

RESEARCH SUMMARY

Defining Common Carriers

Flight Sharing, the FAA, and the Future of Aviation

In January 2017, the Supreme Court of the United States declined to hear a case brought by Flytenow, an aviation startup, against the Federal Aviation Administration (FAA). While Flytenow’s legal challenge ended when the Supreme Court refused to hear the case, the company continues to have the better policy argument.

In “[Defining Common Carriers: Flight Sharing, the FAA, and the Future of Aviation](#),” Mercatus Senior Research Fellow Christopher Koopman argues that the flight-sharing industry was shut down because the FAA designated flight-sharing services as common carriers, which are subject to a higher regulatory burden than private pilots. The FAA’s definition of *common carriage* is too expansive and was implemented without oversight from Congress, which has been silent on the issue. Congress should intervene by explicitly defining *common carriage* narrowly via statute to allow flight sharing.

OVERVIEW AND KEY FINDINGS

Aviation innovation has a promising future, but the FAA has effectively shut down continued innovation in flight-sharing arrangements. This policy is foreclosing opportunities for both pilots and passengers to connect with one another and create value by providing more options and opportunities within American aviation.

Cost-sharing is a decades-old practice among private pilots. Private pilots traditionally have had a right to share costs, but several times the FAA has sought to stop this practice.

- The cost-sharing system is important to private pilots because aviation is an expensive hobby. A pilot may pay as much as \$33,750 to achieve 250 hours of flight time needed to carry passengers.
- The cost-sharing system allows pilots to recoup thousands of dollars as they pursue their hobby or work toward professional licensure.

Flytenow’s innovative cost-sharing platform attempted to comply with the FAA’s rules. Like ridesharing companies Uber and Lyft, Flytenow provided a platform for potential passengers to find someone willing to transport them, with pilots receiving only a prorated share of the expenses of a flight from each passenger.

- Flytenow structured its operations to comply with the FAA’s regulations on private pilot privileges and limitations, as well as agency guidance and interpretations. A critical objective of this business model was to avoid being designated as a common carrier.
- If flights on Flytenow’s platform were ruled to be common carriage, pilots would need to obtain several certificates and operate according to commercial rules. Essentially, the pilots using Flytenow would need to become full-fledged air taxis, defeating the purpose of the platform.

The FAA has broadly redefined common carriage and found that Flytenow’s pilots are common carriers. The term *common carrier* in aviation is defined neither in federal statute nor in the Code of Federal Regulations. Instead, the current definition is promulgated in an FAA advisory circular from 1986. The advisory circular notes four elements of common carriage: “(1) a holding out of a willingness to (2) transport persons or property (3) from place to place (4) for compensation.”

- Despite Flytenow’s significant attempts to comply with the law, the FAA found that Flytenow’s cost-sharing system constituted “compensation” that rendered the platform a common carrier.
- The FAA also found that the firm’s efforts to avoid “holding itself out” as a common carrier were insufficient. Federal courts subsequently upheld the FAA’s interpretation and ruled that Flytenow pilots were common carriers.

Common law conflicts with the FAA’s interpretation. Historically, the purpose of common carriage is to establish a reasonable set of defaults that prevail in the absence of a contract. However, airlines have been allowed to contract out of common carriage rules before, and the same principle should apply to flight sharing.

PROPOSED SOLUTION AND CONCLUSION

As Congress is currently evaluating reauthorization of the FAA, it can implement reforms to prevent future problems with aviation innovations like Flytenow. Congress could fix confusion in common carriage and remove the FAA’s authority to continually reinterpret its definition by writing a definition into the Federal Aviation Act.

- Allowing flight-sharing arrangements would give consumers more options and cheaper alternatives beyond commercial flight.
- Defining *common carrier* more narrowly in statute would more clearly align with the purpose of common carriage as conceived under the common law.