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Discriminatory Deplaning: Aviation Security and the Constitution

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**DISCRIMINATORY DEPLANING: AVIATION SECURITY
AND THE CONSTITUTION**

NICHOLAS POPPE*

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I. INTRODUCTION

ON JUNE 3, 2013, an early-morning AirTran flight flying from New York to Atlanta ended poorly for one of the groups traveling.¹ Although the two sides are unlikely to agree fully on the progression of events, it is alleged that the captain of the AirTran flight summarily decided to deplane and deny

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¹ Morgan Winsor, *School Opens ‘Investigation’ After Airline Kicks Students off Plane*, CNN.COM (June 4, 2013, 12:43 PM), <http://www.cnn.com/2013/06/03/us/new-york-students-off-plane/>.

service to 109 passengers.² That decision is controversial because all 109 passengers deplaned were members of an Orthodox Jewish high school.³ It took less than twenty-four hours for a member of the group to make a discriminatory charge against AirTran, a company owned by Southwest Airlines.⁴ AirTran defended its decision by noting that the cabin crew and pilot made several requests for members of the group to comply with safety regulations, namely taking their seats and turning off their phones, but those requests were ignored.⁵ Aside from the issue of deplaning the entire 109-member group based on the actions of a few, at initial glance, it appears that some crewmember instructions were in fact ignored, at least temporarily.⁶ Nevertheless, the executive director of the school decided to open an internal investigation, stating, "Preliminarily, it does not appear that the action taken by the flight crew was justified."⁷ Fundamentally, the dispute can be characterized as one of discriminatory animus versus the safety of air travel.

The situation described above is certainly not a catastrophe; in fact, all of the students eventually reached their destination.⁸ The incident raises a larger issue, however—one that pits the current aviation security framework against the rights of individuals traveling throughout the United States to be free from discriminatory practices. Not surprisingly, a large number of discrimination allegations in forced deplaning, at least where race is alleged as the discriminatory factor, are raised by Muslims or individuals of Middle Eastern descent.⁹ Indeed, over half of the Muslims that participated in a comprehensive Pew Research survey said that current anti-terrorism policies single out Muslims, and 21% reported that they felt singled out by airport security personnel.¹⁰ This is perhaps not unanticipated, given

² *See id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *See id.*

⁷ *Id.*

⁸ David B. Caruso, *AirTran Boots 100 Rowdy Students off NYC-Atlanta Flight*, USA TODAY (June 4, 2013, 5:08 PM), <http://www.usatoday.com/story/todayinthesky/2013/06/04/airtran-boots-100-rowdy-students-off-nyc-atlanta-flight/2389599/>.

⁹ *See Muslim Americans: No Signs of Growth in Alienation or Support for Extremism*, PEW RES.: CENTER FOR PEOPLE & PRESS (Aug. 30, 2011), <http://www.people-press.org/2011/08/30/muslim-americans-no-signs-of-growth-in-alienation-or-support-for-extremism/>.

¹⁰ *See id.*

the identity of the September 11, 2001 (9/11), hijackers and the continued efforts of the United States to fight terrorism. Despite the realities of the current political atmosphere, discrimination in the context of airline safety has serious implications for travelers, especially when carriers refuse passage to foreign travelers.¹¹ Passengers may be left stranded at the mercy of airlines and are often forced to interact with law enforcement in foreign countries, perhaps without the requisite language skills.¹²

The heightened scrutiny of this minority group naturally led to a series of lawsuits against both private airlines and public law enforcement agencies. An examination of federal case law reveals numerous suits alleging that pilots engaged in discriminatory practices when, citing “safety concerns,” they removed certain passengers and denied them further service.¹³ Here, the plaintiffs alleged that the decision to remove them from the flight was based not on their individual conduct, but rather was motivated by their racial or ethnic identity.¹⁴ The majority of these types of lawsuits are dismissed prior to a jury trial.¹⁵

The principal reason why cases alleging discriminatory deplaning are dismissed at an early stage is because the current framework for analyzing a pilot’s actions is very deferential to the pilot.¹⁶ The statutory support for the heightened protection of pilots is derived from 49 U.S.C. § 44902(b), which allows pilots to refuse service to passengers that are deemed “inimical to safety.”¹⁷ The standard that courts apply in discriminatory deplaning cases is whether the pilot’s actions were arbitrary or capricious under the facts and circumstances known to the pilot at the time of the incident.¹⁸ This standard, which is not stated anywhere in the statute, has been adopted by the vast majority of courts, although the Supreme Court has never ruled on the appropriate standard.¹⁹ This judicially created standard has been tough for plaintiffs to meet in most situations and gives pilots and airlines considerable advantage in eliminating lawsuits at

¹¹ See *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 875 (9th Cir. 2010).

¹² *Id.*

¹³ Michael T. Kirkpatrick & Margaret B. Kwoka, *Title VI Disparate Impact Claims Would Not Harm National Security—A Response to Paul Taylor*, 46 HARV. J. ON LEGIS. 503, 513–14 (2009).

¹⁴ See *id.*

¹⁵ See *id.* at 514–15.

¹⁶ See *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975).

¹⁷ See 49 U.S.C. § 44902(b) (2006).

¹⁸ *Williams*, 509 F.2d at 948.

¹⁹ See *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 1, 13–14 (1st Cir. 2008).

the summary judgment stage, notwithstanding plaintiffs' efforts to provide objective facts that raise an inference of discrimination.²⁰

A pervasive problem recurrent in these lawsuits is the complete foreclosure of constitutional remedies in favor of the much lower arbitrary and capricious standard.²¹ Although several plaintiffs have cited the Fourteenth Amendment to challenge the purported discriminatory actions of airlines and pilots, to date, no plaintiff has been successful in surviving summary judgment on a Fourteenth Amendment Equal Protection claim under 42 U.S.C. § 1983.²² Plaintiffs have fared no better by invoking the Fourth Amendment's protections against unreasonable searches and seizures.²³ The primary reason for dismissing constitutional claims that allege civil rights violations is that the decision of a private pilot to remove an individual from a flight does not contain the requisite "state action."²⁴

This article focuses on aviation-related cases that have foreclosed a constitutional analysis of discriminatory deplaning and also incorporates an original analysis based upon the Supreme Court's current frameworks for finding state action. Part II briefly outlines the current standard of scrutiny that courts apply to a pilot's decision to remove passengers. Part III analyzes whether pilots should be considered state actors under any of the traditional state action tests and under the natural extensions of those tests.²⁵

²⁰ See Kirkpatrick & Kwoka, *supra* note 13, at 515.

²¹ *Williams*, 509 F.2d at 948 ("The test of whether or not the airline properly exercised its power under [section] 1511 . . . [is] whether or not the opinion and decision were rational and reasonable and *not capricious or arbitrary . . .*" (emphasis added)).

²² See Kirkpatrick & Kwoka, *supra* note 13, at 515.

²³ See David Smith, *Presumed Suspect: Post-9/11 Intelligence Gathering, Race, and the First Amendment*, 11 UCLA J. ISLAMIC & NEAR E. L. 85, 126–27 (2012).

²⁴ See *The Civil Rights Cases*, 109 U.S. 3, 21 (1883) ("Individual invasion of individual rights is not the subject matter of the amendment.").

²⁵ This article does not address whether a wronged plaintiff should plead a cause of action under 42 U.S.C. § 1983 for a constitutional violation "under color of state law" or whether a plaintiff would need to assert a *Bivens* action for a deprivation of civil rights brought on by a federal official. Undoubtedly, this would be a pertinent analysis for any potential plaintiff given the multitude of state and federal actors in an airport setting, but it is outside the scope of this article.

II. CURRENT LEGAL FRAMEWORK

This section provides a brief history of aviation security, but it is limited to the foundational information needed for a proper understanding of the main argument.

Pilots' authority to deplane or refuse passengers service and simultaneously enjoy legal immunity for those actions is derived from two sources. For domestic flights, in addition to the common law authority to protect passengers under a common carrier rationale,²⁶ Congress granted pilots the statutory authority to refuse service if they feel an individual "is, or might be, inimical to safety."²⁷ For international flights, the authority is governed by the United States' ratification of the Tokyo Convention of 1963, which allows for reasonable measures "to protect the safety of the aircraft."²⁸ To the extent that these laws differ—and they do differ significantly on issues of preemption and damages—they are largely irrelevant for the purposes of this article. Due to the scintilla of case law citing the Tokyo Convention, the vast majority of cases cited here are analyses of the domestic statute, 49 U.S.C. § 44902(b).

In response to a series of high-profile airplane hijackings and resulting deaths, Congress passed the Federal Aviation Act of 1958.²⁹ In addition to creating the Federal Aviation Agency (later changed to the Federal Aviation Administration (FAA)), Congress gave airlines the discretionary authority under 49 U.S.C. § 1511 (hereafter referred to as § 44902(b), where the statute is currently codified under federal law) to deny service to a passenger if that passenger might be "inimical to safety"; this authority is sometimes known as "permissive refusal."³⁰ The statute also grants the pilot immunity from civil liability if invoked for appropriate safety concerns.³¹ Subsequent judicial interpretations of the statute have added that an airline's decision should be judged upon "the facts and circumstances of the case as known to the airline . . . [and is] not to be tested by other facts later disclosed by hindsight."³² Some courts have gone even

²⁶ See *Cerqueira v. Am. Airlines*, 520 F.3d 1, 12 (1st Cir. 2008) (noting that § 44902(b) complemented existing air carrier duties under common law).

