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## Comment

**\*353 TIME FOR CONGRESS TO SPREAD LOVE IN THE AIR: WHY THE WRIGHT AMENDMENT WAS  
WRONG BEFORE, AND WHY IT DESERVES REPEAL TODAY**

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## I. INTRODUCTION

WHEN SOUTHWEST AIRLINES opened for business thirty-four years ago, one of its first advertisements featured the slogan, "How do we love you? Let us count the ways." [FN1][FN1] Back then, there were only three ways. [FN2][FN2] The low-fare pioneer served just three cities, and the advertisement took its play on words from the name of Southwest's home base at Dallas' Love Field Airport. Today, Southwest carries more passengers across the skies of America than any other airline [FN3][FN3] and spreads its low-cost airfares to fifty-nine cities in thirty-one states. [FN4][FN4] But if you want to fly to or from Southwest's home base in Dallas, you're limited to just sixteen cities in Texas and a few surrounding states. [FN5][FN5] This means that, for the most part, the love and low fares that Southwest\*354 has spread across the nation do not apply to flights into and out of Dallas' Love Field.

A quirk of federal legislation called the Wright Amendment created this ironic tether, keeping Southwest from freely flying from its own home base. Named after Jim Wright, a former speaker of the House from Fort Worth, the Wright Amendment was passed in 1979 to protect a then-young Dallas/Fort Worth International Airport ("D/FW") from competition at Love Field. [FN6][FN6] The law prohibited carriers from flying to any point outside of Texas, or its four border states (Louisiana, Arkansas, Oklahoma, and New Mexico), unless the aircraft carried no more than fifty-six passengers. [FN7][FN7] The Amendment guaranteed a monopoly for long-haul flights at D/FW and flew in the exact \*355 opposite direction of all other Congressional efforts at the time to deregulate the airline industry and foster competition. [FN8][FN8] The Wright Amendment does not protect the regional economy, as local officials assert. Instead, it protects the monopoly on long-haul air travel at D/FW, dominated by American Airlines. This lack of airline competition hurts the overall economy of the Dallas/Fort Worth region, and it hurts consumers nationwide. From the moment of its passage through today, the Wright Amendment has run contrary to public policy and America's national agenda of encouraging air travel competition. The amendment should never have passed, and Congress should correct its error by repealing the measure.

This comment provides several grounds to justify a Congressional repeal of the Wright Amendment. Part II outlines the historical background of the Wright Amendment, including an examination of the events leading to its passage and the legal challenges that ensued. Part III explores the federal issues involved in the amendment, including the constitutionality issue, deregulation policies and perimeter-rule exceptions. Part IV examines the more recent efforts to expand air service out of Love Field. Finally, Part V analyzes the detrimental effects of

the Wright Amendment and the national, as well as local, interests that will benefit from the law's repeal.

## II. BACKGROUND

The cities of Dallas and Fort Worth grew up just thirty-one miles apart and in the 1960s, became locked in what has been described as an “intense” and “bitter” airport rivalry, which resulted from the operation of separate airports just twelve miles \*356 away from each other. [FN9][FN9] In 1964, to eliminate the inadequate and incomplete service at each airport, as well as the unnecessary expense for air carriers and area taxpayers, federal regulators ordered the cities to build one regional airport between them. [FN10][FN10] The cities' resulting agreement to construct D/FW International Airport included a joint bond ordinance providing for the project's financing and for the eventual phase-out of commercial passenger flights at competing airports in the area, including Dallas' Love Field. [FN11][FN11]

The bond ordinance was adopted in 1968, and in 1970, the eight airlines then servicing the region signed agreements to move their operations to the new airport. [FN12][FN12] Missing from the group was start-up commuter airline Southwest, which got approval from state regulators to start flying from Love Field to Houston and San Antonio in 1971. [FN13][FN13] After Southwest formally notified the new regional airport board that it intended to stay at Love Field, the two cities sued the airline. [FN14][FN14] The cities contended, among other points, that permitting Southwest, or any other carrier, to operate at Love Field threatened the financial security of the new regional airport by diverting air traffic to Love Field. [FN15][FN15] However, the federal district court pointed out that, under the bond arrangements of both airports, “any revenue generated at Love Field by Southwest Airlines defrays the costs and expenses of the Regional Airport.” [FN16][FN16] The court found that the cities had no authority to deny use of Love Field, regardless of fears over economic necessity. [FN17][FN17] The court held that, “so long as Love Field [remained] open as an airport,” the cities could not exclude Southwest from it. [FN18][FN18] The Fifth Circuit agreed and affirmed the decision upon appeal. [FN19][FN19] Further attempts to \*357 prohibit Southwest from operating at Love Field resulted in another court judgment from the Fifth Circuit in 1974, holding, conclusively, that res judicata dictated that the prior decision permitting Southwest's operation should stand. [FN20][FN20] That same year, the long-awaited D/FW opened for business, immediately becoming the region's primary and dominant airport. [FN21][FN21] For several years, Southwest operated its strictly-intrastate commuter flights out of Love Field without further turbulence.

Then, in 1978, Congress passed the Airline Deregulation Act, aimed at removing government control and fostering competition in the airline industry. [FN22][FN22] The relaxed regulations led Southwest Airlines to apply for the right to start a Love Field-to-New Orleans route, which the Civil Aeronautics Board granted. [FN23][FN23] The move alarmed city officials in Dallas and Fort Worth, who feared deregulation would lead Southwest and other airlines to offer more service outside of Texas from Love Field and divert business away from D/FW. [FN24][FN24] In response to these concerns, the powerful Speaker of the House from Fort Worth, Jim Wright, quietly attached the amendment now named after him to the tail-end of the larger International Air Transportation Competition Act of 1979. [FN25][FN25] As one court saw it, Wright hid a provision of “a distinctly parochial, domestic nature” within “the bowels of that internationally oriented measure to protect D/FW from competition.” [FN26][FN26] The law, often called a “compromise” between \*358 the parties, allowed Southwest to continue flying to New Orleans from Love Field, but it effectively cut off any further expansion of service from Love Field to the four states surrounding Texas. [FN27][FN27]

The law stood unchallenged for a decade, [FN28][FN28] until an airline passenger sued to have the law de-

clared unconstitutional. [FN29][FN29] Plaintiff Buddy Cramer's suit alleged the Wright Amendment violated his right to interstate travel. [FN30][FN30] Cramer further alleged that the amendment infringed upon his free-speech rights by limiting the information he was allowed to receive from airlines at Love Field. [FN31][FN31] Beyond anchoring the airlines at Love Field to a four-state service area, the Wright Amendment also prohibits airlines from offering information to consumers on flights connecting outside that area. [FN32][FN32] The Fifth Circuit found that a law violates the right to interstate travel only if it actually deters such travel. [FN33][FN33] The court held that, because Cramer was free to travel nationally through D/FW, or by taking a second flight from a point outside the Love Field service area, the amendment did not deter travel. [FN34][FN34] The court also held that the government could restrict the commercial speech of Love Field airlines because it was a reasonable restraint in light of the government's substantial interest in providing "a fair and equitable settlement for [the] dispute" between Dallas and Fort Worth. [FN35][FN35]

Following on the heels of Cramer, legislators from Kansas, clamoring for the low fares of Southwest Airlines, also filed suit to have the law overturned as unconstitutional. [FN36][FN36] Like Cramer, Kansas also asserted violations of the First Amendment right to \*359 receive information and the right to interstate travel. [FN37][FN37] However, Kansas made one additional Constitutional argument, a violation of the obscure "Port Preference Clause," [FN38][FN38] which will be explored more fully in part III of this comment. Using language similar to the Cramer court's, the D.C. District Court found the Wright Amendment's limits on commercial speech a reasonable means to achieve the government's interest of reducing air travel at Love Field. [FN39][FN39] And similar to Cramer, the Court also held that the Wright Amendment does not violate the fundamental right to interstate travel, since it operates as only a "hinderance" or "impediment" to those traveling out of Love Field. [FN40][FN40] Finally, the court also rejected the Port Preference Clause argument. [FN41][FN41] Two years later, the D.C. Circuit Court of Appeals affirmed the lower court's judgment. [FN42][FN42]

Unable to repeal the Wright Amendment through litigation, Kansas legislators took the matter to Congress. In 1997, the Kansas congressional delegation banned together with legislators of other states hungry for Southwest's service to push through a new amendment on air travel from Love Field. [FN43][FN43] With the help of Richard Shelby of Alabama (who headed the Transportation Subcommittee of the Senate Appropriations Committee) and powerful Kansas politicians including then-Senate Majority Leader Bob Dole, and then-White House cabinet member Dan Glickman (a former Congressman), Congress passed the Shelby Amendment, which added Kansas, Alabama and Mississippi to the list of states that airlines could serve directly from Love Field. [FN44][FN44] Ironically, the law led Southwest to launch service to Birmingham, Alabama, and Jackson, Mississippi, but, to date, the airline has yet to offer service at any airport in Kansas. [FN45][FN45]

Thus, through the efforts of a few key legislators, the Wright and Shelby amendments locked Dallas-Fort Worth into a flight \*360 pattern uniquely different from the rest of America's unregulated air-travel markets. The courts, ceding to Congress' vast powers in commerce and aviation, have allowed the provisions to stand without strong scrutiny. Because Congress does have tremendous power to legislate in aviation matters, it should take a closer look at the Wright Amendment and reconsider its validity.

### III. FEDERALISM ISSUES

Federalism lies at the heart of every court decision that has left the Wright Amendment virtually undisturbed over the decades. The federal government's superior right to set policies that pervade state lines gives Congress

both the power and the responsibility to ensure that such laws are Constitutional and consistent with other federal mandates. This section of the comment looks at issues of federalism and presents Congress with three major arguments for invalidating the Wright Amendment.

#### A. Port Preference Clause

When Kansas sued to repeal the Wright Amendment, [FN46][FN46] it presented an unusual Constitutional argument involving a little-known provision called the Port Preference Clause. [FN47][FN47] The Port Preference Clause prohibits government regulation from giving “preference” to the ports of one state over those of another. [FN48][FN48] On its face, the clause prohibits federal legislation, like the Wright Amendment, that gives “preferences” to ports in one state over those in another, by permitting, for example, flights from Love Field to airports of only select states. Only the district court and the court of appeals hearing the Kansas suit have addressed the effect of the Clause on the the Wright Amendment. But those courts' rejections of the claim that the Wright Amendment violates the Constitution on this ground are not dispositive. And Congress should question the wisdom of retaining a law with a potentially unconstitutional flaw.

