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Reviving Antitrust Enforcement in the Airline Industry

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NOTE

REVIVING ANTITRUST ENFORCEMENT IN THE AIRLINE INDUSTRY

Jonathan Edelman*

The Department of Transportation (DOT) has broad but oft overlooked power to address antitrust issues among airlines through section 411 of the Federal Aviation Act. However, the DOT's unwillingness to enforce antitrust more aggressively may be translating into higher fares and fees for airline travelers.

More aggressive antitrust enforcement is urgently needed. Recent research has revealed a widespread practice of common ownership in the airline industry, whereby investment firms own large portions of rival airline companies. Although this practice leads to higher prices and reduced competition, antitrust regulators, from the DOT to the Department of Justice and the Federal Trade Commission, have declined to take action. This Note argues that the DOT has the clear legal authority—and the responsibility—under section 411 to address common ownership among airlines by promulgating a rule that limits investors' ability to own large shares of multiple airlines. DOT regulation in this area could pave the way for more muscular antitrust regulation among industry-specific agencies.

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INTRODUCTION

Much ink has been spilled on how airline mergers have affected competition.¹ Mergers have cut major carriers nearly in half over the past two decades. From Southwest–Air Tran and Delta–Northwest to United–Continental and American–US Airways, mergers have increased travel costs and reduced travelers’ options.² But airline mergers only tell part of the story. Despite their far-reaching impact, less has been written about how mergers of financial institutions affect the airline industry. When financial institutions BlackRock and BGI merged, ticket prices increased by 0.5% across the industry.³ New research on that merger and others has brought to light the investment practice of “common ownership,” which involves investors owning large shares of stock in multiple rival companies. Common ownership stifles market competition, particularly in the airline industry.

1. See, e.g., Ben Mutzabaugh, *Era of Airline Merger Mania Comes to a Close with Last US Airways Flight*, USA TODAY (Oct. 16, 2015, 10:22 AM), <https://www.usatoday.com/story/travel/flights/todayinthesky/2015/10/15/airline-mergers-american-delta-united-southwest/73972928-perma.cc/W7KT-5PRA>. This Note discusses only passenger airlines.

2. See, e.g., Haobin Fan, *When Consumer Type Matters: Price Effects of the United-Continental Merger in the Airline Industry*, 21 ECON. TRANSP., Mar. 2020.

3. José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513, 1541 (2018).

Common ownership has exploded across the economy over the past two decades.⁴ In 2000, institutional investors⁵ were the largest owners of 25% of the companies listed on the S&P 500 index; by 2017, that number was up to 90%.⁶ By 2010, over half of American public companies had large portions of their stock held by common owners, up from 10% in 1980.⁷ Furthermore, common ownership appears to have increased prices for consumers across several industries—including banking, tech, pharmacy retail, and air travel.⁸ The practice may be costing consumers and society over \$60 billion, representing a significant transfer of wealth from consumers to upper-class investors.⁹ But the rise of common ownership has not persuaded regulators to act. Fearful of harming financial markets and overstepping their legal authority, regulators have responded only by calling for further research.¹⁰

This Note proposes a solution to these concerns. As the larger antitrust agencies—the Department of Justice (DOJ) and the Federal Trade Commission (FTC)—continue to sit on the sidelines, the Department of Transportation (DOT) can and should take action against common ownership. By regulating common ownership of airlines under the broad antitrust jurisdiction of the DOT, federal authorities can enact a workable solution without putting financial markets at risk, all while grounding that regulation in clear legal authority. This will require that the DOT go beyond usual antitrust regulation and embrace its broad legal mandate to prevent methods of unfair competition. In doing so, the DOT could pave the way both for other agencies to regulate common ownership across the economy and for the DOT itself to engage in farther-reaching antitrust enforcement that fulfills its statutory mandate.

4. Miguel Antón, Florian Ederer, Mireia Giné & Martin Schmalz, *Common Ownership, Competition, and Top Management Incentives* 19–20 (Eur. Corp. Governance Inst., Finance Working Paper No. 511/2017, 2021), <https://doi.org/10.2139/ssrn.2802332> [perma.cc/KE6U-S447].

5. Institutional investors are entities that pool large amounts of money for investment, such as mutual funds, pensions, and insurance companies. James Chen, *Institutional Investor*, INVESTOPEDIA (Mar. 20, 2020), <https://www.investopedia.com/terms/i/institutionalinvestor.asp> [perma.cc/6XXU-RE8N].

6. Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669, 674 (2017).

7. *Id.*

8. Einer Elhauge, Essay, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1268 (2016).

9. Posner et al., *supra* note 6, at 679; Our Curious Amalgam, *From Virtual Spring Meeting: Common Minority Interests: Major or Minor Problem?*, A.B.A., at 12:05 (May 27, 2020) [hereinafter *Common Minority Interests*], <https://podcast.ourcuriousamalgam.com/episode/62-common-minority-interests-major-minor-problem> [perma.cc/HL2E-NFV8].

10. Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Opening Remarks at FTC Hearing #8: Competition and Consumer Protection in the 21st Century 11 (Dec. 6, 2018) [hereinafter *FTC Hearing*], https://www.ftc.gov/system/files/documents/public_events/1422929/ftc_hearings_session_8_transcript_12-6-18_0.pdf [perma.cc/AVW3-KC5V].

The DOT's regulation of common ownership and other anticompetitive practices may affect not only how the airline industry might function but also how the economy as a whole distributes income and wealth.¹¹ As the United States creeps toward its highest levels of economic inequality in a century,¹² policymakers, politicians, and activists have started to identify ineffective antitrust laws as one cause of that inequality.¹³ But their proposed remedies tend to focus solely on using the DOJ and the FTC to strengthen merger enforcement and break up monopolies.¹⁴ Less attention has been paid to how antitrust law can more effectively check anticompetitive practices, and less still to where industry-specific agencies like the DOT fit in. By considering the DOT's potential for stronger enforcement, this Note paves the way for more effective antitrust regulation across the economy.

Part I introduces background concepts in antitrust law, airline-specific antitrust law, and the airline industry's competitive landscape—including the presence of common ownership. Part II explains how antitrust law may prevent the larger antitrust agencies from issuing proactive regulations on common ownership, as well as how historical practice has caused antitrust practitioners to overlook the DOT's potential role in antitrust enforcement. Part III proposes that the DOT use its authority to combat common ownership and shows why the DOT should take a more active role in regulating anticompetitive business practices in the airline industry.

I. OVERVIEW OF THE ANTITRUST REGULATORY STRUCTURE OF AIRLINES

This Part provides an overview of the airline industry and the legal structure governing competition within the industry. Section I.A briefly summarizes antitrust law generally. Section I.B describes the specific structure of antitrust regulation of airlines. Section I.C explains the main competitive features of the airline industry, including common ownership and its application to airlines.

11. Posner et al., *supra* note 6, at 679.

12. See, e.g., CHAD STONE, DANILO TRISI, ARLOC SHERMAN & JENNIFER BELTRÁN, CTR. ON BUDGET & POL'Y PRIORITIES, A GUIDE TO STATISTICS ON HISTORICAL TRENDS IN INCOME INEQUALITY (2020), <https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality> [perma.cc/F7GY-WG56].

13. See, e.g., Roger McNamee, Opinion, *A Historic Antitrust Hearing in Congress Has Put Big Tech on Notice*, GUARDIAN (July 31, 2020, 7:42 AM), <https://www.theguardian.com/commentisfree/2020/jul/31/big-tech-house-historic-antitrust-hearing-times-have-changed> [perma.cc/B6K7-MYGH]; Kelly Evans, *Big Tech's "Big Tobacco" Moment*, CNBC: THE EXCHANGE (July 29, 2020, 11:19 AM), <https://www.cnbc.com/2020/07/29/kelly-evans-big-techs-big-tobacco-moment.html> [perma.cc/62CS-ASZ3].

14. See, e.g., Elizabeth Warren (@teamwarren), *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c> [perma.cc/A7EJ-D7FT].

A. Overview of Antitrust Law

Antitrust law allows government regulators and private parties to restrict company behavior that produces monopolies or otherwise interferes with competitive markets.¹⁵ Most antitrust enforcement comes from two agencies: the DOJ and the FTC.¹⁶ The DOJ's antitrust jurisdiction stems from two industrialization-era statutes, the Sherman Act and the Clayton Act.¹⁷ The Sherman Act contains two main sections that provide a broad outline of antitrust law: section 1 prohibits anticompetitive agreements and mergers,¹⁸ while section 2 prohibits anticompetitive behavior by a single company.¹⁹ The Clayton Act provides mechanisms for enforcing the Sherman Act, including provisions for treble damages, prohibitions on stock acquisition, and regulatory review of mergers.²⁰

The exact scope of the Sherman and Clayton Acts is often in dispute. Though it is clear that the Acts apply when business conduct directly and immediately raises prices, judges and practitioners often disagree on their applicability when the conduct has an attenuated effect on competition, affects outcomes outside of price, or stems from interrelated markets.²¹ This Note will not attempt to resolve that disagreement, but it will consider how federal enforcement agencies respond when it is not clear whether the Acts cover certain business practices. This Note refers to this liminal space as the “boundaries” of the Sherman and Clayton Acts, where DOJ jurisdiction is disputed.

The FTC's jurisdiction over antitrust stems from section 5 of the Federal Trade Commission Act (FTC Act), another century-old statute that allows the

15. See EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 1–4 (3d ed. 2018). A monopoly occurs when one company is so dominant compared to its rivals that it can raise prices on its products or services without its customers leaving for its rivals. *See id.* The market—that is, the different items people are willing to substitute for the original item—can be defined in several ways, often for the same product. For example, a soccer podcaster may have one market for her podcast in “podcast lovers,” where she competes with other podcasts for downloads and listens. She may have another market for that same podcast in “soccer lovers,” where she competes with other soccer journalists who post blogs and record TV interviews. And if her podcast is about soccer analytics, she may even have a smaller market in “soccer analytics fans,” where she competes only with other journalists who engage in soccer analytics. The market definition depends solely on what the customer is willing to substitute.

16. *Id.* at 11.

17. Sherman Act, 15 U.S.C. §§ 1–7; Clayton Act, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53.

18. 15 U.S.C. § 1. In the modern antitrust context, “anticompetitive” means a business practice that, on balance, does more to harm a business's current and potential rivals than it does to help that business develop a better or more efficient product or service. *See ELHAUGE, supra* note 15, at 54–55. Anticompetitive behavior often—but not always—results in a company raising its prices without providing value for their customers. *See id.* at 1–2.

19. 15 U.S.C. § 2.

20. *See id.* §§ 15, 18.

