

Oversold, Delayed, Rescheduled: Airline Passenger Rights and Protections

Matthew Schoonover*

INTRODUCTION

Flying was a very tangible freedom

[I]t was beauty, adventure, discovery

—Anne Morrow Lindbergh¹

The freedom of flight was an elusive dream for the forty-seven passengers on Continental Express Flight 2816.² They were captives, waiting to deplane or depart for their final destination.³ Weather had diverted the fifty-seat aircraft,⁴ originally scheduled to fly two-and-a-

* J.D. (2011), Washington University School of Law; Flight Attendant, GoJet Airlines (2006–2008); B.A. History, Video Production (2006), Webster University. Thank you to my mother, Diann Schoonover, and my brother, Christopher Schoonover, for their support on this Note and throughout all areas of my life. I appreciate the work of Editor-in-Chief Laura Johannes, Executive Notes and Projects Editors Kate Lewis and Jane Kim, Primary Editor Katherine Straw, and the rest of the *Washington University Journal of Law & Policy* staff, whose editing skills transformed a rough draft into a finished paper. This Note is dedicated to my father, grandfather, and airline colleagues for sharing their love of aviation.

1. ANNE MORROW LINDBERGH, HOUR OF GOLD, HOUR OF LEAD: DIARIES AND LETTERS OF ANNE MORROW LINDBERGH, 1929–1932, at 4 (1973). Morrow, a pioneering aviator, later married the famous transatlantic pilot, Charles Lindbergh. *Id.* at 6.

2. Continental contracted the operation of Flight 2816 to ExpressJet Airlines. Nomaan Merchant, *Passengers Kept on Plane for Hours*, WASH. POST, Aug. 11, 2009, at A03. Flight 2816 was regularly scheduled to depart Houston at 9:20 p.m. and arrive in Minneapolis at 11:51 p.m. *ExpressJet Airlines # 2816*, FLIGHTAWARE, <http://flightaware.com/live/flight/BTA2816> (last visited Nov. 26, 2009) (on file with author).

3. Merchant, *supra* note 2. Passengers later complained that the crew did not keep them honestly informed about the flight's status. *Id.*

4. ExpressJet operates only two models of the Embraer ERJ-145 jet aircraft, each configured to carry fifty passengers. *Fleet Information*, EXPRESSJET, <http://www.expressjet.com/about/fleet.htm> (last visited Nov. 2009). A commercial configuration of the ERJ-145 seats

half hours nonstop from Houston to Minneapolis.⁵ Five hours after a midnight landing in Rochester, Minnesota, the passengers longed for the terminal a mere fifty yards away.⁶ Snacks and drinks ran low.⁷ The single lavatory overflowed.⁸ Two screaming babies kept everyone awake.⁹ The passengers had been trapped for over eight hours on an airplane designed for short, regional flights.¹⁰

At 5:00 a.m., Flight 2816 received clearance to complete its trip,¹¹ but the crew had reached its duty limit and was required to rest.¹² Still in Rochester, the passengers were permitted to deplane at 6:00 a.m., waiting in the terminal before reboarding with a new crew.¹³ Finally, at 9:15 a.m., almost twelve hours after departing Houston, the passengers of Flight 2816 arrived in Minneapolis.¹⁴

three passengers in each row with a narrow aisle separating one seat from the other two. *See* EMBRAER, ERJ-145 FAMILY: BUILDING REGIONAL AIRLINE SUCCESS 12–13, 19 (2005), available at http://www.embraercommercialjets.com.cn/content/erj/doc/Brochure_145Family.pdf.

5. Merchant, *supra* note 2.

6. *Id.*

7. *See* Editorial, *But They Were Next in Line for Takeoff*, N.Y. TIMES, Aug. 15, 2009, at A18.

8. *Id.*

9. *Id.*; Merchant, *supra* note 2.

10. The ERJ-145 has a range of 1,550 nautical miles, and the ERJ-145 XR has a range of 2,000 nautical miles. EMBRAER, *supra* note 4, at 3, 7. Neither model is capable of crossing the entire United States. *Id.* at 3, 9.

11. Merchant, *supra* note 2.

12. *Id.* Duty limits establish the maximum duration crew members may consecutively work. DREW WHITELEGG, WORKING THE SKIES: THE FAST-PACED, DISORIENTING WORLD OF THE FLIGHT ATTENDANT 120–21 (2007). Pilots have a scheduled duty limit of eight hours. Flight Time Limitations: One or Two Pilot Crews, 14 C.F.R. § 121.481 (2009). Flight Attendants have a scheduled duty limit of fourteen hours. Flight Attendant Duty Period Limitations and Rest Requirements, 14 C.F.R. § 121.467 (2009). Rest requirements, closely related to duty limits, prevent work periods from occurring too close together even when delays cause a crew to arrive late to its layover. WHITELEGG, *supra*, at 121–22.

13. ExpressJet said the delay resulted from the airport's lack of late-night security screeners. Merchant, *supra* note 2. The airport manager stated that "[t]his [was] not an airport issue" but rather "an airline issue," asserting that Flight 2816 passengers could have waited in a secure area within the terminal. *Id.* (quoting Steven Leque).

14. *Id.* The DOT assessed \$50,000 in penalties against Continental and ExpressJet for their involvement in stranding the passengers of Flight 2816, which violated "the prohibitions against unfair and deceptive practices in air transportation contained in 49 U.S.C. § 41712." ExpressJet Airlines, Inc., OST 2009-0001-0031 (Dep't of Transp. Nov. 24, 2009) (consent order), available at <http://regulations.gov/#!documentDetail;D=DOT-OST-2009-0001-0031>; Continental Airlines, Inc., OST 2009-0001-0030-0030 (Dep't of Transp. Nov. 24, 2009) (consent order), available at <http://www.regulations.gov/#!documentDetail;D=DOT-OST->

Most of the flying public has experienced the frustrations of modern travel. Passengers suffer from delays, poor service, and overbooked flights. These conditions are partially the result of airlines competing for lower fares and their overuse of limited airport space.¹⁵

In response, the Department of Transportation (DOT) published a new regulation to limit the effects of delays and require services when passengers are stranded on domestic flights.¹⁶ Beginning in April 2010, all airlines must create a delay contingency plan and, when delays exceed two hours, provide passengers with food and beverages.¹⁷ Lavatories must flush and be sanitary.¹⁸ Most significantly, the regulation requires that passengers be deplaned when a delay exceeds three hours.¹⁹ The DOT will penalize airlines for trapping passengers on planes beyond the three-hour limit.²⁰

The Senate and House of Representatives also began considering the Airline Passenger Bill of Rights Act of 2009 (APBR).²¹ If enacted, the APBR would mandate that airlines develop plans to prevent a recurrence of situations like Flight 2816.²² Carriers would be forced to provide nourishment, lavatory facilities, and the opportunity to deplane for passengers stranded on aircraft.²³ The APBR would also require airports to supply gates to deplane passengers during long ground delays.²⁴

However, the DOT regulation and proposed APBR address only some of the effects of delays²⁵ and fail to impose similar restrictions

2009-0001-0030. The ground operations provider in Rochester was fined \$75,000. Mesaba Airlines, OST 2009-0001-0029 (Dep't of Transp. Nov. 24, 2009) (consent order), available at <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2009-0001-0029>.

15. See *infra* Part I.B.

16. See Enhanced Protections for Airline Passengers, 14 C.F.R. § 259 (2010).

17. *Id.* § 259.4.

18. *Id.*

19. *Id.* However, there are exceptions for security or safety-related reasons, or if returning to the gate or another disembarkation point would cause significant disruption. *Id.*

20. *Id.*

21. S. 213, 111th Cong. (2009); H.R. 624, 111th Cong. (2009).

22. S. 213.

23. *Id.*

24. *Id.*

25. See *infra* Part I.D.

on international flights and foreign carriers.²⁶ Factors that cause delays, like scheduling, maintenance, and hub selection, also should be governed.²⁷ In addition, the deplaning requirements of the DOT regulation and APBR actually could increase delays for displaced passengers.²⁸ Stranded aircraft will compete for already overcrowded ramp spaces, requiring careful orchestration of gate availability.²⁹ Reboarding delayed flights will take additional time, and more passengers may find cancellations as airlines, conscious of new penalties, become cautious of postponing flights.³⁰

Legislation is needed to guarantee the protections of the new DOT regulation and to impose realistic requirements on airlines and airports.³¹ Subsequent statutes and regulations should limit the number of departures and arrivals scheduled by airlines and airports.³² In response to these restrictions, airlines must reduce flights, at least during peak periods.³³

Statutes and regulations should standardize procedures for the airline industry. Penalties for failing to comply with deplaning requirements should be uniform to encourage compliance, reflect airline revenues, and provide passengers with a cause of action.³⁴ Reasonable regulations and penalties need to be applied to all airlines

26. Enhanced Protections for Airline Passengers, 14 C.F.R. §§ 259.3–259.4 (2010). The delay of Virgin Atlantic Flight VS001 from London to New York revealed the limitations of the new regulation. Joe Sharkey, *Despite New Rules, Stranded on the Tarmac*, N.Y. TIMES, June 29, 2010, at B6. Less than two months after the DOT regulation took effect, Flight VS001 was diverted to Connecticut's Bradley International Airport where its three hundred passengers suffered in the heat for approximately four hours before deplaning. *Id.* The aircraft lost power, passengers sweated, and some customers yelled at the flight attendants, "You're treating us like animals." *Id.* (quoting Russell F. Homasi). Virgin Atlantic blamed the delay on a lack of customs officials staffing the airport. Thomas Frank, *Virgin Blames Customs for Delay: Airline Says Official Denied Passengers' Exit*, USA TODAY, June 25, 2010, at 3A. The last passenger made it through customs nine hours after landing in Connecticut. *See id.* Flight VS001 occurred after the DOT regulation took effect, but its international status meant no deplaning limit applied. *See id.*

27. *See infra* Part I.B.

