

Airline Deregulation: An Evaluation of Goals and Objectives

Laurence E. Gesell*
Martin T. Farris**

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* Dr. Gesell is an Associate Professor of aeronautical technology at Arizona State University, where he has taught since 1984. He has more than 25 years of multi-faceted experience in the aviation industry, both military and civilian, as a pilot, airport manager, aviation consultant, and teacher. He is an accredited member of the American Association of Airport Executives (A.A.E.), an executive member of the California Association of Airport Executives (C.A.E.), and a member of the Publications and Scholarships Committees of the University Aviation Association. He has a B.A. from Upper Iowa University (1976), an M.P.A. from the University of San Francisco (1982), and a Ph.D. in justice from Arizona State University (1990). He is the author of several articles, papers and books in aviation, including a monograph, "Airline Re-Regulation."

** Dr. Farris is a Regents' Professor of transportation at Arizona State University, where he has been a teacher and administrator since 1957. He is a member of the Committee on Education for Practice in the National Transportation Practitioners' Association, and is a member of the Editorial Advisory Board of "The Transportation Journal." He earned his B.A. and M.A. at the University of Montana (1949, 1950), and his Ph.D. in economics at Ohio State University (1957). He is the author of numerous articles, papers and books in transportation, including his latest as co-author of the sixth edition of "Domestic Transportation: Practice, Theory, and Policy." Dr. Farris is a recipient of the Schleen Award of Excellence from the American Society of Transportation Logistics.

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I. INTRODUCTION

There has been much debate about the relative success of airline deregulatory policy. "Policy," however, involves politics and opposing opinions. Deregulation, therefore, may have a variety of meanings and expectations for different groups of people. Proponents and opponents alike seem to want to argue the relative merits of deregulation in accordance with contemporary and narrowly defined, sometimes self-serving views.¹ Seemingly ignored² has been the historical perspective and what deregulatory law was supposed to accomplish.

The purpose of this article is to focus upon original intent, and to "evaluate" the relative success of airline deregulation as measured by the explicit goals and objectives of the Airline Deregulation Act of 1978.

II. EVALUATION

There is no single accepted meaning for evaluation, but according to one definition, program evaluation entails the systematic collection of "information" about the outcome of (airline deregulatory) policy in order to decide upon its relative effectiveness.³ Program evaluation may, and often does, use traditional research methods to gather information. However, there evolved a "fact-value" debate in the search for a proper meth-

1. See M. Deutsch, *In Defense of Deregulation*, FREQUENT FLYER (Dec. 1990) 6 (In the August, 1990, issue of Frequent Flyer, Paul S. Dempsey, supported by Martin Deutsch, editor and publisher of Frequent Flyer, critically dissected airline deregulation. In the subsequent December issue, Robert Aaronson, president of the Air Transport Association, responded to Dempsey's point of view. Not surprisingly, Aaronson did not agree with Dempsey, but it is interesting that Aaronson attempts to discredit Dempsey and Deutsch by stating that their conclusions are based upon "preconceived notions," when, as Deutsch points out, Aaronson, himself, as president of the ATA, has a (clearly biased) "position to defend and uphold.")

2. PAUL S. DEMPSEY, *FLYING BLIND: THE FAILURE OF AIRLINE DEREGULATION* (1990) (This study examines the "promises" that were made by deregulatory proponents).

3. MICHAEL QUINN PATTON, *UTILIZATION-FOCUSED EVALUATION* 14 (2nd ed. 1986) (Patton defines program evaluation as the systematic collection of information about the activities, characteristics, and outcomes of programs for use by specific people to reduce uncertainties, improve effectiveness, and make decisions with regard to what those programs are doing and affecting.)

odology⁴ which led in the social sciences to general acceptance of a "multiplist" mode. The attempt in multiplism is to legitimate findings through "triangulation," or the use of multiple indicators to either measure a single concept, or to test the same hypothesis.⁵

In conducting evaluation studies, it is accepted that they are different from scientific research, the latter of which is undertaken to discover unbiased "truth." Evaluation, on the other hand, weighs the preponderance of evidence. It is an adversarial approach, analogous to a court trial where opposing attorneys submit countering evidence. Moreover, it is tolerant of "subjective" input.⁶

Program evaluation is similar to traditional research in that it may use scientific (quantitative) methodologies and other empirical methods to produce information. But unlike experimental research, which declares itself to be "objective" and scientifically neutral, program evaluation involves "policy" research, and is, therefore, motivated by politics and opposing opinions. By definition, "politics" entails competition between groups or individuals. Program evaluation attempts to balance these competing interests, and to be "fair" rather than value-free.⁷ Evaluation, therefore, by taking a position about how well a program is doing, is inherently political. In searching for fairness, evaluation also represents a more jurisprudential approach to discovering truth than does scientific research alone.

The following evaluation is presented in a journalistic style,⁸ using House's "behavioral objectives" approach,⁹ where the discrepancy between the outcomes and the stated goals and objectives (of the Airline Deregulation Act) is the measure of the program's success. It is a summary¹⁰ of the results of each of the goals prescribed in Section 102(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1302[a]), as amended by the Airline Deregulation Act of 1978 (hereinafter ADA).

As outlined in Section 102, there are nine normative goals which were to be achieved by the ADA. It was to: (1) maintain "safety as the highest priority in air commerce. . ."; (2) make available "a variety of adequate, efficient, and low-priced services by air carriers. . ."; (3) place "maximum reliance on competitive market forces and on actual and po-

4. FRANK FISCHER, POLITICS, VALUES AND PUBLIC POLICY: THE PROBLEM OF METHODOLOGY 19 (1980).

5. MARK ABRAHAMSON, SOCIAL RESEARCH METHODS 61 (1983).

6. PATTON, *supra* note 3, at 195-197.

7. *Id.* at 195.

8. E. Guba, *Investigative Reporting*, in METAPHORS FOR EVALUATION: SOURCES OF NEW METHODS 76-77 (Nick L. Smith ed., 1981).

9. ERNEST R. HOUSE, EVALUATING WITH VALIDITY 21-42 (1980).

10. See LAURENCE GESELL, AIRLINE RE-REGULATION (1990) (Presented in an expanded outline in Chapter 2).

tential competition"; (4) develop and maintain "a sound regulatory environment. . ."; (5) prevent "unfair, deceptive, predatory, or anticompetitive practices in air transportation. . ."; (6) avoid "unreasonable industry concentration, excessive market domination, and monopoly power. . ."; (7) encourage "entry into air transportation markets by new carriers. . .and strengthen small carriers so as to assure a more effective, competitive airline industry"; (8) maintain a "comprehensive and convenient system of continuous scheduled service for small communities"; and (9) "encourage efficient and well-managed carriers to earn adequate profits and to attract capital."