21. *See ELHAUGE, supra* note 15, at 274–355 (discussing disagreement over what constitutes “anticompetitive conduct” in doctrines such as predatory pricing and refusals to deal). *See also infra* note 120 for a discussion of predatory pricing.

FTC to prohibit “unfair methods of competition.”²² The FTC’s antitrust enforcement authority under section 5 is at least as broad as the DOJ’s authority under the Sherman and Clayton Acts.²³ Section 5 also gives the FTC authority over consumer protection²⁴ as well as some antitrust issues not covered by the Sherman and Clayton Acts, though exactly which issues are covered is not clearly defined.²⁵

B. Antitrust Enforcement Within the Airline Industry

As explained above, the DOJ and the FTC jointly enforce federal antitrust laws in most industries. But because the DOT is broadly responsible for regulating air travel, the DOT enforces the antitrust laws in the airline industry, not the FTC.²⁶ The role of these agencies has changed significantly over time. This Section focuses on the source and scope of the DOT’s authority.

The airline industry went from strict federal control to relatively lax regulation in the late twentieth century. Airlines used to be tightly regulated: the Civil Aeronautics Board (CAB) had broad authority to set airline routes and prices for airlines, which effectively capped the number of airlines that could stay in business.²⁷ But in 1978, Congress removed most government controls over prices and routes with the Airline Deregulation Act.²⁸ Upon the CAB’s disbandment in 1985, its powers to monitor anticompetitive practices and

22. 15 U.S.C. § 45(a); ELHAUGE, *supra* note 15, at 12–13; *see also* Clayton Act § 11, 15 U.S.C. § 21 (granting the FTC enforcement authority).

23. *See* FTC v. Superior Ct. Trial Laws. Ass’n, 493 U.S. 411, 422 (1990) (noting that conduct violating the Sherman Act consequently “also violated . . . § 5”); ELHAUGE, *supra* note 15, at 13 (“[A]nything that violates the Sherman Act could also be deemed an unfair method of competition actionable under FTC Act § 5.”).

24. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 245–46 (1972); *see also* Cindy R. Alexander & Yoon-Ho Alex Lee, *The Economics of Regulatory Reform: Termination of Airline Computer Reservation System Rules*, 21 YALE J. ON REGUL. 369, 383 (2004).

25. *See* FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 454 (1986) (“[Section 5] encompass[es] not only practices that violate the Sherman Act and other antitrust laws but also practices that the Commission determines are against public policy for other reasons.” (citation omitted)); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rule-making to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 676 (2009). The limits of section 5 of the FTC Act are explored *infra* in Section II.B.

26. Clayton Act § 11, 15 U.S.C. § 21. In contrast to the FTC, the DOJ retains jurisdiction over the airline industry. ELHAUGE, *supra* note 15, at 11 & n.5.

27. *See* Daniel J. Gifford & Robert T. Kudrle, *U.S. Airlines and Antitrust: The Struggle for Defensible Policy Towards a Unique Industry*, 50 IND. L. REV. 539, 541–42 (2017); *see also* TRANSP. RSCH. BD., NAT’L RSCH. COUNCIL, WINDS OF CHANGE: DOMESTIC AIR TRANSPORT SINCE DEREGULATION 22–28 (1991), <https://doi.org/10.17226/11410> [perma.cc/TP8G-DCHP]. Though the CAB was in charge of economic regulation, safety was controlled by the Federal Aviation Administration (FAA), which was housed within the DOT. *Delta Air Lines, Inc. v. Civ. Aeronautics Bd.*, 543 F.2d 247, 259 (D.C. Cir. 1976).

28. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

mergers, as well as its consumer protection authorities, were transferred to the DOT.²⁹ The DOT ceded jurisdiction of mergers to the DOJ in 1989 after the DOT was criticized for rubber-stamping merger applications.³⁰

The DOT's jurisdiction over airline competition comes from section 411(a) of the Federal Aviation Act. That statute allows the DOT to "investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation."³¹ Section 411(a) is nearly identical in language to section 5 of the FTC Act. Accordingly, the DOT's competition authority has been interpreted together with that of the FTC.³²

C. Overview of the Airline Industry and Common Ownership

Antitrust law works by tailoring regulations to the competitive nature of each specific market.³³ This Section covers three aspects of the U.S. airline industry that structure competition: oligopoly, differentiation between low-cost and legacy carriers, and common ownership. Exploring these features reveals how firms interact with each other and consumers and leads to a better understanding of how antitrust enforcement can and cannot protect consumers from anticompetitive practices.

29. *United Air Lines, Inc. v. Civ. Aeronautics Bd.*, 766 F.2d 1107, 1112 (7th Cir. 1985) (Posner, J.); see also Gifford & Kudrle, *supra* note 27, at 553–54. Though the FAA is part of the DOT, economic regulation of airlines is handled by the Office of the Secretary—a remnant of the old division between the CAB and the FAA. See, e.g., Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, 63 Fed. Reg. 17,919 (proposed Apr. 10, 1998) (proposing a rule by the Office of the Secretary to regulate airline pricing).

30. 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"); Jesse Hercules, *Mixed Optimization: Diagnosis and Proposed Solution for Several Problems in the Airline Industry*, 71 J. AIR L. & COM. 691, 702–03 (2006). The DOT retains the ability to exempt international airline agreements from the antitrust laws, but those are outside the scope of this Note. 49 U.S.C. § 41308; see 4 JULIAN O. VON KALINOWSKI, PETER SULLIVAN & MAUREEN MCGUIRL, *ANTITRUST LAWS AND TRADE REGULATION* § 67.02(1)(b) (2d ed. 2020).

31. 49 U.S.C. § 41712(a). DOT jurisdiction also comes from the policy goals specified in 49 U.S.C. § 40101(a), which include preventing anticompetitive practices and concentration.

32. *United Air Lines*, 766 F.2d at 1112–13; Ernest Gellhorn & Richard Liebeskind, *Computer Reservations Systems: To Regulate or Not? Flawed DOT Jurisdiction and Antitrust Rationale*, AIR & SPACE LAW., Spring 2003, at 1, 21; see also *infra* Section II.B.

33. See, e.g., Royce Zeisler, Note, *Chevron Deference and the FTC: How and Why the FTC Should Use Chevron to Improve Antitrust Enforcement*, 2014 COLUM. BUS. L. REV. 266, 269.

First, the airline industry is an oligopoly.³⁴ In an oligopoly, the market is dominated by a small number of firms.³⁵ Firms have market power (that is, the power to reap profits above competitive levels by setting prices and quantities), but that power is constrained by other firms in the market.³⁶ Accordingly, oligopolists have incentives to preserve their market power strategically and reduce competition, often by cooperating with other firms or by driving other firms out of the market.³⁷ As a market becomes more concentrated—that is, as fewer firms control more of the market—firms have even greater incentives to preserve their market power.³⁸

The U.S. airline oligopoly is dominated by four firms: American, United, Delta, and Southwest, which together make up about two-thirds of the market.³⁹ Competition generally takes place along individual “city pairs,” or flights from one specific city to another, like Jacksonville to D.C. or Detroit to Raleigh. The market within each city pair is often more concentrated than the airline market as a whole.⁴⁰ Further, the market within each hub is especially concentrated, and flights to or from hubs are more expensive than those to or from non-hub airports.⁴¹ Further, it is difficult for airlines to compete in new city pairs: fixed costs (like buying planes) are high,⁴² flight schedules must be planned months in advance,⁴³ and airport space must be leased before flights

34. E.g., Larry Moore, Rose M. Rubin & Justin N. Joy, *The World Trade Center Disaster: How Terrorist Airline Attacks Can Affect the Legal, Economic, and Financial Conditions of Airlines Under the Montreal Liability Agreement*, 4 *BYU INT'L L. & MGMT. REV.*, no. 1, 2007, at 1, 9; see, e.g., Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 *HARV. L. & POL'Y REV.* 235, 260–61 (2017).

35. Moore et al., *supra* note 34; *Oligopoly*, ECON. ONLINE, https://www.economicsonline.co.uk/Business_economics/Oligopoly.html [perma.cc/YTT5-FFMN].

36. Moore et al., *supra* note 34; *Oligopoly*, *supra* note 35.

37. *Oligopoly*, *supra* note 35. For more on how firms use business strategy to preserve their market power, see generally William S. Comanor & H.E. Frech III, *Strategic Behavior and Antitrust Analysis*, 74 *AM. ECON. REV. (PAPERS & PROC.)* 372 (1984).

38. Khan & Vaheesan, *supra* note 34, at 261; Moore et al., *supra* note 34, at 8.

39. Khan & Vaheesan, *supra* note 34, at 260; Elena Mazareanu, *Domestic Market Share of Leading U.S. Airlines from January to December 2020*, STATISTA (Mar. 16, 2021), <https://www.statista.com/statistics/250577/domestic-market-share-of-leading-us-airlines> [perma.cc/Z2QD-UB8S].

40. See TRANSP. RSCH. BD., NAT'L RSCH. COUNCIL, ENTRY AND COMPETITION IN THE U.S. AIRLINE INDUSTRY: ISSUES AND OPPORTUNITIES 65–67 (1999); Khan & Vaheesan, *supra* note 34, at 260–61. For example, the Detroit to Raleigh city-pair would have even fewer competitors than the market as a whole.

41. TRANSP. RSCH. BD., *supra* note 40, at 66–72. Examples of hubs include Dallas (American) and Atlanta (Delta). Khan & Vaheesan, *supra* note 34, at 262.

42. Moore et al., *supra* note 34, at 10 (noting that 75% of airlines' cost structure is fixed). High fixed costs are often associated with oligopolies. *Oligopoly*, *supra* note 35.

43. Gifford & Kudrle, *supra* note 27, at 544.

can operate.⁴⁴ Since it is more difficult for would-be rivals to compete in new markets, this lack of flexibility allows airlines to maintain their market power in the city pairs they control.⁴⁵ These concentrating effects incentivize airlines to cooperate and otherwise act strategically to increase market power.

Second, the airline industry is characterized by competition between “legacy” and “low-cost” carriers. Legacy carriers offer more full-service options, such as an extensive flight network (connected through hubs) and first-class seating. Low-cost carriers offer smaller flight networks with fewer connecting flights and cheaper fares.⁴⁶ Low-cost carriers have disrupted legacy carriers’ hub-based business models, meaning that competition—and attempts to undermine it—is often fiercest when legacy and low-cost carriers compete in the same city pairs.⁴⁷

Finally, the airline industry has high levels of common ownership. Common ownership refers to a phenomenon in finance whereby the same investor—often an institutional investor that manages mutual funds for millions of clients (think BlackRock or Berkshire Hathaway)—holds a significant stake in multiple firms in the same industry.⁴⁸ Investors who own a stake in two rivals would prefer for those rivals to cooperate rather than compete. As a result, both economic theory⁴⁹ and recent empirical research⁵⁰ suggest that common ownership leads to reduced competition between firms—to the detriment of consumers. Antitrust scholar Einer Elhauge explains that “[d]ozens of empirical studies have now confirmed” that common ownership affects how companies make decisions, which often causes anticompetitive effects.⁵¹

44. *Id.* at 555 (noting the practice of airlines hoarding airport space to prevent rivals from entering).