28. *See infra* note 144 and accompanying text.

29. *See infra* notes 86, 144 and accompanying text.

30. *See infra* note 144 and accompanying text.

31. *See infra* notes 146, 160–61 and accompanying text.

32. New laws and regulations should build on existing slot controls. *See infra* notes 53–55 and accompanying text.

33. *See infra* notes 53–55 and accompanying text.

34. *See infra* notes 142–44 and accompanying text.

and flights operating within the United States, regardless of international status.³⁵ At the same time, flexibility must exist for diverse situations.³⁶ The minimum service standards during tarmac delays should accommodate various airplane sizes and their respective capacities to provide for passengers.³⁷

Part I of this Note discusses the history of aviation regulation and subsequent deregulation, reasons for delays, and the rising concern for passenger rights. Part II critiques and analyzes the potential effectiveness of the new DOT regulation and the APBR of 2009. Part III proposes regulations and legislation that will prevent economic disruption of the industry while protecting passengers from delay abuses.

I. HISTORY

A. Regulation and Deregulation of the Airline Industry

The current protections for airline passenger rights follow from a long history of regulating the aviation industry. In 1938, Congress established the Civil Aeronautics Board (CAB),³⁸ beginning the regulatory era that would survive until the late 1970s.³⁹ Using its power, the CAB limited economic competition by requiring airlines to fly complementary routes, with each carrier connecting different portions of the country.⁴⁰ The CAB later set fares to ensure industry profitability.⁴¹

35. See *infra* note 141 and accompanying text.

36. See *infra* notes 83, 133 and accompanying text.

37. See *infra* note 83 and accompanying text.

38. Civil Aeronautics Act of 1938, ch. 601, § 201, 52 Stat. 973 (repealed 1978). The CAB had authority to determine carrier routes, control entry into the marketplace, and regulate fares. *Id.* §§ 401, 404. The CAB's power initially extended to safety regulations. *Id.* § 601. The Board, however, never had authority over the schedules or the types of airplanes carriers flew on various routes. ELIZABETH E. BAILEY, DAVID R. GRAHAM & DANIEL P. KAPLAN, DEREGULATING THE AIRLINES 12 (1985).

39. Regulation under the CAB was phased out between 1978 and 1983. BAILEY ET AL., *supra* note 38, at 3, 34.

40. *Id.* at 13. The CAB continued the route system developed during the Hoover administration, periodically granting route extensions and approving mergers. *Id.* at 11–12. During the 1920s, “the predecessors of American, TWA, and United” were granted “transcontinental mail contract authority over parallel routes.” *Id.* at 11. Eastern Airlines was

Under the CAB, established carriers were prevented from expanding into markets served by competitors.⁴² New airlines found an even greater challenge in gaining approval for market entry.⁴³ The CAB's focus on noncompeting routes inflated fares above operating costs, a disparity that grew as new aviation technologies increased efficiency.⁴⁴ Rather than price competition, airlines attracted passengers by offering more frequent flights and unique inflight services.⁴⁵

Only airlines that crossed state borders or international waters flew under the CAB's control.⁴⁶ Intrastate carriers developed outside

made "the north-south carrier on the East Coast and United [was] the north-south carrier on the West Coast." *Id.*

41. *Id.* at 16.

42. *Id.* at 13.

43. *Id.* The policies governing market entry were so strict that "between 1938 and 1977, the CAB permitted no entry at all into city-pair markets that already had two or more carriers." PAT HANLON, *GLOBAL AIRLINES: COMPETITION IN A TRANSNATIONAL INDUSTRY* 71 (3d ed. 2008).

44. BAILEY ET AL., *supra* note 38, at 17. Airplanes introduced after the Second World War were capable of holding more passengers, traveling faster, and operating at lower costs than prewar aircraft. *Id.* The fare discrepancies did not lead to a change in the price of the standard first-class ticket, but the major carriers did introduce the precursor to economy class fares in the 1950s. *Id.* Costs to airlines were further reduced with the widespread introduction of efficient jet service in the late 1950s. *Id.*

45. *Id.* at 18. On longer flights, costs were far below the CAB's fares and "carriers provided more frequent service and lower load factors than consumers wished." *Id.* Excess flights were less common in short-haul markets where the airlines' costs often exceeded the permitted fares. *Id.*; see also WHITELEGG, *supra* note 12, at 46. Passengers enjoyed signature meals and comfortable cabins, foreign concepts to today's travelers, who are squeezed into economy class seats. See BAILEY ET AL., *supra* note 38, at 18. Airplanes were equipped with entertainment areas, using the social aspects of flying to attract travelers. See JOHANNA OMELIA & MICHAEL WALDOCK, *COME FLY WITH US! A GLOBAL HISTORY OF THE AIRLINE HOSTESS* 112 (2006) (reprinting photograph of economy cabin on American Airlines with a piano lounge); see also *id.* at 86 (reprinting photograph of passengers on United Airlines playing at a card table).

The distinction between carriers' services was most pronounced through the brand identity associated with each airline's flight attendants. WHITELEGG, *supra* note 12, at 40. Attendants began as flying nurses to calm passenger fears, but this purpose quickly gave way to the image of "perfect wives and mothers" in the air. *Id.* at 34, 41. Delta marketed the southern belle while United promoted its Midwestern roots through the women it hired. *Id.* at 42-43. The 1960s saw the advent of flight attendants as sex symbols. *Id.* at 45-46. For example, TWA passengers were met with staff dressed in mini outfits to bring the flair of international travel to transcontinental routes. See OMELIA & WALDOCK, *supra*, at 106 (reprinting TWA advertisement).

46. Civil Aeronautics Act of 1938, ch. 601, § 1, 52 Stat. 973 (repealed 1978) (using definition of "[a]ir commerce" to narrow statute).

of the regulatory authority, offering lower fares than those allowed for major airlines.⁴⁷ In heavily traversed states like California, small airlines undercut major carriers on profitable routes such as the one from San Francisco to Los Angeles.⁴⁸ Responding to the lower fares, passenger traffic on that particular route grew 117 percent from 1960 to 1965.⁴⁹

In 1958, Congress formed the Federal Aviation Administration (FAA)⁵⁰ to separate safety and development regulations from the economic concerns administered under the CAB.⁵¹ The FAA was given responsibility for controlling the rising aircraft traffic problems.⁵² By 1969, five major airports had become so congested that the agency imposed high density rule (HDR) slot controls.⁵³ Slot controls divide an airport's schedule into increments, enabling the FAA to regulate the number of airplanes scheduled to depart or arrive within a given time period.⁵⁴ The controls also govern the division of airport slots between carriers.⁵⁵

47. HANLON, *supra* note 43, at 71. The most successful of these intrastate airlines, Southwest, was initially formed to serve the Texas markets. BAILEY ET AL., *supra* note 38, at 28.

48. HANLON, *supra* note 43, at 71. Intrastate carriers, like Pacific Southwest Airlines, were able to offer fares at less than half the rate of airlines operating under the CAB. BAILEY ET AL., *supra* note 38, at 27. To compete, major airlines pressured the CAB into permitting reduced fares for flights within a single state, but the intrastate carriers continued to out-perform their larger counterparts because the CAB required the cheaper tickets be purchased within the state of travel. *Id.* at 28.

49. BAILEY ET AL., *supra* note 38, at 28. As a comparison to the CAB regulated market, the passenger traffic on the intrastate route between Dallas and Houston grew 127.5 percent from 1970 to 1974; similar routes under the CAB increased traffic by only 9.8 percent during the same period. *Id.* at 28–29 (comparing high density routes like Chicago to St. Louis).

50. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (current version at 49 U.S.C. § 40101 (2000)).