²⁷ 49 U.S.C. § 44902(b) (2006); see also *Cerquiera*, 520 F.3d at 12.

²⁸ Convention on Offences and Certain Other Acts Committed on Board Aircraft art. 6, Sept. 14, 1963, 20 U.S.T. 2941.

²⁹ *Williams v. Trans World Airlines*, 509 F.2d 942, 946 (2d Cir. 1975).

³⁰ See 49 U.S.C. § 44902(b) (2006).

³¹ See *id.*; *Williams*, 509 F.2d at 949.

³² *Williams*, 509 F.2d at 948.

further and concluded that the statute is not an immunity from civil liability, but rather is “an affirmative grant” of authority for an air carrier to act in the interest of safety.³³

By far the most important case interpreting § 44902(b) as it pertains to the viability of claims made by individuals seeking redress for discriminatory deplaning is the Second Circuit’s decision in *Williams v. Trans World Airlines*.³⁴ In one of the first appellate decisions concerning § 44902(b), the court held in *Williams* that the standard governing an airline’s actions is “whether or not the opinion and decision were rational and reasonable and not capricious or arbitrary.”³⁵ The phrase “capricious and arbitrary” does not appear in the statute itself, nor is it mentioned in the rules upon which the court relied in setting that standard.³⁶ Despite the unsupported adoption of a standard that is more often associated with review of government agency decisions,³⁷ every other circuit that has addressed this issue has adopted an arbitrary and capricious standard for the domestic statute.³⁸ This standard has made it difficult for plaintiffs to escape summary judgment because the defendant’s threshold is so low.

The FAA made this threshold even lower with the promulgation of an aviation regulation that states that the pilot in command is responsible for all decisions made on board the aircraft.³⁹ Courts that have harmonized this regulation with § 44902(b) have found that the pilot’s actions and decisions are the only germane factors to consider in determining whether a deplaning was arbitrary and capricious.⁴⁰ However, a pilot is separated from the passengers by the cockpit door, cannot leave the cockpit during flight because of post-9/11 security proto-

³³ *Cerquiera v. Am. Airlines, Inc.*, 520 F.3d 1, 13–14 (1st Cir. 2008); *Al-Watan v. Am. Airlines*, 658 F. Supp. 2d 816, 823 (E.D. Mich. 2009).

³⁴ *See Williams*, 509 F.2d at 948.

³⁵ *See id.*

³⁶ *Id.* at 948 n.9.

³⁷ *See Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 868 (9th Cir. 2010) (criticizing the use of an arbitrary and capricious standard that is rarely employed outside of government agency law).

³⁸ Brief for Air Transp. Assoc. of Am., Inc. and Int’l Air. Transp. Assoc. as Amici Curiae Supporting Petitioner at 23–24, *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858 (2010) (No. 10-962).

³⁹ *See* 14 C.F.R. § 91.3 (2014).

⁴⁰ *See Al-Watan v. Am. Airlines*, 658 F. Supp. 2d 816, 824 (E.D. Mich. 2009).

cols, and must necessarily rely on the reports of the flight crew.⁴¹ Thus, the pilot often receives only a partial view of a problem onboard and makes a decision to deplane passengers based upon limited knowledge of the events in the cabin.⁴² Ironically, a pilot that is ignorant as to what is actually occurring in the aircraft cabin and that relies on the potentially exaggerated reports of flight attendants is afforded more protection than if he had done his own independent investigation.⁴³ That is, a pilot is under no duty to independently assess a security risk and is immune from liability even when flight attendants make unreasonable or false representations about the potential threats of passengers.⁴⁴ Because the standard under § 44902(b) does not allow courts to test a pilot's decision by hindsight, even the most egregious misrepresentations by flight attendants are not scrutinized because *the pilot* is unaware of the true security threat or lack thereof.⁴⁵

Following the passage of the Federal Aviation Act of 1958, Congress passed two legislative enactments that are not only relevant to passenger rights but also critical to an analysis of state action.

First, the Air Transportation Security Act of 1974,⁴⁶ which mandated that all passengers be screened for weapons and explosive devices prior to boarding a commercial aircraft, required airlines to refuse service to any passenger who was unwilling to go through a security checkpoint (mandatory refusal).⁴⁷ After the 1974 changes, Congress reorganized the statutory framework to place mandatory refusal (codified at 49 U.S.C. § 44902(a)) in the same section as permissive refusal (codified at 49 U.S.C. § 44902(b)).⁴⁸ Relevant to the state action inquiry discussed in Part III, the 1974 Act did not require state or federal employees to conduct security screenings.⁴⁹ In fact, private

⁴¹ Jordan Campbell, Note, "Get Off My Plane": *The Need for Extreme Deference to Captains and Crews on International Flights Under the Tokyo Convention of 1963*, 77 J. AIR L. & COM. 367, 401 (2012).

⁴² *Id.*

⁴³ See *Al-Qudhai'een v. Am. W. Airlines*, 267 F. Supp. 2d 841, 847-48 (S.D. Ohio 2003); *Christel v. AMR Corp.*, 222 F. Supp. 2d 335, 340 (E.D.N.Y. 2002).

⁴⁴ *Al-Qudhai'een*, 267 F. Supp. 2d at 848.

⁴⁵ *Id.*

⁴⁶ Air Transportation Security Act of 1974, Pub. L. No. 93-366, § 1111(A), 88 Stat. 409, 418 (codified at 49 U.S.C. § 44902(a) (2006)).

⁴⁷ *Id.*

⁴⁸ See 49 U.S.C. § 44902.

⁴⁹ Air Transportation Security Act § 316.

corporations did a bulk of the screening at major airports in the United States.⁵⁰ Argenbright Security, a private screening firm, had 25,000 employees and was responsible for screening at forty-four U.S. airports.⁵¹ Although local and state police were present to supplement private screenings, government involvement after 1974 was neither direct nor comprehensive.⁵²

The world, not just aviation security, was changed by the September 11, 2001 attacks on the World Trade Center and the Pentagon. In direct response to the 9/11 attacks, on November 19, 2001, Congress passed the second piece of legislation relevant to the state action inquiry: the Aviation and Transportation Security Act (2001 Act).⁵³ The 2001 Act created the Transportation Security Administration (TSA), which is under the control of the Department of Transportation.⁵⁴ The 2001 Act turned the then-current aviation security model on its head by supplanting private and state security apparatuses with a completely federal screening system.⁵⁵ The TSA was charged with the responsibility of screening all passengers and property that originated at domestic airports.⁵⁶

Not only did the 2001 Act create a federal regulatory system for aviation security, but it also mandated federal involvement at every airport that is required to screen passengers and property.⁵⁷ And although screening is a separate issue from deplaning, they are logically related given that (1) the 2001 Act did not change permissive refusal under § 44902(b); and (2) the current framework requires airlines to comply with TSA screening procedures, from initial security checkpoints all the way to the gate.⁵⁸ A federal uniformed official is required to oversee every screening operation and has the summary power to dismiss any individual who is part of the screening system,

⁵⁰ Greg Fulton, *An Airport Screener's Complaint*, TIME (Aug. 17, 2006), <http://content.time.com/time/nation/article/0,8599,1228247,00.html>.

⁵¹ *Id.*

⁵² *See id.*; see also *Statute and Regulation History*, TRANSP. SEC. ADMIN. (Dec. 12, 2012), <http://www.tsa.gov/stakeholders/statute-and-regulation-history>.

⁵³ Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.).

⁵⁴ *Id.* § 114.

⁵⁵ *See id.*

⁵⁶ *Id.*

⁵⁷ *See* 49 U.S.C. § 44901(b) (2006).

⁵⁸ *See id.* § 44902(a) (requiring airlines to deny service to anyone who does not pass through, or refuses to pass through, security).

government actor or not.⁵⁹ Thus, Congress envisioned that aircraft security would not simply come under federal regulatory scrutiny, but rather that the federal government would adopt screening and passenger safety as part of its responsibility to protect the American public.⁶⁰

It is under this framework that Part III analyzes whether pilots should be considered state actors while engaging in discretionary deplaning.

III. STATE ACTION

As stated in the introduction, most courts have been hostile to extending the protections of the Fourteenth Amendment to lawsuits based on discriminatory deplaning. Since pilots are private actors working for private corporations, their actions do not fall under constitutional scrutiny unless the requisite level of state action is found.⁶¹ Each of the following subsections will analyze the different tests the Supreme Court has crafted when analyzing whether private actors should be constrained by the Constitution. A cause of action based upon the Constitution is appealing in the context of discriminatory deplaning because it would heighten the scrutiny placed on a pilot's decision. Instead of relegating claims to the arbitrary and capricious standard, the potentially discriminatory decisions would be analyzed using the much higher levels of scrutiny the Supreme Court has utilized for the Equal Protection Clause.⁶²

It is well established that a private individual may be subject to liability for deprivation of another's rights secured by the Constitution if the appropriate level of state action is found.⁶³ Plaintiffs that allege sufficient state action are then capable of suing private individuals under 42 U.S.C. § 1983 for deprivation of constitutional protections like those granted in the Fourteenth Amendment's Equal Protection Clause.⁶⁴

The Supreme Court has adopted a two-part test to determine whether deprivation of a constitutional right can be "fairly attributable" to the state.⁶⁵ First, "the deprivation must be caused by the exercise of some right or privilege created by the

⁵⁹ *Id.* § 44901(b).