45. *Oligopoly*, *supra* note 35 (explaining that barriers to entry into new markets allow existing firms to maintain market power and keep an oligopolistic structure).

46. Legacy carriers (Delta, American, and United) are known as such because they existed before Congress deregulated the industry. Gifford & Kudrle, *supra* note 27, at 542 & n.34.

47. *Id.* at 550–51; see also Paul Stephen Dempsey, *Predation, Competition & Antitrust Law: Turbulence in the Airline Industry*, 67 J. AIR L. & COM. 685, 698 (2002).

48. Azar et al., *supra* note 3, at 1514. For example, an investor in Firm A would want her firm to undercut Firm B’s prices whenever profitable, even if that undercutting would destroy Firm B’s profits. Undercutting prices in this way would benefit consumers, who could take advantage of a lower price. But if the investor owned stakes in both Firm A and Firm B, then she would prefer Firm A to undercut Firm B’s prices only when it would not destroy Firm B’s profits, since she cares about the aggregate profits of Firm A and Firm B. Consumers would lose if the investor got her way because prices would remain high.

49. *Id.* at 1514.

50. Posner et al., *supra* note 6, at 669; *Common Minority Interests*, *supra* note 9, at 1:05:30.

51. Elhauge, *supra* note 8, at 3. Elhauge goes on to note that “[o]nly two of these empirical studies have been disputed, and the critiques of those two studies have been rebutted at length.” *Id.* at 3–4. Some have taken issue with this characterization, pointing out methodological questions with the empirical studies and arguing that many of the studies cited show influences on corporate behavior, rather than anticompetitive effects specifically. C. Scott Hemphill & Marcel Kahan, *The Strategies of Anticompetitive Common Ownership*, 129 YALE L.J. 1392, 1447 n.154

The airline industry is a paradigmatic example of the problems associated with common ownership.⁵² Almost all of the largest owners of the major airlines are common owners, and the ten largest stockholders of the four biggest airlines have surprising overlap.⁵³ For example, in 2016 Berkshire Hathaway was the largest shareholder of both Delta (8%) and United (9%), the second-largest of Southwest (7%), and the third-largest of American (8%).⁵⁴ Mutual-fund giant Vanguard had significant shares in all eight of the largest airlines: it was the largest shareholder of JetBlue (8%), the second-largest of Spirit (7%), third-largest of United (7%), Delta (6%), and Southwest (6%), and fourth-largest of American (6%) and Allegiant (7%).⁵⁵

This extensive network of common ownership is harming competition. A 2018 study found that common ownership of airlines caused a 3%–7% increase in airline fares on average, with fare increases perhaps as high as 12%.⁵⁶ As with any market, as prices increase, fewer people will fly: if the price of a flight from Baltimore to Atlanta rises from \$199 to \$220, some will find the new price too costly and stay on the ground.⁵⁷ These price increases also transfer wealth from consumers to airlines; when travelers have to pay more for each flight, they must spend more every year on air travel, while airlines keep that extra money as profits.⁵⁸

Competition in the airline industry, then, occurs across an oligopolistic structure, where legacy airlines and low-cost carriers compete most fiercely. Partly because of the oligopolistic nature of the market, common ownership

(2020); Patrick Dennis, Kristopher Gerardi & Carola Schenone, *Common Ownership Does Not Have Anti-competitive Effects in the Airline Industry*, SSRN (Mar. 9, 2021), <https://doi.org/10.2139/ssrn.3063465> [perma.cc/FZT7-KDLH]. Resolving econometric disputes is well beyond the scope of this Note; however, some of the studies critiquing Azar et al., *supra* note 3, have themselves come under criticism for fabricating data. See, e.g., Martin Schmalz (@martinschmalz), TWITTER (June 26, 2020, 3:53 AM), <https://twitter.com/martinschmalz/status/1276423263258923008> [perma.cc/MUZ4-2YMG] (critiquing Edward B. Rock & Daniel L. Rubinfeld, *Antitrust for Institutional Investors*, 82 ANTITRUST L.J. 221, 271 (2018), for arbitrary use of dummy variables); Martin Schmalz (@martinschmalz), TWITTER (July 20, 2020, 10:21 AM), <https://twitter.com/martinschmalz/status/1285218246136860672> [perma.cc/FK5R-FGV5] (accusing Dennis et al., *supra*, of making “non-sensical” arguments).

52. See Azar et al., *supra* note 3, at 1514 (using airlines to examine a broader theory of common ownership); Antón et al., *supra* note 4, at 48 tbl.2.

53. Azar et al., *supra* note 3, at 1516 tbl.1; see also *id.* at 1525 (“Note that American Airlines’ top-seven shareholders (who jointly control 49.55% of the stock) are also among the top 10 investors of Southwest Airlines and various other competitors. Similarly, each of Southwest’s top-six shareholders is among the top 10 shareholders of American and Delta, and five of them are among the top 10 holders of United as well.”).

54. *Id.* at 1516.

55. *Id.*

56. *Id.* at 1517–18.

57. *Id.* at 1559. For more on this economic concept, see, for example, *Supply and Demand*, ENCYCLOPEDIA BRITANNICA (Dec. 17, 2019), <https://www.britannica.com/topic/supply-and-demand> (on file with the *Michigan Law Review*).

58. See Azar et al., *supra* note 3, at 1559.

pervades the airline industry, reducing competition further. And when competition is reduced, consumers face fewer options and steeper prices—exactly what antitrust law is supposed to address.

II. SOURCES OF ANTITRUST AGENCIES' RELUCTANCE TO ADDRESS COMMON OWNERSHIP

Though common ownership has emerged as an important competitive problem in the airline industry, antitrust regulators have stopped short of regulating the practice. With traditional antitrust law's application to common ownership unclear, regulators have been hesitant to enact proactive rules addressing it. This Part explores the reasons—both legal (why agencies might lack authority to regulate) and prudential (why agencies might prefer not to regulate)—for that hesitation. Section II.A covers the DOJ's ability to address common ownership through the Sherman and Clayton Acts. Section II.B explores the FTC and the DOT's authority to address practices outside of the Sherman and Clayton Acts through their ability to address "unfair methods of competition." Section II.C traces the DOT's prior regulation of competitive practices that lie on the boundaries of the Sherman and Clayton Acts.

A. *Limits of the Sherman and Clayton Acts*

Though common ownership causes competitive harm within the airline industry, two aspects of the practice make it difficult to regulate within the conventional boundaries of the Sherman and Clayton Acts: courts' emphasis on showing a "mechanism of harm" and an exception to the Clayton Act for investors. This Section covers those aspects in turn.

First, the nebulous nature of the competitive harm caused by common ownership makes the Sherman and Clayton Acts difficult to apply. Since at least *Twombly*,⁵⁹ courts have required antitrust enforcers to show the specific method by which a business practice harms competition in order to bring suit under the Sherman Act.⁶⁰ If regulators bring an enforcement action but cannot prove a specific method by which a common owner is reducing competition (like telling executives not to compete or structuring executive pay to dissuade competition), then courts are likely to dismiss the suit.⁶¹ Such overt

59. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548–49 (2007) (holding that antitrust lawsuits must be dismissed if they only contain bare allegations of anticompetitive behavior).

60. Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. REV. 871, 928 (2011).

61. See *Common Minority Interests*, *supra* note 9, at 52:30; William H. Rooney, Co-chair, Antitrust & Competition Prac. Grp., Willke Farr & Gallagher LLP, Remarks at FTC Hearing, *supra* note 10, at 245.

acts are hard to identify.⁶² In fact, the most likely method is not any overt action but instead “selective omission,” whereby common owners simply decline to encourage corporations to compete as hard as independent owners would.⁶³ Consequently, the DOJ and others suing under the Sherman Act may be prevented from addressing common ownership in many cases.

Section 7 of the Clayton Act specifically prohibits stockholders from using stock acquisitions to reduce competition,⁶⁴ so it could provide an avenue for regulators looking to address common ownership even if the Sherman Act would not apply. But section 7 provides a carve-out for stock that is acquired solely for investment,⁶⁵ which throws its applicability to common ownership into question. Professor Elhauge has argued that because institutional investors still exercise voting power and control through their stock, the Clayton Act should apply to common owners who are institutional investors.⁶⁶ But since institutional investors are often more concerned about making a return on investment than about controlling the corporations themselves, other scholars have disagreed or noted lasting questions about the applicability of the Clayton Act.⁶⁷ Resolving this disagreement is outside of the scope of this Note, but its presence suggests another issue the DOJ may face in suing common owners under the Clayton Act.

Beyond these legal questions lie concerns about the method by which the Sherman and Clayton Acts must be enforced: through the courts. The DOJ may not use notice-and-comment rulemaking to regulate antitrust behavior; instead, it must bring action in court.⁶⁸ But courts are often far from ideal adjudicators of antitrust issues given that economic analysis is required.⁶⁹ This is especially true when courts are confronted with cutting-edge theories of antitrust harm. For example, in the early 2000s the FTC discovered that pharmaceutical companies were paying generic manufacturers to delay

62. See Hemphill & Kahan, *supra* note 51, at 1399–400. *But see* Nathan Shekita, *Interventions by Common Owners*, SSRN (Dec. 15, 2020), <https://doi.org/10.2139/ssrn.3658726> [perma.cc/6RR3-9PX3] (finding thirty examples of common owners using overt actions to encourage anticompetitive conduct in a recent study).

63. Hemphill & Kahan, *supra* note 51, at 1427–28.

64. 15 U.S.C. § 18.

65. *Id.* (“No person shall acquire . . . the stock or other share capital . . . where in any line of commerce . . . the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or tend to create a monopoly. This section shall not apply to persons purchasing such stock solely for investment . . .”).

66. Elhauge, *supra* note 8, at 1305–08.

67. *Common Minority Interests*, *supra* note 9, at 30:00, 52:00. *But see* Azar et al., *supra* note 3, at 1520 (arguing that institutional investors are becoming more activist).

68. 15 U.S.C. § 4 (permitting the DOJ to enforce the Sherman Act only in the courts); ELHAUGE, *supra* note 15, at 11–12, 12 n.11.