51. The stated purpose of the FAA was “to best foster [civil aviation’s] development and safety, and to provide for the safe and efficient use of the airspace by both civil and military aircraft, and for other purposes.” *Id.*

52. *Id.* §§ 307, 312.

53. High Density Traffic Airports, 14 C.F.R. § 93.123 (2009). HDR controls were established at Chicago O’Hare, Washington National, Newark, La Guardia, and Kennedy International. *Id.* HDRs, like the CAB regulations, excluded new entrants to the busiest airports with the most profitable routes. GEORGE L. DONOHUE, RUSSELL D. SHAVER III & ERIC EDWARDS, TERMINAL CHAOS: WHY U.S. AIR TRAVEL IS BROKEN AND HOW TO FIX IT 46 (2008).

54. AIRPORT SLOTS: INTERNATIONAL EXPERIENCES AND OPTIONS FOR REFORM 44 (Achim I. Czerny et al. eds., 2008) [hereinafter AIRPORT SLOTS]. Each airport governed by slot controls is granted a maximum number of flights it may handle in a given period. 14 C.F.R.

Reassigning safety regulations to the FAA was only the beginning of changes made to CAB control. Recognizing the substantial differences in ticket prices between unregulated intrastate carriers and regulated interstate airlines, the CAB and Congress favored reform.⁵⁶ Economy carriers viewed deregulation as a way to gain routes previously reserved for the regulated airlines.⁵⁷ Most major carriers, however, opposed the prospect of fare competition in the financially troubled world of the 1970s.⁵⁸ The CAB determined these concerns were unwarranted and responded with self-deregulation, reducing fare restrictions and barriers to market entry.⁵⁹ A subsequent rise in airline profits relaxed industry resistance to deregulation and created an environment that invited reform.⁶⁰

§ 93.123. For example, Chicago O'Hare can handle eighty departures and arrivals every thirty minutes. *Id.* The slots are divided into specific categories: sixty-two for airlines, thirteen for commuters, and five designated as "other." *Id.* Similar slot allocations developed by the International Air Transport Association (IATA) are used in other countries. AIRPORT SLOTS, *supra*, at 9. In addition to the broader use of IATA recommendations, the IATA allows airlines to actively participate in slot allocation, whereas the FAA does not. *Id.* at 42–47. Under IATA, "[e]ach airline submits its desired schedule to [a coordinator who] then allocate[s] slots." *Id.* at 43. Airlines may trade slots with the coordinator's approval. *Id.* The pricing system model, an alternative to slot controls, limits the number of flights by raising costs during peak periods. *Id.* at 1. Airports operating under a pricing system raise fees to decrease flights and lower fees to attract more flights. *See id.*

55. AIRPORT SLOTS, *supra* note 54, at 48. In 2004, American Airlines was limited to 505 scheduled departures and arrivals between 1:00 p.m. and 7:59 p.m. at Chicago O'Hare. *Id.* United was permitted 655 scheduled operations during the same time period. *Id.* Together, American and United accounted for approximately 88 percent of all scheduled services at the dual hub airport. *Id.*

56. BAILEY ET AL., *supra* note 38, at 29, 32. In 1975, the Kennedy hearings investigated the pricing differences between interstate and intrastate carriers, concluding that low loads caused major airlines to keep fares high. *Id.* at 31. The commission eased fears that deregulation would bankrupt less-competitive carriers. *Id.* At the same time, the CAB leadership published a report favoring complete deregulation as opposed to reform. *Id.* at 32; HANLON, *supra* note 43, at 71. Economists determined that CAB policies set costs equal to fares rather than regulation's intended result of setting fares equal to costs. GEORGE W. DOUGLAS & JAMES C. MILLER III, ECONOMIC REGULATION OF DOMESTIC AIR TRANSPORT: THEORY AND POLICY (1974).

57. BAILEY ET AL., *supra* note 38, at 32. Smaller airlines also sought to obtain larger planes that the CAB restricted to major carriers. *Id.* Even earlier, United Airlines favored reform to obtain new routes and capital for growth. *Id.* at 33. As a result of United's support, the airline industry did not testify in opposition to reform. *Id.*

58. *Id.* at 32.

59. *Id.* at 33. The CAB's first step toward deregulation occurred with the approval of discount fare proposals and relaxation of charter operations. *Id.*

60. *Id.* at 34. Despite reduced fares, profit was driven by expansion of passenger traffic at rates not seen since the 1960s. *Id.*

Congress then passed the Airline Deregulation Act of 1978 (ADA),⁶¹ which phased out the CAB's regulatory authority.⁶² In its place, statutory guidelines imposed limitations on pricing, routes, and market entry.⁶³ The Department of Transportation also took control of international and small community air service.⁶⁴ In the post-CAB era, the need for slot controls grew as airlines took advantage of new route opportunities.⁶⁵ Carriers developed connections through expanded airport hubs, permitting easy travel to and from spokes.⁶⁶ This marked a shift from the regulated era when routes were commonly based on grids that linked several airports without primary connection centers.⁶⁷

B. Delays

The concentration of flights operating at modern hub airports multiplies the effects associated with delays.⁶⁸ Hubs require the prompt arrival of large numbers of airplanes in short time periods known as "waves."⁶⁹ Late arrivals in the morning cause ripple delays

61. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (amending various portions of 49 U.S.C. § 1301). The ADA was designed "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services." *Id.* at 1705.

62. BAILEY ET AL., *supra* note 38, at 34. The CAB relaxation opened almost all routes to new entrants within a year of the ADA's passage. *Id.* at 36.

63. § 33, 92 Stat. 1705.

64. BAILEY ET AL., *supra* note 38, at 34.

65. *Id.* at 74.

66. *Id.* at 75. An airport hub is a concentration point for a carrier where passengers arrive from their originating locations, change planes, and depart for their final destinations. HANLON, *supra* note 43, at 126. "Air carriers normally assign large capacity non-stop flights between their hubs." MASSOUD BAZARGAN, AIRLINE OPERATIONS AND SCHEDULING 32 (2004). For most passengers, spokes serve as the originating and final destinations. *See generally* HANLON, *supra* note 43, at 126. Carriers assign smaller aircraft, often operated by regional airlines, to hub-and-spoke flights. BAZARGAN, *supra*, at 32.

67. HANLON, *supra* note 43, at 124–25. Hub-and-spoke operations offer the advantages of "higher revenues, higher efficiency, and lower number of aircraft needed as compared to" other networks. BAZARGAN, *supra* note 66, at 32. As airlines have combined operations, the new, larger carriers discontinue smaller hub operations and consolidate connections at busier airports. *See* Robert Schoenberger, *Does St. Louis' Loss of Hub Hold Lessons for Cleveland?*, CLEVELAND PLAIN DEALER, May 11, 2010, at A1. For example, American Airlines transferred former TWA flights from St. Louis to its larger hub airports. *Id.*

68. *See* HANLON, *supra* note 43, at 231.

69. *See id.* at 183. Waves are created by scheduling flights at the spokes "so that they

because the same aircraft and crews are needed for subsequent flights.⁷⁰ Delays in the hub system also affect spokes, as departures from hub airports cause passengers to arrive late at their final destinations. Despite concerns about delays, however, airlines and airports consistently operate more than 70 percent of flights on time.⁷¹

The majority of delays are beyond the carriers' control. Weather alone accounts for almost half of all delays.⁷² Extreme weather delays result when conditions prevent all flight operations.⁷³ Weather also can affect the entire National Aviation System, contributing to delays across the country.⁷⁴ Although a city's weather is an important operating factor, selection of hub locations only partially considers the delay risks at connection centers.⁷⁵

Even clear skies do not guarantee timely flights, as delays have become unavoidable in the safety-conscious environment of modern travel. Despite media attention in the wake of September 11, 2001,

connect at the hubs, arrivals preceding departures in sufficient time to permit the transfer of baggage [and passengers] from inbound to outbound flights." *Id.*

70. In 2009, 6.12 percent of flights at major airports suffered delays due to late arrivals. Research & Innovative Tech. Admin., Bureau of Transp. Statistics, *Flight Delays by Cause: All Major Airports (January–December, 2009)*, BTS.GOV, http://www.transtats.bts.gov/OT_Delay/OT_DelayCause1.asp?type=21&pn=1 (last visited Jan. 10, 2011) [hereinafter BTS, *January–December, 2009*] (select "All Major airports," "January, 2009," and "December, 2009" from the drop-down menus at the top of the webpage and click "submit"). Once delayed, passengers flying on the aircraft later in the day may miss their connections unless the crews can get back on schedule. See BAZARGAN, *supra* note 66, at 141 (showing tightly scheduled arrival and departure times). In addition to delays, airlines can also use "flight cancellations, aircraft substitutions, ferry flights (flying an empty aircraft to a point of need) and aircraft diversions to return to their published scheduled flights as soon as possible." *Id.* at 140.