**\*361** In the Kansas case, the challengers argued that the Wright Amendment violated the Clause by establishing a direct preference for the airports of the Enumerated states. [FN49][FN49] The D.C. District Court commended Kansas for making a “compelling argument” that the Port Preference Clause was designed to prevent “precisely this type of statute--one that discriminates on the basis of states qua states.” [FN50][FN50] But the court summarily rejected that argument, finding that the “Port Preference Clause has been rendered almost a historical nullity” because its terms had never been used to hold an act of Congress unconstitutional. [FN51][FN51] Furthermore, the court noted that few court cases have implicated the Clause, and the leading case on the Clause dated back to 1856. [FN52][FN52] In that case, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, the Supreme Court interpreted the Clause narrowly, as prohibiting discrimination between the ports of different states, rather than between individual ports. [FN53][FN53] Adopting that view, the D.C. Court of Appeals held that the Clause does not apply to the Wright Amendment because only planes flying to or from Love Field are required to stop at a point outside the five-state service area, not planes flying to or from Texas, in general. [FN54][FN54]

Neither of the courts addressing the Kansas challenge gave proper consideration to the goal of the Port Preference Clause. And future legal attacks on the Wright Amendment could implicate the Clause again for another court to consider. The Clause can easily apply to the Wright Amendment upon examining the intent of the Constitution's framers. When the framers decided to include the Clause, they saw it as a check on the federal government's power to intrude upon state matters. [FN55][FN55] Specifically, the framers wanted to prevent the federal government from dictating to the states where ships must dock. [FN56][FN56] The framers believed each state should have the right to establish ports wherever the state saw fit, and to require ships to dock at certain ports within that state. [FN57][FN57] They worried that the federal government might pass laws overriding the states' port policies in order **\*362** to dock its ships at the ports the federal government found most convenient or least expensive. [FN58][FN58] Further, the framers wanted to prevent the federal government from requiring ships to pass through federal jurisdictions so that it might collect more taxes. [FN59][FN59] In an era where shipping routes followed the path of America's rivers, ships would necessarily pass through federal jurisdiction if they were forced to start or stop their journey in certain states or ports. Those state ports would also benefit from the taxing potential, thus the framers prohibited giving “preference” to the ports of one state over another. [FN60][FN60]

From this Constitutional history, it seems clear that the framers intended to bar any federal legislation [FN61][FN61] that would limit or dictate routes or ports of entry and departure. This interpretation of the Port Preference Clause leads to a natural conclusion that the Wright Amendment violates the Constitution. Under the Amendment, no carrier can fly freely to or from Love Field, without being forced to stop at a state listed by the Wright or Shelby amendments. Thus, all other airports without such a restriction, and those states not listed by the amendments, enjoy a “preference” over Love Field and Texas. At a minimum, the Constitutional validity of the Wright Amendment under the Port Preference Clause is questionable. Congress has a duty to uphold the Constitution, and so it should repeal the Wright Amendment as a constitutionally unsound measure.

## B. Deregulation and Preemption Policies

The Constitutional framers' concerns over federal port regulation fit snugly with modern Congressional concerns over airport \*363 regulation and regulation in the aviation industry, as a whole. Essentially, the framers wanted transportation carriers to be free to choose their ports, based on their commercial needs or on convenience. [FN62][FN62] Likewise, modern policies on transportation in the aviation industry center around a deregulated model where air carriers are free to choose their routes based on market forces. Thus, the mandates of the Airline Deregulation Act of 1978 (“ADA”) [FN63][FN63] raise another federalism issue worth considering in an analysis of the Wright Amendment: preemption. As a federal legislation, the Wright Amendment cannot be preempted, but the Wright Amendment runs counter to all other federal aviation laws. The Amendment does for local officials something they could not do for themselves under federal preemption doctrines--grant a monopoly on long-haul air service to the favored local airport. Not only is the granting of monopolies a poor policy, but so is the end-run around preemption permitted by the Wright Amendment. Congress should not support such poor policy and should revoke the Wright Amendment.

One key difference between the framers' views on port regulation and our modern system lies in states' powers to determine which ports carriers must use. The framers believed the federal government should leave such regulations to the states. [FN64][FN64] But, to achieve uniformity in aviation rules, Congress has preempted states' powers to enact such rules. And while the Wright Amendment has survived several legal attacks, the courts' analyses in those cases make it clear that locally-adopted flight restrictions of the same kind would be preempted by federal aviation policy. Under the Supremacy Clause of the Constitution, federal laws preempt state laws whenever the two authorities conflict with each other. [FN65][FN65] In other words, where a state or local law stands contrary to Federal legislation, the Constitution resolves the impasse by placing federal policies ahead of local concerns. Preemption generally takes two forms: (1) conflict preemption, where federal law nullifies a directly-conflicting local law; and (2) field preemption, where federal legislation so completely and pervasively dominates an entire field that local governments \*364 cannot regulate within the same field. [FN66][FN66] Perhaps no field is so pervasively dominated by federal regulation as aviation. And the ADA expressly preempted any local rules “relating to rates, routes, or services of any airline.” [FN67][FN67] Congress wanted “maximum reliance on competitive market forces, and on actual and potential competition,” to bring “efficiency, innovation, and low prices,” as well as variety and quality to the air travel industry. [FN68][FN68] Thus, the express preemption provision in the ADA was passed “to ensure that the States would not undo federal deregulation with regulation of their own.” [FN69][FN69]

The ADA preempted more than just direct state regulations on the rates airlines may charge, the routes they may fly and the services they may offer. As the Supreme Court interpreted the Act, state enforcement of any law relating to rates, routes, or services includes actions having a “connection with or reference to airline ‘rates,

routes, or services.” [FN70][FN70] Using that standard, the Supreme Court in 1992 said states could not attack airline advertising and marketing practices through enforcement of state consumer protection statutes. [FN71][FN71] In that case, *Morales v. Trans World Airlines, Inc.*, the attorney generals of several states adopted a set of national guidelines on the advertisement of airfares. [FN72][FN72] The guidelines imposed standards for everything from the size and type of font used to advertise fares, to use of words like “sale,” unless the price is “substantially below the usual price for the same fare with the same restrictions.” [FN73][FN73] The \*365 Court concluded that the guidelines relate to airline rates, and could not be enforced, particularly since they posed a significant negative effect upon airfares by creating disincentives for airlines to advertise. [FN74][FN74]

Using that same standard for ADA preemption, the Supreme Court held in 1995 that Illinois could not permit its citizens to sue an airline under the state's Consumer Fraud and Deceptive Business Practices Act. [FN75][FN75] The case was brought by a group of Illinois residents who participated in American's frequent flyer program. [FN76][FN76] The Supreme Court held that their suit against the airline for retroactively changing the terms of the program was prohibited if brought under the state fraud statute. [FN77][FN77] The Court did leave the plaintiffs with the option of bringing private contract claims against American, because that would involve no state action. [FN78][FN78] From these cases, Congress should see that even arguably-tangential state actions related to airline rates, routes, or services are inconsistent with the nation's laws on aviation. Congress should repeal the Wright Amendment's brazen ban on routes for carriers at Love Field, because it juts out as an undesirable, anti-competitive anomaly from our national aviation policies.

Through the ADA, Congress aimed to provide better transportation services to consumers by strengthening “competition among air carriers [and] . . . to prevent unreasonable concentration in the air carrier industry.” [FN79][FN79] And by many measures, the ADA did just that. Between 1976 and 1996, the average airfares passengers paid dropped forty percent in real, inflation-adjusted terms. [FN80][FN80] Airlines grew more efficient, filled more seats per plane, and added more routes--giving consumers thirty percent more carriers to choose from than they had before deregulation. [FN81][FN81] But while Congress pushed for competition, a few legislators with local ties to Dallas-Fort Worth managed to sneak in the highly-restrictive and anti-competitive Wright Amendment. By all accounts, the measure was clearly and unabashedly designed \*366 to protect D/FW from competition, even though the then-five-year-old airport had already established itself as the primary, dominant airport of the region. Today, the Amendment bucks federal deregulation policies even more flagrantly. D/FW has grown into the third-busiest airport in the world, with the largest airline in America, American Airlines, monopolizing eighty-two percent of the outgoing flights. [FN82][FN82] Consequently, the Wright Amendment has created precisely the result Congress intended to avoid when it passed the ADA, which was to prevent “unreasonable industry concentration, excessive market domination, monopoly powers, and other conditions that would tend to allow at least one air carrier or foreign air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation.” [FN83][FN83] Instead of permitting a few legislators and a powerful airline company to carve out anti-competitive protections, Congress should insist upon a truly and fairly deregulated air travel industry by repealing the Wright Amendment.

### C. Perimeter Rules

Some advocates of the Wright Amendment support their position by noting that Congress and the courts permit perimeter rules to restrict flights at two other airports, New York's LaGuardia Airport and Washington, D.C.'s National Airport (also commonly called “Reagan National”). At LaGuardia, carriers cannot provide non-

stop flights to or from the airport within a 1,500-mile perimeter. [FN84][FN84] At National, carriers cannot provide non-stop flights within a 1,250-mile perimeter. [FN85][FN85] Both perimeter rules were designed to decrease overcrowding at the respective airports by diverting some traffic to larger nearby airports like Kennedy, Newark, Dulles or Baltimore-Washington. [FN86][FN86] But several key differences distinguish the perimeter rules governing LaGuardia and National from the Wright Amendment restrictions. These include the entity imposing restrictions, the authority invoked to pass the restrictions, and the reasons for the restrictions.\*367 [FN87][FN87] Thus, none of the case law upholding those perimeter rules supports continued enforcement of the Wright Amendment. This section draws distinctions, respectively, between the National and LaGuardia perimeter rules and the Wright Amendment. With each comparison, this section will examine the court decisions upholding the perimeter rules, and show why these seemingly similar restrictions do not support the Wright restrictions.

First, the circumstances surrounding the passage of the perimeter rules at National and LaGuardia differ greatly from the circumstances leading to the Wright Amendment's passage. The FAA owns National Airport, as well as nearby Dulles International Airport. [FN88][FN88] The older, smaller National Airport lies just across the Potomac River from the District of Columbia, and is a quick Metro train ride away. The newer, larger Dulles International lies twenty-six miles west of D.C., which takes a forty-five-minute car or bus ride to get to in good traffic. [FN89][FN89] A third airport, Baltimore-Washington International, about thirty miles north of D.C., also serves the region. [FN90][FN90] The FAA enacted the perimeter rule around National in 1981, because the airport's convenience to D.C. travelers had put it over capacity. [FN91][FN91] At the time of the rule's passage, National handled sixty-seven percent of the air traffic in the greater-D.C. area, with 3,500 passengers passing through each hour in peak times. [FN92][FN92] A total of 17-million passengers used the airport annually. [FN93][FN93] This overcrowding went unabated, and seemed destined to worsen, despite the fact that the airport had long operated under an older 650-mile perimeter rule. [FN94][FN94] That older rule made exceptions for seven cities, all within 1,000 miles of the airport. [FN95][FN95] Meanwhile, the newer, larger Dulles Airport averaged fewer than 7,000 passengers per \*368 day. [FN96][FN96] To ease the congestion at National and better distribute air traffic in the region, the FAA set a cap of 17-million passengers per year at National, the same number that had been passing through the airport, annually. [FN97][FN97] The FAA also replaced the pre-existing 650-mile perimeter rule and its exceptions with a flat 1,000-mile perimeter rule. [FN98][FN98] All of the seven cities that had enjoyed the exception sat within the new 1,000-mile perimeter. [FN99][FN99] Eliminating the inequity of the exceptions contained in the old rule was one of the stated goals of the new rule. [FN100][FN100]

These circumstances differ dramatically from the circumstances surrounding the Wright Amendment's passage. In essence, the FAA merely prevented further concentration of flights at National, by capping its passenger load at then-current levels. If anything, the FAA expanded the service available at National by replacing the 650-mile rule with exceptions with a flat, 1,000-mile perimeter rule. Conversely, the Wright Amendment's passage involved no concerns over airport capacity, over-utilization, or an over-concentration of flights at Love Field. In fact, in 1975, the year after D/FW opened (and five years before the passage of the Wright Amendment), Love Field's annual passenger count had already plummeted to a low of 457,212 from its peak of 6,668,398 just three years earlier. [FN101][FN101] Furthermore, the Wright Amendment's protectionist policy guaranteed a monopoly on long-haul flights at one airport, jointly owned by two cities, at the expense of another airport wholly owned by just one of those cities. With National, even if the perimeter rule could be characterized as "protecting" Dulles, the rule approached nothing close to the grant of a monopoly on long-haul flights there. Also, the federal government owned both airports, and any benefit to one or detriment to the other weighs

equally on all the taxpayers of America.