The overall objective of airline deregulatory policy was to return the industry to competitive capitalism,¹¹ with many competing airlines, where none could control the market, and where all would have to actively participate in price competition. The scheme was to create a more perfect economic model of competition wherein prices would be driven down and the consumer would be the ultimate benefactor.

However, within only two years, the ADA was given an all new twist by the Reagan administration, which, through "administrative regulation," redefined deregulatory policy. By the mid-1980s, the Department of Transportation began granting large-scale and wholesale mergers of airline companies. The stage was being set for an organizational trend (back) toward oligopoly, in contravention of the ADA. Consolidation eliminated the possibility of competitive capitalism which was an underlying construct critical to the success of deregulatory policy. Assumed in this article is that the era of effective deregulatory policy (as defined by the ADA) came to a close as early as 1987, but certainly no later than 1988, when industry concentration reached pre-deregulation levels. As Senator John McCain stated, the market forces allowed the major airlines to block competition, resulting in de-facto reregulation — without the regulators.¹² Hence, the "deregulatory era" is defined in this analysis as the years 1978 to 1988 (see "Competition," *infra*).

III. SAFETY

If safety was to be given "the highest priority," then one must ask

11. J. INVERARITY, P. LAUDERDALE AND B. FELD, *LAW AND SOCIETY: SOCIOLOGICAL PERSPECTIVES ON CRIMINAL LAW* 169 (1983) (The authors argue that during the Progressive Era [from about 1890 until the beginning of World War I], "competitive capitalism," exemplified by many low technology enterprises, was transformed into "corporate capitalism," wherein the laissez-faire economic marketplace envisioned by Adam Smith was replaced by imperfect competition and the concentration of capital into fewer and fewer companies in any given market [that is to say, an "oligopoly"]).

12. L. McGinley, *Republicans Are Joining Chorus of Airline Critics Seeking Partial Reregulation to Spur Competition*, WALL ST. J., Sept. 29, 1989, at A1.

what factors in deregulatory policy contributed to that objective. The principal argument that air transportation safety increased following deregulation seems to center upon fatal accident statistics. Morrison and Winston, for example, contend that safety improved, as evidenced by "the absolute number of fatal commercial accidents and midair collisions. . .," which, they conclude ". . .declined significantly, from 42 in the regulated period (1965-1975), to 15 in the deregulated period (1976-1986)."¹³

The Morrison and Winston study, however, is seriously flawed by its definition of regulatory versus deregulatory eras, and by its fundamental reliance upon accident data alone. The study defines deregulation as beginning in 1976,¹⁴ when in actuality the ADA wasn't even passed until 1978. It seems unreasonable to have assumed changes in the system would have occurred instantaneously with passage of the ADA, let alone before the fact, as the Morrison and Winston model assumes.

Rather than accepting 1976 as the beginning of deregulation, an alternative proposal would suggest deregulatory policy was not formally adopted until 1978, did not become effective until 1979, and its impact upon safety was not actually manifested until perhaps sometime in the early to mid 1980's, with latent effects lasting perhaps into 1989 or beyond. By 1985, deregulatory policy was clearly operative, and 1985 was a year of significantly increased airline accidents! Perhaps it was just coincidence, but normatively, one could argue there is a correlation between the accumulative effects of deregulation and aircraft accidents, at least in that one isolated year, if not others. There were seven fatal accidents in 1985 alone, involving aircraft with more than 30 seats (i.e., excluding most commuters). The 31 accidents for scheduled airlines in 1987 were the most since 1974. Of those 31 accidents, four resulted in 231 fatalities, the highest number in five years.¹⁵ There were ten such accidents in 1989, more than double the annual average of 3.69 fatal crashes since 1976,¹⁶ and the highest since 1968.¹⁷

If one accepts the argument that the actual safety-related impact of deregulation lagged until the early 1980s, the implications of the accident data suggest conclusions opposite from the Morrison and Winston findings. If the effective deregulation transition date was shifted to 1982, for example, looking at the seven years on either side of the demarcation

13. Steven A. Morrison and Clifford Winston, *Air Safety, Deregulation, and Public Policy*, THE BROOKINGS REV. (1988).

14. *Id.* at 15 (The authors admit that their choice of 1976 as the beginning of airline deregulation introduces a bias and reduces the frequency of accidents during deregulation.).

15. NTSB, SAFETY INFORMATION, (1988).

16. James Ott, *Mergers Allow Domination Of Individual Airports*, AVIATION WK. AND SPACE TECH., 29 (Oct. 1989).

17. NTSB, SAFETY INFORMATION, (1990).

date to equalize the duration of sample periods, there are more fatal accidents (33 versus 27) occurring in the "post-deregulatory" period (1983-1989). Should the impact date be delayed even further, to 1984, the "post-deregulatory" period (1985-1989), looking at five years on either side, contains a significantly greater number of accidents (28 versus 15).

The bottom line, however, is that accident data, alone, are unreliable predictors of safety. The accident statistics say nothing about potentially decreased emphasis on maintenance, lowered standards for hiring pilots, and other economic pressures which suggest that safety was negatively affected.¹⁸ Additionally, statistics, depending on how they are interpreted, may lead to contradictory conclusions. The picture can change overnight as demonstrated by the sharp increases in accidents in 1985, 1987 and 1989.

Something engendered a widespread perception that safety had declined, and it was not easily dismissed by looking solely at relative numbers of fatal accidents. Those who maintain there was an erosion in safety do not debate the accident statistics. Rather, they argue that air carriers, because of economic pressures and cost saving measures brought on by deregulation, no longer exceeded the minimum Federal Aviation Administration safety standards "to the same degree as prior to deregulation." They say safety standards were lowered, and argue that there was an "insidious erosion" in safety maintenance.¹⁹ Nance, for example, submits that air transportation was and is safe, but still argues the safety "margin" eroded. He, therefore, seems to blame the airlines for much of the safety erosion.²⁰

Gerston, Fraleigh and Schwab seem to support this contention,²¹ and reveal that the number of mechanics employed by the major airlines decreased by 2,000 from 1974 to 1984, while the number of airliners in service dramatically increased. Golich indicates the number of maintenance workers employed may have decreased by nearly twice that many just between 1979 and 1984.²² Added to that, the number of federal safety inspectors fell by 700 during the same period.

By creating a surplus in the Aviation Trust Fund, monies were not

18. LARRY N. GERSTON, CYNTHIA FRALEIGH AND ROBERT SCHWAB, *THE DEREGULATED SOCIETY* 95 (1988) (In debating the Kennedy-Cannon bill, that eventually became the Airline Deregulation Act, deregulatory opponents contended that as competition drove airlines to seek the lowest possible costs, mechanics would be encouraged to cut corners, older aircraft would remain in service longer, and the airline would tend to employ inexperienced pilots and ground crews who might make mistakes.)