71. Research & Innovative Tech. Admin., Bureau of Transp. Statistics, *Flight Delays by Cause: All Major Airports (June, 2003–December, 2009)*, BTS.GOV, http://www.transtats.bts.gov/OT_DelayCause1.asp?pn=1 (last visited Jan. 10, 2011) (select "All Major airports," "June, 2003," and "December, 2009" from the drop-down menus at the top of the webpage and click "submit") (between June 2003 and December 2009, 76.37 percent of flights operated on time).

72. Research & Innovative Tech. Admin., Bureau of Transp. Statistics, *Understanding the Reporting of Causes of Flight Delays and Cancellations*, BTS.GOV, <http://www.bts.gov/help/aviation/html/understanding.html#q4> (last visited Jan. 10, 2011) [hereinafter BTS, *Understanding the Reporting*] (in 2009, weather accounted for over 44 percent of all delays).

73. *Id.* (indicating that, in 2009, extreme weather accounted for 5 percent of flight delays).

74. *Id.* In 2009, 65.7 percent of all National Aviation System delays were weather related. *Id.* The remainder of the system delays were caused by airport operations, heavy traffic, and air traffic control. *Id.*

75. A variety of factors, including proximity to spoke airports and passenger capacity, determine where an airline places its hubs. See BAZARGAN, *supra* note 66, at 22, 132.

heightened security actually causes minimal disruptions.⁷⁶ Maintenance delays are more commonly to blame,⁷⁷ as safety concerns have caused the FAA to impose strict regulations and minimum equipment lists that prevent departure for even minor mechanical problems.⁷⁸ In addition, a lack of readily available replacement aircraft at spoke airports requires flights to wait for qualified mechanics and parts to be flown from maintenance headquarters.⁷⁹

Airline scheduling techniques exacerbate and even cause delays. Despite slot controls, the limitations of airport capacities are stretched by carriers attempting to schedule tight departure and arrival waves in what are collectively known as “complexes.”⁸⁰ The close connection times mean that even short delays result in missed flights. Airlines utilizing a hub and spoke system can maximize possible connections and decrease passenger layover times by concentrating the largest number of flights in the fewest number of complexes.⁸¹ Carriers use regional jets to increase city-pair connections in each complex, exchanging one high-capacity flight with multiple trips on smaller aircraft.⁸² More flights, however, stress already crowded airports,

76. See BTS, *January–December, 2009*, *supra* note 70 (reporting that, in 2009, only 0.03 percent of flights were delayed due to security concerns).

77. BTS, *Understanding the Reporting*, *supra* note 72. Airlines report mechanical delays as part of the broader category of air carrier delays, which accounted for 28 percent of delays in 2009. *Id.*

78. See FED. AVIATION ADMIN., DEP’T OF TRANSP., MASTER MINIMUM EQUIPMENT LIST (2008), available at <http://fsims.faa.gov/wdocs/mmel/emb-145%20r13pt91.pdf> [hereinafter MMEL]. A broken waste container door, with the fire hazard of loose garbage, can lead to delays and flight cancellation unless certain conditions are met. *Id.* at 25-12. The airplane may fly with an inoperative waste door if “[t]he container is empty and the access is secured to prevent waste introduction” and there are “sufficient galley waste receptacles . . . to accommodate all waste that may be generated on a flight.” *Id.*

79. See HANLON, *supra* note 43, at 187.

80. *Id.* at 138–39. At its Atlanta hub, Delta operates ninety-minute complexes that each connect up to 2,500 city-pair linkages. *Id.* at 139.

81. *Id.* at 184.

82. *Id.* at 155. Expanding in the late 1990s, major carriers have turned to agreements with regional airlines operating small jets to connect many smaller spokes to hub airports. *Id.* Such agreements often take the form of franchises, where the regional carrier offers the brand identity of the major airline in the form of flight numbers and airplane livery. *Id.* The relatively low operating costs of regional jets justifies their replacement of large airplane service to smaller spokes. See EMBRAER, *supra* note 4, at 4–6. The shift of major airline flights to regional jets is most evident in the increase in average miles the smaller airplanes travel per flight, from 274 miles in 1999 to 461 miles in 2008. *10-Year Industry Statistics*, REG’L AIRLINE ASS’N, <http://>

with smaller aircraft that are not as equipped as larger ones to handle delays.⁸³

Scheduling conflicts are most apparent when they compound existing delays, particularly those affecting an entire airport. Bad weather like ice and snow can cause waves of departures to clog taxiways.⁸⁴ Flights often wait in lines to be de-iced.⁸⁵ Once airport volume is restored, the backlogged flights can take hours to depart.⁸⁶ Some tarmac delays ultimately culminate in the cancellation of flights, adding frustration as the affected passengers already have suffered confinement before being stranded in their originating or connecting city.⁸⁷

Delayed flights are inconvenient for passengers and cause significant financial loss for airlines, shippers, and the traveling public.⁸⁸ Lengthy tarmac delays also require travelers to remain

www.raa.org/images/Portals/0/IndustryStats/10industrytrafficstats.png (last visited May 12, 2011).

83. See EMBRAER, *supra* note 4, at 6. Regional jets are designed for short flights and light passenger loads. See *supra* note 4 and accompanying text. They generally have tight seating arrangements, a single lavatory, and are served by one or two flight attendants. See EMBRAER, *supra* note 4, at 14–15; see also 14 C.F.R. § 121.391 (2009). Larger airplanes like the domestically configured Boeing 777 offer multiple classes of service, have several lavatories, and transport in excess of three hundred passengers for great distances. *B777-200*, UNITED, <http://www.united.com/page/article/0,6867,50977,00.html> (last visited May 12, 2011). Such airplanes also come in a less crowded, international version that provides an even greater ability to endure delays. *Id.*

84. See *supra* notes 72–74 and accompanying text.

85. See E-mail from Ricks Frazier, Assistant Gen. Counsel, United Airlines, Inc., to Livaughn Chapman, Trial Att’y, U.S. Dep’t of Transp. (June 11, 2008, 8:21 PM), available at <http://www.airlineinfo.com/sites/DailyAirline/web-content/ostpdf/826.pdf>. Passengers on United Airlines’ Flight UA29 experienced a delay that was so long that it required two de-icing procedures before departure. *Id.* The passengers and crew experienced additional delays while waiting for a gate to become available. *Id.* The airplane was then directed to the rear of the departure line. *Id.*

86. To prevent a backlog of flights from clogging tarmacs, airports institute the Ground Delay Program (GDP). *Ground Delay Program*, FED. AVIATION ADMIN., http://www.fly.faa.gov/Products/AIS_ORIGINAL/shortmessage.html (last visited May 12, 2011). The GDP alerts aircraft to hold before departure because their destination airport has exceeded its acceptance rate. *Id.* Airports, however, are still stretched beyond gate capacity. Gary Stoller, *Fliers Trapped on Tarmac Push for Rules on Release, Congress Looks at Laws to Let Travelers Off Delayed Flights*, USA TODAY, July 28, 2009, at 6A.

87. The tarmac may be so full of delayed flights that aircraft have trouble returning to the gates. Stoller, *supra* note 86.

88. “A flight is considered delayed when it arrive[s] 15 or more minutes” behind schedule. See BTS, *January–December, 2009*, *supra* note 70. Domestic flight delays in 2007

uncomfortably seated, posing health dangers.⁸⁹ Passengers delayed inside the terminal remain comparably free, but the DOT warns travelers that “[e]ach airline has its own policies about what it will do for delayed passengers waiting at the airport; there are no federal requirements.”⁹⁰

are estimated to have “cost as much as \$41 billion to the U.S. economy.” *DOT and FAA Actions Will Likely Have a Limited Effect on Reducing Delays During Summer 2008 Travel Season: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 110th Cong. 1 (2008) (statement of Susan Fleming, Dir. of Physical Infrastructure Issues).

89. See Merchant, *supra* note 2. One of the more serious health risks passengers face is deep vein thrombosis, a potentially deadly clot caused when blood flow slows in the legs after sitting for prolonged periods. Rob Lovitt, *Double Trouble: DVT a Small, but Serious Risk*, MSNBC, <http://www.msnbc.msn.com/id/19794895> (last updated July 17, 2007).