In terms of the difference to consumers, the perimeter rules at Dulles and LaGuardia do not go nearly as far as the Wright Amendment, because the perimeter rules do not prohibit carriers\*369 from offering connecting flight service. [FN102][FN102] This means that long-distance passengers flying to National or LaGuardia must accept a layover, but they do not have to change planes, buy separate tickets, or re-check their bags. [FN103][FN103] Conversely, the Wright Amendment does not permit connecting flight service at Love Field for any aircraft with more than fifty-six seats. [FN104][FN104] The freedom to offer connecting service, allowing passengers to buy one ticket and board one plane, played a part in the Fifth Circuit's decision to uphold the perimeter rules at National. [FN105][FN105] The Court noted that passengers could fly from any city into National, so long as they endure a stopover within the 1,000-mile perimeter. [FN106][FN106] The Wright Amendment goes well beyond the bounds of such a perimeter rule by banning airlines from even offering connecting flights to points outside the restricted area, and forcing intrepid passengers to ask for and to make two separate flight arrangements.

Additionally, in upholding the National perimeter rule, the Fifth Circuit pointed out that federal law grants the FAA power to “control the use of navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both.” [FN107][FN107] The court reasoned that promoting the “efficient utilization” of navigable airspace requires that the FAA regulate corridors of air traffic and use of airports as well. [FN108][FN108] “The perimeter rules help to accomplish that goal in the Washington area: by setting up an orderly plan for the development of National and Dulles, they aid in the efficient use of now-crowded airspace.” [FN109][FN109] Thus, the court relied heavily upon the FAA's need to reduce air traffic\*370 congestion as a justification for the perimeter rules. No such justification exists for the Wright Amendment.

Finally, the Fifth Circuit did address the effect of the Port Preference Clause on the perimeter rule. [FN110][FN110] Following the Supreme Court's 1856 opinion that the Clause prohibited federal discrimination “between the states,” the Fifth Circuit held the perimeter rule did not violate the Clause, because it “does not discriminate against a named state or states. It does not declare that Texans may not fly nonstop to National. Rather it sets a limit of 1,000 miles on nonstop flights.” [FN111][FN111] The Court added that some states straddle the perimeter line, and so any discrimination was the result of an “accident of geography,” rather than the intentional grant of a preference to one state over another. [FN112][FN112] This interpretation of the Port Preference Clause, if applied to the Wright Amendment, could render the Wright restrictions unconstitutional, since specific states are named and included within Love Field's “perimeter,” while other states are excluded in a seemingly preferential fashion. An even better argument could be made that the Shelby Amendment violates the Port Preference Clause, since Congress specifically added Mississippi, Alabama and Kansas to Love Field's service area after those states lobbied extensively for inclusion.

At LaGuardia, concerns about overcrowding, similar to those at National, led to the imposition of a formal perimeter rule. [FN113][FN113] Like Washington, New York has three airports in close proximity to each other--LaGuardia, Kennedy and Newark--with LaGuardia being the smallest, oldest and historically more-regional airport. [FN114][FN114] As with National, LaGuardia had already operated under a perimeter rule, albeit an informal one with several exceptions. [FN115][FN115] But unlike at National, the formalized 1,500-mile perimeter rule imposed at LaGuardia in 1984 reduced the permissible non-stop flight area, replacing the old, informal 2,000-mile perimeter rule. [FN116][FN116] This led Western Air Lines, with its hub in Salt Lake City nearly 2,000 miles away, to sue the Port Authority, which owned all three airports in the region and imposed \*371 the

rule to reduce congestion. [FN117][FN117] Western first argued that the Airline Deregulation Act preempted the state from imposing such rules because they clearly affected “routes and services.” [FN118][FN118] The district court ruled that, even if the perimeter rule violated the ADA, the ADA did not create a private right of action. [FN119][FN119] The court then proceeded to explain that LaGuardia's perimeter rule is not preempted by the ADA, because it falls within an exception to the preemption provision. [FN120][FN120] The preemption exception cited by the court provided:

Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport served by any air carrier certificated by the Board to exercise its proprietary powers and rights. [FN121][FN121]

The court ruled that the perimeter rules fell within the Port Authority's “proprietary powers and rights,” even though it acknowledged that other courts recognized a proprietary power or right only when local regulations targeted noise or other environmental problems at airports. [FN122][FN122] Additionally, the court noted the similarity between the Port Authority's actions at LaGuardia and the FAA's actions at National, and concluded that managing congestion within a multi-airport system fell within the proprietary rights of the owner/proprietors of those multi-airport systems. [FN123][FN123] Specifically, the court stated that “in the absence of conflict with FAA regulations, a perimeter rule, as imposed by the Port Authority to manage congestion in a multi-airport system, serves an equally legitimate local need and fits \*372 comfortably within that limited role, which Congress has reserved to the local proprietor.” [FN124][FN124]

This decision (and its subsequent affirmation by the Second Circuit) rests on faulty analysis, and does no more to support the imposition of flight restrictions at Love Field than the National Airport decision. The District Court in Western implied that it had followed the Fifth Circuit's lead on perimeter rules, but the court erred. This case is entirely distinguishable from the National Airport case, on both facts and law. The Court failed to give enough weight to those distinguishing factors and incorrectly extended the boundaries of the proprietary-powers exception to the ADA. While both the Port Authority and the FAA are owner/proprietors of a multi-airport system, the FAA has federal authority to regulate air traffic, where the Port Authority does not. In fact, in the National Airport case, the Fifth Circuit specifically held that the proprietary-powers exception does not apply to the FAA. [FN125][FN125] The Fifth Circuit stressed that the FAA's authority to impose perimeter rules lies strictly within its status as the federal governing agency for aviation. [FN126][FN126] Referring to the proprietary powers exception, the Court stated:

the statute . . . specifies that it deals with “the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the owner or operator of an airport.” The FAA does not fit within that definition. Nothing could be more certain than that the restrictions of [the ADA preemption provision] do not bind the FAA, an arm of the federal government which just happens to own two airports. [FN127][FN127]

So, by granting the Port Authority the right to impose perimeter rules, based on its status as the proprietor of a multi-airport system, the Second Circuit completely misconstrued the Fifth Circuit's decision. Thus, the Second Circuit wrongly redefined the rights of airport proprietors under the proprietary-powers exception. [FN128][FN128] Proprietors have no right to limit the routes and services of airlines, except in very limited circumstances to alleviate noise or environmental problems.

Thus, those who believe that the LaGuardia case somehow supports the perimeter-like rules imposed by the Wright \*373 Amendment are mistaken. As the Fifth Circuit noted, Congress reserved an “extremely limited

role . . . for airport proprietors in our system of aviation management' [FN129][FN129] . . . Why did Congress specify such a limited role? To avoid interference with the preeminent authority of the federal government in the field of aviation." [FN130][FN130] Since the issue of proprietary powers does not apply to the Love Field situation, Congress should not rely on the perimeter rules at LaGuardia as support or justification for the Wright Amendment restrictions. Additionally, because the Wright Amendment restrictions had no basis in reducing air traffic congestion or the efficient utilization of navigable airspace, the rationale supporting the perimeter rules at National also does not apply to Love Field.

#### IV. RECENT ATTEMPTS TO BYPASS WRIGHT

In 1997, after the Shelby Amendment expanded Love Field's service area to include Mississippi, Alabama and Kansas, a flurry of competitive activity took off at Love Field. Aside from adding states to the Love Field service area, the Shelby Amendment expanded an exception that allowed planes with fewer than fifty-seven seats to fly unrestricted. As the Wright Amendment was initially interpreted, the exception applied only to commuter aircraft designed to hold no more than fifty-six passengers. But the expanded Shelby Amendment exception included any aircraft with no more than fifty-six seats, whether originally designed that way, or reconfigured to hold no more than fifty-six seats. [FN131][FN131] The change sparked a period of competition at Love Field, which in turn ignited a series of lawsuits involving multiple parties, a Department of Transportation ("DOT") examination and conflicting judicial judgments. [FN132][FN132] When the smoke finally cleared from the firestorm of legal challenges three years later, the competitive atmosphere at Love Field evaporated, even though the airport gained some ground. The upshot of the lawsuits\*374 was the clarification of several legal issues involving the Wright Amendment.

In the three-year period between 1997 and 2000, new services arrived at Love Field, while the lawsuits taxied slowly through the courts. Southwest added service from Love Field to Mississippi and Alabama. [FN133][FN133] Continental Express started flying from Love Field to its hub in Houston, and it attempted to start non-stop service from Love Field to Cleveland. [FN134][FN134] Start-up airline, Legend, ran non-stop flights from its new home base at Love Field to Los Angeles, Washington, D.C., and Las Vegas, using large, luxury jets reconfigured to hold just fifty-six seats and lots of amenities. [FN135][FN135] Continental Express announced similar plans to offer service between Love Field and Cleveland on regional jets with fifty-six or fewer seats. Delta also started flights at Love Field, using regional jets with fewer than fifty-six seats to fly direct to Atlanta. [FN136][FN136] Unwilling to stand on the sidelines, even though it fought against expanded service at Love Field, American Airlines started flights from Love Field to Austin, and non-stop flights to Los Angeles and Chicago on fifty-six-passenger jets, while its legal challenges awaited adjudication. [FN137][FN137]

The first suit, filed in 1997, went to state district court in Fort Worth. [FN138][FN138] There, Fort Worth and American sued the City of Dallas to force the city to block all the new service at Love Field and won. [FN139][FN139] Dallas immediately appealed that decision, but also filed a separate action of its own in federal court against Fort Worth and the DOT, seeking declaratory relief "on essentially the same issues involved in the state action." [FN140][FN140] Dallas won there, but American immediately appealed. [FN141][FN141] In between, American sought and obtained an injunction to block Continental's non-stop flights to Cleveland. [FN142][FN142] Several of the parties asked \*375 the DOT to step in and clarify what the Wright and Shelby amendments would or would not allow. [FN143][FN143] When the DOT issued its orders, more suits followed, until all of the claims were consolidated in one appeal to the Fifth Circuit. [FN144][FN144]

