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## A Free Bird Sings the Song of the Caged: Southwest Airlines' Fight to Repeal the Wright Amendment

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# A FREE BIRD SINGS THE SONG OF THE CAGED: SOUTHWEST AIRLINES' FIGHT TO REPEAL THE WRIGHT AMENDMENT

JOHN GRANTHAM\*

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## I. INTRODUCTION

TO THE ORDINARY traveler, the Wright Amendment appears to be an antiquated law hindering competition and artificially boosting air fares in the Dallas-Fort Worth Metroplex.<sup>1</sup> Without this law, airlines would be able to fly to any destination of their choice from an airport in the heart of this major city.<sup>2</sup> Southwest Airlines worked hard to bias the public on the inequity of this restriction.<sup>3</sup> By organizing petitions, lobbying Congress, and designing an aggressive media campaign, the airline became heavily invested in solving an alleged problem that affects only one relatively small airport seven miles from downtown Dallas.<sup>4</sup> In reality, the limitation codifies years of aggressive litigation between several parties resolved equitably by a federal law, which, in actuality, fosters competition on a level playing field.<sup>5</sup> Although the restriction addressed only one small airport, it continues to have lasting effects on the entire state.<sup>6</sup> Changes to the amendment could not only affect service to many rural destinations, but could also significantly affect service at other large airports.<sup>7</sup> This law is about much more than

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<sup>1</sup> See Sw. Airlines Co., *The Wright Amendment-Repeal the Restrictions on Dallas Love Airport*, <http://www.setlovetfree.com> (last visited Jan. 7, 2007) [hereinafter *Repeal the Restrictions on Dallas Love Field*] (using these arguments to further influence the opinion of the average traveler).

<sup>2</sup> See *id.* (arguing the side for repeal and the benefits which would result).

<sup>3</sup> See *id.* (illustrating Southwest's motivation behind ending restrictions on their home airport).

<sup>4</sup> Sw. Airlines Co., *Dallas City and Airport Information*, <http://www.southwest.com/cities/dal.html> (last visited Oct. 30, 2007).

<sup>5</sup> See *infra* Part IV.C.

<sup>6</sup> See Todd Gillman, *Smaller Cities Back Wright Law*, DALLAS MORNING NEWS, Nov. 10, 2006, at D2 (reporting on the statewide impact on other cities affected by an attack on the Wright Amendment).

<sup>7</sup> See generally ECLAT CONSULTING, *REPEALING THE WRIGHT AMENDMENT—RISKS FACING SMALL COMMUNITIES AND THE DALLAS METROPLEX 22–24* (2005), available at [http://www.eclatconsulting.com/ppt\\_pdf/wright\\_complete.pdf](http://www.eclatconsulting.com/ppt_pdf/wright_complete.pdf) (showing the route differences between Hobby Airport and Love Field). As Dallas Love Field is restricted through the Wright Amendment, many passengers “double ticket” through other cities. See *id.* As Houston Hobby is one of the largest operations in the region for Southwest, it is likely that Dallas traffic through Hobby would decrease as a result of an open Dallas market. See *id.*; see also KEVIN L. FREIBERG & JACQUELYN A. FREIBERG, *NUTS!: SOUTHWEST AIRLINES’ CRAZY RECIPE FOR BUSINESS AND PERSONAL SUCCESS* 26 (1996) (detailing the original airline plan to alleviate the bind on Dallas Love by unofficially connecting passengers through Hobby).

the "Freedom to Fly."<sup>8</sup> It stems from decades of city rivalry, legal battles, and a powerful drive to gain a competitive edge.<sup>9</sup>

Although Southwest Airlines is headquartered in Dallas, a federal restriction typically referred to as the "Wright Amendment" forbids Dallas Love Field Airport service to a vast majority of destinations served by Southwest Airlines.<sup>10</sup> The twenty-six year old Wright Amendment emerged from a long-lasting battle over airfield service in the Dallas-Fort Worth Metroplex.<sup>11</sup> In an effort to calm this fury, Southwest remained silent on the issue of the amendment's repeal for over twenty years; however, the airline began a campaign at the end of 2004 to "Set Love Free."<sup>12</sup>

When Congress deregulated the airline industry in 1978, it ended a long standing federal policy of ensuring "sound development of an air transportation system."<sup>13</sup> The year 1978 marked a drastic shift. No longer would the government regulate where an airline could fly or how much it could charge for that service.<sup>14</sup> Although almost every airline suffered major losses as a consequence of deregulation, Congress let market forces prevail.<sup>15</sup> Even when the U.S. flag carrier, Pan American Airlines, suffered bankruptcy at the hands of deregulation, the government did nothing.<sup>16</sup> After the Airline Deregulation Act (ADA), Congress exercised its commerce regulatory powers in 1979 to pass the Wright Amendment.<sup>17</sup> Contrary to the federal

<sup>8</sup> See Sw. Airlines Co., Advertising, [http://www.southwest.com/images/ad\\_gallery/30th\\_trdmrk.ad.jpg](http://www.southwest.com/images/ad_gallery/30th_trdmrk.ad.jpg) (last visited Oct. 30, 2007).

