Y REV. 235, 236 (2017) (“Firms in industries ranging from agriculture to airlines collude, merge and exclude rivals, and raise consumer prices above competitive levels, while pushing prices below competitive levels for suppliers.”); Baker, *supra* note 96, at 173.

<sup>114</sup> See, e.g., Marnie Hunter & Julia Buckley, *Is Flying Still Safe? Here’s What Experts Say*, CNN (Mar. 1, 2025); Hugh Cameron, *Americans Are Canceling Flights Over Safety Concerns*, NEWSWEEK (Mar. 6, 2025).

<sup>115</sup> In 1990, there were nine airlines with 4% or more of a market share in the commercial domestic airline market. As of 2024, only three of those airlines remain in existence. Notably, the six defunct airlines all were involved in acquisitions or mergers with the remaining three during this timeframe. See *A Timeline of US Airline Merger History*, PETER GREENBERG WORLDWIDE (Aug. 19, 2023), <https://petergreenberg.com/2013/08/19/a-timeline-of-us-airline-merger-history/>.

Some may argue that traditional merger analysis fails to account for aviation's unique complexities—its diffuse regulatory framework, distinctive barriers to entry, thin margins, and vulnerability to external shocks.<sup>116</sup> These concerns are not entirely without merit. Yet the industry's consolidation record teaches the opposite lesson: airlines need more rigorous antitrust enforcement, not less.<sup>117</sup> Relaxed standards have failed spectacularly, producing precisely the market concentration that antitrust law seeks to prevent. When Congress assigned the DOJ oversight responsibility, its mandate was unambiguous: end airline exceptionalism.<sup>118</sup> Gone were the CAB's protective shields. Rejected was the DOT's willingness to overlook anticompetitive mergers. Airlines became subject to the same rules as any industry.

The DOJ must be measured against its own guidelines—the only legitimate benchmark.<sup>119</sup> U.S. antitrust law prohibits mergers that “may substantially lessen competition, or tend to create a monopoly.”<sup>120</sup> The DOJ's merger guidelines, continuously refined since 1968, follow one north star: “mergers should not be permitted to create or enhance ‘market power’ or to facilitate its exercise.”<sup>121</sup> These guidelines require rigorous assessment of both unilateral effects (harm from the merged entity) and coordinated effects (industry-wide coordination risks).<sup>122</sup> Yet the DOJ has failed to critically and consistently apply this framework to airline mergers.

The agency's failures span all critical dimensions of merger analysis. First, its unilateral effects analysis consistently underestimates anticompetitive risks through artificially narrow market definitions. Second, its coordinated effects analysis has largely ignored the airline industry's structural propensity for coordination. Third, the DOJ has repeatedly accepted speculative efficiency claims while misapplying legal doctrines designed to protect competition. The result: an oligopoly that harms consumers daily while the

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<sup>116</sup> Eli A. Friedman, *Airline Antitrust: Getting Past the Oligopoly Problem*, 9 U. MIAMI BUS. L. REV. 121, 121 (2001); Gifford & Kudrle, *supra* note 5, at 544-47 (defensible policy article)

<sup>117</sup> Moreover, some of the industry's alleged uniqueness dissolves under examination. Complex regulatory frameworks characterize telecommunications, pharmaceuticals, and energy. Victor E. Schwartz et al., “*That's Unfair!*” Says Who—*The Government or the Litigant?*, 41 WASHBURN L.J. 93, 94 (2007). High fixed costs and thin margins define steel production and retail operations. Jonathan M. Jacobson, *Do We Need a “New Economy” Exception for Antitrust?*, 15 ANTITRUST 89, 89 (2001). External vulnerability affects agriculture and hospitals. *See, e.g.*, Theodosia Stavroulaski, *The Healing Power of Antitrust*, 119 NW. U.L. REV. 943, 988-89 (2025).

<sup>118</sup> *See Scocozza, supra* note 111.

<sup>119</sup> Mahshad Badii, *Antitrust's North Star: The Continued and Nameless Judicial Deference Toward the Merger Guidelines*, 77 STAN. L. REV. 1189, 1220 (2025) (“courts still regularly cite to the Guidelines—often to criticize the Agencies for failing to meet their own standards.”).

<sup>120</sup> Clayton Act § 7, 15 U.S.C. § 18.

<sup>121</sup> U.S. Dep't of Justice, *Merger Guidelines*, 47 Fed. Reg. 28,493, at 2 (1982) [hereinafter 1982 Merger Guidelines].

<sup>122</sup> *F.T.C. v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 67 (D.D.C. 2009); *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 38, 44 (D.D.C. 2022); *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 215 (D.D.C. 2017).

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DOJ's flawed analytical framework continues enabling anticompetitive consolidation.

A. *The DOJ's Flawed Unilateral Effects Analysis*

To start, the DOJ's unilateral effects analysis has failed to identify the full anticompetitive risks in airline mergers. This analytical framework predicts whether a merged firm will gain sufficient market power to harm competition, primarily through price increases or reduced output.<sup>123</sup>

Unilateral effects analysis follows a structured approach. Under the Hart-Scott-Rodino Act, merging companies must provide comprehensive information about their operations, including transaction structures, market share data, customer relationships, strategic planning documents, and financial statements.<sup>124</sup> These filings offer regulators an initial image of how the parties compete and the likely competitive impact of their combination.

Using industry data alongside this material, regulators evaluate the merging firms' market power, typically using market share as a proxy.<sup>125</sup> This process requires defining both the relevant product and geographic markets—critically important steps that shape the entire analysis.<sup>126</sup>

Once markets are defined, regulators calculate market concentrations using the Herfindahl-Hirshman Index (HHI).<sup>127</sup> The merger guidelines establish specific HHI thresholds to distinguish between unconcentrated, moderately concentrated, and highly concentrated markets. Transactions that both create highly concentrated markets and produce substantial HHI increases are presumed to substantially lessen competition.<sup>128</sup> While these numerical thresholds and increase benchmarks have evolved over time,<sup>129</sup> the basic analytical framework remains consistent.

In the airline industry, the DOJ has adopted overly narrow market definitions that capture only a fraction of the actual anticompetitive risks.

<sup>123</sup> *Bertelsmann*, 646 F. Supp. 3d at 39; *Fed. Trade Comm'n v. Tapestry, Inc.*, 755 F. Supp. 3d 386, 486 (S.D.N.Y. 2024). The general framework for unilateral effects analysis dates back to the Supreme Court's 1962 decision in *Brown Shoe*. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

<sup>124</sup> The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

<sup>125</sup> See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716-17 (D.C. Cir. 2001) (using market shares a market power proxy).

<sup>126</sup> That said, merger analysis "need not start with market definition" when there is direct evidence that a merger would have an anticompetitive effect. See *U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines* § 4.0 (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>. [hereinafter 2010 Merger Guidelines].

<sup>127</sup> HHI is calculated by summing the squares of each market participant's share of the relevant market. See, e.g., *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 704 (4th Cir. 2021); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 716 n.9 (D.C. Cir. 2001).

<sup>128</sup> U.S. Dep't of Just. & Fed. Trade Comm'n, *Merger Guidelines* §§ 2.1, 2.4 n.21 (2023), [www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf](http://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf) [hereinafter 2023 Merger Guidelines].

<sup>129</sup> The 2010 guidelines increased the threshold of a highly concentrated industry from 1800 to 2500. At that time, the relevant HHI increase rose from 100 to 200 points. See 2010 Merger Guidelines, *supra* note 126, at 19. In 2023, the merger guidelines returned to pre-2010 thresholds: any merger with a HHI over 1,800 and a 100-point increase is presumptively illegal. See 2023 Merger Guidelines, *supra* note 128 at § 2.1.

This artificially deflates concentration metrics, making it easier for merging firms to overcome the government's presumptive case. This foundational error has enabled a wave of consolidation, concentrating market power while harming consumers.

For decades, the agency defined markets as “scheduled non-stop air passenger service” between overlapping city-pairs<sup>130</sup>—routes where merging airlines both provided nonstop service between the same departure and arrival cities.<sup>131</sup> This approach, inherited from the CAB and in place until 2013, rested on two faulty assumptions: consumers readily substitute between airports in the same city, and airlines set fares based on city-level rather than airport-specific competition.

The goal in defining the relevant market is “identification of an area of competition in which variations in price will affect the demand for alternative products.”<sup>132</sup> City-pairs analysis fails this test. Consider a traveler flying to Chicago. The choice between Midway and O’Hare airports can mean an additional \$140 in ground transportation costs. Passengers will pay premiums up to that amount to avoid the less convenient airport: city-pair markets are too broad to capture actual competitive constraints.<sup>133</sup>

By examining only overlapping nonstop city-pairs, the DOJ ignored anticompetitive effects on (1) non-overlapping routes served by only one merging airline; (2) connecting flights routed through airline hubs; and (3) airport-specific route competition.<sup>134</sup> This analytical myopia allowed mergers to proceed with inadequate remedies, harming consumers on routes the DOJ never studied.

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<sup>130</sup> See Am. Compl., *United States v. US Airways Grp., Inc.*, No. 1:13-cv-01236 (D.D.C. Sept. 5, 2013).

<sup>131</sup> City pairs focus on routes between specific cities, not individual airports. A few examples of city-pairs are services from CHA to ATL, BUF to NYC, or CHI to HOU.

<sup>132</sup> *Emigra Grp., LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP*, 612 F. Supp. 2d 330, 353 (S.D.N.Y. 2009).

<sup>133</sup> See Alexa Naumovich, *Domestic Airline Mergers and Defining the Relevant Market: From Cities to Airports*, 83 J. AIR L. & COM. 839, 860 (2018).

<sup>134</sup> This list is not exhaustive. The focus on city-pair also overlooks market entry in airports where one carrier had terminated all service and impact on hub premiums.

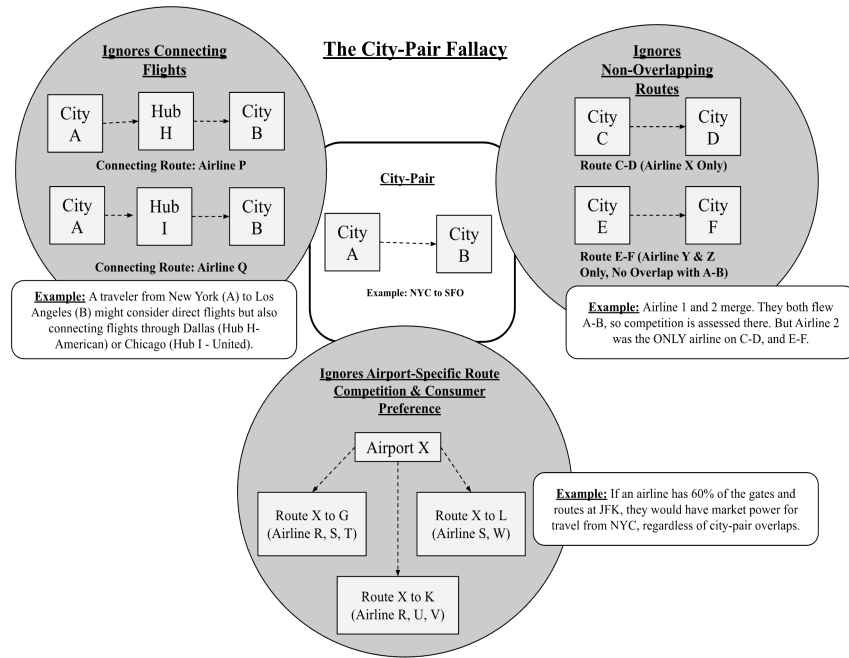


Figure 2

Mergers have also harmed competition on routes serviced by only one of the merging firms. The 2010 *United-Continental* merger illustrates this oversight. The DOJ’s “record time” investigation<sup>135</sup> focused on seven overlapping routes, primarily at Newark airport. While the agency secured some slot divestitures to Southwest, it ignored potential harm on non-overlapping routes at O’Hare and Denver International.<sup>136</sup> Nor did it consider the potential increase for routes where only United provided service pre-merger.

The consequences were predictable. Post-merger, overlapping routes saw 13.9% price increases. Unsurprisingly, non-overlapping routes—those never analyzed by the DOJ—still experienced 8.8% increases.<sup>137</sup> Substantial

<sup>135</sup> *Justice Department Approves Continental-United Merger*, I AM UNION (Aug. 31, 2010), <https://www.goiam.org/news/justice-department-approves-continental-united-merger/#:~:text=Late%20last%20week%2C%20the%20Department,for%20the%20%243%20billion%20merger.>

<sup>136</sup> DOJ, *United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice’s Antitrust Concerns* (Aug 27, 2010), <https://www.justice.gov/archives/opa/pr/united-airlines-and-continental-airlines-transfer-assets-southwest-airlines-response.>

<sup>137</sup> See Marc Remer & Reed Orchinik, *Multimarket Contact and Prices: Evidence from an Airline Merger Wave*, MIT Sloan Research Paper No. 7158-24, Table 3 (Aug. 07, 2024), available at SSRN: <https://ssrn.com/abstract=4919118>

consumer harm occurred precisely where the DOJ's framework created blind spots.

The 2013 American-US Airways merger marked a partial turning point. The DOJ recognized that consumers have strong preferences between Washington D.C. area airports, supporting an airport-specific market definition.<sup>138</sup> The recent JetBlue-Spirit merger continued this airport-focused approach, providing clearer analysis of merger impacts.<sup>139</sup>

However, even this improved framework remains incomplete. Airport-pair definitions still ignore connecting flights, which represent at least one-third of U.S. air travel.<sup>140</sup> Airlines' hub-and-spoke systems route passengers through connection points, creating competitive dynamics invisible to nonstop-only analysis. When mergers reduce competition on one leg of a multi-leg journey, they make the entire trip more expensive—even when the number of connecting options appears unchanged.<sup>141</sup>

Take the 2008 *Delta-Northwest* merger. Pre-merger, the airlines overlapped on only five nonstop routes. After a six-month investigation focused on city-pairs, the DOJ approved the merger between the then-third and fifth largest carriers, expecting cost savings to benefit consumers.

The agency got it wrong on multiple levels. Not only did the five overlapping routes see price increases, but connecting flight prices rose 25.6% more than nonstop flights—a massive consumer harm the agency's framework failed to identify.<sup>142</sup>

The DOJ's evolution from city-pair to airport-specific market definition represents progress, but the agency's analytical framework remains fundamentally incomplete. By focusing primarily on overlapping nonstop routes, the DOJ continues underestimating merger harm, thereby permitting consolidation that reduces competition across multiple dimensions of airline service. Until the agency adopts a more comprehensive approach to market definition—one that consistently accounts for non-overlapping routes, connecting flights, and the full spectrum of airline competition—mergers will further concentrate market power at consumers' expense.

<sup>138</sup> Compl. ¶¶ 24-29, *United States v. US Airways Grp. et al.*, No. 1:13-cv-01236 (CKK) (D.D.C. Aug. 13, 2013).

<sup>139</sup> Order, *U.S. v. JetBlue*, 23-cv-10511, ECF Doc. 461 (Jan. 1, 2024) at 70.

<sup>140</sup> See Rebekah Dix & Roi Orzach, *Market Power Spillovers Across Airline Routes*, at 2 (Jan. 2023); Matthew L. Lawder, *Which Airports Benefit the Most from Connecting Passengers*, STL ANNEX (2020), [https://www.stlannex.com/blogs\\_2020/blog\\_airport\\_connections](https://www.stlannex.com/blogs_2020/blog_airport_connections) (showing 70.5% of consumers at CLT are connecting).

<sup>141</sup> See, e.g., Dix & Orzach, *supra* note 144, at 3.

<sup>142</sup> See *id.* at Table 13 (nonstop fares increased \$17.87 and nonstop fares increased \$22.46). These mergers also reduce consumer choice. Post *Delta-Northwest* merger, the merged firm ceased operating 236 direct routes. This meant the reduction of 878 routes for which the direct routes were one leg of travel. *Id.* at 33.