69. See Hemphill, *supra* note 25, at 673–75.

challenging their drug patents.⁷⁰ When the FTC sued to stop these “pay for delay” arrangements, courts of appeals held that “pay for delay” was not a traditionally recognized mechanism of harm and allowed the arrangements to continue. “Pay for delay” arrangements cost consumers \$60 billion in higher drug prices.⁷¹ As this example shows, the DOJ and private parties may be prevented from enforcing the antitrust laws by courts unfriendly to new theories of antitrust harm.

The DOJ may face an uphill battle countering the competitive harm common ownership causes: it is difficult to identify how common ownership harms competition, the Clayton Act exempts passive investors, and courts are hostile to new economic arguments. Because common ownership sits on the boundaries of the Sherman and Clayton Acts, agencies able to prosecute “unfair methods of competition”—like the FTC and the DOT—may have an easier path to regulation.

B. “Unfair Methods of Competition”

Both section 5 of the FTC Act and section 411(a) of the Federal Aviation Act authorize their respective enforcement agencies to regulate “unfair methods of competition.” Courts have said that the language in those acts is broader than that of the Sherman and Clayton Acts.⁷² But it is not clear how much broader that authorization is, which is key to determining whether the FTC or the DOT can lawfully regulate common ownership. This Section examines how courts have treated attempts by the FTC and the DOT to regulate conduct outside of the Sherman and Clayton Acts.

The scope of the FTC’s section 5 powers has narrowed over time. Until the 1970s, courts allowed the FTC to regulate conduct solely on section 5 grounds, without even considering its relationship to the Sherman and Clayton Acts.⁷³ In 1966, the Supreme Court held that “the Commission has power under § 5 to arrest trade restraints in their incipency without proof that they amount to an outright violation” of the Sherman and Clayton Acts.⁷⁴ Though the Supreme Court has maintained that section 5 extends beyond the Sherman

70. For more on this issue, see generally FTC, PAY-FOR-DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS (2010), <https://www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf> [perma.cc/XC7W-T47D].

71. Our Curious Amalgam, *What’s Ahead in Pharmaceutical Antitrust Enforcement? Taking Stock of Key Pharmaceutical Issues and Enforcement Actions*, A.B.A., at 8:00 (Aug. 31, 2020), <https://podcast.ourcuriousamalgam.com/episode/76-whats-ahead-pharmaceutical-antitrust-enforcement-key-issues-enforcement-actions> [perma.cc/HS5A-KY79].

72. See *supra* notes 25, 32 and accompanying text.

73. See Zeisler, *supra* note 33, at 275–76; *Atl. Refin. Co. v. FTC*, 381 U.S. 357, 369–70 (1965).

74. *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966).

and Clayton Acts,⁷⁵ in practice courts of appeals have limited the FTC's authority by requiring it to prove that business practices were causing actual or potential harm.⁷⁶ The FTC thrice attempted to use section 5 to prosecute conduct outside of the Sherman and Clayton Acts in the 1980s; each time, it lost at the court of appeals.⁷⁷

In *Official Airline Guides, Inc. v. FTC*,⁷⁸ the FTC challenged a company listing airline flights for refusing to deal with certain airlines, potentially making it harder for those airlines to compete.⁷⁹ The Second Circuit rebuffed the FTC, holding that section 5 did not cover situations when companies refused to deal with rivals since antitrust laws do not impose a duty on companies to deal with rivals.⁸⁰ The court concluded that this challenge failed to comport with the general thrust of antitrust law because the FTC conceded the challenge was "outside the mainstream of law concerning monopolies and monopolization."⁸¹ *Official Airline Guides*, then, created a limit on the FTC's ability to define what an "unfair method" was by requiring the FTC to relate the method back to the general principles of antitrust law.

Next, in *Boise Cascade Corp. v. FTC*,⁸² the FTC challenged a plywood manufacturing pricing system that it believed was reducing competition in freight in some plywood markets.⁸³ The Ninth Circuit found that the FTC did not present sufficient evidence to show that the pricing system was actually harming competition and rejected the FTC's argument that it need not find direct evidence of competitive harm because of the breadth of section 5.⁸⁴ The FTC could not simply allege that rivals colluded; rather, "the Commission must demonstrate that the challenged pricing system has actually had the effect of fixing or stabilizing prices."⁸⁵ The Ninth Circuit stressed the complete lack of evidence presented by the FTC and, while noting that the FTC could prosecute "incipient threat[s] to competition," found that the FTC had not

75. See *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986). The Supreme Court has reached this conclusion by looking at the language and the history of the FTC Act. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). The use of the broad term "unfair" gave the FTC broad discretion to determine what conduct fell under the purview of section 5, and the legislative history surrounding the FTC Act evinced Congress's desire that the FTC enjoy broader powers than the DOJ. *Id.* at 241–44.

76. Adam Speegle, Note, *Antitrust Rulemaking as a Solution to Abuse of the Standard-Setting Process*, 110 MICH. L. REV. 847, 858 (2012).

77. *Id.* at 859.

78. 630 F.2d 920 (2d Cir. 1980). For a brief discussion on refusals to deal, see *infra* notes 117–119 and accompanying text.

79. *Off. Airline Guides*, 630 F.2d at 922–23.

80. *Id.* at 927–28.

81. *Id.* at 925 (quoting *Reuben H. Donnelley Corp.*, 95 F.T.C. 1, 76 (1980)).

82. 637 F.2d 573 (9th Cir. 1980).

83. *Boise Cascade*, 637 F.2d at 574.

84. *Id.* at 580–82.

85. *Id.* at 577.

shown any incipient threat.⁸⁶ So while *Boise Cascade* affirmed the reach of the “unfair methods of competition” provision as going further than the Sherman and Clayton Acts (by including incipient threats), it required the FTC to show actual evidence of current or incipient threats.

Finally, in *E.I. Du Pont de Nemours & Co. v. FTC (Ethyl)*,⁸⁷ the FTC challenged a host of practices by gasoline-additives manufacturers that, according to the FTC, were keeping prices artificially high.⁸⁸ The FTC explicitly asserted that though the practices did not violate the Sherman and Clayton Acts, they fell under the reach of section 5 as “conduct that, because of the market structure and conditions . . . substantially lessens competition.”⁸⁹ The Second Circuit, though recognizing the FTC’s broad section 5 enforcement authority, held that the FTC had to show “at least some indicia of oppressiveness” (that is, indications of anticompetitive harm) to regulate otherwise legal business conduct—and that the FTC did not make that showing.⁹⁰ *Ethyl*, like *Boise Cascade*, required the FTC to make findings of anticompetitive harm for conduct to fall under section 5, even as it maintained that the scope of section 5 extended beyond that of the Sherman and Clayton Acts.

Though all three cases endorsed the FTC’s general ability to use section 5 outside of the context of the Sherman and Clayton Acts, they limited the scope of section 5 by requiring the FTC to make findings of harm similar to those the DOJ must show to bring suit under the Sherman and Clayton Acts. Because the FTC has not challenged practices that violate section 5 but not the Sherman and Clayton Acts since *Ethyl*, no other courts have considered the issue.⁹¹

On top of this appellate case law increasing the FTC’s burden in section 5 cases, Congress further limited the scope of section 5 by amendment in 1994. Under the amendment, section 5 only covers practices that cause “substantial injury” that are “not reasonably avoidable by consumers themselves” and not “outweighed by countervailing benefits.”⁹² Some, but not all, commentators have interpreted the case law and statutory change to mean that section 5 no longer extends beyond the Sherman and Clayton Acts.⁹³ At the very least, this

86. *Id.* at 582.

87. 729 F.2d 128 (2d Cir. 1984).

88. *Ethyl*, 729 F.2d at 133.

89. *Id.* at 135.

90. *Id.* at 137–41.

91. Zeisler, *supra* note 33, at 279.

92. ELHAUGE, *supra* note 15, at 12 (quoting 15 U.S.C. § 45(n)).

93. Compare Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 ANTITRUST L.J. 761, 766 (2005) (suggesting that the Sherman and Clayton Acts no longer contain gaps that need to be filled by section 5 of the FTC Act), and Maureen K. Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENF’T 1, 4 (2014) (noting disagreement among FTC commissioners and concluding “that if you are sailing beyond the chart, here be dragons”), with Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 305 (2004) (arguing

amendment now requires the FTC to make findings of competitive harm and balance those against “countervailing benefits” before bringing suit under section 5.

In contrast, the DOT’s attempt to use the “unfair method of competition”⁹⁴ provision in section 411(a) of the Federal Aviation Act was met with judicial approval in Judge Richard Posner’s *United Air Lines* decision. *United Air Lines* considered a set of Civil Aeronautics Board (CAB) rules that limited certain practices by ticketing companies.⁹⁵ Judge Posner upheld the rules, considering it well-established law that “the Board can forbid anticompetitive practices before they become serious enough to violate the Sherman Act.”⁹⁶ Judge Posner distinguished these practices from the ones in *Ethyl*, noting that the ticketing practices were “close enough” to the Sherman and Clayton Acts’ purview to be able to be enforced—given that the practices sounded in “traditional methods of illegal monopolization.”⁹⁷

Posner’s 1985 opinion approving the broader reach of section 411 predated the 1994 amendment to the FTC Act, and the breadth of section 411 has not been litigated since. But general statutory-interpretation principles suggest that section 411 is broader than the amended section 5. The textual canon of *in pari materia* (statutes addressing the same subject should be interpreted together) applies: because Congress included express limits on the conduct captured by section 5, the lack of express limits on section 411 should mean that those limits do not apply.⁹⁸ Further, the fact that Congress passed legislation limiting section 5 without corresponding legislation to limit section 411 could reflect intent to keep the DOT’s section 411 powers broad.⁹⁹

In recent years, the DOT has defined its section 411 power as covering practices “(1) that violate the antitrust laws, (2) that are not yet serious enough to violate the antitrust laws but may well do so if left unchecked, or (3) that violate antitrust principles even if they do not violate the letter of the antitrust

that section 5 of the FTC Act encompasses not only the Sherman and Clayton Acts but also incipient antitrust violations).

94. 49 U.S.C. § 41712(a).

95. *United Air Lines, Inc. v. Civ. Aeronautics Bd.*, 766 F.2d 1107, 1109–10 (7th Cir. 1985). The CAB issued the rules, but by the time the case was decided, the CAB had been disbanded and its authorities transferred to the DOT. *Id.* For more on these ticketing systems, known as CRSs, see *infra* Section II.C.1.

96. *United Air Lines*, 766 F.2d at 1114.

97. *Id.*

98. *Cf. Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 467–69 (2001) (reasoning that because cost was expressly mentioned in other parts of the statute but not the one at issue, cost could not be considered in the provision at issue).