19. John O'Brien, *quoted in Safety Experts Cite Need for Increased Monitoring*, AVIATION WK. AND SPACE TECH., July 17, 1987, 45-50; see also JOHN J. NANCE, *BLIND TRUST* (1986).

20. NANCE, *supra* note 19 at 105.

21. GERSTON, *supra* note 18 at 105.

22. Vicki Golich, *Airline Deregulation: Economic Boom or Bust?*, 42 TRANSP. Q. 159 (1988).

committed to expand the airway system infrastructure "made necessary because of increased traffic volumes caused by deregulation. Congress and the administration may have contributed to a reduced level of safety."²³ "The truth. . .," says Senator Wendell Ford, ". . . is that the federal government allowed the system to be overwhelmed by predictable increases in air travel and bears much of the blame for its dangerous inadequacies."²⁴ He also blames the Reagan administration and some members of Congress for having maintained an aviation surplus rather than spending it on air transportation improvements.

Tension clearly increased in the air traffic system following deregulation, and as McLure²⁵ points out, "increasing competitive scheduling and hub-and-spoke operations created new peak air traffic periods." The growth of hub-and-spoke strategies can be directly attributed to deregulation. If hub-and-spoke activities, with their added congestion, lead even indirectly to safety problems, it follows that deregulation, which promoted hub-and-spoke congestion, led to a lowering of safety. It takes little imagination to see that traffic congestion around specified airports adds to the safety problem, since eighty percent of all aircraft accidents occur in the airport environment.²⁶

There is a commonly held perception the airlines became less safe. There is evidence of airline reductions in labor, training, maintenance, and other safety-related operational costs. There is also evidence of a congested and over-worked air traffic and airspace system. Moreover, there was an apparent failure of the government to provide adequate numbers of controllers and safety inspectors. Added to this, there were significant influxes in accidents during the deregulated era, defined as 1978 to 1988. By triangulating the available information, and by using a statistical metaphor, the "beta coefficients"²⁷ of the independent variables identified above, although perhaps not statistically significant, were nevertheless all moving in a direction which suggests that safety had eroded during the first decade of deregulation.

23. Morrison and Winston, *supra* note 13 at 15. See also Alfred Kahn, *Deregulation: Is This The Tragic Consequences Of Low Fares, More Competition?*, ARIZ. REP. (Aug. 23, 1987) (Kahn cites delays [in air traffic] as attributable to failures of the government to expand airport capacity, and states that the [Reagan] decision not to rehire the striking controllers "comes under the heading of vindictiveness.").

24. W. Ford, *Plane Truth: Blame for Falling Air Safety Lands on Federal Shoulders*, WASH. POST, reprinted in MESA TRIB. (Aug. 17, 1987).

25. Herbert McLure, *How Safe is the System*, J. AIR L. & COM. 15 (1987).

26. James Ott, *Boeing/Flight Safety Foundation, in 10 Fatal Crashes Spark Call For New Safety Measures*, AVIATION WK. AND SPACE TECH. 28 (Oct. 1988).

27. GEORGE BOHRNSTEDT AND DAVID KNOKE, STATISTICS FOR SOCIAL DATA ANALYSIS (1982) (The "beta coefficient" is a standardized regression coefficient indicating the amount of net change in standard deviations of the dependent variable arising from one standard deviation change in an independent variable.).

Still, the fundamental question may not be whether safety declined, but rather, whether it improved. An acceptable safety margin is not static. Safety programs warrant a continuous striving for improvement. A status quo in safety achievement, in effect, represents a *de facto* decline! If safety had indeed "eroded," or, for that matter, even remained at pre-deregulation levels without improvement, then safety was seemingly not given the "highest" priority stipulated as an objective of airline deregulatory policy.

IV. LOW-PRICED SERVICES

A second objective of the ADA was to provide "adequate, efficient, and low-priced services." In sum, this may be interpreted as a goal to achieve the common law duty of a carrier to charge "reasonable" rates. By "adequate" pricing, it is assumed the carrier's prices will cover its variable and traceable costs, and will provide sufficient revenues to apply something toward its fixed and common costs.²⁸ In addition to adequate pricing, it may be further assumed "efficient" pricing is that which will provide adequate returns, while at the same time offering low prices to the consumer. Implicit in deregulatory policy is that sufficient competition (i.e., Adam Smith's "invisible hand")²⁹ would force competitive pricing to occur, and potential profits generated by improved efficiency would be passed along to the consumer by way of lower prices.

One measure of economic efficiency in air transportation is load factors. Analyses of Department of Transportation "Air Carrier Traffic Statistics" for 1986 through 1988 show the average domestic load factors for the major airlines in 1986 were only 59%. Reports through 1988 show only a slight increase to about 61%, with an average between 1979 and 1988 of 60%. Load factors for the last year (1978) before full deregulation averaged 61%, thus indicating little or no change occurred subsequent to deregulation.

Still, it should be noted that it is a function of the airlines to strive for higher profits, and increasing load factors is the principal way of doing it in a competitive environment. In oligopoly, however, the way to account for lower seating capacity is to drive prices up.³⁰

28. RAY J. SAMPSON, MARTIN T. FARRIS AND D. SHROCK, *DOMESTIC TRANSPORTATION PRACTICE, THEORY AND POLICY* 193-199 (1990).

29. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1976).

30. D. WALDMAN, *THE ECONOMICS OF ANTITRUST* 148 (1986). *See also* Kahn, *supra* note 23 (Oligopolists prefer to compete through product differentiation and/or advertising. They typically do not engage in price competition. Hence, monopolistic [and oligopolistic] prices tend to remain high, and potentially higher than marginal costs of production. What disturbs some critics is that airlines appear to be raising air fares by "consensus." Antitrust law prohibits executives from

The airline industry entered effective oligopoly (see "Concentration," *infra*, at VIII), was no longer subject to meaningful competition, and managed to control (i.e., rationalize)³¹ the market, and therefore, was no longer required to push for higher profits through increased load factors.³²

The industry returned to oligopoly, and airlines could raise their fares relatively unrestricted, especially on uncontested routes and at hubs where they were dominant. "Pricing behavior, once mandated, controlled, and monitored by the Civil Aeronautics Board, was replaced with price rigidity similar to that of the regulated era."³³ By 1988, fares were being significantly increased.³⁴ Dempsey determined that by 1989, airline ticket prices were at least 2.6% above the level for which they were headed before deregulation.³⁵ "While a 2.6% increase would hardly qualify as price gouging,"³⁶ it is 24.6 to 27.6% higher than the prices expected from deregulatory policy.³⁷

The airline industry contends that although prices may have risen, 90% of all passengers travelled on a discount.³⁸ This may be deceiving, however, since full-fare fliers were paying substantially more for their tickets than they did with the advent of deregulation.³⁹ Although not readily apparent nor easily quantified, discounted tickets have associated costs

discussing prices, but as Kahn says, they are doing the same thing via the computer reservations systems.).