90. *Fly-Rights: A Consumer Guide to Air Travel*, AVIATION CONSUMER PROT. DIV., DEP’T OF TRANSP., <http://airconsumer.dot.gov/publications/flyrights.htm#delayed> (last visited May 12, 2011) [hereinafter *Fly-Rights*]. Travelers are additionally cautioned that some carriers “do not provide any amenities to stranded passengers” while others only assist when the delay was the airline’s fault. *Id.* An exception to the general lack of protection is made for individuals bumped from flights. *Id.* Passengers are bumped because airlines overbook flights to compensate for those who do not show at the time of departure. *Id.* When more than the predicted number of passengers show at the airport, there are not enough seats and some are forced to wait for the next flight. *Id.* Bumped passengers can be entitled to monetary compensation depending on the length of travel delay. *Id.* Involuntarily bumped passengers who receive substitute transportation scheduled to arrive at their final destination “within one hour of [their] original scheduled arrival time[s] [receive] no compensation.” *Id.* Substitute transportation that schedules passengers to arrive at their final destination between one and two hours of the original arrival time entitles the travelers to the cost of their one-way fares up to \$400. *Id.* “If the substitute transportation is scheduled to get [passengers] to [their] destination[s] more than two hours later . . . , or if the airline does not make any substitute travel arrangements . . . , the compensation doubles (200% of [the] fare[s], \$800 maximum).” *Id.*

Passengers on cancelled flights face difficulties when trying to find alternative transportation because airlines are operating flights filled closer to capacity. JOSHUA MARKS & DARRYL JENKINS, MODELING PASSENGER REACCOMMODATION TIME FOR FLIGHT CANCELLATIONS IN AIRLINE NETWORKS 5 (2010), available at http://www.marksaviation.com/MarksAviation/Tarmac_files/Passenger%20Displacement%20Paper.pdf. Under the CAB Rule 240, airlines were required “to offer passengers on cancelled flights the first available seat on either that airline’s own flight, or on the first available flight of a competing airline.” *Id.* at 1–2. Deregulation ended the mandated rebooking on other airlines, but carriers continued the practice until financial troubles led to cutting the costly procedure. *Id.* at 2. Passengers must instead wait longer to be reaccommodated on their original airline. *Id.* at 6. These factors help lead to Marks and Jenkins’ conclusion “that cancellations create significantly more harm to passengers than delays.” *Id.* at 1.

C. Failed Legislative Remedies

The DOT regulation and proposed APBR come after a series of failed federal statutes designed to protect airline passengers from extended delays and other common problems.⁹¹ The first attempts at passenger protection were acts proposed in the late 1980s.⁹² Early legislation sought to provide consumers with information about dispute resolution and on-time performance records.⁹³ One failed attempt, the Airline Reregulation Act of 1989 (ARA),⁹⁴ called for disclosing carriers' on-time performance,⁹⁵ controlling advertisements,⁹⁶ and preventing carriers from cancelling flights on short notice for economic reasons.⁹⁷ Later proposals demanded better on-time performance on regularly scheduled routes.⁹⁸ With hub development, lawmakers became concerned about the number of passengers missing connections.⁹⁹ To combat delays, legislation sought airport pricing schemes that discouraged carriers from scheduling flights during peak periods.¹⁰⁰ None of the proposals

91. See Timothy M. Ravich, *Re-regulation and Airline Passengers' Rights*, 67 J. AIR L. & COM. 935, 939-52 (2002).

92. *Id.* at 941.

93. *Id.* at 942.

94. S. 1854, 101st Cong. (1989). Senator Byrd, in discussing the proposed bill, noted that if he could recast his vote on the ADA, he "would now vote against deregulation." 135 CONG. REC. 27,898 (1989) (statement of Sen. Robert Byrd). The 1989 legislation proposed the creation of an Aviation Policy Board to improve air service by regulating fares and air routes. S. 1854 §§ 102, 106-07.

95. Carriers were to include information on ticket jackets, directing customers to on-time performance records through travel agents or the airline's reservation office. S. 1854 § 201.

96. The bill would have prohibited airlines "from advertising a fare for any flight at a particular price, unless the air carrier offer[ed] at least one-third of the seats for" that price, without a disclosure stating otherwise. *Id.*

97. Airlines could cancel flights for profitability concerns only if passengers were given a day's notice and properly accommodated on another flight. *Id.*

98. Airline Passengers Defense Act of 1990, H.R. 5453, 101st Cong. § 1703 (1990) ("The on-time performance of any regularly scheduled flight of an air carrier may not be 30 percent or less in any consecutive 3-month period.").

99. Airline Competition and Passenger Protection Act of 1991, H.R. 2037, 102d Cong. § 1701 (1991).

100. "[A]n airport may impose and collect a higher fee for landing an aircraft during a peak hour for air traffic at the airport for the purpose of reducing delays and congestion at the airport." *Id.* § 1703.

passed, but the DOT responded by compiling records of lost baggage and on-time performance.¹⁰¹

Delays continued to be a problem, culminating in the unprecedented January 1999 stranding of hundreds of passengers in Detroit.¹⁰² Again considering corrective legislation,¹⁰³ Congress instead accepted the airlines' promises to improve conditions for passengers on delayed flights.¹⁰⁴ The resulting Airline Customer Service Commitment (Commitment) of June 17, 1999, signed by the Air Transport Association (ATA) on behalf of fourteen of its member airlines, required that each carrier prepare a Customer Service Plan to implement policies for handling and communicating with delayed passengers.¹⁰⁵ The Commitment required that carriers treat bumped passengers fairly, provide for "customers' essential needs during long on-aircraft delays," and notify passengers of delays, cancellations, and diversions.¹⁰⁶

101. Ravich, *supra* note 91, at 941. The Airline Passenger Protection Act of 1987, which led to the current DOT reporting procedures, called for the Secretary of Transportation to compile and retain information regarding fares and frequency of service. H.R. 3051, 100th Cong. (1987).

102. DEP'T OF TRANSP., REPORT ON THE JANUARY 1999 DETROIT SNOWSTORM (1999) [hereinafter 1999 REPORT], reprinted in *Airline Passenger Rights*, H.R. 700, H.R. 780, and H.R. 908: *Hearing Before the Subcomm. on Aviation of the H. Comm. on Transp. & Infrastructure*, 106th Cong. 320–60 (1999). Snow in excess of ten inches delayed an estimated 1200 passengers on airplanes for more than eight hours. *See id.* at 4–7.

103. *See* Airline Passenger Bill of Rights Act of 1999, H.R. 700, 106th Cong. (1999); *see also* Passenger Entitlement and Competition Enhancement Act of 1999, H.R. 780, 106th Cong. (1999); Aviation Consumer Right to Know Act of 1999, H.R. 908, 106th Cong. (1999).

104. *See Airline Customer Service Commitment: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 107th Cong. 1–2 (2001) (statement of Hon. Kenneth Mead, Inspector Gen., U.S. Dep't of Transp.) [hereinafter *Mead Statement*], available at <http://www.oig.dot.gov/sites/dot/files/pdfdocs/cc2001090.pdf>. The decision to allow airlines the opportunity to improve conditions without legislation was the result of Congressional hearings that culminated in an agreement between legislators, the DOT, and the ATA. *Id.*

105. *Id.* In signing the Commitment, the ATA represented Alaska, Aloha, American, ATA, America West, Continental, Delta, Hawaiian, Midwest Express, Northwest, Southwest, TWA, United, and US Airways. *Id.* at 2 n.3.

106. *Id.* at 2. The remaining provisions included requirements that airlines "[o]ffer the lowest fare available," provide "[o]n-time baggage delivery" with "an increase in the baggage liability limit" and "[d]isclose travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration[s]." *Id.* In following these procedures, the carriers were expected to "[b]e more responsive to customer complaints." *Id.*

The DOT conducted observations following the voluntarily enacted plan and found room for improvements.¹⁰⁷ Airlines had made some provisions for customers on tarmac delays, but each carrier differed on the amount of time considered to be an “extended” delay worthy of accommodations like food and beverages.¹⁰⁸ Passengers, the report concluded, could be better informed of their rights if airlines were to “establish in the Commitment and their Customer Service Plans targets for reducing the number of chronically delayed” flights.¹⁰⁹

Congress proceeded with legislation “to establish consumer protections for airline passengers” with the May 2001 introduction of the Airline Passenger Bill of Rights.¹¹⁰ The bill would have required airlines to develop plans for delay situations.¹¹¹ In the case of delays, cancellations, or diversions, honest announcements were to inform passengers about the reasons for the schedule changes.¹¹² Passengers experiencing tarmac delays were to be provided “access to necessary services and conditions, including food, water, [and] restroom facilities.”¹¹³ The bill included a variety of factors that could result in the deplanement of passengers.¹¹⁴ Four months after the act’s

107. *Id.* at 5. Airlines were encouraged to increase the compensation for bumped passengers, which had not changed since 1978. *Id.* at 19.

108. *Id.* at 9. The shortest period counted as an extended delay by an airline was forty-five minutes. *Id.* Other carriers set the extended delay time at three hours. *Id.* Requesting clarification, the DOT noted, “it is unlikely that a passenger’s definition of an ‘extended’ on-aircraft delay will vary depending upon which air carrier they are flying.” *Id.*

109. *Id.* at 16.

110. H.R. 1734, 107th Cong. (2001). The legislation was introduced in spite of “evidence show[ing] significant investment and progress by the Airlines toward meeting these Commitment provisions.” *Mead Statement, supra* note 104, at 8.