<sup>9</sup> See *infra* Parts II–III.

<sup>10</sup> International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48–49 (1980) (the Wright Amendment).

<sup>11</sup> See, e.g., STANLEY H. SCOTT & LEVI H. DAVIS, A GIANT IN TEXAS: A HISTORY OF THE DALLAS-FORT WORTH REGIONAL AIRPORT CONTROVERSY, 1911-1974 5-15 (1974) (detailing the "preliminary skirmishes" which took place between the cities of Dallas and Fort Worth when the beginning of the aviation age created a chaotic and random placement of airports in neighboring cities).

<sup>12</sup> See Eric Torbenson, *Southwest Sets Course for Repeal of Amendment Protecting Dallas Airport*, DALLAS MORNING NEWS, Nov. 13, 2004, at 1A (recording the end of Southwest's neutrality on the Wright Amendment); see Repeal the Restrictions on Dallas Love Field, *supra* note 1.

<sup>13</sup> GEORGE WILLIAMS, THE AIRLINE INDUSTRY AND THE IMPACT OF DEREGULATION 6 (1993).

<sup>14</sup> See The Airline Deregulations Act of 1978, 49 U.S.C.A. § 41713 (West 2007) [hereinafter ADA] (deregulating the airlines from fare and route controls).

<sup>15</sup> See WILLIAMS, *supra* note 13, at 49 (showing that nearly all U.S. carriers were losing profits after deregulation).

<sup>16</sup> *Id.* at xii.

<sup>17</sup> See International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48–49 (1980).

policy of industry deregulation, this regulation passed with careful and thorough foresight, mandating government intervention to protect public policy. The idea behind airline deregulation was to create an open market of competition among the airlines.<sup>18</sup> When Congress carved the Wright Amendment as an exception to the widespread deregulation, it did so for reasons far beyond that of competition restrictions and low fare freedoms.<sup>19</sup> This policy remains as strong as the day of its inception, and although it appears stifling to the idea of open competition, the water runs deeper.

The Wright Amendment is settled law that has withstood countless challenges throughout the court system. Successful action to eliminate this law requires congressional approval of an additional law to repeal the Wright Amendment. The courts have carved a strong constitutional law that stands on the firm footing of the commerce clause and deference to a knowledgeable administrative agency. This Article explores the original and current purposes of the Wright Amendment restrictions on direct flights to and from Love Field, the current push to eliminate those restrictions, and the reasons why Congress should uphold the restrictions against any airline operating at Love Field. Beginning in Part II, this Article clarifies the litigious historical background which necessitated an equitable solution to the further mounting conflict unleashed by industry deregulation. Part III overviews the adaptation of federal airline industry deregulation to rectify the inequities in the North Texas area. Part IV asserts that courts have settled the law within the Wright Amendment, leaving only congressional repealment as an option for destruction. Part IV also argues the policy for upholding the restriction. Although the legal arguments have played out in the courts, any attack on the Wright Amendment goes against its still valid originating policies.

## II. HISTORICAL BACKGROUND

Prior to the enactment of the Wright Amendment, the cities of Dallas and Fort Worth "were engaged in a fierce, intense and sometimes bitter rivalry for the business of commercial avia-

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<sup>18</sup> See, e.g., WILLIAMS, *supra* note 13, at 10–11 (elaborating on the expectations of airline deregulation).

<sup>19</sup> See *infra* Part IV.C.

tion.”<sup>20</sup> Dallas and Fort Worth are two large cities with downtown business districts only thirty-one miles apart. This proximity creates issues of convenience no matter where you locate any one airport.<sup>21</sup> As each city designated its own separate airport, the closeness of the two airports resulted in “unnecessary expense to the carriers as well as the taxpayers and inadequate and incomplete air service to both cities.”<sup>22</sup> This long history of inter-city rivalry and dispute led to congressional enactment of the Wright Amendment.

#### A. THE BATTLE TO ESTABLISH AIRPORTS IN NORTH TEXAS

Even today, many cities have logistical problems when trying to implement new modes of transportation.<sup>23</sup> As public air travel became a reality, many state infrastructures were unprepared for the widespread arrival of the airplane.<sup>24</sup> Without any organization at the state level, Dallas and Fort Worth each formed city airports in the 1920s to manage the increased air traffic.<sup>25</sup> Fort Worth relied on Meacham Field,<sup>26</sup> and the Dallas City Council purchased Love Field after Fort Worth refused to co-sponsor a regional airport.<sup>27</sup> The short distance of thirty miles<sup>28</sup> separated the two commercial airports and created a contemptuous separation between Fort Worth and Dallas far greater than that short distance between the cities.

In 1940, Texas established the Texas Aeronautics Advisory Committee (TAAC) as a unified solution to the growing aviation world in a state “totally unprepared” for modern air travel.<sup>29</sup> When the TAAC examined the north Texas area, it suggested one unified airport for the two cities.<sup>30</sup> Planning for the loca-

<sup>20</sup> *City of Dallas v. Sw. Airlines Co.*, 371 F. Supp. 1015, 1019 (N.D. Tex. 1973), *aff’d*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

<sup>21</sup> *See id.*

<sup>22</sup> *Id.* at 1019–20.