### B. *The DOJ's Inadequate Coordinated Effects Analysis*

The DOJ's coordinated effects analysis presents an even more fundamental blind spot. While unilateral effects analysis examines how merging firms might individually exercise market power, coordinated effects analysis takes a market-wide view.<sup>143</sup> It asks whether a merger risks creating conditions where market participants could “coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels.”<sup>144</sup>

Coordinated effects analysis directly addresses oligopoly power—the dominant threat in today's airline industry.<sup>145</sup> Unlike monopolization, oligopolistic coordination absent direct agreement falls beyond the Sherman Act's reach.<sup>146</sup> When mergers reduce the number of market participants, price coordination becomes easier to achieve but harder for antitrust laws to combat later.<sup>147</sup> Merger law exists precisely to “prevent bad outcomes early when antitrust rules make it difficult or impossible to prevent them later.”<sup>148</sup> The airline industry presents a textbook case of coordination-friendly market structure, yet the DOJ has repeatedly ignored these warning signs.

#### 1. Ignoring Structured Coordinated Risks

The Chicago School's influence fundamentally reshaped merger enforcement by dismissing coordination concerns, maintaining that oligopolies were likely benign and performed competitively absent express collusion.<sup>149</sup> They believed collusion was rare and, when it occurred, inherently unstable.<sup>150</sup> As the Chicago School's thinking gained prominence, the DOJ shifted its merger focus almost exclusively toward unilateral effects,<sup>151</sup> leading to “evaporating agency attention to coordinated effects

<sup>143</sup> Fed. Trade Comm'n v. Tapestry, Inc., 755 F. Supp. 3d 386, 486 (S.D.N.Y. 2024).

<sup>144</sup> United States v. Anthem, Inc., 236 F. Supp. 3d 171, 206 (D.D.C.), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017).

<sup>145</sup> See D. Daniel Sokol & Sean P. Sullivan, *The Decline of Coordinated Effects Enforcement and How to Reverse It*, 76 FLA. L. REV. 265, 268 (2024). (“The greatest threat today is not monopoly power. It is *oligopoly* power.”) (emphasis in original).

<sup>146</sup> Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 533-54 (2007); *In re Dynamic Random Access Memory Indirect Purchaser Litig.*, No. 4:18-CV-2518-JSW-KAW, 2020 WL 8459279, at \*4 (N.D. Cal. Nov. 24, 2020) (subsequent history omitted) (“In [oligopolies], competitors act with “conscious parallelism” where they “share monopoly power, [by] setting prices at a profit-maximizing, supracompetitive level” using coordination, but not agreement” which falls outside section 1).

<sup>147</sup> Cf. Christopher R. Leslie, *The Probative Synergy of Plus Factors in Price-Fixing Litigation*, 115 NW. U. L. REV. 1581, 1624 (2021) (“Market structure itself might not be sufficient to prove collusion, but it is evidence that supports an inference that collusion occurred.”).

<sup>148</sup> Herbert Hovenkamp, *Prophylactic Merger Policy*, 70 HASTINGS L.J. 45, 47 (2018).

<sup>149</sup> See ROBERT H. BORK, *THE ANTITRUST PARADOX* 221 (1978) (“oligopolistic behavior, to the extent that it exists at all (and I am not persuaded that such behavior exists outside of economics textbooks) rarely results in any significant ability to restrict output”).

<sup>150</sup> See *id.*

<sup>151</sup> Jonathan B. Baker, *Why Did the Antitrust Agencies Embrace Unilateral Effects?*, 12 GEO. MASON L. REV. 31, 35 (2003).

theories.”<sup>152</sup> This shift proved particularly damaging in airlines, where key structural factors in the industry create ideal coordination conditions that the DOJ often ignored.

The first and most obvious factor is market concentration. High concentration facilitates coordination by reducing the number of participants who must align their behavior.<sup>153</sup> The HHI for domestic air travel has increased over 400 points since 1990, reaching 1451 by 2024.<sup>154</sup> With relatively few players controlling 80% of the market, coordination becomes easier to achieve and monitor.<sup>155</sup> Yet between 2001 and 2013, the DOJ adopted the DOT’s permissive approach, treating every proposed merger as presumptively beneficial.<sup>156</sup> The DOJ declined to challenge the 2005 *America West/US Airways* merger,<sup>157</sup> remained silent when Delta merged with Northwest in 2008, and approved United’s acquisition of Continental in 2010.<sup>158</sup>

Substantial barriers to entry compound coordination risks by protecting coordinated arrangements from competitive disruption. When new competitors cannot easily enter a market, existing firms can coordinate pricing or capacity without fear that upstart rivals will undercut their arrangements and steal market share. Capital requirements for aircraft acquisition, regulatory compliance costs, and securing airport slots ensure existing carriers face limited threats from new competition, making coordination more durable and sustainable over time.<sup>159</sup> The DOJ acknowledges these formidable entry barriers in non-merger antitrust

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<sup>152</sup> D. Daniel Sokol & Sean P. Sullivan, *The Decline of Coordinated Effects Enforcement and How to Reverse It*, 76 FLA. L. REV. 265, 291 (2024).

<sup>153</sup> See Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 10 (2004); Per Larsen, *Text Message Price Gouging: A Perfect Storm of Tacit Collusion*, 8 J. TELECOMM. & HIGH TECH. L. 217, 226 (2010) (“oligopoly markets facilitate collusion because it is easier to coordinate among a smaller group of sellers to maintain monopoly pricing.”).

<sup>154</sup> SEVERIN BORENSTEIN, *THE RAPID COMMUNICATION AND PRICE FIXING: THE AIRLINE TARIFF PUBLISHING COMPANY CASE* at 1 (noting 1074 HHI in 1990). Using 2024 market share data, the current HHI is 1451.

<sup>155</sup> See Andrew J. Grant, *Tariffs, Trusts, and Antitrust*, 2025 ANTITRUST SOURCE 1, 5 (2025) (“It is generally understood that a high level of market concentration increases the risk of anticompetitive collusion on pricing because there are fewer players with whom to coordinate.”).

<sup>156</sup> Courtney D. Lang, *The Maverick Theory: Creating Turbulence for Mergers*, 59 ST. LOUIS U. L.J. 257, 258 (2014).

<sup>157</sup> In approving the deal, the DOJ focused on how the airlines shared few overlapping routes. It accepted the companies’ representations that the merged airline to offer consumers more and better service. Statement by Assistant General R. Hewitt Pate Regarding the Closing of the American West/US Airways Investigation, *End-to-End Merger Cleared* (June 23, 2005), [https://www.justice.gov/archive/atr/public/press\\_releases/2005/209709.htm](https://www.justice.gov/archive/atr/public/press_releases/2005/209709.htm).

<sup>158</sup> As explained by Darren Bush in his testimony regarding the 2010 *United-Continental* merger, “instead of saying that a merger that might lead to less competition must be halted, the DOJ seems to be saying in some instances that a merger that might lead to more efficiency must be approved.” See Testimony of Darren Bush Before Senate Judiciary Subcomm. Antitrust, Competition Policy and Consumers Rights, *An Examination of Delta-Northwest Merger* (Apr. 24, 2008) [hereinafter Bush, *Delta-Northwest*].

<sup>159</sup> See *In re Packaged Ice Antitrust Litig.*, 723 F. Supp. 2d 987, 1014 (E.D. Mich. 2010) (“oligarchic sellers” conducive to collusion as are “prohibitive entry barriers”); *Standard Iron Works v. Arcelormittal*, 639 F.Supp.2d 877, 883 (N.D. Ill.2009) (“high barriers to entry” conducive to collusion).

enforcement actions.<sup>160</sup> Yet its merger analysis ignores how these same barriers would insulate post-merger coordination from competitive challenge. This represents a striking analytical inconsistency—the same entry barriers that the DOJ has recognized as protecting monopolistic behavior in Section 2 cases somehow disappear from coordinated effects analysis in merger review.<sup>161</sup>

Further, unlike industries where firms compete across multiple product dimensions, airlines primarily compete on price for fundamentally undifferentiated service. Simply put, the service all airlines provide is the safe takeoff at one destination and safe landing at another.<sup>162</sup> The shift toward stripped-down base fares with à la carte add-ons have further standardized offerings.<sup>163</sup> All five top U.S. airlines now unbundle ancillary products,<sup>164</sup> creating fewer variables that participants must align. This standardization should have raised serious coordination concerns.

Finally, extensive multimarket contact is associated with collusive pricing patterns,<sup>165</sup> creating what economists call “spheres of mutual interdependence” that encourage coordination.<sup>166</sup> Airlines compete simultaneously across dozens of routes. When American Airlines and Delta compete on New York-Los Angeles, they also face each other on numerous other routes. If American slashes prices on one route to steal Delta’s market share, Delta can retaliate across all routes where they compete. This threat of multi-route retaliation incentivizes coordination. The DOJ’s unilateral effects focus completely missed these cross-route coordination dynamics.

These structural factors should have been impossible to ignore given the industry’s documented history of coordination attempts. American Airlines’ Chairman once called Braniff’s Chairman, saying: “Raise your goddamn

<sup>160</sup> See e.g., *United States v AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

<sup>161</sup> Cf. JONATHAN B. BAKER, *THE ANTITRUST PARADIGM* 116 (2019) (“the Justice Department’s airline merger challenges have usually avoided alleging coordinated effects”).

<sup>162</sup> The airline industry has abandoned innovative solutions for quality of service that may once have differentiated products. Concentrated oligopolies reduce service, choice, and innovation. Assistant Attorney General Jonathan Kanter Speaks at Mexico’s Federal Economic Competition Commission (cofece) 10th Anniversary Celebration, 2024 WL 262892. For example, in 1961, the Eastern Shuttle provided passengers with hourly flights between Boston, New York City, and Washington DC. Customers did not buy tickets in advance and were not assigned seats; every hour a shuttle would depart. Almanac: The Eastern Shuttle, CBS News: Sunday Morning (Apr. 30, 2017, 10:21 AM), <https://www.cbsnews.com/news/almanac-the-eastern-shuttle/> Mimicking the schedule of a metropolitan train service, consumers had a consistent and reliable method of air transport. The era of Eastern Shuttle style innovation no longer exists.

<sup>163</sup> See SENATOR RICHARD BLUMENTHAL, *THE SKY’S THE LIMIT*, PERMANENT SUBCOMMITTEE ON INVESTIGATIONS MAJORITY REPORT 7 (2024). This ala carte pricing also appears coordinated. See, e.g., *id.* at 9 (“Since they began charging for a first checked bag on domestic itineraries, legacy carriers have historically charged the same price as each other, often announcing increases in their first checked bag fees within days or weeks of one another.”).

<sup>164</sup> See *id.*

<sup>165</sup> See Federico Ciliberto et al., *Collusive Pricing Patterns in the US Airline Industry*, 62 INT’L J. INDUS. ORG. 136, 137 (2019).

<sup>166</sup> See, e.g., David D. Bernheim & Michael D. Whinston, *Multimarket Contact and Collusive Behavior*, 21 RAND J. ECON. 1, 3 (1990).

fares 20 percent. I'll raise mine the next morning. You'll make more money and I will, too."<sup>167</sup> In 2010, US Airways' CEO emailed Delta's CEO attempting to coordinate fare increases.<sup>168</sup> The DOJ launched another collusion investigation in 2015.<sup>169</sup> Yet despite this pattern of coordination attempts, the DOJ continued approving mergers that further concentrated the industry.

Modern coordination has become both easier to achieve and harder to detect, yet the DOJ has failed to adapt its analysis accordingly. Carriers now use quarterly earnings calls to coordinate capacity reductions through "capacity discipline" discussions.<sup>170</sup> When all airlines serving a particular market discussed capacity discipline in earnings calls, seat capacity dropped 1.25 to 4.21%.<sup>171</sup> Technology amplifies these effects—the Internet allows carriers to observe competitors' pricing decisions instantly and adjust accordingly, sometimes multiple times daily. Airlines co-own a central clearinghouse for fare change distribution,<sup>172</sup> enabling pricing coordination without direct communication. Despite DOJ attempts to curtail this coordination mechanism two decades ago,<sup>173</sup> consumers maintain—via ongoing private litigation—that the four largest carriers still use this clearinghouse to conspire on fare increases and capacity limits.<sup>174</sup>

The DOJ's most instructive early failure on coordinated effects involved the 1998 virtual merger<sup>175</sup> of Northwest Airlines and Continental. Northwest

<sup>167</sup> See Robert D. Hershey, Jr., *American Airlines Target of U.S. Suit*, NY TIMES (Feb. 24, 1983). The case was later dismissed after the DOJ settled "with little more than an agreement by [the CEO] to keep a written record of all of his contact with other airline executives for two years." Scott Mayerowitz et al., *Government Seeks Evidence that Airlines Illegally Worked Together, but Will the Case Fly?*, U.S. NEWS (July 3, 2015, 9:28 AM), <http://bit.ly/2FfOgae>.

<sup>168</sup> This email was part of the government's challenge of the American-US Airways Merger. See *Why the Justice Department Blocked the American-US Airways Merger*, THE WASH. POST (Apr. 29, 2016).

<sup>169</sup> PBS NewsHour, *U.S. Probe Into Airline Collusion Needs More than Circumstantial Evidence* (July 3, 2015); see also Kevin Kinder, *Friendly Skies or Turbulent Skies: An Evaluation of the U.S. Airline Industry and Antitrust Concerns*, 91 S. CAL. L. REV. 943, 954 (2018).

<sup>170</sup> Gaurub Aryl et al., *Coordinated Capacity Reductions and Public Communications in the Airline Industry*, 89 REV. ECON. STUD. 3055, 3056 (2022).

<sup>171</sup> See Gaurub Aryl et al., *Colluding in Plain Sight: Study Finds Airline Use Earnings Call to Coordinate Capacity Reductions*, PROMARKET (Mar. 8, 2018).

<sup>172</sup> The Airline Tariff Publishing Company (ATPCO) disseminates price change information to airline and travel computer systems. *In re Transpacific Passenger Air Transp. Antitrust Litig.*, 69 F. Supp. 3d 940, 951 (N.D. Cal. 2014), *aff'd and remanded sub nom.* *Wortman v. All Nippon Airways*, 854 F.3d 606 (9th Cir. 2017).

<sup>173</sup> In Dec. 1992, the DOJ filed suit accusing the airlines using ATPCO of price-fixing. The case ultimately settled, with the defendant airlines agreeing to stop announcing most price increase in advance. *United States v. Airline Tariff Pub. Co.*, 1994 WL 502091, at \*1 (D.D.C. Aug. 10, 1994). In 2004, however, American Airlines paid a \$3 million civil penalty for violating the consent decree. Department of Justice, *Justice Department Settles Civil Contempt Claim Against American Airlines, Inc.* (Aug. 6, 2004), [https://www.justice.gov/archive/atr/public/press\\_releases/2004/204933.htm](https://www.justice.gov/archive/atr/public/press_releases/2004/204933.htm).

<sup>174</sup> While two airlines have settled, the consumer class action is still pending. *In re Domestic Airline Travel Antitrust Litig.*, 691 F. Supp. 3d 175, 181 (D.D.C. 2023) (denying United and Delta's motion for summary judgment).

<sup>175</sup> A virtual merger differs from traditional mergers as it involves contractual arrangements that emulate the same anti-competitive effects of a traditional merger. Due to its unique nature, virtual mergers are often able to circumvent the statutory

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agreed to purchase shares in Continental stock sufficient to afford it more than 50% of the voting power of shareholders and 14% of Continental's equity.<sup>176</sup> Simultaneously, the two carriers entered a sweeping marketing alliance involving codesharing and other coordination of service.<sup>177</sup> The DOJ challenged the arrangement, recognizing that the combined entity would harm consumers across hub-to-hub city pairs and systemwide routes<sup>178</sup>—an explicit acknowledgment that coordination, not just unilateral effects, threatened competition. Yet the Agency settled before trial, requiring only that Northwest divest its controlling interest in Continental while permitting the marketing alliance to stand.<sup>179</sup> The DOJ had identified the coordination risk clearly. It simply declined to eliminate it.