111. H.R. 1734. The 2001 bill required that passengers bumped from flights receive alternate transportation, as well as compensation for food and hotel costs if the trip could not be completed within the same day. *Id.* § 41,722.

112. *Id.*

113. *Id.*

114. *Id.* The bill required:

No air carrier . . . shall prevent or hinder . . . any passenger from exiting the aircraft . . . if –

(1) the aircraft is parked at an airport terminal gate with access to ramp or other facilities through which passengers are customarily boarded and deplaned;

(2) the aircraft has remained at the gate more than 1 hour past its scheduled departure time; and

introduction, on September 11, terrorists hijacked and crashed four airplanes.¹¹⁵ Passenger levels dropped, and concerns about delays were subordinated to security interests.¹¹⁶

By 2007, passenger traffic had returned to pre-September 11 levels.¹¹⁷ In the wake of highly publicized delays at Kennedy International and LaGuardia airports, the New York legislature passed the state's Passenger Bill of Rights.¹¹⁸ The law required carriers to provide food, water, clean lavatories, and electrical power to passengers during ground delays in excess of three hours.¹¹⁹ The statute, however, only applied to flights delayed prior to departure and not to passengers stranded on arrival.¹²⁰ The ATA, the airline industry's trade organization, challenged the law in *Air Transport Ass'n of America, Inc. v. Cuomo (ATA)*.¹²¹ The ATA court determined that the ADA's explicit reference to "services" preempted the state law requiring carriers to provide food and facilities for passengers.¹²²

(3) the captain of the aircraft has not been informed by air traffic control authorities that the aircraft can be cleared for departure within 30 minutes.

Id.

115. David M. Kennedy, Op-Ed., *Fighting an Elusive Enemy*, N.Y. TIMES, Sept. 16, 2001, at A31.

116. Jonathan E. DeMay, *Recent Developments in Aviation Law*, 73 J. AIR L. & COM. 131, 315 (2008).

117. *Id.*

118. N.Y. GEN. BUS. LAW § 251(f)-(j) (McKinney 2008). Particularly troubling was the February 2007 stranding of more than a thousand JetBlue passengers for up to ten hours during an ice storm. Thomas Frank & Andrea Stone, *Fliers' Misery Stings JetBlue*, USA TODAY, Feb. 16, 2007, at A5.

119. N.Y. GEN. BUS. LAW § 251(g). The controversial portions of the statute required "that passengers are provided as needed with: (a) electric generation service to provide temporary power for fresh air and lights; (b) waste removal service in order to service the holding tanks for on-board restrooms; and (c) adequate food and drinking water and other refreshment." *Id.*

120. *Id.*

121. 520 F.3d 218 (2d Cir. 2008). The district court upheld New York's statute as "[un]related to a price, route, or service." *Air Transp. Ass'n of Am. v. Cuomo*, 528 F. Supp. 2d 62, 66 (N.D.N.Y. 2007).

122. *ATA*, 520 F.3d at 223-25. In reviewing the district court, the Second Circuit found that the term "service" in the ADA restricts what states can require of carriers during ground delays. *Id.* at 223. The ADA requires that states not "enact or enforce any . . . provision having the force and effect of law relating to rates, routes, or services of any air carrier" providing interstate travel. ADA, Pub. L. No. 95-504, 92 Stat. 1705, 1708 (1978) (emphasis added) (amending various portions of 49 U.S.C.). The ATA court held that "[r]equiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays does relate to the service of an air carrier and therefore falls within the express terms of the ADA's

Congress, like the New York legislature, became concerned over lengthy delays in 2007.¹²³ The Senate and House of Representatives introduced legislation known as the Airline Passenger Bill of Rights Act of 2007.¹²⁴ The Senate focused on departure delays while the House extended passenger protections to include those stranded on arrival.¹²⁵ The longer House proposal also established requirements for disclosure and publication of chronically delayed flights.¹²⁶ The ATA decision and the death of both bills led to the new DOT regulation and APBR proposal.

D. Proposed and Current Passenger Protections

In January of 2009, a new APBR was introduced.¹²⁷ During the following summer, delays, including the diversion of Continental Flight 2816, hastened support for passing the legislation.¹²⁸ The APBR of 2009 inclusively defines “tarmac delay[s]” as occurring both before takeoff and after landing.¹²⁹ The bill establishes a supervisory role for the Secretary of Transportation in setting

preemption provision.” 520 F.3d at 223. Any safety concerns the New York statute purportedly addressed as part of the state’s police powers were preempted by the ADA and its regulations. *Id.* The ATA decision frustrated other states’ efforts similar to the statute struck down in New York. See Frank Ahrens, *Court Rejects Air Travelers Bill of Rights*, WASH. POST, Mar. 26, 2008, at D3. New York was the first of at least ten states considering laws regarding airline delays to pass the legislation. *Id.*

123. 153 CONG. REC. 2204 (2007) (statement of Sen. Barbara Boxer). Along with JetBlue, American Airlines faced delays in 2007, with one boarded plane sitting nine hours without adequate food, water, or lavatories. *Id.*

124. S. 678, 110th Cong. (2007); H.R. 1303, 110th Cong. (2007).

125. See S. 678 (“In any case in which departure of a flight of an air carrier is delayed, such air carrier shall provide (A) adequate food and potable water to passengers on such flight during such delay; and (B) adequate restroom facilities to passengers on such flight during such delay.”); H.R. 1303 (“A covered air carrier . . . shall provide for the essential needs of passengers at all times during which the aircraft is on the ground in the event of a departure or arrival delay . . .”). The primary distinction would have been the opportunity for arriving passengers, under the House’s wording, to deplane after three hours. See H.R. 1303. If the Senate bill became law, arriving passengers would have remained unprotected from the long tarmac delays that later plagued Flight 2816. See S. 678.

126. H.R. 1303.

127. S. 213, 111th Cong. (2009).

128. See Merchant, *supra* note 2.

129. S. 213 § 2. Flights do not need to be delayed at a scheduled arrival or departure location as the law “applies to aircraft without regard to whether they have been diverted to an airport other than the original destination.” *Id.*

minimum standards for airline and airport delay planning.¹³⁰ These standards include a requirement that carriers provide food, water, lavatories, a comfortable cabin environment, and medical treatment to passengers.¹³¹ Travelers must also be given an opportunity to deplane during prolonged delays every three hours.¹³² Pilots, however, may override the deplaning provision when they have a reasonable belief that the aircraft will depart within thirty minutes or if deplaning would jeopardize safety or security.¹³³ The APBR creates civil penalties for those airlines that fail to comply.¹³⁴

The APBR is not limited to carriers. Airports also must submit plans and make gates available for delayed aircraft.¹³⁵ They are required to provide deplaning options for passengers during long delays.¹³⁶ In addition, airports may need to encourage airlines to share gates.¹³⁷

Acting independently from APBR proponents, the DOT also recognized the problems of delayed flights and sought the advice of industry insiders and the traveling public.¹³⁸ As a result, the DOT set the limit on tarmac delays at three hours and applied it to major and regional airlines.¹³⁹ Each carrier is expected to draft and follow a contingency plan and, in the case of regional airlines operating under a code-share agreement for a major airline, apply the plan most beneficial to passengers.¹⁴⁰ International flights are exempt from the three-hour limits, however, because the DOT believed their cancellation would pose greater hardship to passengers than lengthy

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* Types of civil penalties, however, are unspecified. *Id.*

135. *Id.*

136. To avoid penalties, both airports and carriers must “obtain approval of, or adhere to a contingency plan” submitted in accordance with the APBR. *Id.*

137. *See id.*

138. *See* Advance Notice of Proposed Rulemaking, 72 Fed. Reg. 65,233 (Nov. 20, 2007). The DOT collectively received two hundred responses from airlines, trade associations, consumers, and congressional representatives. Enhancing Airline Passenger Protections, 74 Fed. Reg. 68,983 (Dec. 30, 2009).

139. Enhanced Protections for Airline Passengers, 14 C.F.R. §§ 259.3–259.4 (2010). The three-hour limit applies regardless of whether the delay occurs on departure or arrival. *Id.* § 259.4.

140. *Id.* § 259.4; 74 Fed. Reg. at 68,985.

delays.¹⁴¹ The DOT regulation is enforced by the imposition of penalties, including fining offenders up to \$27,500 for each passenger.¹⁴² The agency, however, turned down proposals requiring contingency plans to appear in an airline's contract of carriage, thereby denying private causes of action.¹⁴³ Initial results from the DOT regulation appear mixed, but the goal of reduced delays has been achieved.¹⁴⁴

II. ANALYSIS

The need for government intervention to protect passenger rights is partially addressed by the new DOT regulation. Beginning April 29, 2010, airlines were required to provide services for passengers on ground delays within two hours and deplane them on delays lasting longer than three hours.¹⁴⁵ The DOT regulation, however, should serve as just the beginning of governing passenger rights and protections. Congressional leaders pushing for the APBR argue that a

141. 74 Fed. Reg. at 68,985. International flights are not permitted unlimited delays, but the carriers may set their own duration when developing contingency plans. 14 C.F.R. § 259.4. The DOT hypothesizes that cancellation of these less frequent flights may cause “greater harm to consumers who are less likely to be accommodated on an alternate flight in a reasonable period of time.” 74 Fed. Reg. at 68,988. The new regulation similarly does not require the reporting of delayed international flights out of concern that it “could make carriers less inclined to hold flights for” late connecting travelers. *Id.* at 68,983.