99. *Cf. Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353–54 (2013) (stating that Congress’s choice of words is presumed to be deliberate, as are “its structural choices” to “deliberately . . . omit[]” changes to one section of code while altering another).

laws.”¹⁰⁰ This framework shows the scope of conduct covered by section 411: it is broader than the Sherman and Clayton Acts, but not so broad as to allow the DOT to address undesirable but competitive conduct. Rather, conduct that is close to the Sherman and Clayton Acts—as a violation of antitrust principles or as an incipient violation of antitrust laws—is also covered. How close that conduct must be is still up for debate, given the relative lack of case law on the issue. But conduct that can be analogized to actual theories of competitive harm is likely to be covered, whereas conduct that falls outside of mainstream theories of harm is likely not covered.

On a final note, section 411 also expands the methods by which the DOT can regulate competition. Case law and historical practice suggest that notice-and-comment rulemaking is within the DOT’s purview. *United Air Lines*, the only case to consider the DOT’s rulemaking authority, held that section 411 authorized antitrust notice-and-comment rules.¹⁰¹ Following the decision, the DOT used notice-and-comment rulemaking for nearly two decades.¹⁰² The ability to engage in rulemaking expands the DOT’s authority beyond that of other agencies, as the Sherman and Clayton Acts do not permit the DOJ to enact notice-and-comment rules,¹⁰³ and the FTC’s authority to do so is unclear.¹⁰⁴

The “unfair methods of competition” provisions of the FTC Act and Federal Aviation Act provide a wider scope for the FTC and the DOT to prosecute anticompetitive conduct than the Sherman and Clayton Acts. Though the exact limits on these agencies remain unclear due to the small number of cases considering these provisions, the DOT appears to have a greater scope under section 411 than the FTC does under section 5, and the DOT may regulate practices that violate antitrust laws or principles, as well as incipient threats to competition. How the DOT has used that authority will be discussed below.

C. History of the DOT’s Approach to Antitrust Enforcement

The DOT has the clearest authority of any agency to address common ownership in the airline industry, but its role in regulating the practice has

100. 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> [perma.cc/G3MR-YAL5].

101. *United Air Lines*, 766 F.2d at 1111–12. The FTC has never attempted to promulgate antitrust rules under section 5. ELHAUGE, *supra* note 15, at 12 & n.11.

102. See *infra* Section II.C.1.

103. See Zeisler, *supra* note 33, at 268–71.

104. The FTC Act made clear that the FTC could promulgate rules for consumer protection, but it did not address—either to endorse or prohibit—the FTC’s ability to promulgate rules for “unfair methods of competition.” ELHAUGE, *supra* note 15, at 12 n.11 (“[T]here were insufficient . . . votes [in Congress] for either the proposition that the FTC could enact rules defining anticompetitive practices or the proposition that it could not.”).

largely been overlooked. This lack of attention may stem from the DOT's hesitancy to use its section 411 authority beyond the narrower Sherman and Clayton Acts. This Section discusses the only two instances¹⁰⁵ of the DOT using its section 411 authority to proactively set antitrust policies: ticketing rules and a proposed policy on predatory pricing.

1. CRS Rules

This Section covers the CAB's introduction of rules governing airline ticketing processes, which were the first substantive antitrust rules issued after deregulation. Ticketing platforms—known as “computer reservation systems” (CRSs)—emerged in the 1970s as a way for travel agents to book their clients' flights via computer. But airlines manipulated their CRSs to prefer their own flights by placing competitors' flights lower on the page, charging competitors higher booking fees, and excluding competitors.¹⁰⁶ Smaller airlines complained that the practices were stifling competition and requested that regulators intervene.¹⁰⁷ The CAB found that the practices met the standard for monopolizing conduct under section 2 of the Sherman Act, meaning that they would be unlawful under section 411 as well. Accordingly, it proposed rules to prohibit many of the offending practices.¹⁰⁸

The proposed rules met resistance from CRS-owning airlines, which argued that the rules punished them simply for having the foresight to create CRSs in the first place.¹⁰⁹ Nevertheless, the rules were adopted and survived a legal challenge in 1985.¹¹⁰ In 1992, the DOT readopted the rules, which had been set to expire in 1990.¹¹¹ But by the 2000s, with the airlines having spun

105. The DOT has also worked with the FAA to propose rules regulating competition for takeoff and landing time slots, known as “slot pairs,” at New York airports. *See* Slot Management and Transparency for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport, 80 Fed. Reg. 1247 (proposed Jan. 8, 2015); Benjamin Berlin & Graham Keithley, *Asserting Broad Authority or Circumventing Deregulation? FAA's Proposed Regulation of New York Airport Slot Transactions*, 28 AIR & SPACE LAW., no. 3, 2015, at 1, 15. But because these rules were so geographically narrow and tied to the FAA, they are not discussed here. At any rate, the rules were withdrawn before being implemented. *See* Slot Management and Transparency for LaGuardia Airport, John F. Kennedy International Airport, and Newark Liberty International Airport, 81 Fed. Reg. 30,218 (May 16, 2016).

106. Alexander & Lee, *supra* note 24, at 379–80.

107. *Id.* at 379, 386; *see also* Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. 11,644 (proposed Mar. 27, 1984).

108. Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. at 11,646–47.

109. Alexander & Lee, *supra* note 24, at 379–80 (noting the complaint of American Airlines CEO Robert Crandall).

110. *See* Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. at 11,644; *United Air Lines, Inc. v. Civ. Aeronautics Bd.*, 766 F.2d 1107, 1122 (7th Cir. 1985) (Posner, J.); *see also supra* notes 95–97, 101–102 and accompanying text.

111. Carrier-Owned Computer Reservations Systems, 49 Fed. Reg. at 11,669; Computer Reservations System (CRS) Regulations, 69 Fed. Reg. 976, 977–78 (Jan. 7, 2004).

off their CRSs into private companies,¹¹² pressure from industry lawyers¹¹³ and the libertarian Mercatus Center¹¹⁴ convinced the DOT that CRS regulations were harming innovation, and most of the rules were allowed to expire.¹¹⁵

These rules exceeded the widely accepted scope of the Sherman and Clayton Acts in two ways. First, though section 411 allowed the CAB to issue notice-and-comment rules governing competition, the Sherman and Clayton Acts do not give the DOJ a similar power.¹¹⁶ Second, some of the conduct regulated by the rules—such as refusals to deal with rivals—now appears to be at the boundaries of the Sherman and Clayton Acts. The CAB’s assertion that CRS practices violated section 2 of the Sherman Act was in line with jurisprudence at the time; in a key 1985 case, the Supreme Court held that the Sherman Act prohibited companies with monopoly power and access to essential resources from refusing to deal with competitors.¹¹⁷ But in 2004, soon after the CRS rules expired, the Supreme Court narrowed those prohibitions to just a few specific circumstances.¹¹⁸ Under current jurisprudence, it is unclear

112. American, Continental, and United Airlines spun off their CRS platforms into separate companies between 1999 and 2001; by 2003, no airline owned a CRS. This dampened the incentive for CRSs to bias results in favor of certain airlines. Alexander & Lee, *supra* note 24, at 398. The rise of flight aggregators like Kayak at the expense of travel agents further shifted power away from CRSs. *See id.* at 405–06.

113. Timothy M. Ravich, *Deregulation of the Airline Computer Reservation Systems (CRS) Industry*, 69 J. AIR L. & COM. 387, 411 (2004) (arguing that regulation harmed innovation); cf. Gellhorn & Liebeskind, *supra* note 32 (arguing that the DOT’s CRS regulations exceeded the DOT’s legal mandate and were unwarranted).

114. ANIL CALISKAN & JAY COCHRAN III, MERCATUS CTR., PUBLIC INTEREST COMMENT ON COMPUTER RESERVATION SYSTEMS (2015), https://www.mercatus.org/system/files/MC_RSP_PIC2003-05DOTCompResvSystems_030315.pdf [perma.cc/W75D-5EJ2]. The Mercatus Center is a think tank committed to showing “how markets solve problems.” *About*, MERCATUS CTR., <https://www.mercatus.org/about> [perma.cc/9XD3-S8XF]. The privately funded organization received tens of millions of dollars from the multibillionaire libertarian megadonors Charles and David Koch. Jane Mayer, *Covert Operations: The Billionaire Brothers Who Are Waging a War Against Obama*, NEW YORKER (Aug. 23, 2010), <https://www.newyorker.com/magazine/2010/08/30/covert-operations> [perma.cc/4WL9-4D9Z].

115. Computer Reservation System (CRS) Regulations, 69 Fed. Reg. at 978 (“The elimination of most of the rules will ensure that government regulation does not interfere with market forces and innovation in the CRS and airline distribution businesses.”).

116. *See supra* notes 101–103 and accompanying text.

117. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); Daniel F. Spulber & Christopher S. Yoo, *Mandating Access to Telecom and the Internet: The Hidden Side of Trinko*, 107 COLUM. L. REV. 1822, 1824 (2007) (noting that *Aspen Skiing* “requires owners of bottleneck elements unavailable elsewhere in the marketplace to make those elements available to competitors on reasonable terms”).

118. *See Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004).

whether airlines' exclusionary conduct would even fall within the reach of the Sherman Act.¹¹⁹

2. Predatory Pricing Policy

The DOT's last major foray to the boundaries of the Sherman and Clayton Acts came in the late 1990s, when the DOT sought to address predatory pricing. In the 1990s, several low-cost airlines notified the DOT of predatory behavior by legacy carriers that had forced them out of new city-pair markets.¹²⁰ Low-cost airlines sued legacy airlines, winning two eight-figure settlements.¹²¹ The DOT, relying on section 411, proposed an enforcement policy that limited how much airlines could cut prices in certain markets. The enforcement policy was not a notice-and-comment rule, but rather a policy statement indicating when the DOT would challenge a specific practice.¹²² The policy prohibited price cuts in response to another airline's entry into the market if one of two conditions were met: first, the price cuts could not cut the original airline's revenue by more than the airline would have lost because of the new entrant;¹²³ second, the price cuts could not reduce the original airline's short-run profits in that city pair more than a strategy of reasonable competition with the new airline would.¹²⁴

Airline executives, libertarian think tanks, and airline-funded institutions waged a public-relations campaign against the rules, claiming that they were preventing airlines from offering low fares.¹²⁵ Eventually, Congress required

119. C. Paul Rogers III, *The Incredible Shrinking Antitrust Law and the Antitrust Gap*, 52 U. LOUISVILLE L. REV. 67, 87 (2013) ("[S]ome scholars have argued that the *Trinko* Court adopted a narrow profit-sacrifice standard for establishing exclusionary conduct under Section 2, at least in refusal-to-deal scenarios.").