The Northwest/Continental settlement set a troubling precedent that the Agency would follow for the next fifteen years. In the 2013 *US Airways/American Airlines* merger,<sup>180</sup> the Agency challenged the transaction, arguing it would create “a high likelihood of coordination among the remaining market participants on higher fares, fees, and service reductions.”<sup>181</sup> The Agency recognized how “past experience shows [legacy airlines] prefer tacit coordination over full-throated competition.”<sup>182</sup> But it quickly settled without addressing the industry’s underlying coordination problem.<sup>183</sup> While acknowledging coordinated effects marked progress,<sup>184</sup> the merger still left consumers paying higher fares for diminished service.<sup>185</sup>

Whether the DOJ will consistently apply coordinated effects analysis remains unclear. After *US Airways/American Airlines*, coordination concerns surfaced sporadically.<sup>186</sup> Most recently, in 2023, the DOJ

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hurdles of traditional mergers, like Hart-Scott Rodino review and approval. *See generally*, Stuart R. Cohn, *The Non-merger Virtual Merger: Is Corporate Law Ready for Virtual Reality?*, 29 DEL. J. CORP. L. 1 (2004).

<sup>176</sup> <https://www.justice.gov/atr/case-document/file/506471/dl> (Trial Brief pg. 4-5)

<sup>177</sup> *Id.* at 5.

<sup>178</sup> *Id.* at 12-14.

<sup>179</sup> Nov. 6, 2000 DOJ Press Release,

<https://www.justice.gov/archive/opa/pr/2000/November/648finalat.htm>

<sup>180</sup> *See infra* Part II.B. and accompanying text.

<sup>181</sup> *See* Press Release, Justice Department Files Antitrust Lawsuit Challenging Proposed Merger Between US Airways and American Airlines, (Aug. 13, 2013), <https://www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-challenging-proposed-merger-between-us-airways-and->

<sup>182</sup> *Id.* at 3.

<sup>183</sup> This settlement agreement required divestitures of slots, gates, and ground facilities at seven airports that would increase the presence of low-cost carriers. *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *See* Somnath Das, *Effect of Merger on Market Price and Product Quality: American and US Airways*, 55 REV. OF INDUS. ORG. 339, 342 (Nov. 2019).

<sup>186</sup> For example, the DOJ raised no objections about the risks of further consolidating the airline industry when Southwest and AirTran merged in 2011. Press Release, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Southwest’s Acquisition of Airtran (Apr. 26, 2011). However, it did as part of its 2016 challenge of the Alaska Virgin deal. *See* Compl., *United States v. Alaska Air Group, Inc. & Virgin Am., Inc.*, Case 1:15-cv-02377 (D.D.C. Dec. 16, 2016) at 1 ECF 1 (discussing the risk of consolidation in an already highly concentrated industry).

successfully deployed coordinated effects theory to block JetBlue-Spirit, arguing the merger would “dampen competition with other airlines.”<sup>187</sup> Yet when Hawaiian and Alaska proposed a \$1.9 billion deal in 2024—giving the combined entity over 50% market share in Hawaii—the DOJ raised no challenge.<sup>188</sup>

This inconsistency has allowed an already coordination-friendly industry to consolidate further, turbocharging the very market conditions that facilitate the coordinated behavior—behavior merger law was designed to prevent. But the structural coordination problem runs even deeper than these factors alone.

## 2. The Common Ownership Problem

The coordination-enabling conditions described above extend beyond market concentration to include common ownership patterns that fundamentally alter competitive dynamics. Common ownership alters the behavior of corporations.<sup>189</sup> Entities held under common ownership do not act as true competitors, due to their self-serving interest to safeguard their investments.<sup>190</sup> The Big Four airlines share common institutional investors—BlackRock, Vanguard, State Street, and PRIMECAP—creating structural incentives for coordination rather than competition.<sup>191</sup>

This ownership structure undermines the competitive assumptions underlying traditional merger analysis. Airlines’ anticompetitive incentives through common ownership concentration “are more than 10 times larger than what the 2010 horizontal merger guidelines presume.”<sup>192</sup> When identical institutional investors hold significant stakes across competing airlines, their interests align with maximizing industry-wide, not individual firm, profits.

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<sup>187</sup> Compl. United States et al. v. JetBlue Airways Corp. and Spirit Airlines, Inc., 2023 WL 10997142 (D. Mass. Mar. 7, 2023). JetBlue’s internal documents confirmed its plan to raise fares post-merger by “at least 24%” and “as high as 40%”. Robert Silk, *Bungled Redactions Reveal JetBlue’s Plan to Increase Spirit Fares*, TRAVEL WEEKLY (Aug. 24, 2023), <https://www.travelweekly.com/Travel-News/Airline-News/Bungled-redactions-reveal-JetBlue-s-plan-to-increase-Spirit-fares>

<sup>188</sup> Letter from Accountable.US et al. to Asst. Atty Gen’l Jonathan Kantor and Dep’t of Transp. Secretary Pete Buttigieg (Dec. 18, 2023), available at <https://www.economicliberties.us/wp-content/uploads/2023/12/2023-12-18-Alaska-Air-Hawaiian-Air-Merger-Letter-.pdf>.

<sup>189</sup> See e.g., Einer Elhauge, *How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It*, 10 HARV. BUS. L. REV. 207, 213-14, 217-19, 239-44 (2020); Alex Haerang Park & Kyoungwon Seo, *Common Ownership and Product Market Competition: Evidence from the U.S. Airline Industry*, 48 KOREAN J. FIN. STUD. 617 (2019).

<sup>190</sup> See e.g., Elhauge, *supra* note 183, at 217.

<sup>191</sup> PRIMECAP owned 6.64%, BlackRock, Inc. owned 5.44%, and State Street Corporation owned 3.19%. BLACKROCK VANGUARD WATCH (last accessed July 13, 2025), <https://blackrockvanguardwatch.com/>. For Delta Airlines, BlackRock is second, owning 6.23%; State Street Corporation is fourth, owning 3.38%; and PRIMECAP is fifth, owning 3.30%. For United, PRIMECAP is second, with 10% of the shares; BlackRock is third with 6.44%; and State Street is fourth with 3.80%. *Id.*

<sup>192</sup> See, e.g., José Azar et al., *Anticompetitive Effects of Common Ownership* 54 (Ross Sch. of Bus., Working Paper No. 1235, 2015), <http://ssrn.com/abstract=2427345>.

The result: higher prices,<sup>193</sup> lower service quality,<sup>194</sup> increased cancellation rates,<sup>195</sup> and longer delays.<sup>196</sup>

Common ownership fundamentally alters the competitive baseline from which regulators should assess proposed transactions. Rather than evaluating whether a merger between independent competitors will create coordination risks, regulators should recognize that coordination incentives already exist through shared ownership structures. This ownership pattern creates a “soft cartel” effect where competition is muted not through explicit agreements but through aligned ownership incentives.

This reality demands a significantly lower threshold for blocking airline mergers. Even modest concentration increases can tip already-aligned firms toward more explicit coordination. The DOJ’s failure to account for common ownership—combined with narrow market definitions—allowed for airline mergers with obvious and documented anticompetitive effects.

### C. *The DOJ Has Botched the Horizontal Effects Balancing Test*

Beyond market definition missteps and overlooked coordinated effects, the DOJ’s efficiency analysis has enabled a wave of anticompetitive airline mergers. Once regulators establish a prima facie case that a merger may substantially lessen competition, firms have two options. They can either demonstrate that merging would not produce anticompetitive effects (often by challenging the market definition) or prove that “extraordinary efficiencies” will offset anticompetitive effects.<sup>197</sup> This efficiency defense rests on simple logic: absent efficiency gains, horizontal mergers typically increase prices and warrant blocking.<sup>198</sup>

Courts remain divided on whether the Supreme Court has even authorized an efficiency defense.<sup>199</sup> Yet the DOJ routinely credits it to approve questionable mergers.<sup>200</sup> Even assuming such a defense exists, the agency has fundamentally misapplied it.

<sup>193</sup> See, e.g., *id.*

<sup>194</sup> See *Airlines & Monopoly*, Open Markets: Anti-Monopoly Basics (last accessed July 13, 2025), <https://www.openmarketsinstitute.org/learn/airlines-monopoly>.

<sup>195</sup> OFFICE OF INSPECTOR GENERAL, CR-2014-040 REDUCTIONS IN COMPETITION INCREASE AIRLINE FLIGHT DELAYS AND CANCELLATIONS 2 (Apr. 23, 2014) (finding “when competition declined, cancellation rates increase to an extent that was both highly statistically significant and substantial in size.”).

<sup>196</sup> See *id.* (finding a 25% increase in length of delays when airlines operate in a concentrated ownership market).

<sup>197</sup> Fed. Trade Comm’n v. Hackensack Meridian Health, Inc., 30 F.4th 160, 175 (3d Cir. 2022).

<sup>198</sup> Nancy L. Rose & Jonathan Sallet, *The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting It Right*, 168 U. PA. L. REV. 1941, 1954 (2020).

<sup>199</sup> See, e.g., *Saint Alphonsus Med. Ctr. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775, 788-89 (9th Cir. 2015) (“The Supreme Court has never expressly approved an efficiencies defense to a § 7 claim.”); see also *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) (“[p]ossible economics cannot be used a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economics but it struck the balance in favor of protecting competition.”).

<sup>200</sup> See e.g., Moss, *supra* note 212, at 12 (urging “skepticism about projected efficiencies”).

The DOJ has distorted this analysis in three ways. First, it approves risky mergers based on speculative efficiency claims that repeatedly fail to materialize. Second, it allows claims of financial distress to override antitrust analysis. Third, for over three decades, it accepted benefits flowing to different consumers than those harmed by anticompetitive effects—a fundamental analytical error the agency has only recently acknowledged. While earlier merger guidelines allowed out-of-market efficiencies to justify merger approval,<sup>201</sup> the 2023 guidelines eliminated this provision,<sup>202</sup> implicitly recognizing the flawed logic of robbing Peter to pay Paul. However, this belated course correction cannot undo the damage from decades of misguided approvals that concentrated the airline industry based on precisely this faulty reasoning.

### 1. Only Verifiable Efficiencies Can Offset Anticompetitive Harm

Even when courts recognize the defense, they construe it narrowly. Only efficiencies that meet three strict criteria merit consideration. They must be merger-specific—unachievable by either party alone. They must be verifiable—supported by concrete evidence rather than speculation. And they must be pro-competitive—not arising from “anticompetitive reductions in output or service.”<sup>203</sup> Qualifying efficiencies must “enhance the merged firm’s ability and incentive to compete”<sup>204</sup> through concrete improvements like technology transfer or higher output at the same cost level.<sup>205</sup> This high bar prevents companies from using speculative claims to justify anticompetitive consolidation.

Despite these strict legal requirements, the DOJ repeatedly accepted unverified airline efficiency promises. Airlines deploy similar arguments across mergers, claiming “substantial dollar benefits—in the hundreds of millions of dollars—to consumers from creating more single-carrier routes and more frequent service on any single route.”<sup>206</sup> Airlines promise mergers will enable equipment and route network optimization: reducing overlapping flights on identical routes while adding new destinations made viable by the larger combined network accessible through hub airports and diverse fleets.

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<sup>201</sup> See e.g., United States Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 4 (1997) [hereinafter 1997 Merger Guidelines]; 2010 Merger Guidelines, *supra* note 126, at § 10 n.14.

<sup>202</sup> 2023 Merger Guidelines, *supra* note 128, at § n. 71.

<sup>203</sup> 2010 Merger Guidelines, *supra* note 126, at § 10; see also *Hackensack Meridian Health, Inc.*, 30 F.4th at 176; Fed. Trade Comm’n v. IQVIA Holdings Inc., 710 F. Supp. 3d 329, 397 (S.D.N.Y. 2024).

<sup>204</sup> Statement of James J. O’Connell Deputy Assistant Attorney General Antitrust Division, 2008 WL 2061163, at \*4 (May 14, 2008).

<sup>205</sup> Such qualifying efficiencies are distinct from pecuniary efficiencies, including tax gains and the creation of monopsony power, which may result in lower costs but are not real resource savings. Frederick R. Warren-Boulton Director, Economic Policy Office, Antitrust, *Merger Policy and Enforcement at the Antitrust Division: The Economist’s View*, 54 ANTITRUST L.J. 109, 112 (1985).

<sup>206</sup> John Kwoka, *Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice*, AM. ANTITRUST INST. 32 (Oct. 9, 2018).

Yet even as courts question the defense's legitimacy and despite the defense's stricture, the DOJ has repeatedly accepted unverified efficiency promises from airlines. This approach contradicts mounting research casting doubt on claims of merger efficiencies generally.<sup>207</sup>

The 2008 *Delta-Northwest* merger exemplifies the DOJ's credulous approach. Delta and Northwest promoted their \$3.1 billion deal as producing "cost synergies from reduced overhead and improved operational efficiency."<sup>208</sup> The DOJ accepted these claims despite questionable economics. Legacy carriers already operated hub-and-spoke networks that captured available scale economies.<sup>209</sup> Critics warned that expanding such networks risked diminished efficiencies.<sup>210</sup> Yet the DOJ deemed the mere possibility of consumer benefits sufficient.<sup>211</sup>

Post-merger reality exposed these promises as false. Post-merger Delta-Northwest cut airport-pairs by 10%,<sup>212</sup> slashed scheduled departures at Cincinnati/Northern Kentucky International Airport by 63%,<sup>213</sup> and reduced Memphis hub flights by 35%.<sup>214</sup> The promised efficiencies came through output reductions—fewer flights—that harmed the very consumers the merger supposedly helped. Worse, integration costs exceeded projections by 200%, wiping out \$1 billion in promised benefits.<sup>215</sup>

This reveals two fundamental problems with airline efficiency claims. First, airlines achieve "efficiencies" by cutting services rather than improving operations, meaning consumers suffer twice—from reduced competition and reduced service. Second, airlines systematically underestimate integration costs, which directly reduce net consumer benefits. The true consumer benefit equals efficiency gains minus integration costs. When Delta-Northwest's integration costs ballooned and when United and Southwest

<sup>207</sup> Robert H. Lande et. al., *The Forgotten Anti-Monopoly Law: The Second Half of Clayton Act Section 7*, 103 TEX. L. REV. 785, 846 n.264 (2025). ("The most recent scholarly analyses of merger efficiencies also suggests that there should be no efficiencies defense or rebuttal in merger cases.").

<sup>208</sup> Delta, *Delta Air Lines, Northwest Airlines Combining to Create America's Premier Global Airline* (Apr. 14, 2008), <https://ir.delta.com/news/news-details/2008/Delta-Air-Lines-Northwest-Airlines-Combining-To-Create-Americas-Premier-Global-Airline/default.aspx>.

<sup>209</sup> See Severin Borenstein, *Dissipating the Airline Deregulation Dividend: The Decline of Competition at Hub Airports*, 13 CATO R. OF BUS. & GOV'T 69, 67-70 (1990).

<sup>210</sup> See, e.g., AAI, *The Merger of Delta Air Lines & Northwest Airlines: An Antitrust White Paper* (July 10, 2008); Subal C. Kumbhakar, *A Reexamination of Returns to Scale, Density, and Technical Progress in U.S. Airlines*, 57 S. ECON J. 428, 439 (1990) (finding future mergers in the airline industry would not result in economics of scale because such gains were already exhausted).

<sup>211</sup> Ken Heyer, Carl Shapiro, & Jeffrey Wilder, *The Year in Review: Economics at the Antitrust Division, 2008-2009*, 35 REV. IND. ORGAN. 349, 355 (2009). The DOJ's willingness to accept these efficiencies is particularly odd given it dismissed the carriers' other claims of cost efficiencies. See *id.*

<sup>212</sup> See Moss, *supra* note 212, at 11.