142. 14 C.F.R. § 259.4; JOSHUA MARKS & DARRYL JENKINS, IMPACT OF THREE-HOUR TARMAC DELAY RULES AND FINES ON PASSENGER TRAVEL TIME AND WELFARE 16 (2010), available at http://www.tarmaclimits.com/tarmac/tarmac_Limits_files/Tarmac_Paper.pdf.

143. 14 C.F.R. § 259.4; 74 Fed. Reg. at 68,988–89.

144. In May 2009, there were thirty-four flights with tarmac delays of at least three hours. Research & Innovative Tech. Admin., Bureau of Transp. Statistics, *Table 2 Monthly Summary of Tarmac Times, Oct. 2008–Oct. 2010*, BTS.GOV, http://www.bts.gov/programs/airline_information/taxi_out_and_other_tarmac_times/table_02.html (last visited May 12, 2011). In May 2010, however, only one flight suffered a three-hour delay. *Id.* Although the results appear promising, flight cancellations rose 40 percent from 2009 to 2010. MARKS & JENKINS, *supra* note 142, at 60. Direct cancellations resulting from the rule could reach 2,600 annual flights, displacing approximately 203,000 passengers. *Id.* at 51. Numbers might be even higher when non-delayed flights later in the day are indirectly cancelled for lack of aircraft or crew. *Id.* at 51–52. All displaced passengers must wait for the sparse open seats on later flights—as much as “21 or more hours” after their scheduled departure as compared to the “average 2.7 hours of incremental tarmac time.” *Id.* at 51. Carriers, leery of fines between 200 and 300 times passenger revenue, have encouraged “flights returning to the gate [and] a higher cancellation percentage as airlines free gates for passenger disembarkation.” *Id.* at 2.

145. 14 C.F.R. § 259.4.

statute would provide passengers with more permanent protections from the powerful airline industry.¹⁴⁶ While a developed statutory and regulatory scheme is needed, the form passenger protections take should be carefully considered.

Passengers should not suffer decreased rights on domestic flights merely because a major airline has elected to use regional carriers in some markets. Including regional airlines in the DOT regulation was an important step in preventing dissimilar treatment.¹⁴⁷ The shift from only flying large jets to using regional airplanes means that any effective protection for passengers must also apply to these smaller aircraft.¹⁴⁸ The DOT regulation properly requires all airlines to file contingency plans.¹⁴⁹ When a major airline and its regional carrier have conflicting plans, the plan most advantageous to passengers must be applied.¹⁵⁰

The new DOT regulation implements essential protections, but its nuances leave many passengers unprotected and may cause additional harm to others. For example, the DOT treats flights differently if they leave the country.¹⁵¹ The deplaning requirements applied to domestic trips offer no protection for international travelers.¹⁵² Passengers wish to avoid cancellations, especially those on infrequent flights leaving the United States. The DOT regulation, however, fails to provide any limitation on the tarmac delays international travelers may endure.¹⁵³ The rationale of preventing *departure* cancellations does not explain the lack of regulation for flights *arriving* in the United States.¹⁵⁴

146. Press Release, Sen. Barbara Boxer, Boxer, Snowe Praise DOT Action to Protect Passenger Rights (Dec. 21, 2009), available at <http://boxer.senate.gov/en/press/releases/122109a.cfm>. “As good as this rule is, it doesn’t give passengers permanent protection because it could be overturned by a future administration.” *Id.*

147. See 14 C.F.R. § 259.4. The DOT, over objections raised by carrier associations and ExpressJet, decided to apply the new restrictions to those airlines operating airplanes with thirty or more passenger seats. *Id.* § 259.2. Regional airlines sought to avoid the new regulation on the basis that their contracts with major airlines governed responses to delays. 74 Fed. Reg. at 68,984. The requirement that regional airlines develop contingency plans could lead to conflicts when they differ from those created by their larger code-share partners. *Id.*

148. See *supra* note 66 and accompanying text.

149. 14 C.F.R. § 259.4.

150. 74 Fed. Reg. at 68,985.

151. See 14 C.F.R. § 259.4.

152. See *supra* note 26 and accompanying text.

153. 14 C.F.R. § 259.4.

154. The passengers on Virgin Atlantic Flight VS001 did not suffer a flight cancellation by

Recognizing their greater capacity to care for passengers, the conditions on even the largest aircraft used to span continents can devolve to the levels of cramped, regional jets during long delays.¹⁵⁵

The DOT regulation expands protections guaranteed by the government's ability to impose fines, but it fails to provide a private cause of action for stranded passengers.¹⁵⁶ Airlines are not required to publish their contingency plans in their contracts of carriage.¹⁵⁷ By not mandating provisions for redressing passenger injuries, the regulation limits the potential for breach of contract suits to those airlines that voluntarily incorporate plans into their contracts.¹⁵⁸ The regulation instead provides a method of complaining through the offending airline itself.¹⁵⁹ Such a limited option inhibits consumer involvement in policing the aviation industry and provides few incentives to draft complaints.

Supporters of the APBR recognize the achievement of the DOT regulation, but also believe that a more permanent statute is necessary.¹⁶⁰ Airlines and their representatives at the ATA are politically powerful and have extensive legal resources.¹⁶¹ Without legislative action like the APBR, a future administration would find it easier to deregulate.¹⁶² Voters and passengers could hold politicians directly accountable if legislative attempts were made to decrease

deplaning at Bradley International. *See* Sharkey, *supra* note 26. They had already made the flight and arrived in the United States, albeit not in the intended destination of New York. *See id.* Applying the deplaning requirements to international arrivals does not mean passengers are stranded because additional flights or alternative transportation could be provided. *See id.*

155. *Id.*

156. Enhancing Airline Passenger Protections, 74 Fed. Reg. 68,983, 68,988–89 (Dec. 30, 2009).

157. *Id.* at 68,989. The DOT strongly “encourage[s] airlines] to include their contingency plans in their contracts of carriage” and “will publicize a list of carriers that do and do not so incorporate their plans.” *Id.*

158. 14 C.F.R. § 259.6. The DOT continues to consider whether plans will eventually be required to be part of contracts of carriage. 74 Fed. Reg. at 68,989.

159. 14 C.F.R. § 259.7.

160. *See supra* note 146 and accompanying text.

161. As demonstrated in the ATA case, the ATA is aggressive in attacking government actions that impose upon the airline industry. *Air Transp. Ass'n of Am. v. Cuomo*, 520 F.3d 218, 218 (2d Cir. 2008).

162. The DOT could conduct notice and comment and repeal the rule, offering an explanation of the policy goals that eliminating the regulation served. Administrative Procedure Act, 5 U.S.C. § 553(b)–(c) (2006).

passenger protections.¹⁶³ It would be comparably difficult to alter actions of the DOT.¹⁶⁴ Lacking a comprehensive statute also means that agency regulating power is not being used to fully reduce long delays. The FAA's slot control mechanism, for example, is not addressed in the DOT regulation or the proposed APBR.¹⁶⁵

The DOT regulation and proposed APBR have limited goals of addressing the effects of delays but may actually cause additional problems.¹⁶⁶ The strict penalties imposed under the DOT regulation risk exacerbating the detriment to delayed passengers by causing flight cancellations.¹⁶⁷ The best form of protection would be avoiding delays rather than minimizing their effects. Airlines, however, make prevention difficult by squeezing more flights into shorter time periods.¹⁶⁸

III. PROPOSAL

The DOT regulation surpasses prior attempts to limit passenger tarmac delays.¹⁶⁹ The proposed APBR similarly offers more robust, albeit less specific, statutory protection in an area where previous legislation has failed.¹⁷⁰ Both the regulation and bill, however, should serve only as the beginning of passenger rights improvements.

A comprehensive plan is necessary to establish statutory rights that can be refined by regulations. Such a plan should provide for

163. Senators stand for election every six years. U.S. CONST. amend. XVII. Representatives stand for election every two years. U.S. CONST. art. I, § 2, cl. 1.

164. Agency officials are not directly accountable to voters. They are, however, mindful of public opinion and must "respond to significant points made during the public comment period." Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 523 (1985); see MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND ADMINISTRATIVE LAW* 193 (3d ed. 2009). Passengers also could challenge repeal of the regulation in court, the same as with the creation of a rule. See *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). The agency action would be evaluated under the "arbitrary and capricious" standard, but this review is "narrow." *Id.* at 42–43.