120. Dempsey, *supra* note 47, at 710. Legacy and low-cost carrier competition, as well as city pairs, are discussed *supra* Section I.C. Predatory pricing is an anticompetitive tactic used by monopolists to drive smaller firms out of the market. When a new firm challenges the monopolist's market, the monopolist undercuts the new firm by offering prices below production cost. This guarantees that neither firm will be able to make a profit in that market. The monopolist, having more resources, simply waits for the new firm to abandon its entry, then raises prices. Cf. Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, 63 Fed. Reg. 17,919, 17,921 (proposed Apr. 10, 1988) (describing predatory pricing in airlines). See VON KALINOWSKI ET AL., *supra* note 30, at § 27.01.

121. Dempsey, *supra* note 47, at 711.

122. Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, 63 Fed. Reg. at 17,919. For more on policy statements, see Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1324–27 (1992).

123. Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, 63 Fed. Reg. at 17,919.

124. *Id.*

125. A chief example was James L. Gattuso, Opinion, *Don't Outlaw Cheap Airfares*, WALL ST. J. (Apr. 8, 1998, 12:01 AM), <https://www.wsj.com/articles/SB891982141365556500> [perma.cc/4XFV-RU5C], which was submitted by a vice president of the Competitive Enterprise

the Transportation Research Board to study the policy. That study criticized the policy for being difficult to administer and potentially discouraging benign conduct; it also cast doubt on the DOT's efficacy as an agency in enforcing antitrust laws as compared to the DOJ.¹²⁶ The DOT withdrew the policy in 2001, resolving to pursue predatory behavior on a case-by-case basis.¹²⁷ The withdrawal was based on market considerations rather than concerns about the DOT's authority under section 411 to enact the policy.¹²⁸

Like the ticketing rules, the proposed policy would have governed conduct at the boundaries of the Sherman Act. According to the Supreme Court, predatory pricing only violates the Sherman Act when a firm prices its products below cost and has a "dangerous probability" of recouping its short-term losses through increased market power.¹²⁹ In fact, the DOJ's attempt to prosecute American Airlines for predatory pricing was rebuffed by the Tenth Circuit in *United States v. AMR Corp.*, as the DOJ could not show that American was pricing fares below cost.¹³⁰ The DOT policy, however, would have allowed the DOT to prosecute conduct in certain circumstances in which an airline priced flights above cost, going beyond the Tenth Circuit's construction of the Sherman Act (as guided by Supreme Court precedent).¹³¹

The DOT's predatory-pricing policy showed both the potential of, and the difficulty with, broader section 411 regulation. The DOT tried to expand the scope of section 411 beyond the Sherman and Clayton Acts, endorsing an approach disfavored by the Supreme Court in a Sherman Act context, and later rejected by the Tenth Circuit, with little worry about overstepping its legal mandate. But it stopped short of regulation, instead bowing to pro-industry political pressure.

Institute (CEI). CEI is a libertarian policy organization funded by a suite of large corporations. Juliet Eilperin, *Anatomy of a Washington Dinner: Who Funds the Competitive Enterprise Institute?*, WASH. POST (June 20, 2013, 6:00 AM), <https://www.washingtonpost.com/news/the-fix/wp/2013/06/20/anatomy-of-a-washington-dinner-who-funds-the-competitive-enterprise-institute/> [perma.cc/9WS4-GWLZ]. Around the time of Gattuso's advocacy, CEI founded the "Cooler Heads Coalition," which "sowed the seeds of climate denial." Stephanie Kirchgaessner, *Revealed: Google Made Large Contributions to Climate Change Deniers*, GUARDIAN (Oct. 11, 2019, 2:00 AM), <https://www.theguardian.com/environment/2019/oct/11/google-contributions-climate-change-deniers> [perma.cc/RWN2-TNZQ].

126. Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, Dkt. No. OST-98-3713, at 2 (U.S. Dep't of Transp. 2001) (findings and conclusions), <https://rosap.nsl.bts.gov/view/dot/34080> [perma.cc/UP54-2WET].

127. ELHAUGE, *supra* note 15, at 298.

128. Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, *supra* note 126, at 73–74.

129. Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993).

130. 335 F.3d 1109, 1120–21 (10th Cir. 2003). Scholars have criticized this definition of predatory pricing for being too narrow, and some thought courts would expand the definition in *AMR*. Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 269–71 (2003).

131. ELHAUGE, *supra* note 15, at 298.

While outside forces convinced the DOT to withdraw its attempts to use section 411 at the boundaries of the Sherman and Clayton Acts, the more telling sign of the DOT's ethos of relaxed regulation is just how rarely it has attempted to use section 411. The two attempts detailed above are a far cry from the DOT's consumer-protection activities,¹³² which have resulted in the DOT winning judgments against airlines and changing airline practices.¹³³ Tellingly, the DOT itself sometimes neglects to mention that antitrust enforcement is part of its job under section 411.¹³⁴ It is no wonder that antitrust scholars and practitioners have overlooked the DOT when debating how to regulate anticompetitive practices like common ownership. In sum, the DOT's reticence to enforce the antitrust laws is less a legal issue than one of political will and enforcement preference. When it has ventured into antitrust enforcement, its legal authority has been upheld.

III. SECTION 411'S ABILITY TO REDUCE HARMS FROM COMMON OWNERSHIP

The DOT should use its section 411 authority to address anticompetitive practices and protect consumers participating in the airline industry. Because these anticompetitive practices are beyond the reach of the Sherman and Clayton Acts, the DOT is empowered to take enforcement and regulatory actions that the DOJ cannot. Common ownership presents a key opportunity for the DOT to do so.

The historical lack of regulation of common ownership in airlines shows why DOT action is needed. Regulatory action is necessary because high levels of common ownership in the airline industry lead to anticompetitive conduct.¹³⁵ Still, due to common owners' use of implicit mechanisms to reduce competition and the passive-investment exception of the Clayton Act, common ownership is not universally accepted as within the scope of the Sherman

132. See, e.g., 14 C.F.R. § 254.4 (2020) (rebuffing efforts by airlines to limit their liability for lost baggage); *id.* § 399.80 (2020) (regulating unfair and deceptive practices of ticket agents); *id.* § 399.81 (2020) (prohibiting certain ways of characterizing often-delayed flights); Joanne W. Young & Lyndsey M. Grunewald, *Supreme Court Review of DOT Actions: An Opportunity to Discipline Government Efforts to Re-regulate the Industry*, 25 AIR & SPACE LAW., no. 4, 2013, at 1, 12 (noting the DOT rule requiring a twenty-four-hour refund period for flight tickets).

133. See, e.g., Terence Lau, *Mistakes, Airfares, and Consumers: Restoring the Department of Transportation's Role in Regulating Unfair Trade Practices*, 34 QUINNIPIAC L. REV. 371, 386 (2016) (describing how the DOT's 2009 tarmac-delay rules led to a drastic decline in tarmac delays); Robert F. Foster, *The Boundaries of Consumer Protection Regulation: DOT Rejects FlyersRights.org Petitions for Rulemaking*, 32 AIR & SPACE LAW., no. 2, 2019, at 4, 9 n.26 (noting that airlines have paid millions of dollars in fines based on the tarmac-delay rules).

134. See OFF. OF THE SEC'Y, U.S. DEP'T OF TRANSP., BUDGET ESTIMATES: FISCAL YEAR 2021 (2020), https://www.transportation.gov/sites/dot.gov/files/2020-02/OST%20FY%202021%20Budget%20Estimates_0.pdf [perma.cc/64SF-V7UP] (mentioning consumer-protection activities several times but antitrust activities only in the context of granting antitrust immunity).

135. See *supra* text accompanying notes 49–56.

and Clayton Acts.¹³⁶ In the past, when the DOT was confronted with anticompetitive conduct lurking on the boundaries of the Sherman and Clayton Acts, it shied away from enforcement.¹³⁷ But now political actors across the federal government are taking a renewed interest in the importance of government regulation to curb competitive abuses, including Transportation Secretary Pete Buttigieg.¹³⁸ With the practice of common ownership, the DOT should take an active role in regulation.

This Part explores how and why the DOT should attempt to limit the competitive harm caused by commonly owned airlines. Section III.A covers the DOT's legal authority to promulgate notice-and-comment rules against common ownership. Section III.B specifically proposes that the DOT employ the "market-share rule." Section III.C shows why the DOT's adoption of the market-share rule is the best path forward to limit the anticompetitive effects of common ownership.

A. *The DOT's Authority to Promulgate Notice-and-Comment Rules for Common Ownership*

The DOT should look to regulate common ownership of airlines through a notice-and-comment rule. Unlike other agencies with an antitrust mandate, the DOT has clear authority to address common ownership. And the DOT can more effectively regulate common owners through notice-and-comment rules, instead of depending on courts for adjudication. Both issues will be discussed in turn.

An agency promulgating a notice-and-comment rule regarding an anticompetitive practice must show that it has the authority both to regulate that practice specifically and to promulgate rules generally.¹³⁹ As explained in Section II.A, the DOJ may have difficulty showing that its purview encompasses common ownership due to the limits of the Sherman and Clayton Acts.¹⁴⁰ But the DOT does have the authority to address this practice because common ownership and control fall squarely within the reach of the judicially defined scope of section 411. The DOT may regulate practices that are "incipient violations" of antitrust laws as well as those violating antitrust principles as "unfair methods of competition."¹⁴¹ Common ownership is an incipient violation

136. See *supra* Section II.A.

137. See *supra* Section II.C.

138. Jonathan H. Hatch & David Kleban, *The Democratic Presidential Candidates and Antitrust*, PATTERSON BELKNAP (Feb. 19, 2020), <https://www.pbwt.com/antitrust-update-blog/the-democratic-presidential-candidates-and-antitrust> [perma.cc/AV2U-QDL9]; see *supra* note 14 and accompanying text.