<sup>23</sup> *See, e.g.,* Rad Sallee & Patrick Kurp, *When Will Commuter Rail Arrive?*, HOUSTON CHRONICLE, Sept. 12, 2005, at B2 (explaining the hurdles again Houston’s goal for city-wide rail travel).

<sup>24</sup> SCOTT & DAVIS, *supra* note 11, at 5.

<sup>25</sup> *Id.* at 2–3.

<sup>26</sup> *Id.* at 2. Meacham Field was built five miles north of downtown Fort Worth and named after ex-Mayor H.C. Meacham. *Id.*

<sup>27</sup> *Id.* at 3. Love Field, named after Moses Love, a young cavalry officer killed in 1914, originated as an Army Air Corp field in 1917, which was later privately purchased in 1918 and subsequently sold to Dallas in 1927. *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.*

tion of a unified airport proved to be an impossible task for Dallas and Fort Worth. After several years of negotiations, a location was selected midway between the two cities.<sup>31</sup> Arlington, Texas, the city located between the two rivals, became the new player, and the three cities engaged in "heated sessions on the exact location, management, and operation" of an airport to be called "Midway."<sup>32</sup> Eventually, the fighting resulted in both Dallas and Fort Worth withdrawing from the Midway negotiations, relying instead on their mutually outdated airports.<sup>33</sup> With help from the airlines and federal funding, Arlington independently built Midway Airport.<sup>34</sup> However, without the support of Dallas and Fort Worth to include Midway in their aviation plans, the airport was seen as useless after the government stopped using it after World War II ended in 1946.<sup>35</sup>

In 1947, Fort Worth purchased Midway from Arlington for one dollar.<sup>36</sup> In addition, Fort Worth purchased 378 acres south of Midway and announced its plan to spend over \$11,000,000 on making Midway a major airport.<sup>37</sup> Subsequently, Dallas fought hard to improve Love Field and taint the image of the new Greater Fort Worth International Airport (GFWIA), further driving the cities apart.<sup>38</sup> The Civil Aviation Authority (CAA), a federal agency, blessed Fort Worth's GFWIA as the regional airport and allocated \$340,000 of federal funds to have GFWIA serve the entire north Texas area.<sup>39</sup> Dallas officials began a congressional fight to halt federal money from going to an airport which one representative claimed "is to be built for the purpose of destroying Love Field."<sup>40</sup> After Dallas' failed attempt to convince Congress or the CAA to withdraw funding, Dallas unsuccessfully took the fight to the courts, which dismissed the case for lack of jurisdiction and deference to the agency's discre-

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 6-7.

<sup>33</sup> *Id.* at 9-11.

<sup>34</sup> *See id.* at 9-11.

<sup>35</sup> *See id.* at 11-12.

<sup>36</sup> *Id.* at 17.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* Several Dallas newspapers coined the name "Nineteen-Mile Airport" for GFWIA to remind Dallasites of the distant location of GFWIA. *See, e.g.,* Dorothea McGrath, *Airport Debate Boils Up Over Future Traffic*, DALLAS MORNING NEWS, Nov. 9, 1951, at part III, 1, 13.

<sup>39</sup> SCOTT & DAVIS, *supra* note 11, at 18.

<sup>40</sup> *Id.* at 19 (quoting *Hearing on Departments of State, Justice, Commerce, and Judiciary Appropriations Bill for 1949 Before the S. Comm. of Appropriations*, 81st Cong. 369 (1949)).

tion.<sup>41</sup> Although Dallas continued to seek improvements for Love Field, Fort Worth opened its airport renamed as "Carter Field" on April 24, 1953.<sup>42</sup> As the feud between Dallas and Fort Worth continued, the Civil Aeronautics Board (CAB) assumed the job of mediator between two old rivals.<sup>43</sup> For several years after Carter Field opened, the two airports fought for the CAB's approval of routes and market share of air travel in north Texas.<sup>44</sup> Love Field "instituted a vigorous improvement program" in 1954, and by 1958, Love Field prospered at the expense of quickly outdated and distant Carter Field.<sup>45</sup>

By the 1960s, the new jets of the era rocketed over the urban residential area surrounding Love Field.<sup>46</sup> While this signaled success and cued expansion for Love Field, the proximity of the proposed new runway, added noise, and safety concerns ignited a string of battles in the courts.<sup>47</sup> Love Field was losing its edge, and nearby residents, airlines, and the city of Fort Worth were all pushing for a regional airport solution.<sup>48</sup> After the CAB felt it could no longer keep both cities happy, it launched the Dallas-Fort Worth Regional Airport Investigation, in the interest of

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<sup>41</sup> See *id.* at 19–22; see *City of Dallas v. Rentzel*, 172 F.2d 122, 123 (5th Cir. 1949) (holding a lack of special statutory review jurisdiction required by the Administrative Procedure Act).