165. See S. 213, 111th Cong. (2009); H.R. 624, 111th Cong. (2009); Enhanced Protections for Airline Passengers, 14 C.F.R. § 259 (2010).

166. The new regulation seeks to prevent airlines from operating "consistently delayed flights." See *supra* note 98.

167. See *supra* note 144 and accompanying text.

168. See *supra* notes 80–81 and accompanying text.

169. See *supra* Part I.C.

170. See *supra* Part I.C.

deplaning passengers based on the size of aircraft and their ability to hold passengers in relative comfort.¹⁷¹ The DOT regulation arguably offers a similar provision by not restricting international flights.¹⁷² The virtual exclusion of deplaning requirements, however, does a disservice to consumers because even large aircraft are unable to provide indefinite comfort.¹⁷³ Future regulations should apply equally to international flights and foreign carriers. At the least, international arrivals or foreign flights diverted to American airports should be included in the deplaning requirements.¹⁷⁴ While time limits for international departures might cause cancellations or inhibit carriers from holding flights for connecting passengers, the application of deplaning requirements to international arrivals poses no similar problems.¹⁷⁵

Generally, larger airplanes are more capable of storing the supplies needed during long tarmac delays.¹⁷⁶ Bigger aircraft with higher passenger loads also require significantly more time to deplane in comparison with their smaller counterparts.¹⁷⁷ If flights are not cancelled, reboarding all the passengers will further delay departures, leading to missed connections and upset customers. Regional jets, like those operated by ExpressJet, might be strictly limited on delays, perhaps to an even shorter time than the three hours now permitted.¹⁷⁸ Depending on the rationale—time to deplane or capable facilities—larger aircraft might be granted longer delay periods.¹⁷⁹ A general approach that divides airplanes into small,

171. See *supra* note 83 and accompanying text.

172. See *supra* note 141 and accompanying text.

173. See *supra* note 26 and accompanying text.

174. Virgin Flight VS001 demonstrated the potential hazards that delays pose to international travel. See Sharkey, *supra* note 26.

175. See *supra* note 141 and accompanying text.

176. The DOT cites passenger expectations on long, international flights as a reason for permitting airlines to set longer delays. Enhancing Airline Passenger Protections, 74 Fed. Reg. 68,983, 68,988 (Dec. 30, 2009). The same rationale exists for long, domestic flights.

177. Both the Embraer 145 and Boeing 777 use a single door for deplaning, but the 777 holds approximately six times as many passengers. See EMBRAER, *supra* note 4, at 7; see also B777-200, *supra* note 83. In the event of cancellation, deplaning more passengers also necessitates the unloading of more bags.

178. See *supra* note 83.

179. See *supra* note 83 and accompanying text. While the international configuration might provide greater facilities for stranded passengers, the higher density of travelers on the domestic configuration will take longer to deplane and reboard. For example, a United 777 has 253

medium, and large capacities will avoid unnecessary confusion that would result from arbitrarily grouping aircraft by destination or accommodations aboard. Deplaning requirements must be communicated to customers prior to boarding so expectations are clear.

Furthermore, future statutes and regulations should require airlines to include delay limits and procedures in their contracts of carriage.¹⁸⁰ By establishing a civil claim for breach of contract, the DOT would empower passengers to recoup damages when airlines violate delay limits.¹⁸¹ A delayed flight may mean a cancelled business meeting, a missed wedding, or a lost day in Disney World. Consumers justifiably believe their time is valuable. They want and deserve the opportunity to seek redress. As the regulation currently reads, passengers benefit from the DOT's severe fines only as much as they prefer the risk of cancellations over delays.¹⁸² The fines should be reduced to more reasonably reflect the severity of violating the regulation.¹⁸³ A fine structure or civil damages alternative that more closely reflects fares and revenues would reduce the chance of needless deplaning and cancellations.¹⁸⁴

Flight 2816 demonstrated the importance of airport cooperation in deplaning delayed passengers.¹⁸⁵ Any statute or regulation seeking to decrease delays should require contingency plans for airports and airport service providers in addition to airlines.¹⁸⁶ In many of the delay situations caused by extreme weather, thousands of passengers can be stranded in aircraft scattered around an airport's tarmac.¹⁸⁷

passenger seats in its international version and 348 in the domestic model. *B777-200*, *supra* note 83.

180. *See supra* notes 156–58 and accompanying text (The DOT has not yet required airlines to include plans in contracts of carriage.).

181. *See supra* notes 156–58 and accompanying text.

182. *See supra* note 144 and accompanying text.

183. Fines of \$27,500 per passenger equate to a \$1.4 million penalty for a full, fifty-seat regional aircraft like Continental Express Flight 2816. MARKS & JENKINS, *supra* note 142, at 1.

184. *See supra* note 144 and accompanying text.

185. *See supra* note 13.

186. The APBR includes a basic requirement that airport operators cooperate in the deplanement of passengers. *See supra* note 24 and accompanying text. At airports that are already overcrowded, finding empty gates to deplane becomes more difficult.

187. The delays of February 2007 provide an example. *See supra* note 118 and accompanying text.

Rather than attempting to set unrealistic time limits that depend on the actions of carriers, all airports should restrict the number of airplanes they serve at a given time to those that they can accommodate realistically.

The limit on aircraft numbers would work best if it was divided into two categories. First, slot controls, a restriction that already exists, can decrease the number of aircraft attempting to arrive or depart at a given airport.¹⁸⁸ The number of slots at busy airports must be decreased and applied in shorter increments to more evenly distribute flights throughout the day.¹⁸⁹ Departing flights should no longer be scheduled at overlapping times.¹⁹⁰ Having fewer aircraft waiting in line for take-off will minimize the number of passengers stranded on the tarmac when delays occur. By limiting the size of aircraft waves, airports can decrease many of the more common, shorter delays.¹⁹¹

Second, the maximum number of airplanes an airport can serve at a given time should be more tightly regulated.¹⁹² Determining the exact number of aircraft permitted should be based on factors that include the number of gates and likelihood of extensive delays. While the FAA and DOT might provide guidance, each airport has different needs based on terminal configuration, weather patterns, passenger usage, and the types of aircraft served. Airport operators should evaluate these considerations in drafting plans for agency approval.¹⁹³ Any such restrictions, however, need to leave room for safety

188. *See supra* notes 53–55 and accompanying text.

189. *See supra* note 54 and accompanying text.

190. *See supra* note 80 and accompanying text.

191. *See supra* notes 69–70 and accompanying text.

192. “Serving,” as opposed to general capacity, should be used to exclude from the restrictions those airplanes that are parked at the airport for storage or maintenance. The narrowing of the calculation to only reflect commercial passenger aircraft is significant in that the primary purpose of airport capacity restrictions would be to make gates available for the easy deplaning of delayed passengers. *See BAZARGAN, supra* note 66, at 132–33 (discussing complexity of gate assignments). Private and cargo flights that must be included when calculating arrival and departure limits do not use the terminal gates for airlines and should be excluded from the number an airport can serve.

193. Arguably, airports already recognize the limits to their serving capacity, but restrictions remain unenforceable without the risk of penalties. *See supra* note 86 and accompanying text.

considerations such as diversions or emergency landings that would increase the number of aircraft to an otherwise unacceptable level.

Carriers will change their behavior in response to airport restrictions.¹⁹⁴ Infrequent flights on high-capacity aircraft will replace frequent services on regional airplanes.¹⁹⁵ Connections via hubs to some city pairings may become unavailable during some complexes. Passengers must exchange these conveniences to minimize delays, but cancelling scheduled flights should not be the primary response.¹⁹⁶ A better remedy presupposes that delays will occur and prepares carriers and airports to handle disruptions with fewer scheduled flights.

CONCLUSION

The recent DOT regulation protecting delayed passengers offers hope that Flight 2816 will remain a horror story of the past and not a fear that follows travelers down every jetbridge. Government regulation in the early twentieth century protected the airline industry from its own competitive forces. Now regulation is needed to protect consumers from delays in the modern, complex market of air travel. Legislation and regulations must address both the effects of delays that passengers experience and the causes of late flights.

Aviation in the United States was forever changed by deregulation in the 1970s and the tragedies of September 11, 2001. The once glamorous industry has lost its charm: aviation has become an option for the average traveler through greater competition, reduced fares, and more flights. Today's passengers will never experience the freedom of flight enjoyed by the Lindberghs. The "adventure" of aviation, however, does not need to be the prospect of interminable delays if Congress and the DOT continue to advance passenger rights and protections.

194. *See supra* notes 53–55 and accompanying text.

195. *See supra* notes 81–83 and accompanying text.

196. *See supra* note 144 and accompanying text.