<sup>213</sup> This is addition to a loss of jobs for many employees at these airports. Tom Breckenridge, *Northwest-Delta Airline Merger Hurt Hubs, Including In Cincinnati*, THE PLAIN DEALER (Apr. 25, 2010).

<sup>214</sup> 3 U.S. DEP'T OF TRANSP., AVIATION INDUSTRY PERFORMANCE, A REVIEW OF THE AVIATION INDUSTRY, 2008-2011 (DOT Report) (#CC-2012-029) (Sep. 24, 2012).

<sup>215</sup> *Id.*

reported similar overruns,<sup>216</sup> those miscalculations eliminated hundreds of millions of dollars in promised consumer benefits.

Retrospective studies consistently find that airline mergers produce higher prices, reduced service, and poorer quality without offsetting net efficiency gains.<sup>217</sup> Despite having access to decades of evidence quantifying these harms,<sup>218</sup> the DOJ continues accepting speculative efficiency claims without consistently scrutinizing either the nature of claimed efficiencies or the integration costs that reduce those benefits.

The agency's recent inconsistency compounds this failure. In 2024, the DOJ vigorously challenged JetBlue's network synergy claims in its Spirit merger. The proposed deal would have eliminated Spirit as a head-to-head competitor with JetBlue and other airlines. The DOJ urged "skepticism" for the firms' efficiency defense given the lack of supporting evidence.<sup>219</sup>

Yet the agency simultaneously approved *Alaska-Hawaiian*, the very next merger, with zero conditions.<sup>220</sup> The DOJ's brief skepticism evident in *Spirit/JetBlue* had evaporated entirely. Though the DOJ provided no formal comment, this approval suggests the agency accepted promises that increased service would offset the harm from giving Alaska a 40% capacity share on Hawaii-U.S. mainland routes and eliminating competition on at least 12 specific routes.<sup>221</sup> On three routes, the two airlines were the only competitors. By approving this merger, the DOJ guaranteed total elimination of consumer choice on 25% of overlapping routes.<sup>222</sup> Ironically, given its own history of antitrust failure, the DOT—not the DOJ—demanded concessions to maintain service levels on interisland routes.<sup>223</sup>

<sup>216</sup> *Id.*

<sup>217</sup> See, e.g., Kai Huschelrath & Kathrin Muller: *The Competitive Effects of Firm Exit: Evidence from the U.S. Airline Industry*, 2 *ECONS. OF TRANSP.*, 72, 72 (2013) (analyzing six U.S. airline mergers between the late 1990s and 2008 and finding price increases between 3-6% depending on the post-merger time frame); Moss, *supra* note 212, at 12 (discussing post-merger service reductions); Julia Gonzalez et al., *Mergers and Organization Disruption: Evidence from the U.S. Airline Industry*, 33 *J. ECONS. & MGMT. STRATEGY* 111, 111 (2024) ("a merger can reduce the performance of both merging firms"); Adams B. Steven et al., *Mergers and Service Quality in the Airline Industry: A Silver Lining for Air Travelers?*, 89 *TRANSP. RSCH. PART E: LOGISTICS & TRANSP. REV.* 1, 1 (2016) ("recent mergers in the US, including Delta and Northwest, United and Continental, Southwest and AirTran, have likely resulted in increased market concentration and decreased service levels"). *But see* Jeffrey T. Prince & Daniel H. Simon, *The Impact of Mergers on Quality Provision: Evidence From the Airline Industry*, *LXV J. INDUS. ECONS.* 336, 336 (June 2017) (finding minimal negative impact on on-time performance post mergers).

<sup>218</sup> See, e.g., Severin Borenstein, *Hubs and High Fares: Dominance and Market Power in the U.S. Airline Industry*, 20 *RAND J. OF ECONS.* 344-365 (1989).

<sup>219</sup> Pls.' Post-Trial Br., *United States et al. v. JetBlue Airways Corp. and Spirit Airlines*, 2023 WL 9111116 (D. Mass.). The DOJ's complaint in the 2013 American-US Airways merger hints towards recognition of the error in their ways. See *Am. Compl., United States v. US Airways Grp., Inc.*, No. 1:13-cv-01236 (D.D.C. Sept. 5, 2013); see also Justin Elliott, *The American Way*, *PROPUBLICA* (Oct. 11, 2016), <https://www.propublica.org/article/airline-consolidation-democratic-lobbying-antitrust>.

<sup>220</sup> Robert Silk, *The DOJ Didn't Challenge the Alaska-Hawaiian Merger. What Will the DOT Do?*, *Travel Weekly* (Aug. 23, 2024).

<sup>221</sup> See *id.*

<sup>222</sup> See *id.*

<sup>223</sup> U.S. Dep't of Transport., *USDOT Requires Alaska & Hawaiian Airlines to Preserve Rewards Value, Critical Flight Service as Merger Moves Forward* (Sept. 17, 2024).

The record reveals a triple failure. The DOJ has credited a legal defense that may not be judicially recognized. It has done so in service of claims that are consistently proven false. And it has adopted a more credulous approach than courts operating within the same legal framework.<sup>224</sup> This pattern suggests that efficiency considerations in airline mergers serve not as legitimate analytical tools but as convenient justifications for approving anticompetitive consolidation.

## 2. The Misuse of the Failing Firm Defenses

The DOJ's willingness to accept speculative efficiency claims becomes even more troubling when combined with its lenient treatment of financially distressed airlines. The failing firm defense permits otherwise anticompetitive mergers only when a company faces imminent cessation, cannot reorganize successfully, and no less harmful alternatives exist.<sup>225</sup> Courts apply this standard strictly to prevent abuse—companies deliberately weakening themselves, or competitors allowing rivals to deteriorate to justify acquisitions.<sup>226</sup>

The DOJ abandoned this rigor. In 2001, the DOJ approved the *TWA/American Airlines* merger based solely on a bankruptcy court's finding that TWA faced "dire financial" straits. In doing so, the DOJ faced a clear test case. When Carl Icahn, TWA's former majority owner, submitted a competing bid, the agency conducted no meaningful analysis of whether his offer might preserve competition more effectively than American's acquisition.<sup>227</sup> The DOJ simply deferred to American's preferred structure,<sup>228</sup> contradicting its own merger guidelines' requirement of a thorough examination of alternatives.<sup>229</sup>

This lenient approach has expanded beyond failing firms to airlines facing routine financial difficulties. *United-Continental* and *American-US Airways* both used identical reasoning: merger was necessary to reduce costs and compete effectively.<sup>230</sup> Yet, it is unclear whether any of these companies truly met the definition of a failing firm. After all, United had just emerged from

<sup>224</sup> See Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 741 (2017) ("Evidence of efficiencies has rarely succeeded in rebutting an accepted prima facie case of illegality."); Brian Facey, Navin Joneja, Paul Cuomo, Jeffrey Oliver, *Mind the Gap: Merger Efficiencies in the United States and Canada*, ANTITRUST 64, 66 (Spring 2018) ("In the United States, the efficiencies defense generally lands like a dubious alibi--necessarily considered but very seldom credited [by the judiciary].")

<sup>225</sup> See, e.g., 2010 Merger Guidelines, *supra* note 126, at 32.

<sup>226</sup> See generally *id.* at § 11.

<sup>227</sup> *In re Trans World Airlines, Inc.*, No. 01-00056(PJW), 2001 WL 1820326, at \*10 (Bankr. D. Del. Apr. 2, 2001).

<sup>228</sup> *Id.* at \*1.

<sup>229</sup> See, e.g., Ian Conner, *On "Failing" Firms -- and Miraculous Recoveries*, FED. TRADE COMM'N. (May 27, 2020), <https://www.ftc.gov/enforcement/competition-matters/2020/05/failing-firms-miraculous-recoveries>.

<sup>230</sup> Press Release, Dep't. of Just., United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice's Antitrust Concerns (Aug. 27, 2010) (<https://www.justice.gov/opa/pr/united-airlines-and-continental-airlines-transfer-assets-southwest-airlines-response>).

bankruptcy.<sup>231</sup> The DOJ accepted these claims anyway, creating dangerous precedent.

The agency ignores industry realities that undermine its analysis. Ninety-two percent of firms continue operations following bankruptcy.<sup>232</sup> Airlines routinely use bankruptcy not because they are about to go under, but to restructure debt and reduce labor costs while remaining viable.<sup>233</sup> Many airlines that filed for bankruptcy since 2000 continue to thrive today.<sup>234</sup>

Financial distress merits consideration—bankrupt airlines can liquidate assets, leaving customers without service.<sup>235</sup> But the DOJ's cursory review resurrects the CAB's discredited framework of protecting competitors rather than competition.

### 3. Procompetitive Effects Must Benefit Harmed Consumers

Beyond accepting speculative efficiency claims and misusing financial distress arguments, the DOJ committed a third fundamental error from 1997 to 2023. During this three-decade period, the agency's merger guidelines allowed verifiable efficiencies to justify mergers even when they benefited different consumers than those facing reduced competition—despite contrary judicial precedent requiring that efficiency benefits accrue to the same consumers facing competitive harm.<sup>236</sup> This fundamental mismatch between the DOJ's permissive guidelines and established legal standards violated basic principles of consumer protection by forcing some customers to subsidize theoretical gains for others.

The 2013 *US Airways-American* merger illustrates this fundamental error. The DOJ initially challenged the merger with considerable fanfare,<sup>237</sup>

<sup>231</sup> Associated Press, *United Airlines Finally Flies Out of Bankruptcy*, NBC (Feb. 1, 2006), <https://www.nbcnews.com/id/wbna11126203>.

<sup>232</sup> *Airline Transportation Bankruptcy Enterprise Values & Creditor Recoveries: 2025 Fitch Case Studies*, FITCH RATINGS: SPECIAL REP. (Feb. 20, 2025), <https://www.fitchratings.com/research/corporate-finance/airline-transportation-bankruptcy-enterprise-values-creditor-recoveries-2025-fitch-case-studies-20-02-2025>.

<sup>233</sup> *Operational Disruptions & High Leverage Drive Recent US Airline Bankruptcies*, FITCH RATINGS (Feb. 20, 2025, 1:30 PM), <https://www.fitchratings.com/research/corporate-finance/operational-disruptions-high-leverage-drive-recent-us-airline-bankruptcies-20-02-2025>.

<sup>234</sup> See *Spirit Airlines Emerges from Financial Restructuring, Better Positioned to Advance Its Transformation and Enhanced Guest Experience*, *SPIRIT: NEWS* (March 12, 2025), <https://ir.spirit.com/news/news-details/2025/Spirit-Airlines-Emerges-from-Financial-Restructuring-Better-Positioned-to-Advance-its-Transformation-and-Enhanced-Guest-Experience/default.aspx>; *Delta Air Lines Exits Chapter 11 Stronger and Better Positioned for New Era of Competition*, *DELTA: NEWS* (April 30, 2007), <https://ir.delta.com/news/news-details/2007/Delta-Air-Lines-Exits-Chapter-11-Stronger-and-Better-Positioned-for-New-Era-of-Competition/default.aspx>.

<sup>235</sup> See Henry Epp, *A Brief History of Airline Bankruptcies*, *MARKETPLACE* (Nov. 21, 2024), <https://www.marketplace.org/story/2024/11/21/a-brief-history-of-airline-bankruptcies>.

<sup>236</sup> See, e.g., *FTC v. Cardinal Health, Inc.* (D.D.C. 1998) (finding even if the merger created efficiencies in some markets, those benefits had to accrue to consumers in the specific markets where competition would be reduced); *FTC v. University Health, Inc.* (11th Cir. 1991) (emphasizing efficiencies in one geographic market cannot offset competitive harm in another).

<sup>237</sup> DOJ, Justice Department Files Antitrust Lawsuit Challenging Proposed Merger Between US Airways and American Airlines (Aug. 13, 2013),

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warning of “hundreds of millions of dollars of harm to consumers”<sup>238</sup> affecting 1,000 city pairs and 14 million passengers.<sup>239</sup> For Dallas to Charlotte, alone, the post-merger HHI exceeded 9000, and the post-merger change in concentration was 4648.<sup>240</sup>

The DOJ’s challenge was lauded as one of the strongest Clayton Act cases in decades.<sup>241</sup> However, after several months, the DOJ capitulated to a consent decree requiring limited slot divestitures at seven airports.<sup>242</sup> The settlement’s fatal flaw: remedies addressed only markets where both carriers competed pre-merger.

In overlooked potential competition markets—served by one carrier but where the other could enter—consumers faced permanent loss of their only credible competitive threat. These markets were twice as numerous as overlap routes<sup>243</sup> yet received zero protection. As a New York Times editorial observed, “In agreeing to the merger, the department seems to have forgotten the crucial arguments it made in its suit.”<sup>244</sup>

Under the Tunney Act,<sup>245</sup> courts must determine whether proposed consent decrees serve ‘the public interest’—a standard requiring meaningful scrutiny of whether remedies actually address competitive harms.<sup>246</sup> The settlement should have failed. Post-merger results confirmed the mismatch between harms and remedies. In overlap markets, prices rose 3.2% and flight options decreased by 4.3%.<sup>247</sup> In potential competition markets, the results were more dire. There, consumers endured 4.3% higher prices and 6.3% service reductions.<sup>248</sup> Any efficiency gains flowed elsewhere—if they materialized at all.

The fundamental problem extends beyond inadequate remedies to a complete mismatch between harms and benefits. American closed St. Louis Lambert after merging with TWA;<sup>249</sup> Delta downgraded Cincinnati after

<https://www.justice.gov/archives/opa/pr/justice-department-files-antitrust-lawsuit-challenging-proposed-merger-between-us-airways-and>

<sup>238</sup> *Id.*

<sup>239</sup> G. Steven Olley & Robert Town, *End of an Era: The American Airlines-U.S. Airways Merger*, in *THE ANTITRUST REVOLUTION* 453 (2013).

<sup>240</sup> Proposed Final J. & Competitive Impact Stmt., *United States v. US Airways Group and AMR Corp.*, Case:1:13-cv-01236 (D.D.C. Nov. 17, 2013), ECF 147-2. Under any merger guidelines, a HHI of 9,000 would constitute extreme concentration.

<sup>241</sup> See Michelle Chan, *Politics in the American Airlines-U.S. Airways Merger and Antitrust Settlement*, 20 *FORDHAM J. OF CORP. & FIN. LAW* 175, 193 (2014).

<sup>242</sup> *Id.*

<sup>243</sup> See Huubinh B. Le, *An Ex Post Analysis of the U.S. Airways/American Airlines Merger*, 11 *REV. ECON. ANALYSIS* 383, 384 (2019).

<sup>244</sup> Opinion, *An Unwise Airline Merger*, *NY TIMES* (Nov. 13, 2013); *Baffling About-Face in American-US Airways Merger*, *NY TIMES* (Nov. 11, 2013).

<sup>245</sup> 15 U.S.C. § 16(b). The Tunney Act applies to “[a]ny proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws.” *Id.*

<sup>246</sup> 15 U.S.C. § 16(e).

<sup>247</sup> *Id.* at 388.

<sup>248</sup> *See id.*

<sup>249</sup> Brent Hisel, *The Last Day of TWA*, *MEDIUM* (July 15, 2023); Jace Moseley, *The Near Death and Resurgence of St. Louis International Airport*, *AIRLINE GEEKS* (Aug. 7, 2017).

merging with Northwest;<sup>250</sup> United dehubbed Cleveland after merging with Continental;<sup>251</sup> and Northwest closed Memphis operations after merging with Delta.<sup>252</sup> Time and again, communities lost service entirely while any network benefits accrued to different markets.

The DOJ's historical approach transformed antitrust enforcement from consumer protection into an elaborate shell game where benefits and harms never aligned. While the 2023 guidelines finally eliminated consideration of out-of-market efficiencies,<sup>253</sup> the damage was already done.