31. MAX WEBER, *GENERAL ECONOMIC HISTORY* 207 (1961) (The rational capitalistic establishment is one with capital accounting, that is, an establishment which determines its income yielding power by calculation according to the methods of modern bookkeeping and the striking of a balance.); *see also* R. COLLINS, *WEBERIAN SOCIOLOGICAL THEORY* 22 (1986) (Rational in this sense means "calculability." "Rational capitalism" means that it is methodical and predictable).

32. E. Harraf and W. Cheek, *Deregulation-Oligopoly to Oligopoly*, Address Before the Airshow Canada Symposium (Aug. 8, 1989) (Harraf and Cheek argue that "high load factors to offset cost reductions no longer have the same importance to airlines where their ability to establish prices well above marginal costs can easily generate revenue sufficient to gain high returns.").

33. *Id.* at 10.

34. LAURENCE GESELL, *AIRLINE RE-REGULATION* 42 (1990).

35. Dempsey, *supra* note 2, at 26.

36. Deutsch, *supra* note 1, at 6 (Robert Aaronson's response to Dempsey's claim of a 2.6% fare increase).

37. GENERAL ACCOUNTING OFFICE, *REPORT TO CONGRESS, Lower Airline Costs per Passenger Are Possible in the United States and Could Result in Lower Fares* 11 (Feb. 1977). *See also* D. Strassman, *Impacts On Air Fares And Traffic*, in *AIRLINE DEREGULATION: THE EARLY EXPERIENCE* (Auburn House eds., 1981); R. Kane, *AIR TRANSPORTATION* 9-1 (1990) (The GAO reported that regulated fares exceeded estimated deregulated fares by 22 to 25%).

38. Deutsch, *supra* note 1, at 6 (Robert Aaronson speaking for the Air Transport Association).

39. Peter Greenberg, *Decade of Deregulation Put Public Ahead*, *SAN JOSE MERCURY NEWS*, Oct. 16, 1988, at 4T. *See also* Mary Kihl, *The Impacts of Deregulation on Passenger Transportation in Small Towns* 42 *TRANSP. Q.* 243, 256 (1988).

beyond the price of the ticket. For example, a passenger required to stay over Saturday to obtain a lower air fare incurs additional per diem expenses such as food and lodging. Or, with certain non-refundable tickets, failure to meet a departing flight, no matter how reasonable the cause, can result in greater cost than paying for a regular fare in the first place. The consumer not only forfeits the cost of the discounted ticket, but must then pay for another ticket as well — ostensibly at a higher price than before deregulation. Non-refundable tickets are part of the market rationalization process which has advantaged the airline company, but at the expense of the consumer. Uncertainty for the airlines is reduced by shifting the risk to the (individual) consumer, but risk-taking can have a price attached to it if the gamble doesn't work out.

Moreover, irrespective of the volume of tickets that are discounted, a discount on a higher fare still amounts to a higher fare, and higher fares was not a goal of airline deregulation.

V. COMPETITION

A third objective of airline deregulation was to rely upon "actual and potential" competitive forces in a marketplace with freedom of entry. Free entry was to produce many airlines in an openly competing market that would provide the traveller with variety, choice and "natural" prices.⁴⁰

As the deregulatory era unfolded, airline deregulation did, in fact, produce an openly competitive market of new entrants intermixed with older, established carriers. The consumer generally benefitted from the competition, but the excess capacity of over-competing airlines, coupled with a recession in the early 1980s, proved devastating for most carriers. By 1984, however, the dominant carriers began to overcome the financial setbacks of the earlier years, and seemingly to overtake any advantages of the low fares, post-deregulation, carriers may have acquired.

Mergers are likely to occur during periods of market disequilibrium, and almost as if to model the economic ideal, airline consolidation began in earnest as the airline industry came out of the recession of the early 1980's. By 1986, there was an escalated merging of airlines which markedly altered the state of competition and pricing strategies within the industry.

Even with consolidation, airline management still maintained that competition in the industry remained intense. But the "competition" they referred to was in terms of national and world market shares, not at the individual level within local airport markets, and certainly not the price

40. Smith, *supra* note 29, at 56.

competition of an open marketplace of many competing carriers.⁴¹

In the event actual competition were to become a non-reality, the fallback position of deregulatory proponents was upon the "contestable market" theory. Although not called "market contestability" as such, the theory goes back at least to Adam Smith,⁴² but the more contemporary theory of the contestable market was developed in the late 1970's and early 1980's⁴³ As a revived theory, it became a premise used to help justify adoption of the deregulatory policy in transportation. The results of adopting the contestability theory, however, have shown there was a misplaced trust in its applicability. As Dempsey states, "a decade of empirical evidence strongly suggests that the premises upon which deregulation were predicated were erroneous."⁴⁴

The contestable market assumption is that there are no significant economies of scale or barriers to entry. Because there are no barriers to entry, the market, even in the absence of actual competition, is threatened (i.e., contested) by a prospective new entrant. Hence, the market is expected to behave in a perfectly competitive way.

Deregulation proponents, and those who espoused the contestability theory, expected there would be freedom to move in and out of markets with minimal costs. They placed maximum reliance upon competitive market forces and on potential as well as actual competition. Assumed was that contestable markets would prevent unfair, deceptive, predatory or anticompetitive practices. However, anti-competitive developments in deregulated airline markets were inconsistent with, and generally invalidated, the contestable market theory⁴⁵

For market contestability to have worked, four conditions had to be present: 1) there had to be no barriers to entry; 2) no economies of scale; 3) consumers had to be willing and able to switch carriers; and 4) existing carriers could not readily lower their cost and price structures to meet the

41. See J. MALDUTIS, AIRLINE COMPETITION AT THE 50 LARGEST U.S. AIRPORTS SINCE DEREGULATION (1987). See also Gesell, *supra* note 34, at 57-59 (Maldutis states that measures of concentration, based on nationwide industry data are almost meaningless. Gesell points out that the individual passenger cannot take advantage of competing services at the national level, but rather, accesses the system at a single airport where competition may be limited. This is especially the case where a passenger must access or exit the system at less than hub origins or destinations.)

42. Smith, *supra* note 29, at 67.

43. See generally, W. Baumol, et. al., CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1982). See also Dempsey, *supra* note 2, at 24-25. See also Gesell, *supra* note 34, at 44-45.

44. Paul Dempsey, *Deregulation Has Spawned Abuses in Air Transport*, AVIATION WK. AND SPACE TECH. 147 (Nov. 21, 1988).

45. Michael E. Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy*, 4 YALE J. ON REG. 393 (1987).

competition of new entrants.⁴⁶ What happened, however, is that incumbent carriers wasted little time in learning to adapt to the new (deregulatory) environment.