<sup>42</sup> SCOTT & DAVIS, *supra* note 11, at 23. The Fort Worth city council passed a resolution to name the terminal at GFWIA after Amon G. Carter, a local businessman responsible for funding the administration building. *Id.* at 21.

<sup>43</sup> See *id.* at 20. The CAB was created by the Civil Aeronautics Act of 1938 and was in charge of economic regulation of commercial air travel—setting fares and regulating routes. See The Civil Aeronautics Act of 1938, Pub. L. No. 706, 52 Stat. 973 (1938) (amended 1958).

<sup>44</sup> SCOTT & DAVIS, *supra* note 11, at 27–28. Within these disputes, Dallas sued the CAB when it granted Central Airlines a route that designated Carter Field as the airport serving the Dallas area, further drawing a line in the sand between the two competing airports. See *City of Dallas v. Civil Aeronautics Bd.*, 221 F.2d 501, 504 (1954) (allowing the CAB to designate a central airport if it was in the public interest to have a unified airport).

<sup>45</sup> SCOTT & DAVIS, *supra* note 11, at 34–35.

<sup>46</sup> See *id.* at 42–43.

<sup>47</sup> See *Donovan v. City of Dallas*, 377 U.S. 408, 409–414 (1964); *Atkinson v. City of Dallas*, 353 S.W.2d 275, 276–79 (Tex. Civ. App.—Dallas 1961, writ denied). These cases sought an injunction to restrain the city from building an additional runway at Love Field and from issuing bonds to cover the cost. See *Atkinson*, 353 S.W.2d at 276–79. *Donovan* was a continuation of the *Atkinson* case and effectively delayed Dallas from building the new runway until the case settled in 1964 after the U.S. Supreme Court reversed and remanded the case on secondary grounds. *Id.*; SCOTT & DAVIS, *supra* note 11, at 43.

<sup>48</sup> SCOTT & DAVIS, *supra* note 11, at 41–43.

public convenience and necessity.<sup>49</sup> The announcement of the investigation brought "optimistic and grateful expressions from Fort Worth" but "resentment and determined opposition from Dallas."<sup>50</sup>

Hearings in the investigation began on July 10, 1963, and over one year later, the board unanimously decided that the DFW area should be served through one regional airport.<sup>51</sup> Dallas and Fort Worth finally cooperated and agreed to build a regional airport located between the two cities.<sup>52</sup> The cities jointly selected an engineering firm to select the location of the new regional airport.<sup>53</sup> On September 25, 1965, a location just north of Carter Field<sup>54</sup> became breaking ground for a massive new airport that would later be named Dallas-Fort Worth International Airport (DFW).<sup>55</sup>

#### B. PLANNING FOR THE SUCCESS OF THE NEW AIRPORT

The cities of Dallas and Fort Worth created and staffed the new Dallas-Fort Worth Regional Airport Board that would oversee the creation of a new airport to serve both cities.<sup>56</sup> To finance the airport, the Board authorized the issuance of bonds through a 1968 Bond Ordinance.<sup>57</sup> Through the Dallas-Fort

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<sup>49</sup> *CAB Orders Hearings on Regional Airfield for Dallas Fort Worth: Local Leaders Oppose Inquiry*, DALLAS MORNING NEWS, Aug. 22, 1962, at 1. The order setting up the investigation stated that "[the CAB] intend[s] systematically to focus on each situation in which there is a potential public interest in providing service to closely located communities through a single airport," and explaining that the "use of multiple airports by the scheduled airlines tends to diminish the services to each airport and increase the cost of air transportation." *Id.* at 6.

<sup>50</sup> *Id.* at 1.

<sup>51</sup> SCOTT & DAVIS, *supra* note 11, at 46-49. The CAB first reached a decision that neither airport should be designated; however, after cooperation failed to solve the problem between the cities, the investigation was reviewed, and the CAB gave the cities 180 days to select a single facility. *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> At this time, Carter Field was actually referred to as Greater Southwest International Airport (GSIA)—renamed in 1962 as an attempt to pacify Dallas into approving GSIA as the regional airport. *Id.* at 43, 49-50.

<sup>55</sup> Carl Harris, *Airport Site Includes Greater Southwest; Overlaps County Line: Little Change Expected in Love Role*, DALLAS MORNING NEWS, Sept. 26, 1965, at 1A; *'Square' Has a Reason For Its 'X' Shape*, DALLAS MORNING NEWS, Nov. 8, 1970, at D1.