Even if the DOJ brings future challenges, such efforts may still do little to stem the rising tide of consolidation. The DOJ's analytical failures—from artificially narrow market definitions to downplaying coordinated effects to credulous acceptance of speculative efficiency claims—enabled a wave of consolidation that transformed nine competing airlines into a four-firm oligopoly. Until the agency abandons its deferential approach, airline mergers will continue concentrating market power at consumers' expense. While it is unclear how much can be done to reverse the tide, action can be

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<sup>250</sup> Tom Breckenridge, *Northwest-Delta Airline Merger Hurt Hubs, including in Cincinnati*, THE PLAIN DEALER (Apr. 25, 2010); Jace Moseley, *The Death and Rebirth of Memphis (MEM) and Cincinnati (CVG)*, AIRLINE GEEKS (June 14, 2017).

<sup>251</sup> *Cleveland, State Assessing Loss of United Hub*, CBS MONEY WATCH (Feb. 3, 2014).

<sup>252</sup> Ben Mutzabaugh, *Delta to Pull Plug on Memphis Hub after Labor Day*, USA TODAY (June 4, 2013). The American Antitrust Institute warned this closure could occur if the merger went forward. DIANA MOSS, THE MERGER OF DELTA AIR LINES AND NORTHWEST AIRLINES: AN ANTITRUST WHITE PAPER (July 10, 2008) ("Some of the smaller hubs such as Cincinnati, Indianapolis, and Memphis that are situated geographically between the larger hubs might eventually be eliminated or scaled back. All of this would come at a cost to consumers in the form of higher fares, lower service quality, and less choice.").

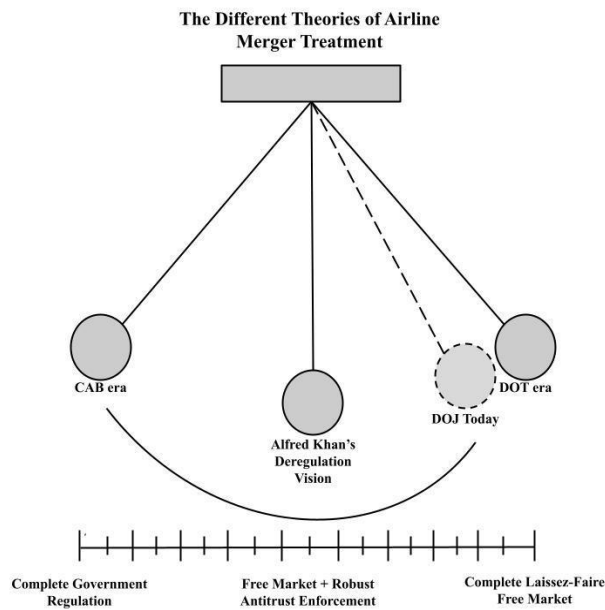
<sup>253</sup> 2023 Merger Guidelines, *supra* note 128, at § n. 71.

taken to at least change course. Part III examines what meaningful reform would require.

Figure 3

III. THE ROUTE FORWARD

As Part II exposed, the DOJ’s approach to merger analysis in the airline industry has left consumers worse off. Airlines continue reporting billions in profits while consumers feel the impact of reduced competition.<sup>254</sup> This Part begins by recommending the antitrust moonshot solution: break up the



airlines. It explains how the renewed interest in breaking up monopolies should extend to this oligopoly. This proposal is tempered, though, given there may not be sufficient political will to make this move. Given this practicality, this Part then provides a series of solutions to reform the airline industry as it currently stands. These solutions will not undo damage caused by years of failed merger oversight; rather, they serve to stave off further harm.

<sup>254</sup> *U.S. Airlines Net Profit was \$6.7 Billion in 2024, a Decrease Over 2023* BUREAU OF TRANSP. STAT.: NEWSROOM (May 13, 2025), <https://www.bts.gov/newsroom/us-airlines-net-profit-was-67-billion-2024-decrease-over-2023#:~:text=U.S.%20scheduled%20passenger%20airlines%20reported,operating%20profit%20of%20%2413.5%20billion.>

### A. *The Case for Breaking up the U.S. Airline Oligopoly*

The persistent pattern of coordinated output and pricing detailed in Part II demonstrates limited remedies have failed to address the fundamental market structure enabling anticompetitive conduct.<sup>255</sup> The time has come to consider the ultimate antitrust remedy: breaking up the airline oligopoly.

Courts possess equitable power to impose structural remedies to antitrust violations.<sup>256</sup> While market power alone does not violate antitrust law, proof of impermissible trade restraint can justify dramatic intervention. This includes industry break-ups that create new market participants or enable existing competitors to compete more effectively.<sup>257</sup>

The airline industry's history of recidivism reinforces the need for structural intervention. Airlines that have colluded before typically do so again; decades of allegations suggest that behavioral remedies are inadequate deterrents.<sup>258</sup> Recent developments confirm this pattern continues. New evidence suggests airlines may now use artificial intelligence to facilitate actionable collusion.<sup>259</sup> Ongoing private litigation alleges pricing collusion between American Airlines and JetBlue.<sup>260</sup> These cases represent a critical juncture; regulators should pursue fundamental structural change rather than the limited remedies imposed to date.<sup>261</sup>

The market structure data supports breaking up this oligopoly. As of 2015, one or two airlines controlled the majority of seats at 93 of the 100 largest U.S. airports, with a single airline dominating total domestic passenger traffic at 40 airports.<sup>262</sup> More troubling than concentration alone, the industry has become characterized by a race-to-the-bottom in quality of services offered. Unlike other oligopolies that compete on quality while maintaining price

<sup>255</sup> The failure of merger remedies is not limited to the airline industry. *See, e.g.*, Federal Trade Commission, A Study of the Commission's Divestiture Process (1999), available at <http://www.ftc.gov/os/1999/08/divestiture.pdf>; John E., Kwoka, *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78. ANTITRUST L.J. 619 (2013) (discussing how structural and behavioral remedies only partially address merger harm).

<sup>256</sup> 15 U.S.C. § 4

<sup>257</sup> *See, e.g.*, Roray Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955, 1987-89 (2020) (detailing the benefits of antitrust breakups).

<sup>258</sup> *See, e.g.*, Victoria Tozer-Pennington, *American Airlines Settle Fare Collusion Lawsuit*, AVIATION NEWS (June 19, 2018), <https://aviationnews-online.com/public/article/american-airlines-settle-fare-collusion-lawsuit>; Martin Tolchin, *Six Airlines Settle Suit by Government on Fares*, NY TIMES (Mar. 18, 1994), <https://www.nytimes.com/1994/03/18/business/six-airlines-settle-suit-by-government-on-fares.html>; cf. William E. Kovacic et al., *Serial Collusion by Multi-Product Firms*, 6 J. Antitrust Enforcement 296, 302 (2018) ("A history of serial collusion should also be used by enforcement agencies when deciding whether to launch price fixing investigations and especially when reviewing mergers that could facilitate future cartel activity.")

<sup>259</sup> *See* Myongjin Kim et al., *Algorithmic Collusion in the Skies: The Role of AI in Shaping Airline Competition* (January 13, 2025), available at <https://ssrn.com/abstract=5208737>.

<sup>260</sup> *In re American Airlines/JetBlue Antitrust Litigation*, No. 1:22-cv-07374 (E.D.N.Y. 2024).

<sup>261</sup> *See* Joseph E. Harrington, *A Proposal for a Structural Remedy for Illegal Collusion*, 82 ANTITRUST L.J. 335, 340 (2018) ("Past collusion in a market could be the basis for an inquiry and for a structural remedy.")

<sup>262</sup> *See Airlines & Monopoly*, *supra* note 188.

discipline, airlines have systematically degraded service while maintaining competitive pricing—the worst of both worlds for consumers.

In a restructured airline industry, coordination tools between carriers should be systematically dismantled unless they prove clear consumer benefits. Airlines currently use two primary coordination mechanisms: (1) alliances that coordinate schedules, share revenues, and jointly market flights; and (2) code-sharing arrangements that allow airlines to sell seats on each other’s flights under their own flight numbers. These tools facilitate market coordination and should be dulled, unless airlines can demonstrate genuine consumer benefits.<sup>263</sup>

Regulators should adopt a surgical approach, preserving only elements that demonstrably lower fares or enhance service quality. Reciprocal frequent flyer programs and coordinated connections between complementary routes serving passengers can remain. However, revenue-sharing and market coordination, features of airline alliances, should go.<sup>264</sup>

Contemporary antitrust scholarship increasingly supports structural remedies for such concentrated markets. While the Chicago School historically dismissed oligopoly concerns,<sup>265</sup> the Neo-Brandeis movement advocates structural remedies to address concentrated market power.<sup>266</sup> This intellectual shift provides support for aggressive enforcement,<sup>267</sup> backed by empirical evidence that structural remedies more effectively curb future price increases than behavioral ones.<sup>268</sup>

Even conservative antitrust frameworks support intervention here. Robert Bork, architect of modern deregulation theory, distinguished between monopolies resulting from superior efficiency and those created through

<sup>263</sup> See, e.g., Nicole Adler & Eran Hanany, *Regulating Inter-Firm Agreements: The Case of Airline Codesharing in Parallel Networks*, 84 *TRANSP. RSCH.* 31, 32, 34 (discussing how the competitive risks and benefits of codesharing and alliance agreements depend on market structure).

<sup>264</sup> The proposal here is to expand antitrust scrutiny to ensure alliances and code sharing agreements are reviewed from a competition perspective, rather than the limited “public interest” scrutiny currently provided by the DOT for such agreements. See 49 U.S.C. § 41309.

<sup>265</sup> Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 *U. PA. L. REV.* 2145, 2155 (2020) (discussing “the Chicago School’s price-theoretically influenced belief that absent collusion, oligopoly would pose a problem only at high levels of concentration”). For a thorough discussion of structural remedies to break up monopolies and consummated mergers, see Hiba Hafiz, *Rethinking Breakups*, 71 *DUKE L.J.* 1491, 1509-1515 (2022).

<sup>266</sup> Phil C. Neal et al., *Report of the White House Task Force on Antitrust Policy 2* reprinted in 2 *ANTITRUST L. & ECON. REV.* 11 (1968-1969) [hereinafter *Neal Report*].

<sup>267</sup> See, e.g., ZEPHYR TEACHOUT, *BREAK ‘EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY* 12 (2020) (“we should be stopping mergers, breaking up big corporations, regulating aspects of big tech as a public utility” and “demanding that states and the federal government use their existing power to regulate and investigate the corporate usurpers”); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* 15 (2018) (arguing antitrust law should address “the rule of concentrated oligopolies and monopolies, in industries like finance, media, airlines, and telecommunications, just to name the most obvious—firms whose size allows them to treat customers and competitors with impunity”).

<sup>268</sup> See, e.g., JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* 120 (2014) [hereinafter *MERGER CONTROL*]; Steven C. Salop, *Modifying Merger Consent Decrees to Improve Merger Enforcement Policy*, *ANTITRUST* 15, 18 (Fall 2016); Spencer Weber Waller, *The Past, Present, and Future of Monopolization Remedies*, 76 *ANTITRUST L.J.* 11, 15 (2009).

merger.<sup>269</sup> The airline industry represents the latter—an oligopoly by merger rather than innovation.

Breaking up the airline oligopoly would address three critical structural barriers. First, the industry’s reliance on limited airport slots and gates creates natural barriers to entry—exploitable by incumbents through dominant hub positions. Structural separation would redistribute these infrastructure assets, enabling more effective competition by providing new entrants and smaller carriers access to previously monopolized facilities.

Second, large airlines’ hub-and-spoke systems create network effects that systematically disadvantage smaller competitors.<sup>270</sup> These advantages—where an airline’s service value increases with destinations served—become self-reinforcing, making it nearly impossible for point-to-point carriers to compete on routes dominated by hub carriers.

While defenders of the current system would argue that hub networks provide greater destination variety at lower cost, this apparent efficiency masks several problems. Hub systems often force passengers into circuitous routings that add hours to journeys where direct service would be more efficient. Moreover, the “lower costs” on competitive routes are frequently subsidized by monopoly profits extracted from captive passengers on spoke routes—cross-subsidization that represents market manipulation rather than genuine efficiency. The dominance of entrenched hub carriers prevents the emergence of potentially more efficient point-to-point networks that could better serve consumer needs.<sup>271</sup> Structural separation weakens these self-reinforcing advantages and enables the development of more efficient routing patterns that prioritize passenger convenience over carrier market control.

Third, consolidation has created monopsony power in specialized labor markets, particularly for pilots and mechanics.<sup>272</sup> This concentrated buying power suppresses wages and working conditions in ways that ultimately degrade service quality. Breaking up major airlines would increase labor market competition, potentially improving both working conditions and service quality as airlines compete for skilled workers.

Critics would likely argue that a break-up would be too “radical,”<sup>273</sup> risking operational efficiency and international competitiveness.<sup>274</sup> However, these

<sup>269</sup> See ROBERT H. BORK, *THE ANTITRUST PARADOX* 178 (1978).

<sup>270</sup> See Eric Pels, *Optimality of the Hub-Spoke System*, 104 *TRANSPORT. POL’Y* A1, A1-A2 (2021) (detailing how hub-spoke systems impact smaller airlines).

<sup>271</sup> Anming Zhang, *An Analysis of Fortress Hubs in Airline Networks*, 293 *J. TRANSPORT. ECON. & POL’Y* 293, 293 (1996) (discussing how hub-and-spoke networks advantage dominant airlines).

<sup>272</sup> See Myongjim Kim et al., *Mergers and Labor Market Outcomes in the U.S. Airline Industry*, 39 *CONTEMP. ECON. POL’Y* 849, 850 (2021) (examining airline mergers’ harm to labor markets).

<sup>273</sup> See, e.g., *United States v. Microsoft*, 253 F.3d 34, 80 (D.C. Cir. 2001) (“[W]isdom counsels against radical structural relief.”).

<sup>274</sup> See, e.g., Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, *Antitrust*, Summer 2021, at 33, 42–43 (“Breaking up successful, efficient, and innovative companies merely because they have grown too large or powerful is antithetical to the competitive process....”).

concerns must be weighed against documented consumer harm from the current structure. Moreover, the industry's poor service record suggests that current scale advantages, if they exist, are not benefiting consumers.

Others might question the pragmatism of this proposal, given courts' historical reluctance to break up oligopolies.<sup>275</sup> Yet judicial resistance represents a practical challenge, not a legal barrier. Courts show greater willingness to consider dramatic relief when presented with clear evidence of persistent anticompetitive conduct and failed remedies.<sup>276</sup> Moreover, support for corporate break-ups currently enjoys bipartisan backing<sup>277</sup>—suggesting legislative action could be feasible if courts fail to act.<sup>278</sup>

### B. *How to Realign Merger Analysis*

A breakup is needed in the airline industry. But even while pursuing that ultimate remedy, regulators can act immediately. They can minimize harm from future mergers by retooling merger analysis.

The first step is addressing Part II's identified shortcomings by ensuring regulators consider all dimensions of competitive harm and apply appropriate skepticism to efficiency claims. The foundation lies in proper market definition. Current approaches narrowly focus on city-pair competition and miss the full scope of anticompetitive harm.<sup>279</sup> Market definition should begin with consumer preferences and travel patterns. Some passengers view multiple routing options and connection possibilities as substitutes, while others prioritize direct flights or specific airports. Regulators should look beyond fiscal impact to consider route reduction, as well.<sup>280</sup> Considering consumer preference provides a more complete picture of the anticompetitive harm of the merger.<sup>281</sup> A consumer-centric approach would reveal broader competitive relationships obscured by traditional city-pair analysis.

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<sup>275</sup> See, e.g., Kenneth M. Davidson, *The Competitive Significance of Segmented Markets*, 71 CAL. L. REV. 445, 460–61 (1983) (discussing the judicial reticence towards breaking up oligopolies); Hafiz, *supra* note 255, at 1514 (“The Bush and Obama administrations were reluctant to pursue divestiture remedies, likely in part due to court hostility to imposing them.”).