⁶⁰ *See generally* Aviation and Transportation Security Act.

⁶¹ *See* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 (1982).

⁶² *See id.*

⁶³ *See id.* at 939.

⁶⁴ *Id.* at 935.

⁶⁵ *Id.* at 937.

[s]tate.”⁶⁶ Second, “the party charged with the deprivation must be a person who may fairly be said to be a state actor.”⁶⁷ In the context of discriminatory deplaning, the first element of this test is readily satisfied because there is no question that § 44902(b) is a federal grant of authority that vests discretionary power in a pilot to deny transportation services.⁶⁸ The deprivation comes in the form of the right to air travel, which is a federal statutory right expressly granted in 49 U.S.C. § 40103; the Supreme Court and other courts have consistently upheld the constitutional right to freedom of movement.⁶⁹ Moreover, citizens have a federal statutory right to be free from discrimination in air travel.⁷⁰

The second element of the “fairly attributable” test is where most plaintiffs fail in the context of discriminatory deplaning. The Supreme Court has articulated a number of tests to determine whether a particular action by a private individual should be considered state action.⁷¹ Although each of the tests represents a unique approach to analyzing state action, “[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”⁷² Taking each test in turn, the author will start with the “public function” exception that originated in *Marsh v. Alabama*.⁷³ Second, the author will briefly address the theory of government compulsion and show how the current statutory framework in aviation forecloses this path. Third, the author will analyze and argue for the good-faith extension of the joint participation theory outlined in *Lugar v. Edmondson Oil Co.*⁷⁴ Lastly, the author will apply *Burton v. Wilmington Parking Authority*’s public entwinement or symbiotic relationship test,⁷⁵ despite the lack of recent Supreme Court holdings based on this case’s rationale.⁷⁶

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See 49 U.S.C. § 44902(b) (2006); Responsibility and Authority of the Pilot in Command, 14 C.F.R. § 91.3 (2014).

⁶⁹ See *United States v. Guest*, 383 U.S. 745, 757 (1966); see also *Latif v. Holder*, No. 3:10-CV-00750-BR, 2013 WL 4592515, at *9 (D. Or. Aug. 28, 2013).

⁷⁰ See 49 U.S.C. § 40127.

⁷¹ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982).

⁷² *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

⁷³ See *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

⁷⁴ See *Lugar*, 457 U.S. at 931–32.

⁷⁵ See *Burton*, 365 U.S. at 725–26.

⁷⁶ The other exceptions to the state action requirement simply do not apply in this context. The judicial intervention exception found in *Shelley v. Kraemer*, 334 U.S. 1 (1948), has been limited by subsequent rulings to race-based covenants

A. THE PUBLIC FUNCTION TEST

In *Marsh v. Alabama*, the Supreme Court held that a private corporation that owned an entire town was subject to the same constitutional constraints as a public town.⁷⁷ Admittedly, the public function exception has become a high bar to meet, and subsequent cases have foreclosed certain areas from constitutional scrutiny.⁷⁸ The public function test has also been judicially modified in modern day jurisprudence to be the “exclusive[] public function” test.⁷⁹ The holding of the Supreme Court in *Flagg Bros., Inc. v. Brooks* limited a finding of state action to instances where the conduct was exclusively within the realm of government control.⁸⁰

It is this tough standard by which courts must scrutinize the actions of pilots.⁸¹ Essential to the public function exception, however, is a specific articulation of the actual conduct being analyzed.⁸² Discriminatory deplaning does not involve regulating the airline industry or making a business decision, but rather involves the conduct of pilots who invoke their authority to make determinations about safety.⁸³ Thus, the public function analysis hinges on whether a pilot’s discretionary authority to deplane individuals is conduct normally reserved for government actors.⁸⁴ Unfortunately, there is very little case law regarding whether a pilot’s discretionary decisions regarding safety constitute state action. The following argument will instead compare other types of private conduct that have been weighed by courts considering the public function exception.

With a security/safety function in mind, one logical starting place is to analogize cases where private individuals exercising

and, regardless, would not be applicable in a larger context here. The final exception, conspiring with government officials to deprive an individual of his or her rights, could gain traction in certain circumstances, although a specific set of facts would need to be present. In an effort to espouse broader principles that encompass a multitude of fact patterns, this exception has been omitted.

⁷⁷ *Marsh v. Alabama*, 326 U.S. 501, 508–10 (1946).

⁷⁸ See *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982) (declining to find state action in discharge or transfer decisions of nursing homes); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841–42 (1982) (dismissing an argument that a private school was a state actor under the public function test).

⁷⁹ *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158–60 (1978).

⁸⁰ *Id.*

⁸¹ See *id.*

⁸² *Id.* at 164.

⁸³ *Id.* at 158–60.

⁸⁴ See *id.*

law enforcement power have been held to constitutional standards. Pilots may question, investigate, and potentially detain passengers on the flight while they assess a potential security threat; these types of actions are customarily reserved to state actors.⁸⁵ Thus, as it relates to their authority under § 44902(b), pilots are similar to other types of private law enforcement actors because they operate under a statutory grant of authority—like the authority of private bank guards or casino security guards—and have the ability to conduct quasi-criminal investigations normally associated with law enforcement.⁸⁶

Federal appellate courts have generally been cautious in extending the public function exception based solely on an individual's use of traditional law enforcement techniques.⁸⁷ The mere investigation of a crime or security concern, without more, does not transform an individual into a state actor.⁸⁸ An Eighth Circuit opinion, *United States v. Garlock*, is factually comparable to the actions of a pilot and is helpful in the public function analysis.⁸⁹ In *Garlock*, a private bank security guard conducted an investigation of a bank teller regarding a shortage of money.⁹⁰ The teller, after being interrogated by two private fraud experts, admitted to embezzlement; after the information was turned over to the police, she was subsequently tried and convicted.⁹¹ On appeal, she asserted in part that the investigation should have been subject to the Fourth and Fifth Amendments given that a criminal investigation was a traditional public function.⁹² Her argument carried weight because a federal regulation required banks to develop programs for identifying thefts and mandated reporting to the proper federal agency.⁹³ Thus, the defendant-appellant attempted to portray the security officer and fraud examiners as extensions of law enforcement bodies.⁹⁴ The Eighth Circuit held that simply investigating potential crime does not rise to the level of public function needed to impose constitutional restrictions.⁹⁵ Highly relevant to the

⁸⁵ See, e.g., *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 1, 7–8 (1st Cir. 2008).

⁸⁶ See 49 U.S.C. §§ 44902(b), 44941 (2006); see, e.g., 12 C.F.R. § 21.11 (2014).

⁸⁷ See *United States v. Garlock*, 19 F.3d 441, 443–44 (8th Cir. 1994).

⁸⁸ *Id.*

⁸⁹ See *id.*

⁹⁰ *Id.* at 442.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 443 (referencing 12 C.F.R. § 21 (1993)).

⁹⁴ *Id.*

⁹⁵ See *id.* at 443–44.

court's holding was that the bank's actors were motivated by their own pursuit of protecting bank assets, not by a desire to vindicate the public or the state.⁹⁶

Other circuits have followed this line of reasoning, finding the context and motivations of the private actors to be relevant in analyzing public functions but downplaying the importance of the actual law enforcement techniques employed.⁹⁷ The Tenth Circuit tracked this reasoning in *Gallagher v. Neil Young Freedom Concert*, holding that private security guards who conducted pat-down searches were acting pursuant to company policy in furtherance of their own security interests, despite the fact that the concert took place on government property and was overseen by public law enforcement.⁹⁸ This holding further reinforces the notions presented in *Garlock* that (1) the public function exception, in terms of law enforcement powers, must be analyzed by looking at the motivations of the private actors and whether such conduct is a natural arm of law enforcement's goal of protecting the public interest; and (2) the actual law enforcement techniques employed are less relevant.⁹⁹ This is not to say that a particular technique is never germane to the analysis, but it is simply less important when analyzing whether the public function exception applies.¹⁰⁰

As applied to commercial airlines, decisions like *Garlock* and *Gallagher* seem to foreclose a finding of state action, at least from a law enforcement perspective. The authority under § 44902(b), as stated previously, was an outgrowth from the common carrier

⁹⁶ See *id.* at 444.

⁹⁷ See *Johnson v. LaRabida Children's Hosp.*, 372 F.3d 894, 897–98 (7th Cir. 2004); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1457 (10th Cir. 1995); *State v. Sanders*, 448 A.2d 481, 485–86 (N.J. Super. Ct. App. Div. 1982); *People v. Houle*, 13 Cal. App. 3d 892, 895 (Cal. Ct. App. 1970). *But see Warner v. Grand Cnty.*, 57 F.3d 962, 964 (10th Cir. 1995) (holding a private actor liable under § 1983 for conducting a strip search because it was a “search power which has been traditionally reserved for the states”).

⁹⁸ See *Gallagher*, 49 F.3d at 1457. This is in no way meant to diminish potential state law causes of action against private individuals, including: assault, battery, false imprisonment, and defamation. Although outside the scope of this article, but still relevant to the remedial focus on passenger rights, the Airline Deregulation Act, 49 U.S.C. § 41713 (2006), preempts a large number of these claims, hence the focus on finding a constitutional answer. See, e.g., *Smith v. Comair, Inc.*, 134 F.3d 254 (4th Cir. 1998) (passenger claims of breach of contract, false imprisonment, and intentional infliction of emotional distress were preempted by the Airline Deregulation Act).