<sup>56</sup> SCOTT & DAVIS, *supra* note 11, at 57. The Dallas-Fort Worth Regional Airport Board contained eleven members staffed by both cities in proportion to their relative population—Dallas having seven members and Fort Worth having four. *Id.*

<sup>57</sup> See *City of Dallas v. Sw. Airlines Co.*, 371 F. Supp. 1015, 1020 (N.D. Tex. 1973) (concluding in a victory for Southwest Airlines continued operation at

Worth Regional Airport Joint Revenue Bonds, both cities intended to:

. . . take such steps as may be necessary, appropriate and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective phase-out at Love Field, Redbird, GSIA and Meacham Field, of any and all Certificated Air Carrier Services, and to transfer such activities to [DFW] effective upon the beginning of operations at the [DFW] airport.<sup>58</sup>

In taking such substantial steps to create a regional airport, the Bond Ordinance had to carry with it the intent to bind both cities in the mutual endeavor to ensure that no previous rivalry<sup>59</sup> between the cities would hinder the success of DFW.<sup>60</sup> In accordance with the Bond Ordinance and its stated objectives, the Board executed a Letter of Agreement with every airline<sup>61</sup> then serving the Dallas-Fort Worth area.<sup>62</sup> The agreements stated that each airline would "move all of its Certificated Air Carrier Services serving the Dallas-Fort Worth area to [DFW]" in accordance with the 1968 Bond Ordinance.<sup>63</sup> The agreements ensured that sufficient revenues would be available to operate DFW, and because every airline was required to move, the cities of Dallas and Fort Worth attempted to shutdown all "Certificated Air Carrier Services"<sup>64</sup> at all other area airports.<sup>65</sup> The

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Love Field), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974) (quoting Dallas, Tex., Regional Airport Concurrent Bond Ordinance 12,352 § 9.5 (1968)).

<sup>58</sup> *Id.* (quoting Dallas, Tex., Regional Airport Concurrent Bond Ordinance 12,352 § 9.5A (1968)).

<sup>59</sup> U.S. District Court Judge William M. Taylor, Jr. described the rivalry between the two cities as "fierce, intense and sometimes bitter rivalry for the business of commercial aviation and commercial air carriers." *Sw. Airlines Co.*, 371 F. Supp. at 1019.

<sup>60</sup> The Bond Ordinance further stated that neither city would implement any policy or action which would be "competitive with or in opposition to the optimum development of [DFW]." Eric A. Allen, Comment, *The Wright Amendment: The Constitutionality and Propriety of the Restrictions on Dallas Love Field*, 55 J. AIR L. & COM. 1011, 1015 (1990) (quoting Dallas, Tex., Regional Airport Concurrent Bond Ordinance 12,352 § 9.5B (1968)).

<sup>61</sup> The eight airlines serving the Dallas area at this time were American Airlines, Braniff Airways, Continental Airlines, Delta Air Lines, Eastern Air Lines, Frontier Airlines, Ozark Air Lines, and Texas International Airlines. *See Sw. Airlines Co.*, 371 F. Supp. at 1020–21 n.1.

<sup>62</sup> *Id.* at 1020–1021.

<sup>63</sup> *Id.* at 1021.

<sup>64</sup> *See id.* at 1027 (discussing "Certificated Air Carrier Services" as it is defined in the 1968 Bond Ordinance). A general definition would include an air carrier

Board did not intend to render the competing airports useless, but rather this measure restricted the use of the area airports to operations that fell outside of the air carrier category.<sup>66</sup> These operations, carved out by the Bond Ordinance, allowed the area airports to continue some revenue generating operations rather than subject each city to waste the substantial investments placed in their respective airports. The continued operation of Love Field and the Board's vulnerable attempt to carve out a use for the airport was soon to become the target of a new carrier—Southwest Airlines.

### C. THE UNEXPECTED BATTLE FOR AIRPORT CONSOLIDATION

In 1966, attorney Herbert Kelleher<sup>67</sup> was approached by Rolin King, a previous client, with an idea to start a regional airline to serve the Texas cities of Dallas, San Antonio, and Houston.<sup>68</sup> On March 15, 1967, Kelleher incorporated Southwest Airlines, Co. and began raising capital to begin air service.<sup>69</sup> Prior to 1978, federal and state governments regulated the airline industry by controlling fares, routes, and airport entry.<sup>70</sup> Thus, in order to begin service, Kelleher filed the airline's application to fly between the three cities with the Texas Aeronautics Commission (TAC).<sup>71</sup> After a few startup delays, Southwest began service on

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that was licensed by a governmental authority to conduct a scheduled service. *See, e.g.*, 14 C.F.R. §§ 119.1–119.3 (2007) (stating the most recent federal definitions explaining this term).

<sup>65</sup> *Sw. Airlines Co.*, 371 F. Supp. at 1020–21.

<sup>66</sup> *See id.* at 1028 (listing examples of the types of operations that fall outside of “Certificated Air Carrier Services”); *but cf.* Harris, *supra* note 55, at 1A (quoting Dallas Mayor Johnson’s expectation that Love Field will be “even wider open (in usage) after [Dallas] get[s] the new airport”).

<sup>67</sup> At this time, Herb Kelleher was an attorney at Matthews, Nowlin, Macfarlane & Barrett. Reference for Bus., Biography of Herb Kelleher, <http://www.referenceforbusiness.com/biography/F-L/Kelleher-Herb-1931.html> (last visited Oct. 30, 2007).

<sup>68</sup> FREIBERG & FREIBERG, *supra* note 7, at 15.

<sup>69</sup> The airline was originally incorporated as Air Southwest Co. and later changed to Southwest Airlines. *Id.* at 16.

<sup>70</sup> *See* The Airline Deregulations Act of 1978, 49 U.S.C.A. § 41713 (West 2007) (deregulating the airlines from fare and route controls).