Throughout the various cases, the same issues kept emerging. In the end, the DOT issued an order with five parts, and the Fifth Circuit upheld each of those orders, mostly embracing the same conclusions as DOT. [FN145][FN145] First, the court addressed Fort Worth and American's claim against Dallas for failure to enforce the 1968 Regional Airport Concurrent Bond Ordinance. [FN146][FN146] The bond ordinance required each city to "take such steps as may be necessary, appropriate and legally permissible . . . to provide for the orderly, efficient and effective phase-out at Love Field . . . of any and all Certified Air Carrier Services, and to transfer such activity to the Regional Airport." [FN147][FN147] The Fifth Circuit settled this argument by holding conclusively that the ADA expressly preempted local regulations like the bond ordinance, because it affected the prices, routes and services of airlines. [FN148][FN148] The court said preemption freed Dallas from any contractual obligations to Fort Worth to enforce the bond ordinance. [FN149][FN149] The court also said no proprietary-powers exception applied that would allow Dallas to restrict flights. Specifically, the court held that the LaGuardia and National Airport cases do not go so far as to grant an airport owner proprietary power to allocate traffic between two airports. [FN150][FN150] Rather, the court interpreted those cases to mean that proprietors can enact perimeter rules if the proprietors articulate a need to alleviate noise, pollution or congestion; none of which conditions applied to Love Field. [FN151][FN151]

Second, the court upheld the DOT's interpretation that the Wright Amendment's commuter aircraft exemption allows airlines to use jets for non-stop, long-distance flights, so long as they hold fifty-six passengers or less. [FN152][FN152] Third, the court rejected \*376 a different contract claim by Fort Worth and American that the D/FW Board must enforce agreements made between the Board, the cities and eight airlines to move operations to D/FW. [FN153][FN153] The court found that, just as preemption would not allow the cities to regulate routes and services by local law, it also would not allow them to do so by contract. [FN154][FN154] Thus, even though Continental was one of the original eight carriers that had agreed to move its operations from Love Field to D/FW, neither the cities nor the D/FW Board could keep Continental Express out of Love Field. [FN155][FN155] Finally, the court upheld the DOT's ruling that the Wright Amendment permits airlines using fifty-six-passenger aircraft to offer connecting service. DOT interpreted the fifty-six-passenger aircraft exception to mean those aircraft are exempt from all of the Wright Amendment's regulations. [FN156][FN156] As a result, Continental Express gained the right to offer its through service between Love Field and "the world" by flying small regional jets with fifty-six or fewer seats through its hub in Houston. [FN157][FN157]

These rulings appeared to widen the scope of service allowed at Love Field. Indeed, such a clamor ensued for gate space at Love Field after the rulings that Dallas ordered an airport analysis to come up with a master plan for accommodating growth. But that need soon diminished. The major carriers from D/FW swooped into Love Field and virtually nullified the effect of the court ruling by using their strength and dominance to drive out the new services. American went nose-to-nose with Legend, offering its own direct flights from Love Field to Los Angeles. Delta offered direct flights to Atlanta, and Continental offered direct flights to Cleveland. The Dallas Morning News summarized the airlines' moves this way:

When start-up Legend Airlines began flights from Love Field to Los Angeles and Washington in 2000, American, Continental Airlines Inc. and Delta started competitive operations at the airport . . . After Legend failed, American and Delta abandoned Love Field, leaving only Southwest and Continental, which continues\*377 to operate regional jet service to Houston Intercontinental Airport. [FN158][FN158]

With the world's largest airline as a competitor, it didn't take long for Legend to fail. It started flying from Love Field April 5, 2000. [FN159][FN159] It "declared defeat" and dropped out of the field nine months later on December 2, 2000. [FN160][FN160] American subsequently terminated its direct flights to Los Angeles, and pulled out of Love Field altogether after September 11th, 2001. [FN161][FN161] Delta pulled out of Love Field

in 2003. [FN162][FN162] And while Continental still offers connecting service through its hub in Houston, it no longer offers direct flights from Love Field to anywhere outside the restricted area. No airline offers such direct flights, perhaps, because the ailing industry can't afford to fly fewer than fifty-seven passengers on a regular long-distance route, especially with skyrocketing fuel prices. So even though the courts have permitted a broad reading of the Wright Amendment, the reality is that Love Field still operates under severe limitations.

In a move reminiscent of the Kansas effort to expand Love Field's service area, Tennessee legislators joined forces in the fall of 2004 to amend the Shelby Amendment by including their state on the list of approved states. [FN163][FN163] Like the legislators from Kansas, Alabama and Mississippi, the Tennessee delegation wanted greater competition at its airports, [FN164][FN164] which for the other states meant luring Southwest to offer service in those states. What's unusual about Tennessee's effort is that Southwest already offers substantial services to Nashville's Airport--eighty arrivals per day. [FN165][FN165] But Tennessee lawmakers say they want the benefits of even greater competition. [FN166][FN166] In all likelihood, they're seeking something dubbed by the DOT in 1993 as the "Southwest Effect." [FN167][FN167] The term refers to the impact of Southwest\*378 Airline's entry into a market. Studies show that Southwest lowers airfare prices overall when it enters a market, and it lowers prices even more definitively on the routes it serves. [FN168][FN168] Both Southwest and the Tennessee delegation say neither influenced the other to push for changes to the Wright Amendment. [FN169][FN169] But Tennessee's move in September 2004 prompted the latest round of debates over the continued wisdom of flight restrictions at Love Field. [FN170][FN170]

Further fueling the debate was Delta's announcement in September 2004 that it would eliminate its hub operation at D/FW and slash its daily flights by more than ninety percent as a part of its corporate restructuring plan. [FN171][FN171] Delta held the number two spot in operations at D/FW, behind American, but the struggling airline cut the 254 daily flights it offered down to twenty-one in January 2005. [FN172][FN172] The airline also pulled out from all but four of its nineteen exclusive-use gates at D/FW. [FN173][FN173] Delta's decision put D/FW officials into a tailspin, but it also presented them with the perfect opportunity to ask the most profitable airline in the nation to leave Love Field, and its cumbersome flight restrictions, to slip in to Delta's gates at the unrestricted D/FW. [FN174][FN174] Southwest considered that offer to take Delta's gates. [FN175][FN175] But on November 12, 2004, it shocked and incensed officials at D/FW and American Airlines by announcing that it would rather stay at Love Field and fight for repeal of the Wright Amendment. [FN176][FN176] "It's anti-competitive . . . the facility it was designed to protect, Dallas/Fort Worth International Airport, no longer needs the law because it has become a powerful "fortress hub" for American Airlines," said Gary Kelly, Southwest's\*379 chief executive. [FN177][FN177] D/FW officials immediately responded by saying "repeal would be detrimental, not only to this airport, but to the entire North Texas economy." [FN178][FN178] D/FW later vowed to make protection of the Wright Amendment (and, in effect, protection of its monopoly), its "highest priority in the coming Congressional term." [FN179][FN179] As expected, American Airlines, Fort Worth officials and several other area politicians are vigorously defending the Wright Amendment. Meanwhile, business leaders, citizens of the region, and consumers nationwide are mounting their opposition to the Wright Amendment's continued existence. The stage is set once more for a debate over the Wright Amendment. This time, however, the issue has registered on the national radar, and Congress can ignore the Amendment no longer. Three bills introduced in the summer of 2005 seek to change or repeal the Wright Amendment. Senators John Ensign (R-Nev.) and John McCain (R-Ariz.) have introduced a bill to repeal the Wright Amendment in the Senate, co-sponsored by four other senators. [FN180][FN180] Representatives Sam Johnson (R-Plano, Tex.) and Jeb Hensarling (R-Dallas) have twenty-eight co-sponsors for a similar House bill. [FN181][FN181] Finally, Representative Marsha Blackburn (R-Tenn.) introduced legislation to add Ten-

nessee to the list of states within the Love Field service area. [FN182][FN182] Add to these bills, Southwest's new grass-roots campaign to mobilize public support, [FN183][FN183] and it seems increasingly likely that Congress will be forced to address the inequities of the Wright Amendment soon. Rather than bow to the interests of a few powerful supporters of the Amendment, Congress should examine the law's negative impact on the region, and on the nation's aviation industry, and repeal what never should have passed in the first place.

### \*380 V. TIME FOR REPEAL

Wright supporters have justified the Amendment as a necessary protection to ensure D/FW's economic success. [FN184][FN184] But such legislative protectionism actually hinders economic growth for the region and harms consumers nationwide. This section will review the Wright Amendment's justifications and look at the negative impact of the restrictions. In short, this section will show why the time has come for a congressional repeal of the Amendment.

#### A. D/FW's Economic Success

Whatever economic protection D/FW needed as a five-year-old airport when Congress passed the Wright Amendment, it no longer needs today. Sitting midway between the nation's two coasts, D/FW has grown into the third-busiest airport in the world for daily departures, and it ranks sixth in the world for the number of passengers enplaned daily. [FN185][FN185] D/FW has seven runways, 132 gates and three control towers. [FN186][FN186] In fact, officials boast that its "immense landmass and facilities make D/FW the only airport in the world able to land four aircraft simultaneously," and that the airport "can handle more operations than any other U.S. airport under any weather condition." [FN187][FN187] By contrast, Love Field Airport has but three runways, the newest one commissioned in 1958. [FN188][FN188] Southwest and Continental, the only airlines currently operating at Love Field, use fewer than twenty gates. [FN189][FN189] D/FW serves nearly 54-million passengers annually, while Love Field serves 5.6 million. [FN190][FN190] By any measure, D/FW has established an entrenched dominance that Love Field could never threaten, not even if Congress repeals the Wright Amendment. Yet Wright supporters claim that D/FW faces economic \*381 disaster if Congress should repeal flight restrictions at Love Field. [FN191][FN191]

D/FW officials say that the airport needs protection today for several reasons. First, they argue that D/FW needs help paying for \$2.7 billion of new debt issued in 2004 to fund a capital expansion project, including the construction of a new international terminal. [FN192][FN192] Second, they say the airport will suffer from Delta's plans to drastically reduce its operations at D/FW. [FN193][FN193] Finally, they claim the airline industry as a whole "remains in an economic tailspin" from the effects of the September 11th terrorist attacks. [FN194][FN194] "The latest assault on the Wright Amendment could not be more ill-timed to have a detrimental impact upon D/FW," Kevin Cox, D/FW's Chief Operating Officer, said in a press release. [FN195][FN195] But industry consultants and analysts say that D/FW officials are overreacting and hyping the impact of a Wright Amendment repeal. "You have to remember that the circumstances were even more difficult when the Shelby Amendment passed [in 1997]," said Ed Faberman, President of the Air Carriers Association, a trade group for discount airlines. [FN196][FN196] In fact, the airline industry has never enjoyed much economic stability, constantly bumping along the turbulent skies of fierce competition. And while airlines may fail, airports rarely go out of business. The Dallas Morning News reported that economists have long maintained that a repeal of the Wright Amendment "would cause transitional but not long-term pain for D/FW," because Love Field simply can't compete at the same level. [FN197][FN197] One economist flatly put it this way: "I don't see any

threat to D/FW if the Wright Amendment went away. Love Field doesn't have the infrastructure, and it doesn't have the space to build the infrastructure.” [FN198][FN198]