139. See *United Air Lines, Inc. v. Civ. Aeronautics Bd.*, 766 F.2d 1107, 1111–14 (7th Cir. 1985) (Posner, J.).

140. See *supra* text accompanying notes 59–67.

141. See *supra* text accompanying note 100.

because collusive behavior is more likely when common owners are allowed to invest and control competing firms without restriction.¹⁴² Common ownership also violates the antitrust principle of guarding against one rival taking partial ownership of another.¹⁴³

DOT common-ownership regulations would also be legally sound because common ownership is largely distinguishable from cases such as *Official Airline Guides*, *Boise Cascade*, and *Ethyl* in which courts rejected the FTC's attempts to regulate beyond the Sherman and Clayton Acts.¹⁴⁴ In the airline common-ownership context, the DOT could show evidence of competitive harm and incipency. In contrast to the air travel companies refusing to deal with rivals in *Official Airline Guides*, regulating common ownership is not "outside the mainstream."¹⁴⁵ It may exist at the fringes of the Sherman and Clayton Acts, but there is a colorable argument that the Acts themselves would apply to common ownership because it is behavior that limits competition through collusion.¹⁴⁶ Furthermore, a court need not decide that common ownership is, in fact, covered by the Sherman and Clayton Acts; it need only find that the practice is "close enough" to those theories of harm to sustain the proposed DOT rule.¹⁴⁷ Here, it clearly is, as the practice is at least close to collusion. Collusion among rivals is one of the chief harms of antitrust law.¹⁴⁸ Common ownership is related to collusion since it both facilitates collusive practices and creates the same effect—reduced competition—that collusive practices create.¹⁴⁹

The DOT would also have historical precedent for addressing common ownership, because it depended on section 411 authority in previous attempts to regulate at the boundaries of the Sherman and Clayton Acts—namely, its CRS rules and proposed predatory pricing actions.¹⁵⁰ A rule on common ownership would share many similarities with the DOT's proposed policy on predatory pricing, in that it would seek to regulate a possible antitrust problem in its incipency—even when many have questioned the specific mechanism by which the practice reduces competition. The DOT continued to take a

142. See *supra* text accompanying notes 48–51.

143. See DOJ & FTC, HORIZONTAL MERGER GUIDELINES 33–34 (2010), https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf [perma.cc/A2RK-CHD5]. Common ownership and partial ownership are related in that, in both instances, one actor is controlling parts of multiple firms in an industry. See Elhauge, *supra* note 15, at 24, 32–33.

144. See *supra* notes 48–77 and accompanying text.

145. *Off. Airline Guides, Inc. v. FTC*, 630 F.2d 920, 925 (2d Cir. 1980).

146. See *id.*; Elhauge, *supra* note 8, at 1305–08.

147. *United Air Lines, Inc. v. Civ. Aeronautics Bd.*, 766 F.2d 1107, 1114 (7th Cir. 1985) (Posner, J.).

148. See *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 465–66 (1986).

149. See Elhauge, *supra* note 8, at 8; Shekita, *supra* note 62, at 5–6; Azar et al., *supra* note 3, at 1552.

150. See *supra* Section II.C.

broad view of its legal authority under section 411 even as it withdrew the policy: it cited market conditions, rather than legal authority, as the reason for the withdrawal.¹⁵¹ The abandonment of the CRS rules was likewise based on the DOT's assessment of market conditions instead of legal limitations.¹⁵² Thus, the same authority underlying the DOT's CRS and predatory pricing actions would extend to a common ownership rule, giving the DOT clear authority where the DOJ's power is murky.

In fact, it is not just permissible for the DOT to take a broad view of its section 411 authority to address common ownership; the DOT has a legal responsibility to take such a view. Congress granted the DOT antitrust jurisdiction in the Federal Aviation Act and affirmed that grant of jurisdiction even while disbanding the CAB.¹⁵³ Congress then declined to limit the DOT's authority even as it limited the FTC's jurisdiction.¹⁵⁴ In short, Congress intended for the DOT to enforce antitrust law. To the extent that the DOT passes on enforcement, waiting on other agencies or the market to handle the issue, it contravenes the will of Congress.

The DOT has the power to promulgate a rule on common ownership through notice-and-comment rulemaking. This informal rulemaking process—which the DOT (or possibly the FTC) but not the DOJ has the power to carry out¹⁵⁵—would allow for the transfer of adjudicative power from the courts to the agency in this area. By putting the agency in charge of addressing common ownership, the DOT could guard against courts' inconsistent adjudication of antitrust cases and make adjudication more efficient. Rulemaking also provides the DOT an extra layer of authority, since the agency would be entitled to at least some form of deference for an interpretation of section 411 that covers common ownership.¹⁵⁶ Notice-and-comment rulemaking would allow the DOT to more effectively address common ownership and would bolster its legal authority to do so under section 411.

In sum, this Section has shown that the broad purview of section 411 allows the DOT to address common ownership, even if the practice does not violate the Sherman and Clayton Acts. And previous Sections have shown that the DOT—perhaps uniquely—has the power to promulgate notice-and-comment antitrust rules. These powers provide the DOT a clear legal path to promulgating a rule addressing common ownership in the airline industry.

151. Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, *supra* note 126, at 73–74.

152. Computer Reservations System (CRS) Regulations, 69 Fed. Reg. 976, 985–86, 994–1000 (Jan. 7, 2004).

153. See Dempsey, *supra* note 47, at 789–92.

154. See *supra* notes 97–102 and accompanying text.

155. See *supra* text accompanying notes 103–106.

156. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). See generally Kristin E. Hickman, *To Repudiate or Merely Curtail? Justice Gorsuch and Chevron Deference*, 70 ALA. L. REV. 733 (2019), for an overview of current issues in *Chevron* deference.

B. *How the Market-Share Rule Appropriately Addresses Common Ownership of Airlines*

The DOT can take meaningful action to limit competitive harm from common ownership in airlines by promulgating a notice-and-comment rule based on the recently developed “market-share rule.” This Section explains how the market-share rule works and how the DOT could apply it as a notice-and-comment rule for airlines.

The market-share rule is a proposal for limiting competitive harm from common ownership developed by legal scholars and practitioners Eric Posner, Fiona Scott Morton, and Glen Weyl.¹⁵⁷ The rule would prohibit institutional investors and individual shareholders with shares of “more than a single effective firm in an oligopoly” from owning more than 1% of the market share unless the entity holding shares is a freestanding index fund that commits to being purely passive.¹⁵⁸ Purely passive investors are investors that can only hold more than 1% of multiple companies in an oligopoly if they disclaim the ability to vote their shares and communicate with corporate officials.¹⁵⁹

The market-share-rule authors did not discuss the DOT in advocating for the rule; nevertheless, it could be easily applied to airlines. Since the airline industry is an oligopoly,¹⁶⁰ the DOT would implement this rule by prohibiting investment firms from owning more than 1% of multiple airlines unless they completely waive their ability to influence the corporation. This would reduce anticompetitive incentives since each firm would be controlled only by investors who either have no financial stake in rival airlines or have no control over the company’s competitive conduct. Investors, meanwhile, could still remain in the industry and exercise control—so long as they do so over just one firm. And investors with significant shares over more than one firm in the industry could not control either firm, either by exercising voting power to incentivize lax competition or by communicating with corporate officials like CEOs, directors, or managers to dissuade competition.¹⁶¹ The market-share rule, then, would give the DOT an effective method to control common ownership while still allowing institutional investors to invest in airlines.

By addressing only the airline industry, a DOT market-share rule would minimize the overregulation concerns that accompany the generalized market-share rule. Critics of the market-share rule have argued that it would make

157. Posner et al., *supra* note 6, at 708.

158. *Id.* (emphases omitted).

159. *Id.* at 709. In an article responding to (and largely disagreeing with) Posner, Scott Morton, and Weyl, Edward Rock and Daniel Rubinfeld proposed a similar solution, the main tweak being a 15% threshold instead of a 1% threshold. Edward B. Rock & Daniel L. Rubinfeld, *Antitrust for Institutional Investors*, 82 ANTITRUST L.J. 221, 271 (2018). This Note takes no stance on which threshold would be ideal.

160. See *supra* Section I.C.

161. See Posner et al., *supra* note 6, at 709, 722.

investment more risky by taking away investors' ability to minimize risk by investing in multiple firms in one industry.¹⁶² Posner, Scott Morton, and Weyl maintain that their rule would still allow investors to minimize risk, since investing in multiple firms in the same industry does not reduce risk nearly as much as investing in different industries.¹⁶³ If the market-share rule does increase the risk of investing, whole-cloth regulation of the practice might upset the investments of millions of Americans.¹⁶⁴ But because airlines make up only a small proportion of institutional investors' total portfolios, regulating only airlines would not significantly impact institutional investors.¹⁶⁵ Anti-trust regulators could tinker with the market-share rule in the airline industry without expanding it to the rest of the economy.

An airline-focused market-share rule could serve as an important step toward cohesive regulation of common ownership throughout the economy. First, it would establish a role for enforcement agencies to play in limiting the effects of common ownership. And second, it would allow for a testing ground for some of the disputes that have arisen between scholars. Piloting the market-share rule in the airline industry would answer important questions about whether the rule increases competition in a given market or makes investment more risky. If those answers point toward regulation being necessary, the DOJ and the FTC would have a greater incentive to address common ownership across more industries. Even though the DOJ could not establish a notice-and-comment rule for common ownership and the FTC's ability to do so is unclear, either agency could still address common ownership in industries where it is prevalent.

C. *The DOT Is the Right Agency to Enact the Market-Share Rule*

The previous Section explains how the market-share rule would work as applied by the DOT to airlines. This Section considers why this rule—under DOT direction—is the right way to govern airline common ownership on a practical level. Two reasons will be considered: market conditions that are ripe for a rule on common ownership, and other agencies' hesitance to regulate.

162. Rock & Rubinfeld, *supra* note 159, at 264. For example, an investor with stock in Delta, United, and Southwest would face less risk of losing money because of bad business decisions by one of the airlines, compared with an investor with stock in only one airline. This assessment of risk is based on diversification theory. For more on diversification, see Ben McClure, *Modern Portfolio Theory: Why It's Still Hip*, INVESTOPEDIA (Jan. 16, 2020), <https://www.investopedia.com/managing-wealth/modern-portfolio-theory-why-its-still-hip> [perma.cc/5DHK-UUGR].

163. Posner et al., *supra* note 6, at 710–11.

164. See Allison Bennington, Partner, ValueAct Capital, Remarks at FTC Hearing, *supra* note 10, at 82 (“In my opinion, we should very seriously consider the implications or unintended consequences of a shift in antitrust policy that could have major, far-reaching implications for established capital markets policies and practices that have served us all well.”).

165. Cf. Azar et al., *supra* note 3, at 1518 (noting that when BlackRock acquired Barclays, airline stocks were “a small fraction” of their overall portfolios).

First, market conditions in the airline industry are ripe for addressing common ownership. Antitrust law prevents firms from amassing market power, which firms can use to extract supracompetitive profits from the industry.¹⁶⁶ So dominant firms' earning high (perhaps supracompetitive) profits tends to signal antitrust issues. Conversely, if the dominant firms in an industry are losing money, that industry will be less likely to have firms with market power.