<sup>71</sup> As Southwest intended to provide an air service which operated wholly within the state of Texas, it was able to obtain a certificate from the state regulatory agency rather than the federal CAB. FREIBERG & FREIBERG, *supra* note 7, at 16, 22; *see also Sw. Airlines Co.*, 371 F. Supp. at 1021 (discussing the certificate issued by the TAC for Southwest’s Dallas operation).

June 18, 1971.<sup>72</sup> With DFW still under construction, Love Field remained the only commercial airport serving the Dallas area.<sup>73</sup> As the earlier Letters of Agreement from the Dallas-Fort Worth Airport Board were executed in 1970, Southwest was not bound by the agreements the other carriers signed as they had not yet begun service in the Dallas area.<sup>74</sup> In October of 1971, Southwest Airlines informed the DFW Board that it had no plan to move to the new airport in accordance with the 1968 Bond Ordinance.<sup>75</sup> Although Southwest participated earlier in planning sessions to comply with the ordinance, it withdrew from those sessions and refused to execute a similar letter agreement with the Board. Every other airline then serving Dallas agreed to relocate at the request of the city.<sup>76</sup> There was an obvious advantage for Southwest to be the only carrier at the more convenient Love Field airport, as the airline intended to “cater[ ] to business travelers who wanted to get into and out of the city quickly.”<sup>77</sup> One month later, as Southwest was given the liberty to select any airport for service through the TAC’s certification,<sup>78</sup> the airline moved from Houston’s Intercontinental Airport to the closer and vacant Hobby Airport when the airline was proving unsuccessful in drawing passengers and was “bleeding money.”<sup>79</sup> Airlines moving to DFW were “outraged at [Southwest’s] refusal to join them at the new regional airport.”<sup>80</sup> Many believed that Southwest took an unfair market advantage, and that the advantage was at the expense of two cities that painstakingly planned to unite at one airport compelled by the CAB’s Regional Airport Investigation.<sup>81</sup> Over a year before DFW

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<sup>72</sup> Sw. Airlines Co., Southwest Airlines Fact Sheet, [http://www.southwest.com/about\\_swa/press/factsheet.html](http://www.southwest.com/about_swa/press/factsheet.html) (last visited Oct. 31, 2007).

<sup>73</sup> See Doug Domeier, *DFW Airport Ready for Dedication*, DALLAS MORNING NEWS, Sept. 22, 1973, at A1 (announcing the official opening of Dallas-Fort Worth International Airport).

<sup>74</sup> See *City of Dallas v. Sw. Airlines Co.*, 371 F. Supp. 1015, 1020 (N.D. Tex. 1973), *aff’d*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

<sup>75</sup> *Id.* at 1021.

<sup>76</sup> *Id.*

<sup>77</sup> FREIBERG & FREIBERG, *supra* note 7, at 22–23.

<sup>78</sup> See, e.g., *Sw. Airlines Co.*, 371 F. Supp. at 1021 (stating that the TAC authorized the airline to serve the Dallas-Fort Worth region through “any” airport in the area).

<sup>79</sup> FREIBERG & FREIBERG, *supra* note 7, at 22–23.

<sup>80</sup> *Id.* at 24.

<sup>81</sup> See *Sw. Airlines Co.*, 371 F. Supp. at 1020 (detailing the CAB’s order giving the cities 180 days to agree on a single airport plan or the CAB would regulate the carriers to conduct service through an airport of the CAB’s choice).

opened its doors, Dallas, Fort Worth, and the Dallas-Fort Worth Regional Airport Board sued Southwest Airlines seeking a declaratory judgment stating their right to exclude Southwest from Love Field once DFW airport opened.<sup>82</sup> The U.S. Court for the Northern District of Texas ruled that Southwest Airlines could not be excluded from Love Field operations.<sup>83</sup> As Southwest Airlines operated only within Texas and was certificated by the TAC, any CAB order to move to a regional airport was preempted by the State's right to control a wholly *intrastate*<sup>84</sup> airline.<sup>85</sup> The court held that because Southwest was the only TAC-certified intrastate airline operating at Love Field, and therefore the only intrastate airline restricted by the Bond Ordinance, the Ordinance was "unjustly discriminatory."<sup>86</sup> Herb Kelleher, along with a team of other attorneys, won the right to reject the request of Dallas, Fort Worth, and their airport board to have Southwest join the other airlines serving the Dallas area at DFW.<sup>87</sup>

### III. THE EXCEPTION TO DEREGULATION

#### A. THE DEREGULATION OF AIRLINE TRAVEL

The CAB's Dallas-Fort Worth Regional Airport Investigation of 1963 established that a single airport would be utilized in the Dallas area.<sup>88</sup> As the CAB held the interstate strings, Southwest obtaining the right to conduct interstate travel from Love Field would be impossible. Southwest's evasion of CAB regulation

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<sup>82</sup> *Id.* at 1018–21.

<sup>83</sup> *Id.* at 1034.