The existing airlines set out to reduce competition by developing a variety of new (effectively predatory) programs designed to disadvantage potential rivals, and to tear down the foundations that made contestability work.⁴⁷ They erected physical, informational, and capital barriers to entry; developed economies of scope and density;⁴⁸ and imposed switching costs that made initial trial of the competitor's services difficult or expensive.⁴⁹ (see "Anti-Competitive Practice," *infra*, at VII).

The innovations implemented by the larger, surviving airlines sheltered them from competition. Fawcett and Farris contend it is this adaptive ability of the airlines that has fundamentally led to the recent controversy about the efficacy of airline deregulation.⁵⁰

The "variety of adequate, efficient and low-priced services" gave way to oligopoly and monopolistic competition. So, too, did the competitive market forces upon which proponents of the ADA placed "maximum reliance." By the close of the first decade of deregulation, free-market competition in the airline industry was nearly non-existent.

VI. SOUND REGULATION

Melton⁵¹ argues that adoption of a total deregulatory policy was from the outset a mistake. To think that one could have the stability, reliable service, and social allocations that prevailed before deregulation, and at lower rates, was simply fallacious. "Inefficient regulation," he says "is one thing, no regulation at all is quite another."

Weber probably would have rejected the idea of total deregulation in a modern capitalist state as completely absurd. The concept of total deregulation is the antithesis of what he called the "rationality of economic action"⁵² and the necessity of a system of calculable rules and procedures.

46. Stanley Fawcett & Martin Farris, *Contestable Markets and Airline Adaptability Under Deregulation*, 29 *TRANSP. J.* 12, 14 (Fall 1989).

47. *Id.* at 17.

48. *Id.* at 18 & 19 (Economies of scope refer to advantages that result from being involved in more than one type of activity or more than one market. Economies of density refer to advantages that result from greater utilization of available capacity.).

49. *Id.* at 20 (Three incentive based programs in particular — frequent flyer programs, progressive commissions for travel agents, and corporate discounts — made switching to a rival airline less attractive.).

50. *Id.* at 21.

51. L. Melton, *Transportation Regulation: An Effective Tool of Public Policy*, 17 *TRANSP. L.J.* (1989).

52. MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION*, 184 (1947).

A fourth goal of the Act was to develop and maintain a "sound" regulatory environment, but the concept of "total" deregulation was, from the outset, a contradiction to this goal. Competition leads naturally to instability in the marketplace. As Kahn⁵³ submits, instability is the price that must be paid for competition.

It is difficult to determine from reading the Act, what the authors meant by "sound," but Webster's defines it as "free from error . . . and . . . undisturbed," which are certainly not terms to be used in describing the environment which evolved following deregulation. Rather, there was an apparent consumer revolt over the deterioration of air service. Service eroded and the variety of alternative choices vanished in the midst of mergers. Unreliable airline schedules, delays, cancellations and lost baggage caused intense consumer frustration. The environment was anything but "sound!"

Congress has subsequently found itself on the horns of a dilemma between equally unattractive alternatives. There is general discontent with the results of airline deregulation, but there is equal concern about potential re-regulation of the industry.⁵⁴

VII. ANTI-COMPETITIVE PRACTICE

A fifth goal of the Act was to prevent "unfair, deceptive, predatory or anticompetitive practices in air transportation." But this goal, like the goal of a sound regulatory environment, was perhaps doomed to failure from the beginning. The problem with antitrust law is in enforcement. Historically, antitrust has been difficult to define, therefore difficult to prove, and hence nearly impossible to enforce. Its enforcement would seemingly have required a diligence that has not been seen in recent practice. The Reagan administration seemingly never even tried to enforce antitrust law!

Nevertheless, as Morash⁵⁵ and Kahn⁵⁶ indicate, the airline industry may be naturally predisposed to predatory pricing and to other antitrust violations. In the Weberian⁵⁷ perspective these "natural predispositions" are but part of the market rationalization process. Kahn⁵⁸ argues that although the airline industry has oligopolistic tendencies, it fails to behave

53. Alfred Kahn, *Airline Deregulation — A Mixed Bag, But A Clear Success Nevertheless*, 16 *TRANSP. L.J.* 56 (1988). See also Dempsey, *supra* note 2, at 46.

54. Gesell, *supra* note 34, at 119.

55. Dr. Edward A. Morash, *Airline Deregulation: Another Look*, 50 *J. AIR L. & COM.* 253 (1985).

56. Alfred Kahn, *Is It Time to Re-regulate the Airline Industry?*, 5 *WORLD ECONOMY* 341 (1982).

57. WEBER, *supra* note 31.

58. KAHN, *supra* note 56, at 343.

like an "intelligent" oligopoly. One factor that made pricing so destructive was motivated by what he calls "disciplinary intention," which he characterizes as predatory in nature, whether intentional or not.

This predatory intent (which might be defined more aptly as greed) can lead to enlarging the airline company beyond its ability to provide efficient economic return. Although there may be no economies of scale in the airline industry, there do seem to be potential economies of "scope" (or size) which seemingly provided dominant carriers with anti-competitive market advantages. Most academic theorists have found no significant economies of scale in airline operations, and yet, for some reason the industry concentrated into what could be characterized as an oligopoly (see "Concentration," *infra*, at VIII).

Active predation in many instances invalidated the contestability theory. What Thornton⁵⁹ calls the "weapons of war" became a new form of predatory practice which was designed to reduce, if not eliminate competition. These possibilities suggest new and innovative antitrust implications, for which there are seemingly no remedies in the antitrust laws.⁶⁰

To ward off the competition in what Thornton⁶¹ called a "war" among the carriers, the contestants developed as weapons of war a set of operating procedures and marketing tools such as complex discriminatory fare structures, the exercise of "exclusive" rights to limited airport and airspace facilities, computer reservations systems bias, frequent flier programs, alignments of majors with regional counterparts, and hub-and-spoke networks; of which, the latter was perhaps the most effective. These "weapons" became formidable barriers to competition, and opened the path to consolidation.

Given regulatory freedom the economy rights itself by way of natural economic laws. Excess competition may be reduced or eliminated, if not by expansion and growth of surviving companies, then by merger, which leads to the next goal of consideration.

VIII. ECONOMIC CONCENTRATION

A sixth goal of airline deregulation was to avoid "unreasonable industry concentration, excessive market domination and monopoly power." What constitutes "unreasonable concentration" is not defined in the Act, but one can assume that "reasonable concentration" means something less than what it was before deregulation.