Recent trends suggest that airline profitability is likely to remain high, suggesting that regulation is appropriate. After losing money overall from 1980 to 2010,¹⁶⁷ the industry reaped record profits during the 2010s.¹⁶⁸ And though profits have nosedived during the COVID-19 pandemic,¹⁶⁹ the industry's profit outlook remains strong.¹⁷⁰ In fact, the drivers of airlines' increased profitability since 2010 seem to be longer lasting: better-evolved business strategies, more efficient flight planning, and less competition.¹⁷¹ Airlines' struggles since deregulation in 1978, then, do not explain the DOT's lax antitrust enforcement since 2010. Further, financial struggles across an industry need not totally preclude antitrust enforcement within that industry, since anticompetitive conduct may still exist.¹⁷² So even if the airline industry faced the prospect of long-term losses, the DOT need not abandon antitrust enforcement. In sum, then, airline profitability suggests that regulation is appropriate, and enacting the market-share rule would address competitive harms from common ownership without driving airlines out of business.

166. See *supra* note 36 and accompanying text. Supracompetitive profits are profits above levels that could be achieved under a competitive landscape. DOJ, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 49 (2008), <https://www.justice.gov/sites/default/files/atr/legacy/2009/05/11/236681.pdf> [perma.cc/KGQ5-66Q5].

167. Gifford & Kudrle, *supra* note 27, at 543.

168. Frank Holmes, *What Headwinds? Airlines to Book Their 10th Straight Year of Profitability*, FORBES (Jan. 28, 2019, 2:04 PM), <https://www.forbes.com/sites/greatspeculations/2019/01/28/what-headwinds-airlines-to-book-their-10th-straight-year-of-profitability> [perma.cc/5T6D-XHFF].

169. Leslie Josephs, *US Airlines Are Losing Money for the First Time in Years as Coronavirus Ends Travel Boom*, CNBC (Apr. 23, 2020, 7:25 PM), <https://www.cnbc.com/2020/04/23/coronavirus-us-airlines-set-to-report-their-first-losses-in-years-as-travel-demand-falls.html> [perma.cc/5L3T-DVUN].

170. Airline stock prices predict that airlines' future profitability will be lower than before COVID-19 but significantly above 2010 levels. See *S&P 500 Airlines Industry Index*, MARKETWATCH, <https://www.marketwatch.com/investing/index/sp500.203020?countrycode=xx> [perma.cc/RS3W-2ANC].

171. Gifford & Kudrle, *supra* note 27, at 547; Khan & Vaheesan, *supra* note 34, at 260–61.

172. See Khan & Vaheesan, *supra* note 34, at 260 (noting that competitive issues can still exist when industries lose money); cf. Spencer Weber Waller, *A Comparative Look at Failing Firms and Failing Industries*, 64 ANTITRUST L.J. 703, 704 (1996) (noting that there is “no failing industry doctrine” that would allow merger standards to be relaxed).

Second, the DOT should enact the market-share rule because other agencies have failed to effectively regulate common ownership in the airline industry. In recent decades, the DOJ and the FTC have shied away from strong antitrust enforcement.¹⁷³ That tendency has continued in the context of common ownership, in which the DOJ and the FTC have signaled that they prefer to continue researching the issue instead of taking action.¹⁷⁴ In fact, agencies' hesitancy to address common ownership may be driven by political considerations: As with the CRS rules and predatory pricing policy, industry groups and libertarian organizations have cautioned agencies against addressing common ownership, and DOJ and FTC inaction may be a signal of these groups' success.¹⁷⁵

In a regulatory context where other agencies sit on the sidelines, the DOT should be unafraid to address common ownership. Its design—overlapping authority with the DOJ over airlines—allows it to pick up regulatory slack if the other agency falters.¹⁷⁶ The DOT also brings industry expertise to crafting and managing a market-share rule: it studies the competitive effects of the airline industry at length,¹⁷⁷ and it brings a wealth of industry knowledge that

173. See, e.g., William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459, 476 (2020); Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595, 599 (2020); Jonathan Tepper, *Why Regulators Went Soft on Monopolies*, AM. CONSERVATIVE (Jan. 9, 2019, 12:01 AM), <https://www.theamericanconservative.com/articles/why-the-regulators-went-soft-on-monopolies> [perma.cc/JC98-C2CS].

174. See Organisation for Economic Co-operation and Development [OECD], *Hearing on Common Ownership by Institutional Investors and Its Impact on Competition – Note by the United States*, at 9, OECD Doc. DAF/COMP/WD(2017)86 (Dec. 6, 2017), [https://one.oecd.org/document/DAF/COMP/WD\(2017\)86/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)86/en/pdf) [perma.cc/5XQQ-CG9C]; see also *supra* note 10 and accompanying text.

175. See, e.g., Thomas A. Lambert & Michael E. Sykuta, *Calm Down About Common Ownership*, REGULATION, Fall 2018, at 28. *Regulation* is a magazine published by the Cato Institute, a libertarian think tank founded by Charles Koch that is “dedicated to . . . individual liberty, limited government, [and] free markets.” *About*, CATO INST., <https://www.cato.org/about> [perma.cc/JJ5S-XNWL]; Jane Mayer, *The Kochs vs. Cato*, NEW YORKER: NEWS DESK (Mar. 1, 2012), <https://www.newyorker.com/news/news-desk/the-kochs-vs-cato> [perma.cc/9QNN-LCBT]. *Regulation* was originally published by the American Enterprise Institute (a conservative think tank) and was a key player in pushing deregulation in the 1970s and 1980s. Claudia Anderson, *Anne Brunsdale, 1923–2006*, WASH. EXAMINER (Feb. 13, 2006, 12:00 AM), <https://www.washingtonexaminer.com/weekly-standard/anne-brunsdale-1923-2006> [perma.cc/GBB3-G8JL].

176. See Alexander & Lee, *supra* note 24, at 395, 420.

177. See, e.g., Note, *The Antitrust Implications of Airport Lease Restrictions*, 104 HARV. L. REV. 548, 559 (1990); Robert M. Rowen, *The Dilemma of Predatory Pricing in the Airline Industry*, AIR & SPACE LAW., Winter 1999, at 1, 16 n.4 (describing the DOT's database on fares); Michael W. Tretheway & Ian S. Kincaid, *The Effect of Market Structure on Airline Prices: A Review of Empirical Results*, 70 J. AIR L. & COM. 467, 483–84 (2005) (describing the DOT's study on competition at hubs).

may make up for its lack of antitrust-specific experience.¹⁷⁸ The DOT has a unique role in addressing common ownership.

This rule is even more critical when other agencies fail to take action. Scholars have advanced concerns about the DOT encroaching on the province of other antitrust agencies by enacting broad antitrust rules.¹⁷⁹ The DOJ is thought to be a more discerning regulator, since it has a century of experience enforcing antitrust law and an entire section dedicated to transportation, energy, and agriculture.¹⁸⁰ The DOJ also has more experience weighing costs and benefits in antitrust enforcement generally, and it alone handles airline mergers.¹⁸¹ But deferring to the DOJ is impractical when the DOJ has declined to effectively address common ownership in airlines.¹⁸²

The DOT has clearer legal authority to regulate common ownership than the DOJ, and despite its relative lack of antitrust experience, it can step in and remedy the competitive harm caused by the practice. Given the scope of the potential harm to consumers—price increases of perhaps 7%¹⁸³—regulatory steps are necessary. The DOT is the right agency to undertake them.

The likeliest reasons for the DOT's timidity in antitrust enforcement do not withstand scrutiny. The DOJ's enforcement powers do not make the DOT redundant, worries about section 411's narrow scope are unfounded, and the airline industry will not buckle under the weight of antitrust regulation. The DOT should be unafraid to take more proactive steps regulating anticompetitive practices—even when those practices are at the boundaries of the Sherman and Clayton Acts.

CONCLUSION

The DOT has the power and responsibility to address anticompetitive practices through section 411 of the Federal Aviation Act. Common ownership is one such anticompetitive practice, and the DOT could limit its harm to consumers by adopting the market-share rule. Though the DOJ may be limited in addressing harms from common ownership and enacting proactive

178. Cf. Scott G. Alvarez, Gen. Couns., Bd. of Governors of the Fed. Res. Sys., Statement Before the Antitrust Modernization Commission 10 (Dec. 5, 2005), https://govinfo.library.unt.edu/amc/commission_hearings/pdf/Alvarez_Statement.pdf [perma.cc/Q5JS-MZXQ] (“The Federal Reserve System’s specialized expertise, data, and market knowledge provide critical resources for competitive analysis, including in defining local geographic banking markets.”).

179. See, e.g., Gellhorn & Liebeskind, *supra* note 32, at 20 (“[L]odging jurisdiction in the FTC rather than [the] DOT to enforce [the CRS rules] is a more rational use of scarce resources.”).

180. See *Transportation, Energy, and Agriculture Section*, DOJ, <https://www.justice.gov/atr/about-division/transportation-energy-and-agriculture-section> [perma.cc/5EZR-GE7E]; see also *supra* text accompanying notes 17–20.

181. Gellhorn & Liebeskind, *supra* note 32, at 21. The DOT does review international airline agreements. See *supra* note 30.

182. See *supra* note 174 and accompanying text.

183. See *supra* note 56 and accompanying text.

rules to combat it, the DOT has broader jurisdiction to test new regulations within this space. Under section 411, the DOT can and should lead the charge toward effective regulation of the anticompetitive harms of common ownership, which could ultimately recoup billions of dollars in the form of more competitive markets—stemming a wealth transfer from poorer consumers to wealthier investors.¹⁸⁴

The DOT has considered a more proactive role in antitrust enforcement in the past but has been dissuaded by political and prudential concerns.¹⁸⁵ Now, with rising airline profitability,¹⁸⁶ a better understanding of how the DOT can supplement (and not simply mimic) DOJ enforcement,¹⁸⁷ and a political appetite for controlling monopoly power,¹⁸⁸ the DOT should not shy away from more muscular antitrust enforcement. In fact, by refusing to regulate at the boundaries of the Sherman and Clayton Acts, the DOT shirks its congressional mandate.

In recent years, politicians and academics have started to realize the immense effect that antitrust regulation—and the lack thereof—has on the U.S. economy and wealth distribution. But their calls for stronger antitrust laws and enforcement have largely overlooked the role of industry-specific agencies like the DOT. It is more important than ever to reclaim the DOT's role in antitrust: the DOT has been able to take a broader approach to antitrust regulation within the airline industry in the past, and it offers the clearest path to addressing recently understood practices like common ownership. The DOT has the tools to protect consumers against anticompetitive practices now and set up a stronger infrastructure for effective antitrust enforcement down the line. These tools should be put to use.

184. For more on the relationship between common ownership and inequality, see generally Joshua Gans, Andrew Leigh, Martin Schmalz & Adam Triggs, *Inequality and Market Concentration, When Shareholding Is More Skewed than Consumption*, 35 OXFORD REV. ECON. POL'Y 550 (2019).

185. See *supra* Section II.C.

186. *Supra* note 168 and accompanying text.

187. See *supra* notes 176–178 and accompanying text.

188. See *supra* notes 13–14.