\*382 Indeed, the limited capacity for air traffic at Love Field already sufficiently protects D/FW from the specter of any substantial competition. Even if the lifting of flight restrictions would entice Southwest or other carriers to offer more service at Love Field, the airport can only operate a maximum of 32 gates. [FN199][FN199] That is what the City of Dallas determined in an airport Master Plan released in March 2001, taking into account the limited airspace in the region and the level of acceptable air traffic, noise and congestion. [FN200][FN200] The city started its Master Plan study while competition at Love Field ascended toward its apex in 2000, when the plan enthusiastically predicted further growth. [FN201][FN201] But since September 11, 2001, traffic at Love Field has fallen by more than twenty percent, [FN202][FN202] and the volume will drop even more. Southwest, the predominant carrier at Love Field, has cut its daily flights from 128 to 117 in 2005. [FN203][FN203] Thus, any additional service prompted by the lifting of flight restrictions would likely bring a slow, incremental increase in air traffic--first bringing flight levels back to pre-September 11th levels before hitting a maximum capacity. As one news report figured, even if Southwest added eight to ten flights per day at each of its nine currently-unused gates, it would still fly fewer than 200 flights per day. [FN204][FN204] Southwest's Chief Executive Gary Kelly told the Dallas Morning News that if the airline could fly unrestricted from Love Field, he envisions offering service similar to what the airline offers at Houston's Hobby airport. [FN205][FN205] At Hobby, Southwest operates 141 daily flights, with a mix of both regional and \*383 long-distance routes. [FN206][FN206] Compare that to Southwest's 117 daily departures from Dallas, and it seems hardly possible that such an incremental increase in activity at Love Field could pose a substantial threat to D/FW's financial stability. Thus, claims that D/FW needs the Wright Amendment for its economic survival simply don't fly.

#### B. A Comparative Look at Houston's Airports

The way Southwest operates in Houston highlights just one of the reasons Wright Amendment supporters should take a closer look at Houston's successful two-airport system. When D/FW officials learned of Southwest's plans to challenge the Wright Amendment, Chief Operating Officer Kevin Cox said: “We believe that airline competition is good for the traveling public, but competition by two airports that share some common ownership is not.” [FN207][FN207] Yet the City of Houston has owned and simultaneously operated the two biggest airports south of Dallas without any real complaints from travelers. The two-airport system in Houston offers a fair model for comparison, since both regions have similar economies and demographics. Both are situated in Texas, offering similar geographic convenience to airlines operating nationwide. Finally, the two airports in Houston developed in a very similar fashion to D/FW and Love Field, but they co-exist harmoniously without any flight restrictions.

Houston's Hobby Airport, like Dallas' Love Field, first started operating in the early days of commercial aviation. [FN208][FN208] Like Love Field, Hobby sits close to downtown, just seven miles south of the city's center. [FN209][FN209] Like Love Field, major construction at Hobby ended in the 1950s. [FN210][FN210] And like Love Field, Hobby has a maximum capacity of thirty-two gates. [FN211][FN211] Of the thirty-two gates, only twenty-four are currently in use. [FN212][FN212] In the 1960s, Houston \*384 city officials saw the need for a bigger and more modern airport, so they built Houston Intercontinental Airport on the other side of the city, about twenty-three miles north of downtown. [FN213][FN213] As with D/FW and Love Field, Houston city officials moved all passenger airline service from Hobby to Intercontinental (now named Bush Intercontin-

ental) when the new airport opened for business in 1969. [FN214][FN214] But unlike what officials did to protect D/FW, Houston never attempted to place flight restrictions on Hobby. Passenger service did in fact end at Hobby for a few years, from 1968 to 1971. [FN215][FN215] In 1971, Southwest started operating out of Love Field, and it flew to Houston's older, smaller Hobby Airport. [FN216][FN216] That prompted a couple of other passenger airlines to fly into Hobby, but they didn't stay long. [FN217][FN217] Only when the Airline Deregulation Act of 1978 made it easier for airlines to apply for service did competition return to Hobby. [FN218][FN218] At one point, the airport had as many as twelve passenger carriers offering service. [FN219][FN219] Today, seven airlines offer unrestricted passenger service at Hobby. [FN220][FN220] Combined, the airlines offer direct, non-stop flights from Hobby to more than sixty-five cities throughout the country. [FN221][FN221] Simultaneously, at Bush Intercontinental, twenty-four passenger airlines fly 34-million passengers each year. [FN222][FN222] The airlines at Bush offer direct, non-stop flights to 152 cities around the world. [FN223][FN223] Both airports thrive and continue to grow. In fact, Houston proudly boasts that both airports have financial self-sufficiency through enterprise funds and do not "burden the local tax base for airport operations, maintenance or capital improvements." [FN224][FN224] D/FW officials say they do not want a repeal of the Wright Amendment to disturb the harmonious co-existence of D/FW and Love Field, but Houston's two-airport system provides good evidence that two \*385 airports with very different facilities can indeed serve one region without any flight restrictions.

### C. Economic Impact of the Wright Amendment

When Wright Amendment supporters worry about competition between the two airports, what they really fear is competition between airlines. If and when Congress lifts the flight restrictions at Love Field, the new service offered would probably not come first from the airlines currently operating at D/FW, because it wouldn't make economic sense for an airline to run two separate operations in the same city. Southwest contemplated such a move when officials at D/FW urged the airline to take over some of the gates abandoned by Delta's cut backs. [FN225][FN225] But after studying the opportunity, Southwest's Chief Executive Gary Kelly said duplicating the structure Southwest has at Love Field at D/FW would cost too much. [FN226][FN226] For similar reasons, Southwest recently announced it would cut all six of its daily flights at Houston's Bush Intercontinental and operate in Houston exclusively out of Hobby. [FN227][FN227] Thus, additional service at Love Field would likely come first from Southwest or other airlines moving into the region for the first time, before drawing from existing airlines at D/FW. That type of result does not put the airports in direct competition, but rather the airlines. To compete, the airlines may offer cheaper ticket prices, more flights per day or more routes, which was precisely the goal Congress wanted to achieve with the Airline Deregulation Act. The more airlines compete, the more consumers benefit. Even D/FW's chief operating officer Kevin Cox recognized this when he said "[c]ompetition between airports won't get you lower cost service; competition among airlines will." [FN228][FN228]

As the situation stands, Dallas has one of the least competitive airline markets in the nation. The monopoly over long-haul flights granted to D/FW by the Wright Amendment has evolved into a virtual monopoly on air travel to and from the region for a single air carrier, American Airlines. In 2004, American and its affiliate, American Eagle, operated more than 700 flights per \*386 day out of D/FW. [FN229][FN229] Its closest competitor at the airport was Delta, which flew only 254 flights per day before it dismantled its D/FW hub at the start of 2005, cutting down to just twenty-one daily flights. [FN230][FN230] With Delta's departure, American's dominance at D/FW will become even more pronounced. American announced in February that it planned to pick up the slack left by Delta by adding 119 daily departures at D/FW, bringing its total flights per day to 839 as of

July 2005. [FN231][FN231] As the Dallas Morning News reported, that growth means American will fly more than eighty percent of all air traffic at D/FW, “a concentration that even airport officials admit is a ‘monopoly.’” [FN232][FN232] The Department of Transportation has a name for airports so dominated by a single airline -- “fortress hubs.” [FN233][FN233] The term refers to airports where the dominant carrier operates at least sixty percent of the flights. [FN234][FN234] Only three airports hold that “fortress hub” distinction, according to DOT's Bureau of Transportation Statistics: D/FW, and the airports in Cincinnati, Ohio, and Minneapolis, Minnesota. As the term implies, “fortress hub” airlines, like American, maintain their strongholds by walling out the competition. Southwest's chief executive, Gary Kelly, suggested that American's stronghold on D/FW played a large part in Southwest's decision to not take over any of Delta's empty gates. “It's called a fortress hub for a reason,” [FN235][FN235] he told the Dallas Morning News. If the nation's most profitable and successful airline feels it can't compete with American at its legislatively-protected home turf, and the second biggest carrier at D/FW had to cede the market to American's fortress hub, then how can consumers reap the benefits of competition that Congress intended to foster?

Even before American's latest expansion, its grip on the region's air traffic squeezed consumers with artificially inflated \*387 ticket prices. According to American Express's eClique Advisors, a group that negotiates bulk travel discounts for businesses, the lack of airline competition in Dallas puts the average business airfare at \$593, forty-eight percent higher than the \$402 average in North America. [FN236][FN236] A more specific study on the effect of the Wright Amendment showed that, in 1996, D/FW airfares to or from a state outside the Wright Amendment's restricted area were seventy-six percent higher than airfares to or from a state within the restricted area, even after adjustments for flight distances. [FN237][FN237] Even low-priced Southwest charged about fifteen percent more on routes at Love Field than elsewhere. [FN238][FN238] Conversely, in the unrestricted markets where Southwest operates, even at airports where there's little competition, fares have dropped by forty-seven percent since 1978. [FN239][FN239] In unrestricted markets where Southwest competes with other airlines, the “Southwest Effect” has lowered fares by more than fifty-four percent since 1978. [FN240][FN240] All of these figures show the price consumers have to pay when restrictions artificially limit competition on routes, allowing single airlines to dominate.

Not only does the Wright Amendment hurt travelers to and from Dallas, but studies show that limits on competition hurt consumers nationwide. A working paper by three economists called “Competition and Welfare in the U.S. Airline Industry” shined an even harsher light on the dramatic difference between the impact of American and Southwest on the flying public. [FN241][FN241] Using data from 1990 to 2000, Professor Steven Morrison of Northeastern University and Clifford Winston and Vikram Maheshri of the Brookings Institution evaluated the welfare generated by an airline's entrance or exit from a market. [FN242][FN242] \*388 They assessed “welfare” in terms of airfare and flight frequencies, and took into account how other airlines react to the movement of a given airline into or out of a market. [FN243][FN243] For example, low-cost carriers like Southwest tend to increase flight services in a market where large legacy carriers cut back, while the legacy carriers like American tend to decrease service when other legacy competitors drop out. [FN244][FN244] As Dr. Winston explained to the New York Times, “your value is in a sense determined by how replaceable you are. Or, more to the point, who are you keeping out of markets?” [FN245][FN245] The economists calculated that Southwest Airlines contributed the most to consumer welfare, generating \$20 billion worth of value a year, while American Airlines actually lowered travelers' welfare. [FN246][FN246] Put another way, when Southwest responds to market changes, the services they offer benefit consumers, while American's response to market forces hurts consumers. [FN247][FN247] In fact, the study found that American's presence in a market tends to raise the average ticket prices paid. [FN248][FN248] Based on these calculations, the study calls for the government to let

free-market forces regulate the airline industry, instead of providing financial subsidies, particularly to airlines that do not contribute to the welfare of travelers. [FN249][FN249] While the study never mentioned the Wright Amendment, the flight restrictions now amount to a government subsidy in favor of American Airlines, because American, as the primary carrier at D/FW, essentially has the exclusive right to operate long-distance flights into and out of the region. Such a monopoly, propped up by legislative action, sends a competition-stifling ripple effect across the airline industry that hurts consumers nationwide. Congress should remove these barriers to competition by repealing the Wright Amendment and allowing consumers to benefit from free market forces.