59. Robert L. Thornton, *Airlines and Agents: Conflict And The Public Welfare*, 52 J. AIR L. & COM. 371 (1986).

60. Laurence E. Gesell & Martin T. Farris, *Antitrust Irrelevance In Air Transportation: and the Re-defining of Price Discrimination*, 57 J. AIR L. & COM. 173 (1991).

61. Thornton, *supra* note 59, at 381.

Functioning seemingly within the free enterprise paradigm,⁶² the Department of Transportation adopted a policy for ease of entry as a key factor in its analyses of potential anti-competitive effects in merger cases.⁶³ Between 1985 and 1987, DOT approved 25 mergers with remarkably few restrictions. The result was to effectively reconcentrate the industry to pre-deregulation levels.

By 1987 year end, there were 31 scheduled air carriers serving the domestic market. Of those 31 carriers, 10 had cornered 88.2% of the market, with the top four carriers controlling 56.4%. The subsequent year reflected a similar pattern, although individual market shares had shifted amongst carriers, with the smaller of the top ten carriers slightly increasing their shares. By 1988, the top four carriers held 56.4% of the market and the top ten had increased their aggregate share to 90.1%.⁶⁴

Added to the predominance of the top ten airlines, the alignment of regional (commuter) carriers with a major counterpart increased industry concentration, and the market shares of the dominant carriers (see "Small Carriers," *infra*, at IX). Mergers in air transportation approved by the (Reagan) Department of Transportation permitted the largest airlines to dominate passenger services at individual airports and at highly concentrated hubs.

Kahn submits that two of the "surprises of deregulation" were: (1) the reconcentration of the industry, and (2) the intensification of price discrimination and monopolistic exploitation.⁶⁵ Fawcett and Farris,⁶⁶ however, suggest that the airlines' ability to adapt to competition should have come as no surprise. The airlines ". . . merely performed as the policy-makers had hoped they would — as rational and innovative decision makers responding to the incentives of the deregulated market environment."

IX. SMALL CARRIERS

The seventh goal of the Act was to encourage "entry into air transportation markets by new carriers. . . and the strengthening of small carriers so as to assure a more effective, competitive airline industry." It should be observed that this goal is closely associated with the eighth goal of providing essential air service (EAS) to small communities.

62. D. Berman, *Consumerism and the Regulatory System: Paradigms of Reform*, 1 POL. STUDIES REV. 454 (1982) (In a continuum of consumer interests, the free enterprise paradigm is at one extreme. It assumes that there should be little, or no, intervention in the marketplace by government—that consumers are individuals responsible for their own actions).

63. *DOT Officials Say Ease Of Entry Key To Merger Reviews*, AVIATION DAILY, May 5, 1986.

64. Gesell, *supra* note 34, at 39-41.

65. Alfred Kahn, *Surprises of Airline Deregulation*, 78 AM. ECON. REV. 316 (1988).

66. Fawcett & Farris, *supra* note 46, at 21.

There was a concern, prior to deregulation, that if the certificated carriers were allowed freedom of exit from less lucrative markets, the smaller communities would be left without service. The government made a commitment in Section 419, "Small Community Air Service," of the Act, to ensure continued air service to these remote communities. As the larger carriers were expected to withdraw from less lucrative markets, the government shifted its reliance upon the smaller, third level, or "commuter," carriers to insure service would be provided to smaller communities.

As deregulation unfolded, many new airlines entered the marketplace, and the once "third level" non-certificated carriers were allowed to grow into the "regionals" of today, with some remaining non-certificated (14 C.F.R. Part 298 exempt) carriers, while others became fully certificated (under Section 401 of the Aviation Act). But as the market began to consolidate, market forces allowed the dominant major carriers to block competition from newcomers, and few post-deregulation carriers above the regional level survived.

By 1985, the independent regional airlines began losing their individual identities by forging marketing and scheduling links with the larger airlines. They changed their names and colors to show alignment with the larger carrier. And, like their major counterparts, the numbers of regional carriers diminished as well.⁶⁷ As the smaller carriers lost their identity, they became increasingly dominated by the major carriers. With many being purchased outright and others franchised, the market became vertically, as well as horizontally integrated.

Ironically, the alignment of the commuters with the dominant carriers may have provided for more reliable service to small community markets where heretofore the (eighth) goal of "maintaining a comprehensive and convenient system of continuous scheduled airline service for small communities" failed. However, it does not represent the kind of competition envisioned in the deregulation act — the healthy competition of many carriers in a free market. Rather, the competition amongst these carriers was of the destructive (predatory) variety which resulted in fewer numbers and less variety for the consuming passenger.

X. SMALL COMMUNITY SERVICE

Kahn⁶⁸ argues that "the year or two after deregulation witnessed many improvements in service, for towns in all size categories, as measured by the frequency of departures and the convenience of schedules." It is of note that he grounds his judgement of consumer convenience

67. Kahn, *supra* note 65, at 49.

68. Kahn, *supra* note 56, at 354.

upon "frequency" of service. Morrison and Winston⁶⁹ argue in a like vein that deregulation had not contributed to a net loss of service to small communities. Rather, they submit that deregulation moved the industry closer to a socially optimal configuration of fares and service, "with the largest gains coming from further increases in departure frequency, particularly in low-density markets."

One need only look at the much-referred-to Bakersfield, California, market to see the results of deregulation upon small communities. Smaller, essential service communities were, on the aggregate, not so much better off. Nor were they provided, as the Act required, with "comprehensive, convenient and continuous" air service. And, Bakersfield is perhaps the best example to argue the point.

Frequency of departures says nothing about quality of service. Deregulation was a disaster for Bakersfield, particularly in terms of "continuous" service.⁷⁰ In 1978 Bakersfield enplaned 147,844 passengers, but United pulled out soon after enactment of the deregulation act. In 1979, enplanements dropped to 95,212, with Swift Aire Lines and Golden Gate Airlines providing turbo-prop⁷¹ service. In 1981 Swift and Golden Gate (which by then had been merged) went into Chapter 7 bankruptcy. In 1982 enplanements dropped to 49,538, the lowest since deregulation. Service was restored by Pacific Express and Continental Airlines, and enplanements picked up again to 76,025 in 1984. Then Continental and Pacific Express went into Chapter 11 and service was terminated. For an interim period American and United both entered the market, but subsequently both left. In 1986 Continental returned, and by 1987 annual enplanements were back up to 136,607, but unfortunately Continental announced its withdrawal effective May 7, 1988. Bakersfield was left with three, turbo-prop-equipped airlines, each of which was a commuter aligned with a major carrier (American Eagle, United Express and Westair).

According to then Bakerfield aviation director, Larry Galindo, the Bakersfield population grew 30% from 1978 to 1987, yet in 1987 air traffic growth (measured in enplanements) was 8% less than ten years before. One could hardly call this "convenient" air service, nor "continuous" according to the historical pattern.