<sup>276</sup> See, e.g., *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 62 (D.D.C.), *appeal denied, cause remanded*, 530 U.S. 1301 (2000), and *vacated and remanded*, 253 F.3d 34 (D.C. Cir. 2001); *United States v. AT&T*, 552 F. Supp. 131, 163 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>277</sup> This political unity is focused primarily on Big Tech. See, e.g., Lindsey Graham & Elizabeth Warren, *When It Comes to Big Tech, Enough is Enough*, NY TIMES (July 27, 2023), <https://www.washingtonpost.com/politics/2025/04/03/maga-antitrust-republicans-big-tech-ferguson-lee/>.

<sup>278</sup> Hafiz, *supra* note 255, at 1516 (“This emerging consensus across the political spectrum in favor of breakups portends meaningful changes in remedial antitrust policy, whether through legislation or remedial proposals and decisions by agencies and the courts.”).

<sup>279</sup> See *supra* Part II.A.1 and accompanying notes.

<sup>280</sup> The DOJ has considered consumer price preference. See, e.g., DOJ Press Release, *Justice Department Sues to Block JetBlue's Proposed Acquisition of Spirit* (Mar. 7, 2023), <https://www.justice.gov/opa/pr/justice-department-sues-block-jetblue-s-proposed-acquisition-spirit> <https://www.justice.gov/opa/pr/justice-department-sues-block-jetblue-s-proposed-acquisition-spirit>.

<sup>281</sup> See Amended Complaint at ¶ 29, *United States v. US Airways Grp., Inc.*, No. 1:13-cv-01236 (D.D.C. Sept. 5, 2013).

Take a proposed merger involving a carrier with 10% of the market for flights from New York City to Las Vegas but 35% of the market for flights from La Guardia to Las Vegas specifically. Defining the relevant geographic market as La Guardia to Las Vegas rather than the broader NYC market more accurately assesses market power in an oligopoly structure.

Beyond market definition, anticompetitive effects analysis must include potential competition. The Clayton Act bans mergers that risk substantially lessening competition in *any* relevant market<sup>282</sup> When incumbents eliminate potential competitors through consolidation, they foreclose opportunities that could have constrained market power. Airline merger review has systematically undervalued this future entry impact.

Any proposed merger in this concentrated industry must also rigorously examine coordinated effects. Further consolidation strengthens an already problematic oligopoly. The airline industry's parallel pricing behavior creates a foundation for coordinated conduct that consolidation reinforces.

Coordinated effects risks are strongest among legacy carriers but extend to any consolidation reducing meaningful competitors. Enhanced concentration entrenches tacit coordination, diminishing competition even among non-merging carriers. Competitive harm is multiplied beyond immediate merger participants.

Given existing concentration, broader harm analysis increases the potential damage any merger poses. In highly concentrated markets, even modest competitive losses ripple through the entire industry. This fundamentally shifts the balancing test. Greater potential harm demands both larger efficiency gains and ironclad evidence from merging parties.<sup>283</sup>

Regulators should approach airline efficiency claims with deep skepticism.<sup>284</sup> The industry's track record is dismal; promised merger benefits consistently fail to materialize, while competitive harms prove lasting and severe. Nor is it sufficient for airlines to rely on speculative promises of future market entry. Potential competition fails to discipline the impact of airline mergers.<sup>285</sup> In a market already plagued by coordination, the efficiency bar must be set prohibitively high. Mergers must be blocked unless

<sup>282</sup> See, e.g., *Fed. Trade Comm'n v. Peabody Energy Corp.*, 492 F. Supp. 3d 865, 885 (E.D. Mo. 2020) ("competitive harm in *any* relevant product market is enough to make out a prima facie case for violation of the Clayton Act.")

<sup>283</sup> See 2010 Merger Guidelines, *supra* note 126, at § 10. ("The greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to consumers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market.")

<sup>284</sup> This type of skepticism permeates the DOJ's analysis of hospital mergers. See, e.g., Norman Armstrong, Jr. & Subramaniam Ramanarayanan, *Taking Stock of the Efficiencies Defense: Lessons from Recent Health Care Merger Reviews and Challenges*, 82 ANTITRUST L.J. 579, 583 (2019) ("public statements from the agencies almost always convey a strong sense of skepticism when it comes to evaluating efficiency claims."). Carrying over that same skepticism to the airline industry makes sense given the existing evidence of harm to consumers in the industry.

<sup>285</sup> See, e.g., Darren Bush, *Rethinking the Potential Competition Doctrine*, 2004 Wis. L. REV. 1035, 1116-17 (2004) (discussing how entrenched airlines can expand services to squeeze out new entrants).

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efficiency evidence is overwhelming, and benefits demonstrably outweigh expanded oligopoly risks.

These analytical changes are achievable. The DOJ has adopted broader market definitions and scrutinized efficiency claims in select cases.<sup>286</sup> The key is consistency across all airline merger reviews.

Critics may argue this approach would block all future airline mergers. This concern deserves serious consideration—blocking an entire category of transactions represents a dramatic shift in enforcement policy. Yet the industry’s unique circumstances reflect the necessity of a dramatic shift to produce sound antitrust policy.

The DOJ has systematically underused Section 7’s prophylactic power in aviation, allowing merger after merger despite mounting evidence of competitive dysfunction. Traditional merger analysis assumes some level of healthy competition will persist post-merger. That assumption fails in markets where competition has already been substantially eliminated. In such contexts, a complete moratorium on further consolidation may serve the Clayton Act’s core purpose: preserving competitive market structures.

### C. *Building Comprehensive Antitrust Enforcement*

Relying solely on the DOJ to reinvigorate its merger analysis is not enough. As Part II demonstrated,<sup>287</sup> the DOJ has repeatedly accepted inadequate modifications to proposed airline mergers, resulting in consent decrees that provide only marginal consumer protection while leaving anticompetitive harms largely unaddressed. A course correction will require action by other actors, as well. The judiciary and other regulators also have roles to play.

#### 1. Rejecting Inadequate Airline Merger Settlements

Courts have largely rubber-stamped airline merger consent decrees, abandoning their duty under the Tunney Act to ensure settlements serve “the public interest.”<sup>288</sup> The *American/US Airways* merger approval exemplifies this problematic deference. When approving the DOJ’s consent decree, the district court disregarded empirical evidence from commenters and amici demonstrating that the proposed divestiture would inadequately address anticompetitive harm. The court explicitly stated that “matching between remedies and alleged violations is not required for Tunney Act approval,”<sup>289</sup> effectively abandoning meaningful scrutiny of remedy adequacy. Rather than engaging with this substantive evidence, the court presumed unknown

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<sup>286</sup> For example, in the American-U.S. Airways and JetBlue/Spirit mergers, the DOJ recognized that consumers had a strong preference for flying into a specific airport. The expanded the magnitude of anticompetitive harm the DOJ considered in reviewing the merger.

<sup>287</sup> See *supra* Part II(B)(3) and accompanying footnotes.

<sup>288</sup> 15 U.S.C. § 16(e).

<sup>289</sup> 15 U.S.C. § 16.

weaknesses in the DOJ's case might justify weak remedies. It deemed the settlement reasonable without asking the central question the Tunney Act demands: whether the decree would eliminate potential anticompetitive effects.<sup>290</sup>

The judiciary has shown excessive reluctance to exercise robust Tunney Act oversight. The DC Circuit, for example, claims courts can only reject consent decrees that are “a mockery of judicial power”<sup>291</sup>—a stance that misunderstands judicial capabilities and ignores Congressional intent.<sup>292</sup> Federal enforcement agencies, subject to political pressures and institutional capture, cannot be trusted to serve unchecked as sole guardians of competitive markets.

This is not the first call for more assertive judicial review under the Tunney Act.<sup>293</sup> However, earlier critiques have proven prescient. Inadequate consent decrees continue to enable unprecedented concentration while delivering minimal consumer benefits. When courts accept DOJ settlements without meaningful scrutiny, they enable the market failures antitrust laws were designed to prevent. The public interest standard demands genuine judicial analysis, not reflexive acceptance of prosecutorial choices that may reflect political compromise rather than competitive necessity.<sup>294</sup> Courts must reclaim their proper role as independent arbiters, determining whether remedies adequately serve competition and consumers. Congress already strengthened the Tunney Act in 2004 to enhance judicial oversight,<sup>295</sup> but courts have continued exercising excessive deference.<sup>296</sup> If courts persist in abdicating this responsibility, Congress must intervene with additional legislative measures mandating more rigorous judicial scrutiny.

The need for action is particularly acute at this juncture. Mounting economic evidence confirms that past airline merger settlements have failed to prevent consumer harm, with passengers facing higher fares,<sup>297</sup> reduced

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<sup>290</sup> *Id.*

<sup>291</sup> *See, e.g.,* United States v. Microsoft, 56 F.3d 1148, 1462 (D.C. Cir. 1995); Mass. School of Law at Andover, Inc. v. United States, 118 F.3d 776, 783 (D.C. Cir. 1997).

<sup>292</sup> The 2004 amendment was, in part, to push back against the D.C. Circuit's overly deferential stance. *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub.L. No. 108-237, § 221 (a)(1)(B), 118 STAT. 668.

<sup>293</sup> *See, e.g.,* Darren Bush, *The Death of the Tunney Act at the Hands of the Activist D.C. Circuit*, 63 ANTITRUST BULL. 113, 136 (2018).

<sup>294</sup> *See, e.g.,* Michelle Chan, *Politics in the American Airlines-U.S. Airways Merger and Antitrust Settlement*, 20 FORDHAM J. CORP. & FIN. L. 175, 195-200 (2014).

<sup>295</sup> *See* 15 U.S.C. § 16(e)(1) (as amended) (listing specific factors for judicial consideration).

<sup>296</sup> For example, the D.C. Circuit maintains the amendment “effected minimal changes, and that [the] scope of review remains sharply proscribed....” United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1, 11 (D.C. Cir. 2007).

<sup>297</sup> *See, e.g., supra* note 210 (listing studies).

service quality,<sup>298</sup> and diminished choice.<sup>299</sup> The airline industry’s network structure—where hub dominance creates significant barriers to entry<sup>300</sup>—means that inadequate merger remedies have particularly durable anticompetitive effects. Courts should not defer to settlements that fail to protect consumers from these effects.<sup>301</sup>

Courts possess substantial procedural authority to conduct evidentiary hearings, take expert testimony, authorize amici, and permit intervention.<sup>302</sup> While courts cannot substitute their preferred remedies for those negotiated by the parties or demand relief beyond the complaint’s scope,<sup>303</sup> they retain significant power to reject inadequate settlements.

Courts should adopt several concrete practices to strengthen Tunney Act review. Most fundamentally, courts should demand clear evidence showing how proposed remedies will maintain competition in affected markets.<sup>304</sup> Rather than accepting conclusory assertions about competitive effects, judges should ensure the proposal accounts for market structure, entry barriers, and consumer substitution patterns. Beyond just immediate competitive effects, this analysis should encompass longer-term market dynamics. Additionally, courts should require comprehensive monitoring and reporting mechanisms

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<sup>298</sup> See, e.g., Julia Gonzalez et al., *Mergers and Organization Disruption: Evidence from the U.S. Airline Industry*, 33 J. ECONS. & MGMT. STRATEGY 111, 112 (2024) (“a merger does not always improve quality relative to the quality of the individual merging firms before the merger. In fact, in the United–Continental merger, Continental converged to United’s relatively worse premerger on-time performance.”). See BLUMENTHAL, *supra* note 166 at 19 (detailing the rise of airline passenger complaints post-mergers).

<sup>299</sup> See, e.g., William S. Swelbar & Michael D. Wittman, *Trends and Market Forces Shaping Small Community Air Service in the United States* Report No. ICAT-2013-02 MIT Small Community Air Service White Paper No. 1 at 3 (May 2013) (“The nation’s small- and medium-sized airports have been disproportionately affected by these reductions in service.”); U.S. GOV’T ACCOUNTABILITY OFF., AIRLINE COMPETITION: THE AVERAGE NUMBER OF COMPETITORS IN MARKETS SERVING THE MAJORITY OF PASSENGERS HAS CHANGED LITTLE IN RECENT YEARS, BUT STAKEHOLDERS VOICE CONCERNS ABOUT COMPETITION 35 (June 2014) (“mergers— which have allowed airlines to reduce redundant capacity and eliminate hub airports—and capacity restraint have resulted in a reduction of flights across the country”).

<sup>300</sup> See, e.g., Alfred E. Kahn, *The Competitive Consequences of Hub Dominance: A Case Study*, 8 REV. INDUS. ORG. 381, 384 (1993) (detailing the competitive advantages associated with hub dominance); Erica Wessling, *Spirit Airlines, Inc. v. Northwest Airlines, Inc.: A Case for Increased Regulation of the Airline Industry*, 6 WM. & MARY BUS. L. REV. 711, 713 (2015) (“Barriers to entry include monopolistic gate leasing agreements and the hub dominance of high-cost legacy carriers.”).

<sup>301</sup> Cf. *The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 93d Cong. 452 (1973) (remarks by Sen. John V. Tunney and Sen. Edward Gurney) (explaining the Tunney Act charges the judiciary to undertake an “independent” investigation of proposed settlements); cf. Lloyd C. Anderson, *Mocking the Public Interest: Congress Restores Meaningful Judicial Review of Government Antitrust Consent Decrees*, 31 VT. L. REV. 593, 614 (2007) (“history teaches that there must be a meaningful check on the government’s decision to settle”).

<sup>302</sup> 15 U.S.C. § 16(f).

<sup>303</sup> *United States v. Microsoft*, 56 F.3d 1448, 1459 (D.C. Cir. 1995) (holding the Tunney Act does not allow district courts to “reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made”).

<sup>304</sup> See Note, *The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 MICH. L. REV. 153, 177 n.57 (1983) (quoting Cong. Rec. 31,675 (1972)) (“In approving a particular decree, the Justice Department attorneys may overlook certain issues, ignore certain concerns, or misunderstand certain facts.”).

to track remedy efficacy over time.<sup>305</sup> Enhanced monitoring provisions would allow courts to assess whether their initial public interest determination proved accurate and provide valuable data for future merger reviews.

Courts must also scrutinize divestiture proposals more carefully. Too often, airline merger divestitures have involved slots, gates, or routes that proved insufficient to enable meaningful competitive entry.<sup>306</sup> Courts should examine whether proposed divestitures include the full complement of assets (including customer relationships, operational systems, and regulatory approval) necessary for effective competition.<sup>307</sup>

Further, courts should consider cumulative market effects when reviewing mergers in already concentrated markets. The public interest inquiry cannot be confined to the immediate competitive effects of a single transaction. Instead, the judicial review must account for how the proposed settlement fits within the broader pattern of industry consolidation.<sup>308</sup>

Finally, given the technical complexity of airline markets and merger remedies, courts should routinely seek input from economists, antitrust scholars, industry experts, and affected stakeholders—actively engaging with their objections<sup>309</sup> rather than deferring to DOJ representations in isolation.<sup>310</sup> Enhanced judicial scrutiny would improve DOJ incentives prospectively. Knowing that courts will meaningfully evaluate settlement adequacy, the DOJ would be compelled to negotiate more comprehensive remedies upfront.

Critics may argue that stricter Tunney Act review could paradoxically reduce enforcement by forcing the DOJ to litigate cases to judgment rather

<sup>305</sup> See MERGER CONTROL, *supra* note 258, at 160 (“[A] larger body of retrospectives, covering the full range of agency determinations, and—ideally—based on internal agency data and other relevant information would over time constitute a more comprehensive basis for understanding the effects of mergers and merger control.”).

<sup>306</sup> Slot restrictions, gate access limitations, and regulatory requirements further entrench incumbent advantages. See, e.g., *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 927 (6th Cir. 2005) (“gate access is a substantial barrier to entry.”); see also Gautam Gowrisankaran, *Competition and Regulation in the Airline Industry*, FED. RESV. BD. OF S.F.ECON. LETTER, 1 (Jan. 18, 2002). (“Perhaps the most important regulation comes from local governments, which own and manage the airports in their region and therefore control key bottlenecks to airport service: access to boarding gates and runways....”).