In addition, local legislators should wake up to the economic reality that the Wright Amendment hurts the region, and start lobbying for its repeal, rather than its continuation. While flight restrictions rob consumers of competitive choices in flight and \*389 ticket prices, they cost the regional economy far more by making the area less accessible to travelers and businesses. Yet local politicians from the city to the state level have supported the Wright Amendment over the years. In this latest round of debates over the amendment, Dallas Mayor Laura Miller seems to have settled upon supporting the Amendment. Yet, in interviews given to the media, she also seems to recognize the damage the Wright Amendment wreaks upon Dallas. She described to National Public Radio how Dallas' higher-than-average airfares rob the region of visitors and convention business:

I went up to see Pfizer recently on a sales trip with the Convention and Visitors' Bureau in New York and I said, "You've gotta come do more of your big meetings in Dallas. You meet constantly, and you have salespeople all over the country." And they said, "Well, we'd love to come to Dallas because it's in the middle of the country, but, sorry, your airfares are too high, so we keep going to Orlando because it's too expensive to fly to Dallas." [FN250][FN250]

The mayors of Dallas have always juggled a delicate balance between the city's interests in Love Field and D/FW. Dallas wholly owns Love Field, where the now powerful Southwest Airlines keeps its headquarters, but Dallas also owns half of the much larger D/FW Airport, where American, the biggest airline in the world, is based. So, for now, the current mayor says she supports keeping the Wright Amendment, but will work to attract other low-cost carriers to D/FW to boost competition. [FN251][FN251] Yet, the mayor noted the challenge in that effort during a recent meeting with American Airlines.

One of my questions for American was, "Let's say we're lucky and we get a low-cost carrier to come out at D/FW. Will you crush them like a bug, like you did at Love Field with Legend? Or will they be allowed to live so that we can bring down airfares but hopefully leave the status quo with Love Field?" [FN252][FN252]

Ironically, D/FW officials have accused Southwest of a similar attempt to keep out low-fare competitors through a repeal of the Wright Amendment. "The Wright Amendment has really nothing to do with fares but everything to do with Southwest trying to keep its monopoly at Love Field and trying to stymie growth at D/FW Airport," said Kevin Cox, D/FW's chief operating\*390 officer. [FN253][FN253] But the stifling of competition at D/FW occurred long before Southwest announced plans to challenge the Wright Amendment, as evidenced by American Airline's long-developing monopoly at the airport.

## VI. CONCLUSION

What D/FW officials refuse to recognize is that no amount of competition between airlines has ever caused the airport in a major city to close. And the Wright Amendment smothers competition between airlines, not airports. The Wright Amendment's protectionist policy snuck past Congress in 1979 without publicity. The flight

restrictions helped D/FW grow into the nation's third-busiest airport, and sheltered American from competition as it grew into the world's largest airline. Those two major players compose the loudest voices continuing to support the Wright Amendment. Their predictions of economic disaster at D/FW if Congress repeals the Wright Amendment hides their ultimate self-serving desires to preserve the status quo--one in which D/FW enjoys continued expansion under a monopoly on long-haul flights, and American hopes to regain profitability through its virtual monopoly on air service at D/FW. But neither of those interests benefits the public. Through deregulation, consumers now enjoy cheaper flights to more destinations with more choices for carriers and flight times. But that successful model for expanding the nation's airline industry fails when special interests manipulate lawmakers into carving out deregulation exceptions. Those exceptions are even more objectionable when they rest on shaky legal foundations. Congress must recognize that both the airline industry and the Dallas-Fort Worth region have changed tremendously over the past twenty-five years. Whatever justified the Wright Amendment twenty-five years ago, no longer flies today. The time has come for Congress to put love back in the air by giving consumers true competition through a repeal of the Wright Amendment.

[FNa1]. B.A., Southern Methodist University; M.S. Columbia University Graduate School of Journalism; J.D. Candidate, SMU Dedman School of Law (May 2006). I would like to thank Professor Tom Mayo for his suggestions on this comment and his invaluable mentorship. I would also like to thank my husband, Chad, for his support and encouragement.

[FN1]. Southwest Airlines Advertisement Copy, at [http:// www.southwest.com/images/ad\\_gallery/p\\_ad01.jpg](http://www.southwest.com/images/ad_gallery/p_ad01.jpg) (last visited Feb. 14, 2005).

[FN2]. Southwest flew from Dallas to Houston and San Antonio. See *id.*

[FN3]. Southwest is the nation's largest airline measured by total domestic passengers carried. See Vikas Bajaj, Southwest Creeping onto D.C. Radar Airline May Raise Its Lobbying Profile to Fight Wright Law, *Dallas Morning News*, Dec. 5, 2004, at D1.

[FN4]. See Southwest Airlines' Fact Sheet, at [http:// www.southwest.com/about\\_swa/press/factsheet.html](http://www.southwest.com/about_swa/press/factsheet.html) (last visited Feb. 14, 2005). On January 13, 2005, Southwest announced it will service 11 more cities through a code-sharing arrangement with ATA Airlines, a right Southwest obtained by acquiring some of ATA's assets in bankruptcy. Micheline Maynard, From Aw-Shucks to Cutthroat: Southwest's Ascent, *N.Y. Times*, Dec. 26, 2004, at 37.

[FN5]. See Southwest Airlines' Interactive Route Map, at [http:// www.southwest.com/travel\\_center/routemap\\_dyn.html](http://www.southwest.com/travel_center/routemap_dyn.html) (last visited Feb. 15, 2005).

[FN6]. International Air Transportation Competition Act of 1979, *Pub. L. No. 96-192, § 29, 94 Stat. 35 (1980)* (the amendment has never been codified) [hereinafter Wright Amendment].

[FN7]. In its entirety, the Wright Amendment provides:

(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other office or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common

carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of fifty-six passengers or less.

(b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on Nov. 1, 1979, may continue to provide service to such point.

(c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

(d) This Section shall not take effect if enacted after the enactment of the Aviation Safety & Noise Abatement Act of 1979.

[FN8]. Wright Amendment, *supra* note 6, at § 29(a)-(d). The Shelby Amendment, passed in 1997, added Kansas, Alabama and Mississippi to the list of states where carriers may fly directly from Love Field. Department of Transportation & Related Agencies Appropriations Act of 1998, [Pub. L. No. 105-66, § 337, 111 Stat. 1425, 1447 \(1997\)](#) [hereinafter Shelby Amendment]. For the purposes of this comment, reference to the Wright Amendment incorporates the Shelby Amendment provisions as well.

In addition to the International Air Transportation Competition Act, Congress also passed the Airline Deregulation Act of 1978, [Pub. L. No. 95-504, 92 Stat. 1705 \(1978\)](#) (codified in various sections of 49 U.S.C.) [hereinafter the Airline Deregulation Act (“ADA”)].

[FN9]. See *City of Dallas v. S.W. Airlines Co.*, 371 F. Supp. 1015, 1019 (N.D. Tex. 1973), *aff'd* 494 F.2d 773 (5th Cir. 1974).

[FN10]. *Id.* at 1019-20.

[FN11]. *Id.* at 1020.

[FN12]. *Id.* at 1020-21.

[FN13]. *Id.* at 1021.

[FN14]. *Id.*

[FN15]. *Id.* at 1025.

[FN16]. *Id.* DFW had an obligation to finish paying off Love Field bonds, but no money would be diverted away from DFW to pay off those Love Field bonds so long as Love Field generated sufficient revenue of its own. *Id.* Thus, the court concluded, any revenues accrued through Southwest's presence at Love Field actually benefited DFW by preventing funds from being diverted to Love Field. *Id.*

[FN17]. *Id.* at 1026.

[FN18]. *Id.* at 1035.

[FN19]. *City of Dallas v. S.W. Airlines Co.*, 494 F.2d 773, 775 (5th Cir. 1974).

[FN20]. *S.W. Airlines Co. v. Tex. Int'l Airlines, Inc.*, 546 F.2d 84, 103 (5th Cir. 1977).

[FN21]. See History of DFW Airport, at <http://www.dfwairport.com/visitor/history.htm> (last visited Feb. 15, 2005).

[FN22]. See generally Ann K. Wooster, Annotation, [Construction and Application of § 105 Airline Deregulation Act \(49 U.S.C.A. § 41713\), Pertaining to Preemption of Authority Over Prices, Routes, and Services](#), 149 *A.L.R. Fed.* 299 (2005); see generally Alfred E. Kahn, Airline Deregulation, *The Concise Encyclopedia of Economics*, available at <http://www.econlib.org/library/Enc/AirlineDeregulation.html> (last visited Feb. 14, 2005).

[FN23]. The Civil Aeronautics Board was the predecessor to the Federal Aviation Administration (“FAA”). See *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 793 (5th Cir. 2000).

[FN24]. Martin Zimmerman, Southwest, Love Field's Strong Ties Economics, Survival Bring Two Together, *Dallas Morning News*, Jan. 8, 1989, at H1.

[FN25]. A search of newspaper archives from the time revealed no public reporting on the measure, but Southwest Airlines executives later said that they fought against its passage. See *One-on-One with Herb Kelleher*, *Dallas Magazine*, March 1, 1986, at 18. The Wright Amendment provisions are found in the very last section of the International Air Transportation Competition Act of 1979. Wright Amendment, *supra* note 6; see also *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1446 (D.C. Cir. 1998).

[FN26]. *Cont'l Air Lines, Inc.*, 843 F.2d at 1446.

[FN27]. See full text of the Wright Amendment, *supra* note 7. Southwest Airlines founder and Chairman Herb Kelleher described the provision as an unwanted compromise he was forced to accept. *One-on-One with Herb Kelleher*, *supra* note 25.

[FN28]. In 1987, Dallas and Fort Worth unsuccessfully challenged Continental Airline's decision to start service from Love Field to Houston, because, unlike Southwest, the airline was an “interlining” carrier that could offer connecting service to points outside of the Wright Amendment's restrictive borders. *Cont'l Air Lines, Inc.*, 843 F.2d at 1447.

[FN29]. *Cramer v. Skinner*, 931 F.2d 1020, 1022 (5th Cir. 1991).

[FN30]. *Id.*

[FN31]. *Id.* at 1033.

[FN32]. *Id.*; see also full text of the Wright Amendment, *supra* note 7.

[FN33]. *Cramer*, 931 F.2d at 1031 (emphasis added) (citing *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986)).

[FN34]. *Id.*

[FN35]. *Id.* at 1034.

[FN36]. *Kansas v. United States*, 797 F. Supp. 1042, 1044 (D.D.C. 1992), *aff'd*, 16 F.3d 436 (D.C. Cir. 1994).

[FN37]. *Id.* at 1048.

[FN38]. *Id.*

[FN39]. *Id.* at 1053-54.

[FN40]. *Id.* at 1052.

[FN41]. *Id.* at 1051.

[FN42]. *Kansas v. United States*, 16 F.3d 436 (D.C. Cir. 1994).

[FN43]. See *Kansas Lawmakers Try to Repeal Restrictions on Dallas Love Field*, *The Journal Record*, Feb. 8, 1997.