⁹⁹ See *Gallagher*, 49 F.3d at 1457.

¹⁰⁰ See *Warner*, 57 F.3d at 964.

rule that required airlines to remove passengers that potentially threatened the safety of other passengers.¹⁰¹ The duty incumbent on common carriers is a duty owed to passengers, not to the FAA or federal law enforcement figures.¹⁰² Section 44902(b) also does not require reporting to federal officials, nor does it require airlines to detain passengers until they are handed over to law enforcement.¹⁰³ Thus, even when performing certain law enforcement functions, like investigations, airlines are concerned more about their own pecuniary interests and the safety of their passengers than the goals of law enforcement, like apprehending potential security threats.¹⁰⁴

One potential factor that distinguishes deplaning cases from those like *Garlock* and *Gallagher* is that the regulatory framework as a whole, not just the power under § 44902(b), makes a pilot's decision appear to contain a mixed motive—in other words, the pilot's decision does not seem focused purely on the airline's private interest. Post-9/11 security protocols placed greater emphasis on aircraft safety and crew training.¹⁰⁵ The 2001 Act grants immunity to airline personnel if they report suspected security threats to TSA or law enforcement.¹⁰⁶ Airlines are also required to adopt security policies that are often proposed or drafted by the federal government.¹⁰⁷ Although heavy government regulation, or even government endorsement of a private actor's activities, cannot sustain a finding of state action under the public function exception, a totality of the circumstances could indicate a hybrid of interests in the current aviation security framework.¹⁰⁸

Unfortunately, courts have addressed comprehensive regulatory frameworks in other contexts and often hold that private actors lack a sufficient connection to an exclusive public function, despite a potential law enforcement motive.¹⁰⁹ In an inter-

¹⁰¹ *Cerqueira v. Am. Airlines, Inc.*, 520 F.3d 1, 12 (1st Cir. 2008).

¹⁰² *See id.*

¹⁰³ *See* 49 U.S.C. § 44902(b) (2006).

¹⁰⁴ *See Cerqueira*, 520 F.3d at 8 (noting that the pilot testified about lost revenue and disruption to flight, not interests of law enforcement in capturing individuals).

¹⁰⁵ *See Campbell*, *supra* note 41, at 400–01.

¹⁰⁶ *See* 49 U.S.C. § 44941.

¹⁰⁷ *See Shqeirat v. U.S. Airways Grp., Inc.*, 645 F. Supp. 2d. 765, 792 (D. Minn. 2009).

¹⁰⁸ *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 41 (1999); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974).

¹⁰⁹ *See State v. Sanders*, 448 A.2d 481, 485–86 (N.J. Super. Ct. App. 1982).

esting comparison, casinos have faced similar lawsuits where plaintiffs argued that the public function exception applied to certain employee conduct because of the security powers granted to casino personnel.¹¹⁰ In *State v. Sanders*, a criminal case where the defendant argued for suppression under the Fourth Amendment, casino security guards detained and searched an individual they suspected of card counting.¹¹¹ The search yielded a foreign substance, which the security guard and a law enforcement officer jointly tested for cocaine.¹¹² A positive test for cocaine led to the individual's arrest.¹¹³

The defendant in *Sanders* argued that the security guards were state actors for the following reasons: (1) they were exercising authority normally granted exclusively to law enforcement; (2) the security guards had such authority under New Jersey's Casino Control Act; (3) they had authority to detain individuals suspected of violating gambling regulations; and (4) casinos were required by the state to have detailed security procedures.¹¹⁴ Thus, the statutory framework for casino security personnel is similar to the current aviation security framework for discriminatory deplaning, given the mandate for aircraft security, the authority to act as a pilot, and immunity for reporting and acting.¹¹⁵ Despite the extensive government directives, the court in *Sanders* overruled a lower judge's decision that found state action.¹¹⁶ In support of its ruling, the court held that the regulatory directives did not confer state action upon the security guards, and even if they did, the guards exceeded such authority when they subjected the individual to a search.¹¹⁷ Once again, the court found it highly relevant that the guards were acting in the pecuniary interest of the casino, even if they ultimately had a close connection with law enforcement.¹¹⁸

Another pair of recent casino cases analyzing whether private actions fall under the public function exception in highly regulated industries is probative of how courts distinguish between private action and state action in the context of security

¹¹⁰ See *id.* at 483–84.

¹¹¹ *Id.* at 482.

¹¹² *Id.*

¹¹³ *Id.* at 483.

¹¹⁴ *Id.* at 486.

¹¹⁵ See 49 U.S.C. § 44902(b) (2006); see also 49 U.S.C. § 44941 (2006).

¹¹⁶ See *Sanders*, 448 A.2d at 485–86.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 486.

frameworks. In *Romanski v. Detroit Entertainment*, the court did find that casino security guards were state actors because they were licensed under Michigan law and had “plenary arrest authority.”¹¹⁹ For purposes of determining whether the public function exception should apply, the court divided relevant case law into two categories: (1) where private actors exercised some police authority related to their employer’s interest (partial framework); and (2) where private actors had the same authority as police officers (full framework).¹²⁰ Less than a year later, the same court held that similar detention tactics did not constitute state action because, despite heavy government direction of the gaming industry, the particular guards implicated in that lawsuit did not have plenary arrest authority.¹²¹

The authority granted to pilots falls within the line of cases in which private actors are granted some authority, but not plenary power to arrest.¹²² While it is true that the captain of an aircraft has the final say on any aspect of the flight and may deviate from any established protocol when necessary,¹²³ the regulatory framework and § 44902(b) confer only the authority to deny passage, not a broader authority to act as a law enforcement officer while parked at the gate or in the terminal.¹²⁴ And even though in a certain number of circumstances a pilot may engage in the very activity that is normally reserved for law enforcement, such as a citizen’s arrest,¹²⁵ no argument can be made that the language of 49 U.S.C. § 44902(b) grants authority beyond aircraft safety.¹²⁶ Thus, under the current framework, a pilot’s law enforcement abilities simply do not confer the responsibility necessary to find state action under the public function test.

¹¹⁹ *Romanski v. Detroit Entm’t, L.L.C.*, 428 F.3d 629, 639 (6th Cir. 2005).

¹²⁰ *Id.* at 637–38.

¹²¹ *See Lindsey v. Detroit Entm’t, L.L.C.*, 484 F.3d 824, 829–30 (6th Cir. 2007).

¹²² *See id.*

¹²³ *See* 14 C.F.R. § 91.3 (2014).

¹²⁴ *See* 49 U.S.C. § 44902(b) (2006).

¹²⁵ *See Lee v. Town of Estes Park*, 820 F.2d 1112, 1114 (10th Cir. 1987) (holding that citizen’s arrest by a private actor did not automatically transform that individual into a state actor).

¹²⁶ *See* 49 U.S.C. § 44902(b).

B. DOES THE 2001 AVIATION AND TRANSPORTATION SECURITY ACT CHANGE THE PUBLIC FUNCTION ANALYSIS?

It is possible that the Aviation and Transportation Security Act of 2001, enacted by Congress post-9/11,¹²⁷ opened up another avenue through which to find state action under the public function test. As previously stated, the 2001 Act completely supplanted private screening at major airports in favor of screening done by federal employees and security personnel.¹²⁸ In addition to screening, the 2001 Act authorized and deployed federal marshals on both domestic and international flights, with special emphasis on high-risk flights, including those operated by the long-haul, heavy, fuel-laden planes that were used on 9/11.¹²⁹ Although the air marshal program existed prior to 9/11, at the time of the September 11th attacks, only thirty-three agents were employed.¹³⁰ Although the exact number of current agents is classified, an educated guess made in 2004 estimated that about 6,000 agents were employed.¹³¹ Congress also enacted legislation that concerned airport perimeter fencing, technical changes to flight-deck doors and access, and crew training for recognizing and communicating potential threats.¹³² Thus, TSA screeners represent only a fraction of the government's involvement in the current aviation safety scheme.

It is plausible that the 2001 Act is so comprehensive that it has actually led Congress to "adopt" aviation safety as a public function. This argument focuses on whether aviation security, as an entire theme, has come under the blanket of federal control. The Supreme Court has already spoken on similar issues, finding that heavy government regulation does not transform a private actor into a state actor.¹³³ In *Jackson v. Metropolitan Edison Co.*, the Court rejected an argument that extensive regulation of industry led to a finding of state action, thus shielding a wide area of business activity from constitutional scrutiny.¹³⁴ The fol-

¹²⁷ Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.).

¹²⁸ See 49 U.S.C. § 44901(b).

¹²⁹ See Aviation and Transportation Security Act; see also Samantha Levine, *The Marshals' Cloudy Skies*, U.S. NEWS (Nov. 21, 2004), http://www.usnews.com/usnews/news/articles/041129/29marshals_2.htm.

¹³⁰ Levine, *supra* note 129.

¹³¹ *Id.*

¹³² See Aviation and Transportation Security Act.

¹³³ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350-51 (1974).