<sup>307</sup> See John Kwoka, *Revisiting Structural Remedies*, 39 ANTITRUST 38 (Fall 2024) (“There have been sufficient troublesome experiences—including outright failures—of divestitures to prompt increasing caution about their use”); see also Matt Reilly et al., *Merger Remedy Divestitures: The Agencies Zig and the Courts Zag*, 37 ANTITRUST 13-18 (Summer 2023).

<sup>308</sup> Alexandra P. Clark, *Leaving Judicial Review with the Judiciary: The Misplaced Role of Agency Deference in Tunney Act Public Interest Review*, 78 WASH. & LEE L. REV. 925, 938–39 (2021).

<sup>309</sup> In some cases, the DOJ has attempted to minimize the value of amicus submissions in Tunney Act hearings. See, e.g., *United States v. CVS Health Corp.*, 407 F. Supp. 3d 45, 52-53 (D.D.C. 2019) (stating the DOJ urged disregarding criticisms posed by the *amici curiae* as outside the review’s scope). Such arguments should be rejected outright. See *id.* (explaining that such “arguments severely understate the permissible scope of a Tunney Act review.”).

<sup>310</sup> See Alexandra P. Clark, *Leaving Judicial Review with the Judiciary: The Misplaced Role of Agency Deference in Tunney Act Public Interest Review*, 78 WASH. & LEE L. REV. 925, 969–70 (2021) (“Less agency deference, therefore, is critical to ensuring that the goals of the Tunney Act are met. Without such review, the goals embedded in the Tunney Act’s public interest provision are lost.”); cf. Lawrence M. Frankel, *Rethinking the Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees*, 75 ANTITRUST L.J. 549, 611 (2008) (“Because such procedures impose significant costs, they ought to be undertaken only if necessary, and should be only as extensive as needed to resolve the court’s concerns.”).

than accepting settlements, consuming resources that could address other antitrust violations.<sup>311</sup> Additionally, they may contend that rigorous judicial oversight could deter the DOJ from challenging airline mergers altogether, since the Tunney Act applies only to consent decrees.<sup>312</sup>

These concerns, while understandable, are unpersuasive. First, deterring inadequate enforcement is a feature, not a bug. If consent decrees provide insufficient consumer protection, the DOJ should either negotiate better terms or litigate to judgment. Second, meaningful judicial review would improve settlement quality rather than reduce settlement frequency. Airlines seeking merger approval would have incentives to offer more comprehensive remedies knowing that courts will reject inadequate proposals. Third, the resource allocation argument assumes that ineffective enforcement is preferable to no enforcement—a premise this Article rejects.

By exercising their existing authority more vigorously through these concrete practices, courts can ensure that airline merger settlements actually serve the public interest rather than merely facilitating deal completion.<sup>313</sup>

## 2. Removing Barriers to Antitrust Enforcement

The airline industry suffers from a fundamental enforcement deficit. Unlike most other economic sectors, airlines face incomplete antitrust oversight due to statutory barriers, information gaps, and judicial misinterpretation that collectively shield the industry from the multi-layered enforcement system that characterizes effective antitrust regulation.

The United States relies on a nonhierarchical system of overlapping antitrust enforcement, distributing regulatory authority among federal agencies, state attorneys general, and private parties.<sup>314</sup> The DOJ and FTC serve as federal regulators, while state attorneys general represent local interests and private enforcers—including competitors and consumers—provide additional oversight through litigation. This blend of private and public enforcers is an intentional design feature.<sup>315</sup> Parallel enforcement prevents any single regulator from becoming the sole guardian of competition and creates multiple avenues for detecting and challenging anticompetitive conduct.<sup>316</sup>

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<sup>311</sup> Frankel, *supra* note 298, at 598 (“to the extent the DOJ must devote more staff time and budgetary resources to Tunney Act proceedings, those resources will not be available for other enforcement activities.”).

<sup>312</sup> *See id.* at 617-18 (discussing potential ramifications of overly strict Tunney Act review).

<sup>313</sup> *See The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 93d Cong. 452 (1973) at 449 (remarks by Sen. John V. Tunney and Sen. Edward Gurney) (stating that the public interest review charges the judiciary with “an independent duty to assure itself that entry of the decree will serve the public generally”).

<sup>314</sup> *See* Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 296, 300-01 (2016).

<sup>315</sup> Christine P. Bartholomew, *The Dark Side of Antitrust Statements of Interest*, 49 J. CORP. L. 233, 236 (2024).

<sup>316</sup> Christine P. Bartholomew, *Playing Nicely with Others: How and Why Antitrust Enforcers Should Work Together*, 85 ANTITRUST L.J. 241, 248 (2023) (“Having more than one

The airline industry represents a dramatic departure from this model. Federal agencies dominate merger review, with the DOJ taking the lead and the DOT playing a supporting role. State attorneys general are relegated to minor participants, typically challenging mergers only when the DOJ does. Private enforcement faces a myriad of substantial barriers.

This enforcement asymmetry undermines competition by concentrating oversight responsibility in a single institutional framework rather than distributing it across multiple enforcement mechanisms. It also forecloses enforcement innovation by limiting the diversity of regulatory approaches and economic perspectives brought to bear on anticompetitive conduct.<sup>317</sup> Further, it creates gaps in coverage with some anticompetitive behavior escaping scrutiny entirely, particularly conduct that affects local markets differently than national ones.<sup>318</sup>

In contrast, parallel enforcement creates a force multiplier effect. When states and private parties actively challenge anticompetitive conduct, it provides political cover and institutional momentum that enables the DOJ to pursue more aggressive enforcement strategies than it could sustain alone.<sup>319</sup>

Some may argue that the DOT's authority over unfair and deceptive airline practices fills the enforcement gap, rendering expanded state and private enforcement unnecessary.<sup>320</sup> That argument fails on two fronts. First, DOT's consumer protection power operates through notice-and-comment rulemaking, a process subject to reversal with each change in administration. The Biden DOT spent years building the most significant package of airline consumer protections in decades: automatic cash refunds for cancellations, mandatory compensation for carrier-caused delays, transparent fee disclosures, and protections for passengers with disabilities.<sup>321</sup> The Trump DOT dismantled them in months. It withdrew, paused, or handed back to the airlines rules protecting passengers from hidden fees, flight cancellations,

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regulator watching markets can lead to a more optimal antitrust system than centralized authority.”) [hereinafter *Playing Nicely*].

<sup>317</sup> See *Playing Nicely*, *supra* note 304, at 248 (discussing how different regulators bring their own viewpoints and economic approaches to enforcement).

<sup>318</sup> Max Huffman & Daniel B. Heidtke, *Behavioral Exploitation Antitrust in Consumer Subprime Mortgage Lending*, 4 WM. & MARY POL'Y REV. 77, 98 (2012).

<sup>319</sup> See Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H. L. REV. 303, 309-10 (2016) (noting that Congress can starve an agency of funding); Katherine Mason Jones, *Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and State Antitrust Enforcement is a Model for Effective Economic Regulation*, 30 NW. J. INT'L L. & BUS. 285, 336 (2010) (“[T]he Executive Branch may seek to curtail antitrust significantly, or more commonly, to sit on the sidelines while cases are not brought. In any given case, the federal enforcement agencies may elect not to proceed, but injured parties and the states have the ability to fill the gap.”).

<sup>320</sup> See 49 U.S.C. § 41712 (authorizing DOT to prohibit unfair or deceptive practices and unfair methods of competition); U.S. Dep't of Transp., *Notice of Practice Regarding Proposed Airline Mergers and Acquisitions*, 80 Fed. Reg. 2468 (Jan. 16, 2015) (describing DOT's consumer protection and merger-adjacent authorities).

<sup>321</sup> See *Airline Refunds and Other Consumer Protections*, 89 Fed. Reg. 32,760 (Apr. 26, 2024) (Biden DOT final rule requiring automatic cash refunds for cancellations and significant changes); *Airline Passenger Rights; Withdrawal*, 90 Fed. Reg. 71,432 (Nov. 17, 2025) (Trump DOT withdrawal of proposed delay compensation rule).

and stranded baggage were withdrawn, paused, or handed back to the airlines—at the direct request of Airlines for America’s ninety-three-page industry wish list.<sup>322</sup> Rulemaking-based consumer protection is only as durable as the administration that issues it. The proof is recent and concrete.

The problem is not only that DOT’s power can be taken away: it was never adequate to begin with. DOT’s unfair and deceptive practices power addresses consumer-facing conduct: fees, refunds, service quality. It has no authority over competitive market structure.<sup>323</sup> And DOT’s merger-adjacent authority was deliberately abandoned. DOT ceded primary merger jurisdiction to the DOJ in 1989—after approving all twenty-one merger applications submitted to it, including those the DOJ vigorously opposed.<sup>324</sup> DOT’s dual mandate, promoting commercial aviation while protecting consumers, creates the very capture risk this Article has documented throughout. Durable protection against anticompetitive harm requires enforcement insulated from both political reversal and industry capture. Antitrust enforcement through courts, by states and private parties, provides exactly that. The barriers that prevent state and private parties from filing this gap are not accidental. They are structural...and removable.<sup>325</sup>

First, information barriers prevent state attorneys general from effectively challenging airline mergers.<sup>326</sup> While federal agencies receive comprehensive merger data through the Hart-Scott-Rodino process,<sup>327</sup> states operate blind, lacking timely access to the detailed information essential for merger analysis.<sup>328</sup>

Second, judicially erected barriers undermine consumer class actions through misapplication of Article III standing doctrine. Recent court decisions have erected artificial barriers to consumer merger challenges by

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<sup>322</sup> Airlines for America, Response to DOT Regulatory Reform Request for Information (May 2025) (ninety-three-page submission requesting elimination of consumer protection rules including junk fee disclosures, automatic refunds, and wheelchair protections). *See also* Suzanne Rowan Kelleher, *For Airlines, Trump’s Deregulation Is Gift That Keeps On Giving*, *Forbes* (Dec. 8, 2025).

<sup>323</sup> *See* U.S. Dep’t of Transp., *The Role of DOT in the Review of the Proposed American Airlines/US Airways Merger*, Testimony Before the S. Comm. on Commerce, Science, & Transportation (Mar. 14, 2013) (“[T]he DOJ has the lead role in reviewing proposed airline mergers” and DOT plays a “supporting role”; DOT acts on antitrust only after DOJ decides whether to challenge a transaction).

<sup>324</sup> *See* Paul Stephen Dempsey, *Regulatory Schizophrenia: Mergers, Alliances, Metal-Neutral Joint Ventures and the Emergence of a Global Aviation Cartel*, 83 *J. AIR L. & COM.* 3, 20 (2018) (“[T]he USDOT never met a merger it did not like, approving each of the twenty-one merger applications submitted to it, even those to which the DOJ vigorously objected.”).

<sup>325</sup> The thirty-eight attorneys general’s 2022 letter similarly concluded that DOT’s authority had proven insufficient to protect consumers, underscoring the need for state enforcement capacity independent of federal agencies subject to capture. *See supra* note 348 and accompanying text.

<sup>326</sup> 15 U.S.C. § 18, Section 7 of the Clayton Act.

<sup>327</sup> Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C.A. § 18a (requiring premerger notification).

<sup>328</sup> *See* National Conference of Commissioners on Uniform State Laws, Uniform Antitrust Pre-Merger Notification Act at 1 (2024) (discussing how informational gaps place “the AGs at a significant disadvantage in the process of merger review”).

misinterpreting what constitutes “concrete and particularized” harm,<sup>329</sup> effectively insulating airline mergers from private enforcement despite clear statutory authority under the Clayton Act.<sup>330</sup>

Removing these barriers would restore the comprehensive enforcement system that airlines currently avoid. Each barrier requires targeted reform.

a. Enacting Baby HSRs

The first barrier stems from information asymmetries that systematically disadvantage state enforcement. The Hart-Scott-Rodino Act requires merging entities to produce comprehensive data about proposed deals, industry conditions, and competitive dynamics, providing federal agencies with proprietary information about pricing strategies, route structures, capacity decisions, and competitive assessments.<sup>331</sup> This 30-day review process<sup>332</sup> creates a substantial information advantage for the DOJ.

State attorneys general, by contrast, receive no automatic notice of airline merger filings, much less access to the materials themselves.<sup>333</sup> Current workarounds—voluntary information requests, requests for DOJ cooperation requiring merging parties’ consent, or state subpoenas and civil investigative demands—are inadequate.<sup>334</sup> These alternatives require weeks of drafting, service, and potential litigation while federal merger reviews proceed on accelerated timelines, forcing states into a reactive posture where they rush to gather information after deals are already well advanced.

This timing disadvantage undermines effective enforcement. Preventing mergers is always preferable to attempting to unscramble them after completion,<sup>335</sup> yet states often arrive late due to information barriers rather than legal limitations.<sup>336</sup>

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<sup>329</sup> *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016), *as revised* (May 24, 2016) (“To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’”) (citing *Lujan*, 504 U.S., at 560) (internal quotation marks omitted).

<sup>330</sup> Section 4 of the Clayton Act permits private enforcement actions by “any person who shall be injured in his business or property by reason of anything forbidden by antitrust laws.” 15 U.S.C. Code § 15.

<sup>331</sup> Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C.A. § 18a; *Hart-Scott-Rodino Merger Investigations: A Guide for Safeguarding Business Secrets*, 56 BUS. LAW. 943, 944–45 (2001) (detailing types of information provided during the HSR process) [hereinafter *HSR Merger Investigations*].

<sup>332</sup> 15 U.S.C.A. § 18a(a), (b)(1), (e)(2).

<sup>333</sup> *See, e.g., Lieberman v. F.T.C.*, 771 F.2d 32, 33 (2d Cir. 1985) (holding state attorneys general do not have a right to Hart Scott Rodino premerger filing materials); *Mattox v. F.T.C.*, 752 F.2d 116, 117 (5th Cir. 1985) (same).

<sup>334</sup> Information provided as part of the HSR process is often competitively sensitive. *HSR Merger Investigations*, *supra* note 317, at 944–45. As such, consent is required for the DOJ to share the filings. Alternatively, the state can attempt to subpoena the information, but doing so burns precious weeks while the HSR review proceeds. DOJ, *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General*, (June 25, 2015), <https://www.justice.gov/atr/protocol-coordination-merger-investigations-between-federal-enforcement-agencies-and-state>

<sup>335</sup> *See, e.g., TENN. CODE ANN. § 8-6-402* (2025); *IND. CODE § 4-6-3-3* (2025).

<sup>336</sup> *See* National Conference of Commissioners on Uniform State Laws, *Uniform Antitrust Pre-Merger Notification Act at 1* (2024) (“by the time most AGs obtain access to HSR filings, the federal agencies and parties are often far along in the process of investigation and

State attorneys general offer unique enforcement advantages that federal agencies cannot replicate.<sup>337</sup> Their antitrust laws are tailored to address specific conditions and concerns facing citizens of their state.<sup>338</sup> State enforcers possess intimate knowledge of local market conditions, enabling them to craft remedies tailored to their specific circumstances.<sup>339</sup> State antitrust laws often reach different anticompetitive conduct than federal statutes, expand potential damages<sup>340</sup> and standing limitations,<sup>341</sup> or have substantively broader reach.<sup>342</sup>

Importantly, state attorneys general have demonstrated renewed commitment to independent antitrust enforcement over the past decades.<sup>343</sup> Rather than merely joining federal challenges as they once did, states now initiate their own enforcement actions across industries, reflecting both increased capacity and willingness to pursue cases that federal agencies might overlook.<sup>344</sup> Rising consumer awareness and complaints have galvanized attorneys general nationwide to combat anticompetitive practices that directly harm their constituents.<sup>345</sup> This shift toward independent enforcement makes the current information asymmetries particularly problematic—states have the motivation and legal authority to act, but lack timely access to the data necessary for effective intervention.

The airline industry presents a particularly compelling case for enhanced state oversight. Relying solely on federal priorities may not align with state-

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negotiation”); see also Frank Schultze, *Old, Not Odd: Running Latches Against the States and the Future of Antitrust After New York v. Meta Platforms*, 123 MICH. L. REV. 111, 139 (2024) (discussing how “document production agreements are one of the lengthiest and most difficult stages of an investigative life cycle.”).