<sup>84</sup> Intrastate refers to operations which are only entirely within the borders of a single state and are outside the authority of federal powers. *See* BLACK'S LAW DICTIONARY 285 (8th ed. 2004) (defining intrastate and interstate commerce); *see also* U.S. CONST. art. I, § 9, cl. 3.

<sup>85</sup> *See* Robert B. Gilbreath & Paul C. Watler, *Perimeter Rules, Proprietary Powers, and The Airline Deregulation Act: A Tale of Two Cities . . . And Two Airports*, 66 J. AIR L. & COM. 223, 226 (stating that Southwest's intrastate operations were exempt from federal regulations).

<sup>86</sup> *Sw. Airlines Co.*, 371 F. Supp. at 1028. Intrastate operations authorized by the CAB were not included in the Bond Ordinance which the court felt discriminated against Southwest even though each CAB carrier was bound by the Letters of Agreement not to operate a service at Love. *See id.* at 1027 (holding that the 1968 Bond Ordinance was only applicable to those intrastate services authorized by the TAC—namely only Southwest at that time).

<sup>87</sup> *Id.* at 1034.

<sup>88</sup> *See supra* text accompanying note 51.

would also bind Southwest Airlines to intrastate service.<sup>89</sup> However, when Congress passed the 1978 ADA,<sup>90</sup> Southwest seized the opportunity of federal deregulation to expand into markets that the CAB would not previously authorize.<sup>91</sup> Immediately, Southwest applied for the right to launch direct service from Love Field to New Orleans through the ADA's automatic market entry program.<sup>92</sup> In granting the application, the CAB rejected the argument that the ADA allowed a city such as Dallas, which owns Love Field, to restrict the services rendered at that airport as a right granted to the proprietor.<sup>93</sup> Congress reacted strongly to the CAB's decision to allow Southwest Airlines to begin an interstate service from Love Field, and in one day of deliberation, the U.S. House of Representatives, with Congressman Jim Wright, then House Majority Leader, banned all interstate air service into and out of Love Field through an amendment to the International Air Transportation Competition Act.<sup>94</sup> As the amendment was headed to the Senate for approval, Herb Kelleher and one of Washington's foremost lobbyists, J.D. Williams, obtained Senate influence to ease restrictions in the amendment.<sup>95</sup> Eventually, both houses adopted a relaxed version of the original amendment, eventually referred to as the "Wright Amendment."<sup>96</sup> The Wright Amendment provides:

(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation,

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<sup>89</sup> See *Sw. Airlines Co.*, 371 F. Supp. at 1021-22 (holding that Southwest was not subject to the 1964 CAB ruling that all regulated carriers must be moved to a single airport).

<sup>90</sup> 49 U.S.C.A. § 41713 (West 2007). The ADA essentially removed government control from the airline industry and stripped the CAB from its power to regulate routes and fares. *Id.*; see generally WILLIAMS, *supra* note 13 (detailing the significant market shift that occurred when the ADA was enacted).

<sup>91</sup> See FREIBERG & FREIBERG, *supra* note 7, at 25 (showing how Southwest "quickly took advantage of the interstate freedom afforded by deregulation").

<sup>92</sup> See Gilbreath & Watler, *supra* note 85, at 226; see also Allen, *supra* note 60, at 1017 (explaining the Automatic Market Entry program as one which "allowed carriers to enter certain markets prior to complete route deregulation"). The application to allow Southwest to begin interstate travel from Love Field was opposed "vehemently" by supporters of DFW Airport. FREIBERG & FREIBERG, *supra* note 7, at 25.

<sup>93</sup> See *Cramer v. Skinner*, 931 F.2d 1020, 1023 (5th Cir. 1991), *cert. denied*, 502 U.S. 907 (1991) (providing background to a constitutional attack on the Wright Amendment).

<sup>94</sup> FREIBERG & FREIBERG, *supra* note 7, at 25; see Allen, *supra* note 60, at 1019.

<sup>95</sup> FREIBERG & FREIBERG, *supra* note 7, at 27.

<sup>96</sup> See generally International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980).

the Civil Aeronautics Board, nor any other officer 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 56 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 the State of Texas from Love Field on November 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.<sup>97</sup>

The Wright Amendment contains three sections, each having some effect on the operation of Love Field Airport. Section (a) sets out the general prohibition of all interstate flights from Love Field as originally intended by its first draft in the House of Representatives.<sup>98</sup> Section (a) then provides two exceptions for interstate travel which do not apply to Southwest Airlines – (1) chartered air transportation<sup>99</sup> and (2) commuter airlines operating aircraft with a passenger capacity of fifty-six passengers or

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Charter air transportation is a travel arrangement in which transportation is hired by and for one specific group of people. *Id.*

less.<sup>100</sup> Section (b) provides an exception that only applied to Southwest's Love Field-New Orleans route; however, that exception is made redundant by the inclusion of Louisiana in section (c).<sup>101</sup>