69. Steven A. Morrison and Clifford Winston, *The Economic Effects of Airline Deregulation and Public Policy*, THE BROOKINGS REV. (1986).

70. Telephone Interview with Larry Galindo, Aviation Director for Bakersfield Airport. "Deregulation has really been a mess for us." Statistics for Bakersfield were obtained via telephone (April 7, 1988).

71. Swift Aire Lines operated Fokker F-27 aircraft, and Golden Gate Airlines operated DeHavilland Dash 7 airplanes into Bakersfield. Each type of aircraft is capable of carrying 50 passengers or more. Hence, these were not "small" commuter airliners. Still, they were not jets and the market diminished.

Kihl⁷² found similar results in her study of the deregulatory impacts on air service to small mid-western (specifically Iowa) towns with respect to schedules, service levels and fares. The overall pattern she discovered was one of: (1) schedule changes, (2) turnover in carriers, and (3) variance in fare structure.

What Kihl found in the mid-west seemed to mirror national results. Where large and medium hubs experienced an increase in enplanements of approximately 36-38% between 1978-1984, small hubs increased only 8%, and non-hubs declined 9.7%.⁷³

In an analysis of essential air service to eight Southeastern states after deregulation, Vellenga and Vellenga⁷⁴ concluded substantiating results. The vast majority of communities experienced increased flight frequencies, but at the expense of fewer weekly seats as commuters replaced larger carriers. They reported the "negatives" outweighed the "positives," and that the most common complaint was about the relatively high fares for the short-haul markets.

The initial impact of deregulation was to increase service to larger airports while effectively decreasing the quality of service at smaller airports.⁷⁵ In general, deregulated service was neither reasonable nor convenient for small communities.

It was convenient only if one was able to pay the fare and willing to trade the comfort and security of jet service for the "frequency" of smaller, demonstrably less safe commuter (turbo-prop) service.⁷⁶ But as Morash⁷⁷ submits, the airline industry is "vested with a public interest in commerce, national defense, and safety." Passengers at small communities have a right to expect a safe, "convenient system of continuous, scheduled airline service," as provided for in the Airline Deregulation Act, and which they apparently were not receiving during what has been defined herein as the "deregulated era."

XI. PROFIT

The ninth goal of the Act was to "encourage efficient and well-managed carriers to earn adequate profits and to attract capital." This is the

72. Mary Kihl, *The Impacts of Deregulation on Passenger Transportation in Small Towns*, 42 *TRANSP. Q.* 243 (1988).

73. *Id.* at 245.

74. D.B. Vellenga et al., *An Analysis of Essential Air Service to the Southeastern U.S. Since the Airline Deregulation Act of 1978*, 28 *J. TRANSP. RESEARCH FORUM* 1 (1987).

75. Kihl, *supra* note 72, at 245.

76. See Nance, *supra* note 20, at 118-123; see also Paul Proctor *FAA Increases Texas Air Investigation to Include Continental Airlines*, *AVIATION WK. AND SPACE TECH.* 97-98 (April 25, 1988); DEP'T. OF TRANSP., *TRANSPORTATION SAFETY INFORMATION REPORT: 1987 ANNUAL SUMMARY*, DOT-TSC-RSPA-88-3 (1988).

77. Morash, *supra* note 55, at 253.

second mention in the Act of "efficiency," which, again, refers to the common law duty of a carrier to charge "reasonable" rates, or ideally what Adam Smith referred to as "natural" price, or that which would result in a world of perfect competition. In the real world of imperfect competition, however, price results from complex decisions based not only upon market demands but also corporate objectives.⁷⁸

Airline deregulation and the simultaneous reduction of government economic enforcement may have ushered in a new generation of managers with a focus upon profit as their only organizational goal.⁷⁹ The editors of *Aviation Week and Space Technology*,⁸⁰ for example, observed that airlines in the United States had been traditionally managed by "airline people" committed to safety and service, but that they were being replaced by "finance entrepreneurs," whose primary commitment was to the "bottom line." This dramatic change in who was running the airlines, they argued, could seriously damage the air transportation system.⁸¹

By at least one definition of financial entrepreneurship, empirical evidence does, in fact, indicate the relative proportion of "finance-oriented" airline managers increased from 25% in 1978 to 55% in 1988.⁸² Although the effect of the transition to more finance-oriented management is not altogether clear, industry concentration, discriminatory pricing, hostile takeovers, and leveraged buyouts were all potentially the result of an airline culture dominated by finance-oriented management.

After 1987, and before the onset of the current recession, the financial condition of the airlines improved dramatically.⁸³ However, profiting by the airlines occurred in ways unforeseen by the airline deregulators. By 1987 the airlines were effectively concentrated more than before deregulation! Hence, the short-lived airline profitability was attributable more to concentration and market rationalization by the airlines than to deregulatory policy.

78. See Martin Farris et al., *MODERN MANAGERIAL ECONOMICS* 413-15 (1987) (outlining an approach to "real world pricing").

79. Gesell, *supra* note 34, at 79.

80. *Keep the Sharks Out of Airline Waters*, *AVIATION WK. AND SPACE TECH.*, 19 (Aug. 1989).

81. Paul Dempsey, *Robber Barons in the Cockpit: The Airline Industry in Turbulent Skies*, 18 *TRANSP. L.J.* 1 (1990) (referring to the new generation of airline managers as "robber barons").

82. Gesell, *supra* note 34, at 95-97.

83. See J. Maldutis, *The Financial Condition of the U.S. Airline Industry at Year-End 1987* 1 (1988); see also *American Statistical Index (1978-1988)* (Following the recession of the early 1980's, the major airlines began to profit once again in 1984, but had a relapse in 1985 and 1986. The financial condition of the airlines then improved significantly in 1987. By the year's end, the airline industry cash position reached an unprecedented \$6.0 billion—a 66.9% increase over 1986. By 1988 [when the market had been effectively concentrated into oligopoly], fares were being significantly increased, and the domestic market produced a net income of \$880.3 million. The total net income in 1988 for the major airlines was \$1.6 billion, as compared to \$509.2 million in 1987.).

Although seemingly signalling a degree of success for this final goal of the Act, these profits did not come from the allocative efficiency of a highly competitive market, nor the economic efficiency of higher load factors. They were generated principally in two ways. First by raising fares uncontested, if not cooperatively.⁸⁴ Second, and more importantly, profits were generated by adoption of new income tax guidelines allowed as the result of certain transitional rules contained in the Tax Reform Act of 1986 which provided windfall profits for some companies.⁸⁵

Nevertheless, the airlines were reportedly still below average when compared to U.S. industry overall. The average for U.S. industry profits in 1988 was 5%, while airline earnings were only 2-3%.⁸⁶

Recession beginning in 1990, and the inflated fuel costs attributed to the Persian Gulf crisis caused severe economic downturn in air transportation which signalled the likelihood of even more concentration. Concerns of industry analysts and of Congress pointed to the potential dangers of the high operating ratios that were the result of excessive debt incurred through leveraged buyouts, and which financially weakened a number of the major airlines. Suggested was that a prolonged recession could cause severe economic downturn in air transportation and the potential demise of key airlines.⁸⁷ As it turned out, the recession did not have to last long. By early 1992, Eastern, Midway and Pan American Airways had ceased operations. And, America West, Continental and Trans World Airlines had filed for Chapter 11 protection.