[FN44]. *Id.*; see also *Shelby Amendment*, *supra* note 7.

[FN45]. Southwest does fly to and from Kansas City International Airport, located just across the Kansas state line in Missouri. See *Southwest Airlines Interactive Route Map*, *supra* note 5.

[FN46]. *Kansas vs. United States*, 797 F. Supp. 1042, 1048 (D.D.C. 1992), *aff'd* 16 F.3d 436 (D.C. Cir. 1994).

[FN47]. U.S. Const. art. I, §9, cl. 6.

[FN48]. Specifically, the Port Preference Clause provides: “No Preference Shall be given by any Regulation of Commerce or Revenue to Ports of One State over those of another; nor shall Vessels bound to, or from one State be obliged to enter, clear or pay duties in another.” U.S. Const. art. I, § 9, cl. 6. The term “port” has been interpreted to include airports. See *City of Houston v. FAA*, 679 F.2d 1184, 1196 (5th Cir. 1982).

[FN49]. *Kansas*, 797 F. Supp. at 1048.

[FN50]. *Id.* at 1049, 1051.

[FN51]. *Id.* at 1049.

[FN52]. *Id.*

[FN53]. 59 U.S. 421, 433-35 (1855).

[FN54]. *Kansas v. United States*, 16 F.3d 436, 440 (D.C. Cir. 1994).

[FN55]. See 3 *The Founders' Constitution* 371-373 (Phillip B. Kurland & Ralph Lerner eds., University of Chicago Press 1987).

[FN56]. *Id.*

[FN57]. *Id.*

[FN58]. *Id.*

[FN59]. *Id.*

[FN60]. One of the framers explained the potential abuse of federal power this way: “suppose, for instance, the [federal] government should determine that all ships which cleared or entered in Maryland, should clear and enter at George-Town, on Potowmack [sic], it would oblige all the ships which sailed from, or were bound to, any other port of Maryland, to clear or enter in some port in Virginia.” Luther Martin, *Genuine Information* (1778), in 3 *The Founders' Constitution*, at 372.

[FN61]. Early challenges based on the Clause implied that the provisions also applied to state regulations, since the language of the clause says “any regulation.” But the framers fully intended the Clause to apply only to Federal regulations. Through another method of deducing intent, the Supreme Court held in 1886 that the provision applies only to federal, not state, regulations because it resides within Article I of the Constitution, which governs the scope of congressional powers. See *Morgan's La. & T.R. & S.S. Co. v. Bd. of Health of La.*, 118 U.S. 455, 467 (1886).

[FN62]. 3 *The Founders' Constitution*, at 172.

[FN63]. ADA, *supra* note 8, at § 105.

[FN64]. See 3 *The Founders' Constitution*, at 371.

[FN65]. See generally 16A. *Am. Jur. 2d Constitutional Law* § 244 (2004); see also U.S. Const. art. VI, cl. 2.

[FN66]. See 16A. *Am. Jur. 2d*, *supra* note 65, at § 244.

[FN67]. All of the courts referring to the ADA in part III of this paper cite to the ADA as it was passed in 1978. ADA, *supra* note 8. The courts use the statute language as it then existed. A subsequent 1994 amendment, *Pub. L. No. 103-305*, 108 *Stat. 1569* (codified at 49 U.S.C. § 41713(b) (2004)), changed the wording from “rates, routes, or services” to “price, route or service,” among other minor changes. Specifically, the current language states:

Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C.A. § 41713(b)(4)(A) (West 2004). In the interest of conforming to the courts' opinions, this comment will use the statute language cited by the court, since the changes are not relevant to the legal analysis at issue.

[FN68]. 49 U.S.C.A. § 40101(a) (West 2004).

[FN69]. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

[FN70]. *Id.* at 384 (emphasis added).

[FN71]. *Id.* at 388-91.

[FN72]. *Id.* at 378.

[FN73]. *Id.* at 388.

[FN74]. *Id.*

[FN75]. *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222-28 (1995).

[FN76]. *Id.* at 224.

[FN77]. *Id.* at 226-29.

[FN78]. *Id.* at 228-29.

[FN79]. 49 U.S.C.A. § 40101(f).

[FN80]. Steven A. Morrison, *Airline Deregulation and Fares at Dominated and Slot-Controlled Airports*, Address at Hearing Before the House Comm. on the Judiciary 2 (Nov. 5, 1997).

[FN81]. See *id.* at 1-2.

[FN82]. Wade Goodwyn, *Analysis: Southwest Airlines Challenges the Wright Amendment*, N.P.R. Morning Edition, Dec. 28, 2004.

[FN83]. 49 U.S.C.A. § 40101(a)(10).

[FN84]. *W. Airlines, Inc. v. Port Auth.*, 817 F.2d 222, 223 (2d Cir. 1987).

[FN85]. Metropolitan Washington Airports Act of 1986, 100 Stat. 3341 (codified at 49 U.S.C. § 49109). Prior to 1986, the perimeter extended only 1,000 miles. *City of Houston v. FAA*, 679 F. 2d 1184 (5th Cir. 1982).

[FN86]. *W. Airlines*, 817 F.2d at 223; *City of Houston*, 679 F.2d at 1188.

[FN87]. Compare *W. Airlines*, 817 F.2d at 223, and *City of Houston*, 679 F.2d at 1188, with Wright Amendment, *supra* note 6.

[FN88]. *City of Houston*, 679. F.2d at 1186.

[FN89]. *Id.* at 1186-87.

[FN90]. *Id.* at 1188.

[FN91]. *Id.* at 1186.

[FN92]. *Id.*

[FN93]. *Id.*

[FN94]. *Id.* at 1186-88. In fact, dramatic air-traffic increases seemed certain, because the 650-mile perimeter

rule was about to sunset. The approaching take-off of that old restriction prompted the FAA to swoop in with the new perimeter rule. *Id.*

[FN95]. *Id.* The seven cities were: Minneapolis-St. Paul, St. Louis, Memphis, Orlando, Miami, Tampa and West Palm Beach. *Id.* at 1188 n.6.

[FN96]. *Id.* at 1187.

[FN97]. *Id.* at 1188.

[FN98]. *Id.*

[FN99]. *Id.*

[FN100]. *Id.*

[FN101]. Dallas Love Field Chronology of Events, at <http://www.dallas-lovefield.com/lovenotes/lovechrono.html> (last visited Jan. 20, 2005) [hereinafter Dallas Love Field Chronology].

[FN102]. See *City of Houston*, 679 F.2d at 1192.

[FN103]. See *id.*

[FN104]. See *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1455 (D.C. Cir. 1988). In 2000, a Fifth Circuit decision allowed airlines using aircraft with fewer than fifty-seven seats to offer connecting service. *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788 (5th Cir. 2000). Southwest uses no aircraft meeting that criteria. It employs a uniform fleet of Boeing 737s. However, Continental currently offers connecting service from Love Field by flying passengers on fifty-seat regional jets through its hub in Houston.

[FN105]. *City of Houston*, 679 F.2d at 1192.

[FN106]. *Id.* The Court added that “no one has ever attempted completely to bar travelers from distant cities from flying to National Airport. Such an attempt might well give rise to a constitutional claim.” *Id.* at 1192.

[FN107]. *Id.* at 1194.

[FN108]. *Id.* at 1195.

[FN109]. *Id.*

[FN110]. *Id.* at 1196-98.

[FN111]. *Id.* at 1198.

[FN112]. *Id.*

[FN113]. See *W. Airlines*, 817 F.2d at 222.

[FN114]. See *W. Air Lines Inc., v. Port Auth.*, 658 F. Supp. 952, 953 (S.D.N.Y. 1986).

[FN115]. See *id.*

[FN116]. *Id.*

[FN117]. *Id.*

[FN118]. *Id.* at 954.

[FN119]. *Id.* at 955. The Court of Appeals affirmed the District Court's rulings, and referred to the lower court's analysis on the merits of Western's claim; accordingly, this paper will discuss this case using the lower court's opinion. See *W. Airlines*, 817 F.2d at 226.

[FN120]. *W. Airlines*, 658 F. Supp. at 955-58.

[FN121]. A subsequent 1994 amendment, Pub. L. No. 103-305, 108 Stat. 1569 (codified at 49 U.S.C. § 41713(b)(3)), changed some wording. Specifically, the current language states: "This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights." In the interest of conforming to the courts' opinion, this comment will use the statute language cited by the court, since the changes are not relevant to the legal analysis at issue.

[FN122]. *W. Airlines*, 658 F. Supp. at 958.

[FN123]. *Id.*

[FN124]. *Id.*

[FN125]. *City of Houston*, 679 F.2d at 1194.

[FN126]. *Id.*

[FN127]. *Id.*

[FN128]. The Supreme Court never reviewed the Second Circuit's decision in this case. It denied certiorari. *Delta Air Lines, Inc. v. Port Auth.*, 485 U.S. 1006 (1988).

[FN129]. *City of Houston*, 679 F.2d at 1194.

[FN130]. *Id.* (quoting *British Airways Bd. v. Port Auth.*, 564 F.2d 1002, 1010 (2d. Cir. 1997)).

[FN131]. Specifically, the Shelby Amendment states: "the term 'passenger capacity of fifty-six passengers or less' includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate fifty-six or fewer passengers if the total number of passengers seats installed on the aircraft does not exceed fifty-six." See Shelby Amendment, *supra* note 7.

[FN132]. See generally Dallas Love Field Chronology, *supra* note 101; see also *Am. Airlines*, 202 F.3d at 794.

[FN133]. Southwest Airlines, A Brief History, at [http://www.southwest.com/about\\_swa/airborne.html](http://www.southwest.com/about_swa/airborne.html) (last visited Jan. 20, 2005) [hereinafter *Southwest Airlines History*]; *Am. Airlines*, 202 F.3d at 794-95.

[FN134]. [Am. Airlines, 202 F.3d at 794-95.](#)

[FN135]. *Id.*

[FN136]. *Id.* Delta operated at Love Field through its Delta Connection carrier, Atlantic Southwest Airlines (“ASA”).

[FN137]. *Id.*

[FN138]. *Id.* at 795.

[FN139]. *Id.*

[FN140]. *Id.*

[FN141]. See *Id.* at 794; see also Dallas Love Field Chronology, *supra* note 101.

[FN142]. See [Am. Airlines, 202 F.3d at 794](#); see also Dallas Love Field Chronology, *supra* note 101.

[FN143]. *Id.*

[FN144]. *Id.* at 795-96.

[FN145]. *Id.* at 795.

[FN146]. *Id.* at 804.

[FN147]. *Id.* at 793.

[FN148]. *Id.* at 804-08. Separately, DOT determined that the Wright and Shelby amendments also preempt any city authority to restrict flight service differently. *Id.* at 795.

[FN149]. See *id.* at 804-13.

[FN150]. *Id.* at 807-08.

[FN151]. *Id.*

[FN152]. *Id.* at 808-10.

[FN153]. *Id.* at 810.

[FN154]. *Id.* at 810-11.

[FN155]. *Id.* at 811.

[FN156]. *Id.* at 812-13.

[FN157]. *Id.* at 812.