¹³⁴ See *id.*

lowing argument would seek to distinguish *Jackson* by arguing that aviation safety is no longer a “regulated industry”,¹³⁵ rather, the 2001 Act effectively led the federal government to adopt the vital aspects of aviation security. Thus, *Jackson*, which only speaks to heavy or comprehensive regulation, does not preclude an analysis that aviation security in post-9/11 America has been completely subsumed by the federal government and is now subject to constitutional scrutiny.¹³⁶

An extensive search has yielded very little addressing the idea of the federal government “adopting” something as a public function, which is not surprising given that it takes an extraordinary event to spur Congress into such comprehensive legislation. Even then, it is rare for Congress to completely supplant an entire industry and create cabinet-level organizations out of whole cloth, such as it did with the Department of Homeland Security (DHS) and TSA, which combined now employ over 290,000 people.¹³⁷ Any analysis of whether federal “adoption” of an activity would constitute public function is therefore relegated to what the Supreme Court would likely hold. The following three cases, although not factually comparable to aviation security, present a viable argument in support of what the author coins the “adoption theory.”

The first case, *Pennsylvania v. Board of Directors of City Trusts*, was a per curiam opinion in which the United States Supreme Court invalidated a college board of trustee’s decision to deny two black individuals admission solely on the basis of race.¹³⁸ In upholding the board’s decision, the Pennsylvania Supreme Court held that because the college was initially established by a private trust, the private individual therefore had the right to dispose of his estate at his leisure.¹³⁹ The Pennsylvania Supreme Court wrote, “[I]t is wholly impossible to conceive that the donors and testators had the slightest idea in appointing the city as a trustee of their charitable trusts that it could ever be contended that they were thereby subjecting their trusts to the gov-

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ *See Career Areas*, TRANSP. SEC. ADMIN., <http://www.tsa.gov/careers> (last visited Apr. 18, 2014) (noting that the TSA currently employs 50,000 officers, inspectors, and marshals); *see also About DHS*, DEP’T HOMELAND SEC., <https://www.dhs.gov/about-dhs> (last visited Apr. 18, 2014) (noting the 240,000 individuals currently employed by the DHS).

¹³⁸ *Pennsylvania v. Bd. of Dirs. of City Trusts*, 353 U.S. 230, 231 (1957).

¹³⁹ *In re Girard’s Estate*, 127 A.2d 287, 291 (Pa. 1956), *overruled by Bd. of Dirs. of City Trusts*, 353 U.S. at 231.

ernmental powers of the city.”¹⁴⁰ The U.S. Supreme Court wholly disagreed and found state action because when Pennsylvania chose to oversee the trust under a state agency, its actions instantly became subject to the constraints of the Fourteenth Amendment.¹⁴¹

In the second case, *Public Utilities Commission v. Pollak*, the U.S. Supreme Court found state action where a government agency evaluated a private transit company’s decision to play music across their transit system.¹⁴² The Court grounded its state action theory solely on the basis of the Public Utilities Commission’s substantial surveillance and involvement in the private company’s activities.¹⁴³ The Court found it highly relevant that an investigation had been ordered and that the public commission had subsequently approved of the private company’s decision.¹⁴⁴ *Jackson v. Metropolitan Edison Co.* would later distinguish *Pollak* on the grounds that the action in *Pollak* was much more active, and that the government eventually approved of the private actor’s decisions.¹⁴⁵ Thus, at least during the time period in which *Pollak* and, subsequently, *Jackson* were written, the state action analysis could have hinged on whether the role of the government was active or passive.¹⁴⁶

The final case, and the most famous of the three, is *Evans v. Newton*, in which the Court invalidated a city’s decision to change from public to private park trustees.¹⁴⁷ The city’s removal of public trustees was an attempt to enforce the wishes of the individual that dedicated the park.¹⁴⁸ The Supreme Court invalidated the city’s decision because the history of public maintenance and oversight had made the park “an integral part of the [c]ity.”¹⁴⁹ Using language particularly pertinent to the author’s proposed adoption theory, Justice Douglas wrote, “The momentum it acquired as a public facility is certainly not dissipated ipso facto by the appointment of ‘private’ trustees.”¹⁵⁰ *Evans* therefore stands for the notion that when a government

¹⁴⁰ *Id.* at 295.

¹⁴¹ *Bd. of Dir. of City Trusts*, 353 U.S. at 231.

¹⁴² *Public Utilities Comm’n v. Pollak*, 343 U.S. 451, 462–63 (1952).

¹⁴³ *See id.* at 462.

¹⁴⁴ *Id.*

¹⁴⁵ *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 356–57 (1974).

¹⁴⁶ *See id.*

¹⁴⁷ *See Evans v. Newton*, 382 U.S. 296, 302 (1966).

¹⁴⁸ *Id.* at 297.

¹⁴⁹ *Id.* at 301.

¹⁵⁰ *Id.*

entity takes responsibility for a particular establishment, the nature of that establishment may change, despite its private inception, such that it warrants the protection of the Constitution.¹⁵¹

The upshot of these three cases is that when a government agency accepts ownership of an entity and involves itself in the entity's regulatory machinery in a way that amounts to something more than passive guidelines, the nature of that entity may eventually take on a public character.¹⁵² The author contends that such a "perfect storm" has occurred in the aviation security context.

The 2001 Act is truly comprehensive legislation that supplanted private actors in favor of government regulation. The increased use of air marshals and the development of all-inclusive safety regulations aimed at almost every aspect of flight operations makes the current regulatory framework much more worthy of a public function analysis.¹⁵³ Moreover, the placement of federal TSA and DHS employees as active participants in aviation security is similar to the active roles played by the government agency and city in *Pollak* and *Evans*.¹⁵⁴ The 2001 Act is radically different from the conduct in *Jackson* and instead is more like that in *Pollak*. The government is not using passive regulation to control and slow the growth of certain business activities; it has decided that an active federal solution is more valuable than continued regulation of private companies.¹⁵⁵

It is conceded that private airlines still possess a dominant role in aviation safety, but the courts in *Board of Directors of City Trusts* and *Evans* admitted that private actors were still implicated in the contexts of college admissions and park management.¹⁵⁶ However, the continued activities and motivation of the private companies were not dispositive in those cases; the determinative factor was the role that the government had stepped into and the subsequent changes to those private entities.¹⁵⁷ Aviation security is no different. Section 44902(b) may continue to

¹⁵¹ See *id.* at 302.

¹⁵² See *id.* at 301.

¹⁵³ See Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.).

¹⁵⁴ See *id.*; Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462-63 (1952); *Evans*, 382 U.S. at 297.

¹⁵⁵ See Aviation and Transportation Security Act; *Jackson v. Metro Edison Co.*, 419 U.S. 345, 356-57 (1974); *Pollak*, 343 U.S. at 462-63.

¹⁵⁶ See *Evans*, 382 U.S. at 296; *Pennsylvania v. Bd. of Dirs. of City Trusts*, 353 U.S. 230, 231 (1957).

¹⁵⁷ See *Evans*, 382 U.S. at 301; *Bd. of Dirs. of City Trusts*, 353 U.S. at 231.

confer discretion upon private pilots to deplane individuals, but the totality of the circumstances indicates that the federal government has accepted and adopted aviation security in response to the 9/11 attacks.¹⁵⁸

It is questionable whether the current Supreme Court's jurisprudence would accept such a theory as that posited above. Admittedly, in a battle of the case law, *Jackson* has been far more influential than *Pollak*.¹⁵⁹ However, the rationale in *Evans* may provide a window for a future decision under the public function exception.¹⁶⁰ If the "momentum" of federal aviation security oversight continues to grow, and perhaps increasingly focuses on gateway and in-flight security, then a court may be able to sustain a finding of state action based on the federal government's "adoption" of a public function.¹⁶¹

C. THE GOVERNMENT COMPULSION TEST

A finding of state action under the government compulsion test requires more than approval or government acceptance of a private decision.¹⁶² The government must compel the private actor to engage in the specific conduct for which a plaintiff is complaining.¹⁶³ In the context of aviation security and the powers conferred to pilots under 49 U.S.C. § 44902(b), the analysis is fairly short: permissive refusal, by its very nature, is a discretionary grant of authority that vests control in the pilot.¹⁶⁴ The exercise of independent judgment is fatal to a finding of state action under the compulsion test for almost any set of facts.¹⁶⁵

D. THE JOINT-ACTION TEST

The joint-action test for analyzing state action, as articulated in *Lugar v. Edmondson Oil Co.*¹⁶⁶ and *Adickes v. S.H. Kress & Co.*,¹⁶⁷ imputes state action to private actors when they are "willful participant[s] in joint activity with the State or its agents."¹⁶⁸

¹⁵⁸ See Aviation and Transportation Security Act.

¹⁵⁹ *Jackson* has been subsequently cited by almost 2,500 cases, compared to 500 case citations to *Pollak*.

¹⁶⁰ See *Evans*, 382 U.S. at 302.

¹⁶¹ See *id.*

¹⁶² See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 164 (1978).

¹⁶³ See *id.* (distinguishing between compulsion and the refusal to act).

¹⁶⁴ See 49 U.S.C. § 44902(b) (2006).

¹⁶⁵ See *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982).

¹⁶⁶ See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982).

¹⁶⁷ *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970).