XII. SUMMARY

As measured against the stated objectives of the Act, deregulatory policy failed to measure up to its obligations to the consumer. Identified in the Act are at least nine normative, mostly consumer-oriented goals, of which, the first and foremost objective was safety. The government was to maintain "safety as the highest priority in air commerce." Instead, the safety margin seemingly eroded.

The government was to make available "a variety of adequate, efficient, and low-priced services by air carriers." And initially there was a variety of airlines to choose from, each offering competitive prices, but the

84. *High-Speed Changes Send Fares Up, Up*, USA TODAY, Nov. 18, 1988 (Article references Alfred Kahn. Airlines enjoy unparalleled access to competitor's prices through computer reservation networks, the use of which seems tantamount to collectively setting prices. As Kahn remarks, "I don't see how this form of electronic consultation differs from meeting in a hotel room. Where you have a mechanism for trying . . . [a higher fare] in advance before trying it out in public seems indistinguishable from collusion.").

85. Gesell, *supra* note 34, at 68.

86. Kahn, *supra* note 84.

87. Gesell, *supra* note 60, at 195.

quality of service declined as managers continued to utilize low fares as their principal competitive tool.⁸⁸ Consumer complaints began to mount until the industry was threatened with retaliation from Congress. Service related consumer complaints subsequently subsided, but the industry has been arranged to the airlines' advantage and service related complaints have been replaced with concerns about rising air fares and lack of competition.

The government was to place "maximum reliance on competitive market forces and on actual and potential competition." However, as the airlines became increasingly threatened financially by intense competition and the effects of economic recession in the early 1980s, the government shifted its reliance from "actual" to "potential" competition and relied almost exclusively upon the contestable market theory as it simultaneously authorized mergers which reduced real competition and effectively barred access to any potential new entrants.⁸⁹

The government was to develop and maintain "a sound regulatory environment." But open competition leads to instability, and a market absent rules and regulations is, by definition, "non-rational." The "totally" deregulated industry was anything but sound!

The government was to prevent "unfair, deceptive, predatory or anticompetitive practices in air transportation." However, government not only underestimated industry's ingenuity,⁹⁰ but also its resolve to rationalize its economic environment. An array of unexpected "weapons"⁹¹ were drawn from airline company arsenals to combat competition.

The government was to avoid "unreasonable industry concentration, excessive market domination, and monopoly power." Instead, the government allowed the industry to consolidate and to become even more concentrated than before deregulation, thus permitting the largest airlines to dominate passenger services at individual airports and at highly concentrated hubs.

The government was to encourage "entry into air transportation markets by new carriers . . . and strengthen small carriers so as to assure a more effective, competitive airline industry." Instead, the government's approval of mass consolidation allowed for fewer and larger airline companies, and the government seemingly advocated the horizontal and vertical integration of the industry. Large carriers merged, and rather than strengthening small carriers, the government sat idle while weaker com-

88. Kent Gourdin, *Bringing Quality Back to Commercial Air Travel*, 27 *TRANSP. L.J.* 23 (1988).

89. See Levine, *supra* note 45.

90. *Id.*

91. See Thornton, *supra* note 59; see also Levine, *supra* note 45.

muters either ceased operating or were acquired by their dominant regional competitors.

The government was to maintain a "comprehensive and convenient system of continuous scheduled service for small communities." Instead, the promise of greater "frequency" of service brought with it disruptions in service and higher costs. Air carrier service to small communities was neither "continuous" nor "convenient" according to the historical pattern across the country.⁹²

Finally, the government was to "encourage efficient and well-managed carriers to earn adequate profits and to attract capital." By extracting itself from the regulatory process, the government openly invited market rationalization and a simultaneous shift in management styles from a professional to a finance orientation.

Rather than creating a successful financial environment, deregulatory policy nurtured the conditions necessary for the self-destruction of all but a few of the remaining, elite survivors. The thin profit margin (i.e., 2-3%), coupled with high operating ratios, alarmed industry analysts who had predicted with accuracy that the heavily leveraged buyouts of the major airlines between 1985 and 1987 could severely hurt service, safety and fares — and dramatically if there were a prolonged recession.⁹³

XIII. CONCLUSION

The Airline Deregulation Act was intended to correct the inadequacies of economic regulation, and the ideal of deregulation in air transportation was consumer advocacy. However, following centuries of regulation it seems, in retrospect, presumptuous to have thought that economic regulation could have been totally reversed overnight. Complete deregulatory policy failed to achieve its goals and, in only one decade, the "winds of change" were once again signalling the call for a change in "philosophy."⁹⁴ But as Farris⁹⁵ explains, while a policy may completely reflect the "philosophy" of regulation, the same policy does not always work out in practice to attain the goals desired by society. When this has been the case, society, acting principally through the United States Congress, has amended the regulatory laws or passed new regulation designed to once again attain the goals at a particular time.

"Re-regulation: dare we speak it," asks Dempsey.⁹⁶ In response,

92. See Vellenga, *supra* note 74, at 48; see also Kihl, *supra* note 72.

93. Gesell, *supra* note 10, at 109.

94. Paul Dempsey, *Erosion Of The Regulatory Process In Transportation — The Winds Of Change*, 47 ICC PRACTITIONER'S J. 303 (March/April 1980).

95. Martin Farris, *The Case Against Deregulation In Transportation, Power, And Communications*, 45 ICC PRACTITIONER'S J. 306 (March/April 1978).

96. Dempsey, *supra* note 2, at 46.

the answer is a resounding yes, but few would want to return to the tight-fisted regulation of before. The "politics" seemingly call for an altogether new model, or at most, a modest legislative agenda of regulatory reform and "light-handed" economic regulation.⁹⁷

97. *Id.* at 47, 50-59; *see also* Gesell, *supra* note 10, at Chapter 4 (Dempsey states that there are but four alternative regulatory strategies available, and suggests that a "modest legislative agenda" might put the airlines back on course. Gesell offers yet another solution. By re-defining "social regulation," he envisions an altogether new regulatory model of consumer advocacy that is conceptually grounded in the evolution of strict liability, modelled after worker's compensation, and undergirded by law that moves from the repressive to the restitutive.).