[FN158]. Robert Dodge, Flights sought at Love, Tennessee lawmakers propose easing restrictions at airport,

Dallas Morning News, Nov. 3, 2004, at D1.

[FN159]. Dallas Love Field Chronology, *supra* note 101.

[FN160]. *Id.*

[FN161]. *Id.*

[FN162]. *Id.*

[FN163]. See Robert Dodge, *supra* note 158.

[FN164]. *Id.*

[FN165]. *Id.*

[FN166]. *Id.*

[FN167]. See Randall D. Bennett & James M. Craun, *The Airline Deregulation Evolution Continues The Southwest Effect*, Office of Aviation Analysis, Dep't of Transp. (May 1993), available for pdf download at <http://www.google.com/search?sourceid=navclient&ie=UTF-8&rls=GGLD,GGLD:2004-09,GGLD:en&q=southwest+effect> [hereinafter DOT Study]; see also, Justin Ritter, *Southwest Airlines: An In-Depth Review*, Chapter 8: The, 'Southwest Effect,' a graduate-seminar study by students at Embry Riddle Aeronautical University in Daytona Beach, Florida, available at <http://www.erau.edu/research/BA590/chapters/ch8.htm> (last visited Jan. 21, 2005).

[FN168]. See DOT Study, *supra* note 167; Ritter, *supra* note 167.

[FN169]. Robert Dodge, *supra* note 158.

[FN170]. Eric Torbenson, Susanne Marta & Vikas Bajaj, *Southwest Calling for Repeal of Wright Airline's Chief Ends Neutrality; Others Hail Law Protecting D/FW*, Dallas Morning News, Nov. 13, 2004, at 1A.

[FN171]. Associated Press, *Soon-to-be Vacated D/FW Gates Get Attention from Competitors*, Associated Press State & Local Wire, Oct. 1, 2004.

[FN172]. *Id.*

[FN173]. *Id.*

[FN174]. See *id.*

[FN175]. *Id.*

[FN176]. See Goodwyn, *supra*, note 86; see also Torbenson, *Southwest Calling for Repeal of Wright*, *supra* note 170.

[FN177]. Torbenson, *Southwest Calling for Repeal of Wright*, *supra* note 170.

[FN178]. *Id.* (quoting Kevin Cox, D/FW's chief operating officer).

[FN179]. Bajaj, Southwest Creeping on D.C. Radar, *supra*, note 3.

[FN180]. S. 1424, 109th Cong. (2005).

[FN181]. H.R. 2646, 109th Cong. (2005).

[FN182]. H.R. 2932, 109th Cong. (2005). This bill re-introduces the same proposal Tennessee lawmakers first made in 2004.

[FN183]. See Wright is Wrong! Set Love Free!, at [http:// www.setlovetfree.com/caseforrepeal.html](http://www.setlovetfree.com/caseforrepeal.html) (last visited Sept. 7, 2005).

[FN184]. See Torbenson, Southwest Calling for Repeal of Wright, *supra* note 170 (Charles Boswell, Fort Worth City Manager, stating that “[s]trong competition for more than regional activity out of Love Field could be detrimental to D/FW Airport.”).

[FN185]. D/FW Airport, Airports Council International statistics, D/FW Airport 2003 Annual Report, available at [http:// www.dfwairport.com/airport/financials.html](http://www.dfwairport.com/airport/financials.html) (last visited Jan. 29, 2005) [hereinafter D/FW Airport 2003 Annual Report].

[FN186]. *Id.*

[FN187]. *Id.*

[FN188]. See Dallas Love Field Chronology, *supra* note 101.

[FN189]. See *id.*

[FN190]. See D/FW Airport 2003 Annual Report, *supra* note 185 and Dallas Love Field Facts, at <http://www.dallas-lovefield.com/lovenotes/lovefacts.html> (last visited Jan. 28, 2005).

[FN191]. See Statement of Fort Worth City Manager Charles Boswell (“Strong Competition for more than regional activity out of Love Field could be detrimental to D/FW Airport,” Torbenson, Southwest Calling for Repeal of Wright, *supra* note 170).

[FN192]. See Press Release, D/FW Int’l Airport Responds to Remarks by Southwest Airlines CEO (Nov. 12, 2004) (on file with author) [hereinafter D/FW Press Release, Nov. 12, 2004].

[FN193]. See *id.* Delta, the number two carrier at D/FW, behind American, announced it would cut the 254 daily flights it offered down to twenty-one by the end of January 31, 2005. Associated Press, Soon-to-be Vacated D/FW Gates Get Attention from Competitors, *supra* note 171.

[FN194]. D/FW Press Release, Nov. 12, 2004, *supra* note 192.

[FN195]. *Id.*

[FN196]. Bajaj, Southwest creeping on D.C. radar, *supra*, note 3.

[FN197]. Torbenson, Southwest calling for repeal of Wright, *supra* note 170.

[FN198]. Id.

[FN199]. Dallas Love Field Master Plan, Final Executive Summary, March 3, 2001, available at [http://www.dallaslovefieldmasterplan.com/Information% 20Updates.htm](http://www.dallaslovefieldmasterplan.com/Information%20Updates.htm) (last visited Feb. 7, 2005).

[FN200]. Id. at 1-3.

[FN201]. See id.

[FN202]. Eric Torbenson & Suzanne Marta, Southwest Rethinks Strategy Emerging Opportunities Prompt its Opposition to Wright Amendment, Dallas Morning News, Nov. 13, 2004, at D1.

[FN203]. Southwest Airlines' Top Ten Airports (as of May 4, 2005), available at [http://www.southwest.com/about\\_swa/press/factsheet.html#Top%20Ten% 20Airports](http://www.southwest.com/about_swa/press/factsheet.html#Top%20Ten% 20Airports) (last visited Sept. 7, 2005).

[FN204]. The Dallas Morning News pointed out that Southwest has rights to twenty-three gates at Love Field, but flies out of just fourteen. It noted that adding eight to ten flights per day, per unused gate, would bring Southwest's total daily flights to "less than 200," but at ten flights per day, per gate, Southwest would add ninety flights, bringing its total daily flights to about 207. Eric Torbenson, Suzanne Marta, Dispute Over Amendment Deep-rooted, Dallas Morning News, Nov. 19, 2004, at D1.

[FN205]. Id.

[FN206]. See Press Release, Southwest Airlines, Southwest Airlines Expands Nonstop Flights Between Houston Hobby and Los Angeles International (Feb. 3, 2005), available at [http://www.southwest.com/about\\_swa/press/prindex.html](http://www.southwest.com/about_swa/press/prindex.html) (last visited Feb. 10, 2005).

[FN207]. D/FW Press Release, Nov. 12, 2004, *supra* note 192.

[FN208]. See History of Hobby Airport, available at <http://hou.houstonairportsystem.org/about> (last visited Jan. 15, 2005) [hereinafter Hobby History].

[FN209]. See id.

[FN210]. Id.

[FN211]. See Press Release, Hobby Airport, Major Terminal Rebuilding Project for Houston's Hobby Airport (June 15, 2000), available at <http://www.houstonairportsystem.org/news/?id=6> (last visited Feb. 9, 2005).

[FN212]. Id.

[FN213]. See History of Bush Intercontinental Airport, available at <http://iah.houstonairportsystem.org/about> (last visited Jan. 15, 2005) [hereinafter Bush History].

[FN214]. Id.

[FN215]. See Hobby History, *supra* note 208.

[FN216]. Id.

[FN217]. Braniff and Texas International airlines left before 1978. Id.

[FN218]. See id.

[FN219]. Id.

[FN220]. Id.

[FN221]. Id.

[FN222]. Bush History, supra note 213.

[FN223]. Id.

[FN224]. See Hobby History, supra note 208; Bush History, supra note 213.

[FN225]. See Torbenson, Southwest rethinks strategy, supra note 202.

[FN226]. Id.

[FN227]. Press Release, Southwest Airlines, Southwest Airlines Discontinues Service at Houston George Bush Intercontinental (Jan. 27, 2005), available at <http://www.southwest.com> (last visited Apr. 1, 2005).

[FN228]. Torbenson, Southwest calling for repeal of Wright, supra note 170.

[FN229]. See Press Release, American Airlines, American Airlines Bargain Fares Have Driven Up D/FW Traffic By More Than 12 Percent (Feb. 7, 2005), available at [http://www.aa.com/content/amrcorp/pressReleases/2005\\_02/07\\_dfw\\_expansion.jhtml](http://www.aa.com/content/amrcorp/pressReleases/2005_02/07_dfw_expansion.jhtml) (last visited Feb. 9, 2005) [hereinafter AA Press Release].

[FN230]. See Associated Press, Soon-to-be vacated D/FW Gates Get Attention from Competitors, supra note 171.

[FN231]. AA Press Release, supra note 220.

[FN232]. Torbenson, Dispute Over Amendment Deep-rooted, supra note 204.

[FN233]. Fortress Hubs, Bureau of Transportation Statistics (2003), available at [http://www.bts.gov/programs/economics\\_and\\_finance/air\\_travel\\_price\\_index/2003\\_3rd\\_quarter/html/fortress\\_hubs.html](http://www.bts.gov/programs/economics_and_finance/air_travel_price_index/2003_3rd_quarter/html/fortress_hubs.html) (last visited Feb. 10, 2005).

[FN234]. Id.

[FN235]. Id.

[FN236]. Bajaj, Southwest Creeping on D.C. Radar, supra, note 3.

[FN237]. The Effect of Airport Restrictions on Air Fares: Hearing before the Subcomm. on Transp. and Related Agencies, Committee on Appropriations, 105th Cong. 3-4 (1997) (prepared statement of Steven A. Morrison, Professor of Economics, Northeastern University). The statement points out that the savings may be overstated

because the calculations presume that “Southwest-style” competition could be offered on all domestic routes at D/FW if Congress repealed the Wright Amendment. *Id.*

[FN238]. *Id.* at 4.

[FN239]. Morrison, *Airline Deregulation*, *supra* note 80, at 3.

[FN240]. *Id.*

[FN241]. Steven A. Morrison, Clifford Winston & Vikram Mahershri, *Competition and Welfare in the U.S. Airline Industry*, (Feb. 2005) (unpublished working paper, cited with permission from Clifford Winston) (on file with the author) [hereinafter *Competition and Welfare*].

[FN242]. *Id.*

[FN243]. *Id.*

[FN244]. *Id.* at 25.

[FN245]. Virginia Postrel, *Economic Scene; A Hurdle Faced by Southwest Airlines Shows Drawbacks of Protectionist Legislation*, *N.Y. Times*, Dec. 2, 2004, at C2.

[FN246]. See *Competition and Welfare*, *supra* note 241, at 3.

[FN247]. See *id.*

[FN248]. *Id.* at 31.

[FN249]. See *id.*

[FN250]. Goodwyn, *supra*, note 86.

[FN251]. *Crawling with Cynicism?* *Dallas Morning News*, Jan. 16, 2005, at D2.

[FN252]. *Id.*

[FN253]. *Dallas Mayor Sticks with Wright Amendment*, *Fort Worth Star-Telegram*, Knight Ridder/Tribune Business News, Jan. 7, 2005.

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