<sup>337</sup> See generally Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEORGETOWN J. OF LAW & PUBLIC POLICY 5 (2004).

<sup>338</sup> See, e.g., MINNESOTA ANTITRUST LAW OF 1971: 325D.49, et seq.; TEXAS FREE ENTERPRISE & ANTITRUST ACT OF 1983, TEX. BUS. & COM. CODE § 15.01 et seq.

<sup>339</sup> See *The Enforcers*, Fed. Trade Comm’n, [www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers](http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers); Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1034 (2001) (“Local restraints (or those with lesser economic impact) are likely to be overlooked by federal enforcers who, after all, have their own resource constraints.”).

<sup>340</sup> See, e.g., CAL. BUS. & PROF. CODE 17200 et seq. (allowing civil penalties of up to \$1 million per violation).

<sup>341</sup> The majority of states have passed “Illinois Brick” repealers, which allow recovery for damages by indirect purchasers despite federal policy to the contrary. See, e.g., CAL. BUS. & PROF. CODE § 16750(a) (West 1997); 740 ILL. COMP. STAT. 10/7(2) (West 1993).

<sup>342</sup> For example, the 1974 version of Maryland’s Motor Fuel Inspection Law was stricter than the price discrimination provisions in the Robinson-Patman Act. The Robinson-Patman Act generally prohibits price discrimination “between different purchasers of commodities of like grade and quality,” 15 U.S.C. § 13a (1994). In contrast, the Maryland statute required producers or refiners of petroleum products to extend all temporary price restrictions uniformly to all service stations in the state supplied by the producers or refiners. MD.LAWS, ch. 854 (1974); MD.LAWS, ch. 608 (1975); see also *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130 (1978) (upholding Maryland’s statute over preemption challenges).

<sup>343</sup> Fastow David, *supra* note 314, at 60 (“One of the most far-reaching antitrust developments over the past decade has been the emergence of the states as active participants in antitrust enforcement.”).

<sup>344</sup> See, e.g., *State of Colorado v. The Kroger Co.*, No. 2024CV30459, 2024 WL 5673223, at \*2 (Colo. Dist. Ct. June 26, 2024) (denying motion to dismiss in state attorney general challenge to Albertsons/Kroger merger).

<sup>345</sup> Joshua M. Goodman et al., *State Attorneys General Increase Antitrust Enforcement*, Morgan Lewis (Apr. 23, 2025).

specific harms.<sup>346</sup> Air travel markets are inherently local, with competitive effects varying significantly across routes.<sup>347</sup> Airlines' strategies that reduce or limit service to certain airports can have profound consequences for local communities that federal enforcers, focused on national market effects, may underweight. State attorneys general are uniquely positioned to assess these localized impacts and pursue enforcement actions that protect their constituents' interests.

The urgency of enabling state enforcement is underscored by state officials themselves. In 2022, thirty-eight attorneys general urged Congressional action to remove barriers preventing enforcement of both state and federal consumer protection laws in the airline industry.<sup>348</sup> These officials emphasized decades of unaddressed consumer complaints and warned that the "vacuum of oversight allows airlines to mistreat consumers and leaves consumers without effective redress."<sup>349</sup>

Adopting "baby-HSR" laws<sup>350</sup> represents a direct path to strengthening state enforcement. These laws would require airlines to file merger information directly with state attorneys general and provide adequate review periods for analysis that runs parallel to the federal HSR review period. Several states have already enacted similar laws primarily for healthcare mergers, demonstrating both feasibility and effectiveness.<sup>351</sup> Effective baby-HSR laws for airline mergers should include broad coverage of all airline mergers involving carriers serving the state, regardless of deal size. These laws should mandate disclosure of route-specific data, pricing information, capacity plans, and competitive assessments impacting the particular state. They should also provide adequate review periods with extension provisions and coordination mechanisms to facilitate information sharing among state attorneys general and with federal agencies.

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<sup>346</sup> See *Playing Nicely*, *supra* note 304, at 251.

<sup>347</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, AIRLINE COMPETITION: THE AVERAGE NUMBER OF COMPETITORS IN MARKETS SERVING THE MAJORITY OF PASSENGERS HAS CHANGED LITTLE IN RECENT YEARS, BUT STAKEHOLDERS VOICE CONCERNS ABOUT COMPETITION 37 (June 2014) ("Airline strategies that reduce or limit service to certain airports can have consequences for the local communities.").

<sup>348</sup> Letter from National Association of Attorneys General to Congressional Leadership (Aug. 2022) (available at <https://www.naag.org/wp-content/uploads/2022/08/Airline-Accountability-Consumer-Protection-Letter-Packet.pdf>).

<sup>349</sup> *Id.*

<sup>350</sup> Calls for Congressional action to share HSR pre-merger notification have gone unanswered for decades. See, e.g., Wayne H. Elowe, *Predictability in Merger Enforcement After California v. American Stores: Current Uncertainties and A Proposal for Change*, 42 CASE W. RES. L. REV. 599, 625 (1992) (calling for Congressional action).

<sup>351</sup> See, e.g., CAL. HEALTH & SAFETY CODE §127500 (2024); COLO. REV. STAT. tit. 6, § 6-19-101 et seq.; NEV. REV. STAT. § 598A.370. In addition, the National Conference of Commissioners on Uniform State Laws have prepared a Uniform Antitrust Pre-Merger Notification Act, aimed at providing a template for states. See NATIONAL CONFERENCE OF COMMISSIONS ON UNIFORM STATE LAWS, UNIFORM ANTITRUST PRE-MERGER NOTIFICATION ACT (2024).

b. Correcting Judicial Barriers to Consumer Standing

The second barrier requires addressing judicial misinterpretation of standing doctrine. Consumer class actions serve as a crucial complement to government enforcement. They aggregate dispersed harm into economically viable litigation and deter anticompetitive conduct.<sup>352</sup> Recent judicial decisions have undermined this enforcement mechanism through improper and overly restrictive standing interpretations that misapply Article III doctrine.

The District Court of Massachusetts's decision in the *JetBlue/Spirit* merger challenge exemplifies this judicial error.<sup>353</sup> Plaintiffs, a putative class of airline passengers, sued to block the merger.<sup>354</sup> Defendants successfully moved to dismiss for lack of standing.<sup>355</sup> The court held that only consumers who "regularly" flew the merging airlines possessed standing, concluding that other consumers failed to allege sufficiently "concrete and particularized" harm despite alleging the merger would increase fares.<sup>356</sup> The court reasoned that injuries "widely shared" among class members could not satisfy Article III requirements.<sup>357</sup>

This reasoning fundamentally misconstrues Article III standing.<sup>358</sup> The Supreme Court has never held that injuries become non-concrete merely because they affect many people. In *TransUnion LLC v. Ramirez*, the Court emphasized that standing requires "concrete, not exclusive, harm."<sup>359</sup> Price increases from reduced competition injure each consumer individually—the fact that thousands suffer similar injuries does not transform concrete economic harm into a generalized grievance.

The "widely shared" analysis ignores the inherent nature of antitrust violations. By definition, antitrust violations affect many consumers simultaneously.<sup>360</sup> If widespread impact precluded standing, virtually no

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<sup>352</sup> Paul J. Stancil, *Atomism and the Private Merger Challenge*, 78 TEMP. L. REV. 949, 995 (2005) ("Private enforcement is vital to the functioning of the antitrust system, for both mergers and conduct offenses."); Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 678 n.7 (2010) ("[P]rivate suits provide a significant supplement to the limited resources available to the Department of Justice ....") (quoting *Am. Soc'y of Mech. Engrs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 572 n. 10 (1982)).

<sup>353</sup> *Garavanian v. Jet Blue Airways Corp.*, 706 F. Supp. 3d 168 (D. Mass. 2023).

<sup>354</sup> *Id.* at 172.

<sup>355</sup> *Id.* at 174.

<sup>356</sup> *Id.* at 173.

<sup>357</sup> *Id.* at 174.

<sup>358</sup> In addition to Article III standing, antitrust plaintiffs must also establish antitrust injury. See *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977) ("an antitrust] plaintiff must prove the existence of "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.").

<sup>359</sup> *TransUnion LLC v. Ramirez*, 594 U.S. 413, 439 (2021) ("the 1,853 class members ... whose credit reports were disseminated to third-party businesses during the class period suffered a concrete harm.").

<sup>360</sup> See *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 241 (1987) ("Antitrust violations generally have a widespread impact on national markets as a whole, and the antitrust treble-damages provision gives private parties an incentive to bring civil suits that serve to advance the national interest in competitive economy....").

consumer antitrust case could proceed—a result that would gut private enforcement and contravene Congress’s intent in enacting the Clayton Act.<sup>361</sup>

The restrictive approach differs markedly from the more defensible ruling in *Yoshimoto v. Alaska Airlines*,<sup>362</sup> where the District Court of Hawaii dismissed claims by plaintiffs who alleged no actual or planned travel on affected routes.<sup>363</sup> Those plaintiffs could articulate only abstract concerns about reduced competition,<sup>364</sup> precisely the type of generalized grievance that Article III prohibits. This distinction is crucial: consumers who purchase airline services (even infrequently) suffer concrete economic harm from merger-induced price increases, while those with no connection to the relevant markets suffer only abstract harm from reduced competition generally.

A restrictive standing approach threatens to cripple an already constrained enforcement mechanism.<sup>365</sup> Article III is a threshold issue that must be met to survive a motion to dismiss.<sup>366</sup> Without standing, consumers effectively forego their ability to enforce the Clayton Act. Class actions challenging mergers already face headwinds: insufficient fiscal incentives given dispersed harm, information asymmetries favoring defendants, and timing constraints that make preliminary injunctive relief difficult to obtain.<sup>367</sup> Artificial standing barriers further weaken this enforcement tool.

Moreover, consumers often represent the most direct victims of anticompetitive mergers. Unlike competitor challenges, which may reflect self-interested attempts to block efficient consolidation, consumer challenges focus on antitrust law’s ultimate concern: protecting competition for consumers’ benefit.<sup>368</sup> Preserving meaningful consumer standing ensures that those paying the price for anticompetitive mergers retain the ability to challenge such transactions in court.

Courts must recognize that consumers facing higher prices from anticompetitive mergers suffer concrete, particularized injuries satisfying

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<sup>361</sup> See, e.g., *Nader v. Air Transp. Ass’n*, 426 F. Supp. 1035, 1040 (D.D.C. 1977) (“The antitrust laws clearly reflect the national policy of encouraging private parties (including consumers) to help enforce the antitrust laws in order to protect competition through compensation of antitrust victims, through punishment of antitrust violators, and through deterrence of antitrust violations.”) (quoting H.R. Rep. No. 94-499, pt. 2, at 19-20 (1975)).

<sup>362</sup> Order Granting Mot. to Dismiss at 1, *Yoshimoto et al. v. Alaska*, No. 24-cv-00173 (D. Haw. Aug. 12, 2024), ECF No. 45.

<sup>363</sup> *Id.* at 9.

<sup>364</sup> *Id.* at 7.

<sup>365</sup> See Christine P. Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOK. L. REV. 743, 766 (2015) (“Now, the dominant judicial attitude towards class actions is knee-jerk skepticism.”).

<sup>366</sup> See *Warth v. Seldin*, 422 U.S. 490, 498 (1965) (defining standing as “the threshold question in every federal case, determining the power of the court to entertain the suit.”).

<sup>367</sup> Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 36 (1995).

<sup>368</sup> See John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425, 2433 (2013) (“Protecting consumers from anticompetitive conduct...is the antitrust goal with the widest support.”).

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Article III requirements.<sup>369</sup> Economic injury from higher prices constitutes concrete harm regardless of how many consumers are affected.<sup>370</sup> The “widely shared” nature of antitrust injury reflects anticompetitive conduct’s scope, not the absence of particularized harm. If courts fail to recognize such injury, Congress could and should amend the Clayton Act to explicitly confirm that consumers affected by challenged mergers possess statutory standing, empowering courts to apply Article III doctrine correctly.

Removing enforcement barriers would help restore multiple avenues for detecting and challenging anticompetitive behavior while ensuring that relief reaches consumers harmed by such conduct. Empowered state and private enforcement would subject the airline industry to the same multi-layered oversight that protects competition in other sectors of the economy.

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The airline industry has systematically exploited enforcement gaps that would be unthinkable in most sectors. An industry breakup should be on the table. While airlines engage in price coordination, capacity restrictions, and consolidation that harms consumers, they remain uniquely shielded from the comprehensive antitrust enforcement. This protection stems not from sound policy but from artificial barriers that have allowed airlines to fly under the radar of effective oversight.

Absent extreme measures, the fallback option is to ward off harm from future consolidations. Doing so requires three interwoven adjustments: realigned merger analysis, enhanced judicial scrutiny under the Tunney Act, and empowered state and private enforcement. Combined, these adjustments would subject the airline industry to the same multi-layered oversight that protects competition in other sectors of the economy.

#### CONCLUSION

In 1989, Congress handed the DOJ control over airline merger oversight, hoping new leadership could steer the industry away from concentration. Three decades later, that hope lies in ruins. The industry is more concentrated than ever, and as this Article demonstrates, the DOJ has failed at every turn—consistently underestimating merger harm while chasing phantom benefits that never materialized.

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<sup>369</sup> Cf. William J. Kolasky, Jr., *Current Developments: Merger Enforcement by States and Private Parties*, 56 ANTITRUST L.J. 839 (1988) (“There has never been any serious question about the standing of a customer to seek either damages or injunctive relief against an unlawful merger involving two of its suppliers.”).

<sup>370</sup> See, e.g., *In re Lantus Direct Purchaser Antitrust Litig.*, 512 F. Supp. 3d 106, 123 (D. Mass. 2020) (“In an antitrust action such as this one “all plaintiffs who were forced to pay a higher price in the absence of generic competition have a substantial and shared interest in proving that the higher price was the result of unlawful monopolizing conduct that is redressable by an award of damages.”).

The pattern is as predictable as it is damaging. Brief moments of regulatory awakening—a blocked merger here, a tougher settlement there—dissolve into the same old deference to airline promises. The DOJ makes course corrections on one deal, then plunges into identical errors on the next. Merger oversight became regulatory theater: impressive staging, meaningless results.

The damage has become entrenched. Markets this concentrated do not heal themselves. They metastasize. Structural change demands the kind of radical intervention that regulators have spent decades avoiding. Yet without it, American air travel will continue its descent toward monopoly.

The human cost of this regulatory abdication plays out daily in airports across America. The Lawrences should be heading home from Orlando—exhausted but happy, their children clutching new memories. Instead, they are stranded at the gate—their flight cancelled, the next departure tomorrow, no alternatives, no recourse. In today’s airline oligopoly, this is not misfortune; this is the inevitable result of regulatory capture masquerading as antitrust enforcement.

The future promises worse. Standing room will replace seats.<sup>371</sup> Bathrooms will cost extra.<sup>372</sup> Carry-on bags will require premium subscriptions. Ticket prices will surge while service quality plummets. In a true oligopoly, airlines compete only to see who can extract the most from captive passengers.

Without meaningful antitrust enforcement, this dystopian future is guaranteed. The time for airline exceptionalism has passed. Competition must be restored before passengers are permanently grounded.

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<sup>371</sup> Ben Mesirov, *Thoroughly Uncomfortable Airplane Seats Could Be a Good Thing*, THRILLIST (June 2, 2025, 2:33 PM), <https://www.thrillist.com/travel/nation/standing-seats-budget-airlines>.

<sup>372</sup> Luke Jensen & Brian Yutko, *Why Budget Airlines Could Soon Charge You to Use the Bathroom*, FIVETHIRTYEIGHT (June 30, 2014, 6:00 AM), <https://fivethirtyeight.com/features/if-everyone-went-to-the-bathroom-before-boarding-the-plane-ticket-prices-might-be-lower/>.