¹⁶⁸ *Id.* (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

In the context of aviation security, courts must adapt the analysis slightly. In a search of the case law, nothing has yielded a case involving a situation where a state actor was present at the *exact* point a pilot decided to deplane an individual. Even then, since Congress vested the authority under § 44902(b) with the pilot, not public law enforcement authorities, the actual pilot's decision is a poor place to look for joint action. Instead, this section focuses on perhaps the more serious situation that inevitably develops after a decision to deplane a passenger is made: a detention and interrogation by police. A survey of case law reveals that a number of deplaned passengers are immediately subjected to some form of seizure or questioning upon their ejection from the aircraft.¹⁶⁹ The quick and fluid nature in which police take individuals into custody raises the question of whether passengers are subject to unlawful seizures at the behest of private pilots.¹⁷⁰

The joint-action test is traditionally associated with statutes that provide private creditors with the power to repossess or seize the property of a debtor, normally with an accompanying law enforcement officer.¹⁷¹ However, the joint-action test has been applied in other contexts, assuming the private conduct is "fairly attributable" to the state.¹⁷² Tests developed in lower courts are quite stringent, requiring that the state have an official statutory policy or working relationship that transfers the power of the state to a private actor.¹⁷³ The mere invocation of statutory authority by a private actor, without a mandate to do so, does not transform an individual's actions into state action.¹⁷⁴ Even a statutory scheme that vests some authority in the state but also allows for the exercise of independent judgment by private actors is not conclusive under the joint-action test.¹⁷⁵

In the context of unlawful seizure by a private party, the circuits have similar tests, but the language tends to differ slightly. For example, the Third and Fifth Circuits will allow private ac-

¹⁶⁹ See, e.g., *Rubin v. United Air Lines, Inc.*, 117 Cal. Rptr. 2d 109, 113 (Cal. Ct. App. 2002).

¹⁷⁰ Obviously, to sustain a claim, it must actually be proven that any seizure was unlawful. This article does not attempt to reconstruct the sufficiency of probable cause, but rather focuses on who made the decision: the police or the pilot.

¹⁷¹ See *Lugar*, 457 U.S. at 939.

¹⁷² See *Price*, 383 U.S. at 794-95; see also *Lugar*, 457 U.S. at 937.

¹⁷³ See *Cruz v. Donnelly*, 727 F.2d 79, 82 (3d Cir. 1984).

¹⁷⁴ See *Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1257 (9th Cir. 2008).

¹⁷⁵ See *Sybalski v. Indep. Grp. Home Living Program, Inc.*, 546 F.3d 255, 258 (2d Cir. 2008).

tors to be sued as state actors when: “(1) the police have a pre-arranged plan with the [private entity], and (2) under the plan, the police will arrest anyone identified [by the private entity] without independently evaluating the presence of probable cause.”¹⁷⁶ The Eighth Circuit employs a test that asks whether the decision is “tantamount to substituting the judgment of a private party for that of the police or allowing the private party to exercise state power.”¹⁷⁷ The circuits are in agreement that a private actor does not engage in state action simply by exercising his right to call the authorities.¹⁷⁸ Nor will state action apply if the officers relied in part on, or were directed to, an individual that they subsequently arrested, as long as they performed their own probable cause analysis.¹⁷⁹ Given the slightly broader scope of the Eighth Circuit’s language, the following analysis will rely on that test.

It is conceded that of all the potential avenues to finding state action in the aviation context, the joint-action test is the most fact dependent.¹⁸⁰ Not every invocation of deplaning results in arrest or detention, and in the cases that do result in seizure, the police do not always fail to exercise independent judgment.¹⁸¹ The following three cases are meant to provide an example of what is suspected to be a larger trend in the interaction between pilots and law enforcement.

1. *Shqeirat v. U.S. Airways—The Implied Inference*

Shqeirat v. U.S. Airways provides a good analysis of joint action because the plaintiffs sued both the airline and the law enforcement officers for unlawful seizure.¹⁸² Briefly, the plaintiffs were six Muslim passengers departing on a flight from Minnesota.¹⁸³ Several passengers and flight attendants expressed reservations

¹⁷⁶ *Shqeirat v. U.S. Airways Grp., Inc.*, 645 F. Supp. 2d 765, 789–90 (D. Minn. 2009) (quoting *Cruz v. Donnelly*, 727 F.2d 79, 81 (3d Cir. 1984)) (internal quotation marks omitted).

¹⁷⁷ *Id.* at 790 (quoting *Young v. Harrison*, 284 F.3d 863, 870 (8th Cir. 2002)) (internal quotation marks omitted).

¹⁷⁸ See *Young*, 284 F.3d at 870; *Ibrahim*, 538 F.3d at 1257.

¹⁷⁹ *Bartholomew v. Lee*, 889 F.2d 62, 63 (5th Cir. 1989); *Cruz v. Donnelly*, 727 F.2d 79, 81 (3d Cir. 1984).

¹⁸⁰ See *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 864 (9th Cir. 2010) (noting that although the pilot wanted the passengers arrested, the police and TSA declined to prolong the passengers’ detention after conducting an investigation).

¹⁸¹ See *id.*

¹⁸² See *Shqeirat*, 645 F. Supp. 2d at 781, 791.

¹⁸³ *Id.* at 771.

about their conduct, but a district court later found the alleged suspicions to be wholly inadequate, indicating that race may have been a factor in the decision-making process.¹⁸⁴ The plaintiffs were nevertheless deplaned on the captain's orders, then subsequently searched, handcuffed, transported to a separate location, and interrogated for several hours by law enforcement.¹⁸⁵ When analyzing the officers' actions, the court denied the defendant officers' request for qualified immunity, stating that none of the officers made a probable cause analysis and that the law was clearly established at the time that such conduct was unconstitutional.¹⁸⁶

The judge then addressed the plaintiffs' claim that U.S. Airways had acted jointly in the unlawful arrest.¹⁸⁷ The court denied the occurrence of any joint action because the officers had done "an independent (albeit cursory) investigation."¹⁸⁸ So in the same court order, law enforcement did *not* conduct a proper investigation such that they were potentially liable under 42 U.S.C. § 1983, but they *did* conduct an investigation such that U.S. Airways was not liable as a joint actor.¹⁸⁹ The question then naturally arises: if the officers' independent investigations were inadequate or even nonexistent, then upon what information or persuasions did the officers rely on to justify the arrest in their own minds? The only logical conclusion is that the officers took the pilot and flight crew's apprehensions at face value and took the defendants into custody *because the pilot forced them to deplane*. The order of the trial court supports this conclusion.¹⁹⁰ The flight attendants offered information regarding the pre-flight prayers by the plaintiffs and reported to the police that the request for seatbelt extensions was of concern.¹⁹¹ The officers subsequently arrested the individuals without asking *why* those actions were suspicious.¹⁹² In short, it appears that the flight attendants' report, coupled with the deplaning itself, were all that the officers needed to justify their own actions.

¹⁸⁴ *Id.* at 786, 789 (questioning the "suspicion" raised by the innocuous request for seatbelt extenders by two of the plaintiffs, especially since one of them was completely blind and posed no legitimate threat to the safety of the aircraft).

¹⁸⁵ *Id.* at 772-74.

¹⁸⁶ *Id.* at 786-88.

¹⁸⁷ *Id.* at 789.

¹⁸⁸ *Id.* at 790.

¹⁸⁹ *See id.*

¹⁹⁰ *See id.* at 791.

¹⁹¹ *Id.* at 774.

¹⁹² *See id.* at 786.

Applying the test from the Eighth Circuit, this is the paradigmatic example of an instance where the officers' actions were tantamount to substituting their judgment for that of a private party.¹⁹³ The trial court pointed to the fact that the pilot never explicitly directed law enforcement to arrest the passengers.¹⁹⁴ This ignores the totality of the circumstances. A pilot's decision to remove a passenger is, by itself, a communication that something is seriously wrong.¹⁹⁵ When officers fail to conduct their own independent investigation, they are necessarily relying on the advice of the pilot, even if the pilot does not clarify his intentions.¹⁹⁶ The only other explanation, and the one apparently adopted by the judge in *Shqeirat*, is that the officers randomly and arbitrarily arrested the individuals.¹⁹⁷ Having more faith than that in law enforcement, the more viable explanation is that the officers simply followed the lead of the pilot by effectuating the arrests after the deplaning. The failure to find joint action in these types of situations effectively immunizes pilots and airlines from constitutional scrutiny, even when they supplant the decision-making role of law enforcement.

2. *Al-Watan v. American Airlines*—The “Logical Extension”

In *Al-Watan v. American Airlines*, a series of questionable acts by passengers led the pilot to return to the gate and request the presence of law enforcement.¹⁹⁸ Although the court was careful to say that the flight attendants only pointed out the questionable individuals, the police separated the men, all of Arab descent, from the rest of the passengers and interrogated them for several hours.¹⁹⁹ In a four-sentence analysis, the district judge dismissed the joint-action claim, finding that there was no indication that the pilot or crew ever directed the conduct of the police.²⁰⁰ However, a careful reading of the judge's findings of fact and of the defendant's own admissions points to the opposite conclusion.

While analyzing the plaintiffs' racial discrimination claim for refusal to transport, the court noted that “Captain Plummer did

¹⁹³ See *id.* at 791.

¹⁹⁴ *Id.*

¹⁹⁵ See 14 C.F.R. § 121.537(d) (2014).

¹⁹⁶ See *id.*

¹⁹⁷ See *Shqeirat*, 645 F. Supp. 2d at 791.

¹⁹⁸ See *Al-Watan v. Am. Airlines*, 658 F. Supp. 2d 816, 820 (E.D. Mich. 2009).

¹⁹⁹ *Id.*

²⁰⁰ See *id.* at 829.

not decide that Plaintiffs should be refused transport—just *interviewed by police before reboarding*.”²⁰¹ The defendant airline supported this decision by stating in its trial brief, “Captain Plummer’s decision to have plaintiffs questioned by law enforcement in the gate area is *inextricably intertwined* with, and the *logical extension of*, his decision to return the aircraft to the gate.”²⁰² Thus, the defendant airline in this case justified the conduct of the crew by arguing that the logical next step after deplaning under § 44902(b) was for the police to interrogate the individuals.²⁰³ No probable cause was ever found; in fact, the police released the individuals after their detention and interrogation.²⁰⁴ But the defendant airline exercised state power, in that it used the police as a tool to further the investigation of its own suspicions, and then it defended its actions on the very grounds that it involved the police in their investigation!²⁰⁵ Once again, under the Eighth Circuit’s test,²⁰⁶ this is an ideal case to illustrate a private party’s exercise of state power in cooperation with government actors.²⁰⁷

Airlines cannot use the police as both a sword and a shield. If airlines are going to deplane individuals, which raises serious concerns by itself, and then turn them over to police to further the investigation, courts must consider a pilot’s actions as a “logical extension”²⁰⁸ of the law enforcement process. It is incumbent upon officers to make their own probable cause analysis, but when an airline requests such an investigation and the pilot’s preliminary investigation is taken at face value, pilots should not escape liability as state actors. The implicit communication to law enforcement that deplaning evinces is too strong to warrant any other interpretation. The pilot has already exercised significant statutory discretion under § 44902(b),²⁰⁹ but not every pilot will have the confidence to explicitly inform law enforcement that individuals should be arrested. Courts must address the underlying implications of deplaning and realize that a pilot’s invitation for law enforcement to board the plane

²⁰¹ *Id.* at 828 (emphasis added).

²⁰² *Id.* at 822 (emphasis added).

²⁰³ *See id.*

²⁰⁴ *Id.* at 820.

²⁰⁵ *See id.* at 822, 827–28.

²⁰⁶ *See Shqeirat v. U.S. Airways Grp., Inc.*, 645 F. Supp. 2d 765, 789–90 (D. Minn. 2009).

²⁰⁷ *See Al-Watan*, 658 F. Supp. at 830.

²⁰⁸ *See id.* at 822.

²⁰⁹ *See* 49 U.S.C. § 44902(b) (2006).

or question those already deplaned is strong encouragement for law enforcement to arrest or detain and therefore implicates pilots in joint action.

3. *Cerqueira v. American Airlines—Concurrent Investigations*

The final case, *Cerqueira v. American Airlines*, involved the removal of three men from an aircraft and their subsequent detention by police.²¹⁰ The suspicious passengers were initially removed at the captain's request so that the authorities could question them further.²¹¹ Police officers removed the men without an independent probable cause analysis and detained them in a separate area of the terminal, away from the other passengers.²¹² This captain, unlike the previous captains, was not shy about continuing his investigation of the suspicious passengers while the police began their own investigation.²¹³ The captain personally interviewed a passenger who reported that TSA agents had confiscated a box cutter from one of the detained men; the captain later stated that (under his authority as pilot) "[the] aircraft was not going to fly the entire day no matter what was checked" by the TSA.²¹⁴ After consulting with the Massachusetts State Police and the TSA on the matter, the captain decided to deplane all the passengers, sequester them in a secured area of the terminal, and have the aircraft searched with dogs.²¹⁵ Law enforcement took advantage of the sequestration by re-interviewing the individuals who had raised suspicion with the captain.²¹⁶ During the pendency of those interviews, the captain held discussions with American Airlines support staff, the police, TSA agents, and air marshals.²¹⁷

By the time the case went before a judge, there was apparently some confusion as to who even made the determination to deny the passengers travel.²¹⁸ The pilot unequivocally stated that the state police had made the decision.²¹⁹ A plaintiff, however, had received a response from American Airlines nine days after the

²¹⁰ *Cerqueira v. Am. Airlines*, 520 F.3d 1, 7 (1st Cir. 2008).

²¹¹ *Id.*

²¹² *Id.* at 7–8.

²¹³ *Id.* at 8.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

incident that stated that “the airline had ‘fully reviewed the decision’ to deny boarding and explained that it was because ‘our personnel perceived certain aspects of your behavior which could have made other customers uncomfortable.’”²²⁰ The letter, as reproduced in the First Circuit’s opinion, mentioned nothing about the state police involvement in this determination.²²¹ Unfortunately, this particular plaintiff did not add the state police as defendants, nor did he claim civil rights violations under 42 U.S.C. § 1983, so we are without the benefit of a joint-action analysis.²²²

Nevertheless, this case demonstrates why courts should find joint action when both private and state actors necessarily rely on each other’s statutory authority to perform an investigation. Obviously, the initial determination is made under the pilot’s discretionary authority pursuant to § 44902(b).²²³ The investigation then must turn to law enforcement officers who are vested with the authority to conduct criminal investigations. Courts are trying to draw a distinct line that separates the private authority from the public authority. In the case just described, and probably in other cases, the line is nonexistent, and the airline continues its own investigation during the pendency of the law enforcement questioning, most likely supplementing the findings of law enforcement.²²⁴

Given the gravity of air safety in the post-9/11 context, it is simply unrealistic to assume that calling on law enforcement in a deplaning situation is the same as a storeowner calling the cops on a suspected shoplifter.²²⁵ Although private parties in other contexts are granted discretionary authority by the government or by treaty, courts have observed that pilots have significantly greater responsibility. For example, one court even surmised that pilots have “de facto and de jure law enforcement authority when the plane is in the air.”²²⁶ Additionally, the Ninth Circuit held that one of the reasons flight crews were not given unfettered discretion in the Tokyo Convention was the fear that pas-

²²⁰ *Id.* at 10 (emphasis added).

²²¹ *Id.*

²²² *See id.* at 4.

²²³ *See* 49 U.S.C. § 44902(b) (2006).

²²⁴ *See Cerqueira*, 520 F.3d at 7–8.

²²⁵ *See Cruz v. Donnelly*, 727 F.2d 79, 81 (3d Cir. 1984) (noting that the police were following the ordinary course of conduct in investigating a simple complaint by a private actor).

²²⁶ *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 875 (9th Cir. 2010).

sengers would simply be handed to the authorities and stranded without recourse.²²⁷ Courts must therefore recognize that under the unique framework governing deplaning, the actions of pilots and law enforcement are so necessarily interrelated that there will be very few instances where the two parties do not join together to reach a conclusion. Such conduct cannot be distinguished from the joint action originally complained about in *Lugar*.²²⁸

E. THE SYMBIOTIC RELATIONSHIP TEST

The final test for state action, often coined the “symbiotic relationship” test, originated in the Supreme Court case, *Burton v. Wilmington Parking Authority*.²²⁹ In *Burton*, a parking garage owned and operated by a Delaware state agency decided to rent out extra space to private tenants.²³⁰ One of the tenants, Eagle Coffee Shoppe (Eagle), leased a space within the parking garage and opened a restaurant.²³¹ In the initial agreement, the government agency agreed to construct the necessary utilities, and Eagle invested a substantial sum to make the space suitable for a restaurant.²³² In exchange for the space and utilities, Eagle would pay an annual rent of approximately \$30,000.²³³ After opening, Eagle enforced a discriminatory policy that excluded black individuals from patronizing the restaurant.²³⁴

The issue before the Supreme Court was whether the restaurant, through its direct financial relationship with the state, was subject to the Fourteenth Amendment’s Equal Protection Clause.²³⁵ In a decision that overturned the Delaware Supreme Court, the United States Supreme Court found relevant a number of factors that inescapably led to the conclusion that Eagle was a state actor: (1) the land and building that contained the restaurant were publicly owned; (2) the leased space was integral, in fact vital, to the financial health of the state’s parking garage; (3) the maintenance of the building was the state’s responsibility; and (4) the private and public parties mutually ben-

²²⁷ *Id.*

²²⁸ *See* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982).

²²⁹ 365 U.S. 715, 724–26 (1961).

²³⁰ *Id.* at 719.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 720.

²³⁴ *Id.*

²³⁵ *Id.* at 721.

efited from each other's business.²³⁶ In particularly poignant language, Justice Clark wrote, "It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second class citizen"²³⁷

It is conceded that the symbiotic relationship test developed in *Burton* has not garnered much subsequent attention from the courts, nor has the Supreme Court relied on its holding in any other case analyzing state action.²³⁸ Nevertheless, the symbiotic relationship theory has been utilized in several aviation contexts, and those cases are illustrative of how a court might rule when faced with a deplaning issue.

As a short background, state or local governments own almost all large commercial airports in the United States.²³⁹ The vast majority of these airports are financially self-sufficient, in that they do not draw on a local tax base.²⁴⁰ The costs of constructing and maintaining the airport are paid by leases negotiated with airlines, restaurant revenues within the airport, and parking fees.²⁴¹

One of the first cases to apply the symbiosis analysis from *Burton* in the aviation context was *Adams v. City of New Orleans*, a federal district court case that was adjudicated just over a year after *Burton* was decided.²⁴² In *Adams*, a private corporation under a lease agreement provided food services within a public airport.²⁴³ The government agency did retain some discretion in the quality of food served, its price, and the retention of employees.²⁴⁴ One particular restaurant was racially segregated and black individuals subsequently sued, asking the court to enjoin the discrimination pursuant to *Burton*.²⁴⁵ The court granted the injunction, finding that *Burton* firmly applied because the leas-

²³⁶ *Id.* at 723–24.

²³⁷ *Id.* at 724.

²³⁸ IVAN BODENSTEINER & ROSALIE LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:4 (2013), available at Westlaw STLOCCIVIL.

²³⁹ *Airports Q&A*, AIRLINES FOR AM.: WE CONNECT THE WORLD, <http://www.airlines.org/Pages/Airports-QA.aspx> (last visited Apr. 18, 2014).

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² See *Adams v. City of New Orleans*, 208 F. Supp. 427, 429–30 (E.D. La. 1962).

²⁴³ *Id.* at 430.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 428.

ing arrangement with the government was almost identical to the lease in *Burton*.²⁴⁶ The government was directly profiting from the increased revenue derived from the restaurant owner's discriminatory conduct.²⁴⁷ The defendant argued that the space was "surplus" property that was not necessary to the airport operations, and that the private retailer had invested significant sums of money in the space.²⁴⁸ The district court found these defenses without merit.²⁴⁹ The Fifth Circuit affirmed *per curiam*, finding the defenses "patently frivolous."²⁵⁰

In a more recent Seventh Circuit case, the court addressed whether a private advertising company's refusal to display certain objectionable content within the airport violated the Constitution.²⁵¹ The city of Chicago had paid for the construction of the displays, was responsible for their maintenance, and charged the private company commission in exchange for the advertising space.²⁵² The lease also alluded to some authority that the city could exercise in objecting to certain conduct.²⁵³ Both the city of Chicago and the private advertising company objected to an advertisement that was critical of United Airlines, although the private company made the ultimate decision on the controversial advertisement.²⁵⁴ The court held that the decision of the private corporation was subject to constitutional constraints because both the private party *and* the city of Chicago had a vested financial interest in the advertising space and because both had objected to the plaintiff's proposed content.²⁵⁵

Not all courts have been willing to extend *Burton* to the aviation context; the Sixth Circuit has been particularly hostile.²⁵⁶ In one example, a plaintiff argued that a private search by an airline employee was unreasonable under the Fourth Amendment.²⁵⁷ The court dismissed the argument that it should apply

²⁴⁶ *Id.* at 430.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 429.

²⁴⁹ *Id.* at 430.

²⁵⁰ *City of New Orleans v. Adams*, 321 F.2d 493, 493 (5th Cir. 1963).

²⁵¹ *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation of Chi.*, 45 F.3d 1144, 1147 (7th Cir. 1995).

²⁵² *Id.* at 1149.

²⁵³ *Id.*

²⁵⁴ *Id.* at 1150.

²⁵⁵ *Id.*

²⁵⁶ *See, e.g., Wagner v. Metro. Nashville Airport Auth.*, 772 F.2d 227 (6th Cir. 1985).

²⁵⁷ *Id.* at 228.

a mechanical and simple analysis every time a private corporation leased space from the government.²⁵⁸ In order to place constitutional restraints on a private party, the court required the existence of a substantial relationship between the parties.²⁵⁹ The need for a substantial relationship is supported by previous and subsequent Supreme Court decisions in which the Court required the plaintiff to show that the relationship was more than contractual—that the government in some way actually benefited from the alleged conduct.²⁶⁰ Thus, the holding of *Burton* has been limited to those instances where the plaintiff can show that the state directly profits from the *actual discriminatory conduct*.²⁶¹

The jurisprudence of the Sixth Circuit seems more in line with recent Supreme Court decisions, namely those that are hostile to extending the Constitution to private actors.²⁶² Any potential plaintiff in the aviation context must then show that the government is actually profiting from an airline's discriminatory actions, thus demonstrating the "symbiotic relationship" alluded to by the Sixth Circuit.²⁶³ The difficulty is finding a relationship between discriminatory deplaning and the effect that it has on the profits of public airports. The profit alluded to in *Burton*, however distasteful, was that a certain segment of the white population found a segregated restaurant appealing.²⁶⁴ White individuals who preferred a segregated restaurant would enter the Eagle Coffee Shoppe after parking their cars in the government's garage.²⁶⁵ The argument in *Burton* was that an integrated restaurant would cause business to suffer, which would in turn affect the parking structure.²⁶⁶ In the aviation context, although the argument is still about discrimination, the connection to the airport's profit is simply more attenuated.

Airport revenues were certainly affected by the 9/11 terrorist attacks. Boston Logan International Airport experienced a 19%

²⁵⁸ *Id.* at 229.

²⁵⁹ *See id.* (noting "the necessity of a close nexus between the state and the challenged conduct").

²⁶⁰ *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 840–41 (1982); Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974).

²⁶¹ BODENSTEINER & LEVINSON, *supra* note 238, § 1:4.

²⁶² *See id.* (noting that "the Supreme Court has been generally reluctant to treat the action of private parties as that of the state").

²⁶³ *See Wagner*, 772 F.2d at 229.

²⁶⁴ *See* *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961).

²⁶⁵ *See id.* at 719.

²⁶⁶ *Id.* at 724.

drop in passenger usage from fiscal year 2001 to 2002, and Washington Dulles International Airport's annual financial report from 2003 revealed an increased cost in daily security measures due to heightened federal requirements and alerts.²⁶⁷ The difficulty is attaching these losses or profits to discriminatory deplaning. The conduct in *Burton* was simply more pronounced and invidious; profits rose for both the garage and the restaurant when discrimination was enforced.²⁶⁸ In the aviation context, not every passenger of Middle Eastern descent is denied passage, and there is no indication that even a minority of passengers are unwilling to fly with individuals of Middle Eastern descent. To show the requisite level of symbiosis between public profits and pilot deplaning, a plaintiff would have to show that an airline's refusal to carry Middle Eastern passengers actually boosts an airport's appeal to customers. In that context, the airport would in fact benefit from discrimination, and the rationales from *Burton* and the aforementioned cases would be relevant. Such an allegation cannot be proven, and perhaps is simply not true.

Although promising in theory, the symbiotic relationship is simply too attenuated in the aviation security context, and more importantly, the theory has been distinguished and narrowed by too many courts.²⁶⁹ Even without the theory's subsequent restriction, the facts of cases like *Adams v. City of New Orleans* and *Air Line Pilots Ass'n, International v. Department of Aviation of Chicago* demonstrate a clear connection between the discriminatory conduct and the alleged effect on profits.²⁷⁰ In the context of discriminatory deplaning, due to its relatively infrequent occurrence and lack of direct economic impact, plaintiffs will continue to struggle to find the connections that were so probative in those previous cases.

²⁶⁷ *Comprehensive Annual Financial Report: Logan Airport*, MASS. PORT AUTH. (Nov. 15, 2002), <http://www.massport.com/media/8037/Comprehensive%20Annual%20Financial%20Report%20-%20Year%20Ended%20June%2030,%202002.pdf>; *2003 Comprehensive Annual Financial Report: Significant Economic Events*, METRO. WASH. AIRPORTS AUTH. (Mar. 30, 2004), <http://www.metwashairports.com/file/cafr03.pdf>.

²⁶⁸ See *Burton*, 365 U.S. at 724.

²⁶⁹ BODENSTEINER & LEVINSON, *supra* note 238, § 1:4.

²⁷⁰ *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation of Chi.*, 45 F.3d 1144, 1149 (7th Cir. 1995); *Adams v. City of New Orleans*, 208 F. Supp. 427, 430 (E.D. La. 1962).

IV. CONCLUSION

The previous sections indicate at least two viable avenues for finding state action in a pilot's discriminatory deplaning: public function and joint action. The 2001 Act was so comprehensive in scope and detail that it is plausible that the federal government has adopted aviation security as a public function.²⁷¹ Pilots operating under that authority then become natural extensions of that authority. Alternatively, several examples borne out of recent cases indicate that pilots are often acting in concert with local law enforcement, blurring the lines between private and public actors. A continued refusal of courts to recognize such joint action effectively immunizes pilots' actions from constitutional scrutiny.

The emphasis placed on finding state action, thus allowing for constitutional review, is motivated principally by the watered-down standard that currently applies to a pilot's actions. The arbitrary and capricious standard from *Williams*²⁷² not only avoids review of the facts but also prevents juries from ever deciding whether a particular pilot's actions were justified or discriminatory. As stated in earlier sections, pilots have unbridled discretion to determine what is "inimical to safety,"²⁷³ and courts have been unwilling to second-guess those decisions under the arbitrary and capricious standard.²⁷⁴ Constitutional scrutiny would afford a better balance than is currently struck between pilots and passengers. Instead of viewing a pilot's conduct through an arbitrary or capricious lens, pilots would be forced to justify their actions under the Fourteenth Amendment's Equal Protection Clause standards. Alternatively, passengers could seek relief under the Fourth Amendment's protection from unreasonable searches and seizures. Constitutional scrutiny would not interfere with the legitimate safety concerns of pilots; rather, it would simply ensure that such concerns were *actually legitimate* and not borne out of underlying discriminatory animus. The Constitution seems particularly suited to remedy the injustice found in discriminatory deplaning, and hopefully

²⁷¹ See Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.).

²⁷² See *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975).

²⁷³ See 49 U.S.C. § 44902(b) (2006).

²⁷⁴ See *supra* notes 18-20 and accompanying text.

this article demonstrates that constitutional scrutiny is warranted, and perhaps even mandated, based upon the authority enjoyed by pilots under federal law.



Speeches