The restrictions within section (c) are what are traditionally thought of as the "Wright Amendment;"<sup>102</sup> however, this term includes both of the limitations in sections (a) and (b).<sup>103</sup> These sections provided a significant interstate exception to Southwest in that they allowed travel, withstanding additional restrictions within section (c), to four named states<sup>104</sup>—Louisiana, Arkansas, Oklahoma, and New Mexico.<sup>105</sup> Section (c) restricts airlines utilizing section (c) by stating that the carrier may not provide "any through service or ticketing with another carrier" and may not offer<sup>106</sup> its own through service from a point outside of those states.<sup>107</sup>

At the time of its enactment, it is likely that Southwest approved of the outcome in the Wright Amendment. Prior to deregulation, Southwest had boxed itself into the state of Texas from Love Field by refusing to comply with the CAB order and requests of the cities of Dallas and Fort Worth and by relying wholly on the authority of the TAC to conduct its Love Field service.<sup>108</sup> Faced with a House of Representatives who preferred to restrict Southwest's Love Field operation to the pre-deregula-

<sup>100</sup> *Id.* At the time, Southwest Airlines' entire aircraft fleet was comprised of the Boeing 737-200 and was configured with a passenger capacity of over 100. See FREIBERG & FREIBERG, *supra* note 7, at 19.

<sup>101</sup> International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980).

<sup>102</sup> The "Wright Amendment" is also sometimes referred to as the "Love Field Amendment." See *Cramer v. Skinner*, 931 F.2d 1020, 1022 (5th Cir. 1991) (referring to § 29 of the International Air Transportation Competition Act of 1979 as the "Love Field Amendment").

<sup>103</sup> See *id.* at 1023 (boiling the Wright Amendment down to the prohibition of airlines from "offering single ticket interstate service from Love Field except to the four states contiguous to Texas").

<sup>104</sup> These states are commonly referred to as the "Love Field Service Area." *Id.*

<sup>105</sup> See International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980).

<sup>106</sup> The term "offer" or "offer for sale" within the Wright Amendment Section (c) effectively prevents Southwest from advertising or offering a passenger service which would connect at a Love Field Service Area destination and continue on to a destination outside of that area. See, e.g., Allen, *supra* note 60, at 1011 (introducing a scenario which is a direct result of this "offer" language).

<sup>107</sup> International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980).

<sup>108</sup> See *supra* Part II.C.

tion boundary lines of the State, when the Wright Amendment included provisions for interstate travel, the airline seemed supportive of the Wright Amendment.<sup>109</sup> Southwest was now able to operate a "safe-harbor" at convenient Love Field while other now deregulated airlines were bound under the Letter Agreements at DFW.<sup>110</sup>

## B. DEFINING THE WRIGHT AMENDMENT RESTRICTIONS

Southwest Airlines quickly expanded its service into the surrounding cities.<sup>111</sup> Described as "dreadfully framed" by one court, the need for court interpretations to define the scope of the Wright Amendment emerged.<sup>112</sup> Because Love Field was a far more convenient airport for Dallas residents, Continental Airlines saw an opportunity to utilize both DFW and Love in the deregulated era.<sup>113</sup> After a request by Continental Airlines to start service between Love Field and Houston, Texas, the Department of Transportation (DOT) conducted an "informal enforcement investigation."<sup>114</sup> Southwest Airlines strongly urged the DOT to prevent Continental from encroaching on their turf;<sup>115</sup> however, the DOT interpreted the amendment favorably

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<sup>109</sup> See, e.g., *Hearing on the Wright Amendment Before the Subcomm. on Aviation, S. Comm. on Commerce, Sci. & Transp.*, 109th Cong. 8 (2005) (statement of Kevin E. Cox, Chief Operating Officer, Dallas/Fort Worth International Airport) (providing evidence that the Wright Amendment was "language which Southwest Airlines supports as a compromise on the Love Field interstate service controversy" and quoting a letter drafted by J.D. Williams to Congress on December 11, 1979); see *id.* (stating Herb Kelleher was reported by the Fort Worth Star-Telegram as having accepted the "final resolution" in the long battle against service at Love Field).

<sup>110</sup> Statement of Kevin Cox, *supra* note 109, at 11.

<sup>111</sup> See FREIBURG & FREIBURG, *supra* note 7, at 26 (illustrating the strategy Southwest used to expand its network post-Wright).

<sup>112</sup> See, e.g., *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1446 (D.C. Cir. 1988).

<sup>113</sup> See *id.* at 1445-46.

<sup>114</sup> See Love Field Amendment Proceeding, Order No. 85-12-81, 51 Fed. Reg. 467, 467 (Dec. 31, 1985) (defining the scope of the Wright Amendment).

<sup>115</sup> See generally *Sw. Airlines Co., Response to Order 85-7-65*, Filed in the Love Amendment Proceeding Before the Department of Transportation (Aug. 23, 1985) (stating Southwest's desire to keep out a competing larger carrier). Southwest stated:

The proper uses of Love Field clearly do not include the sort of service contemplated by Continental. The airline intends to begin with seven daily round trips to its hub at Houston Intercontinental, from which it flies to all sections of the country. But the congressionally assigned role of large interlining carriers is to compete in the Dallas/Fort Worth area by suing the airport that was built from

for Continental Airlines.<sup>116</sup> The DOT's interpretation allowed air carriers to "double ticket"<sup>117</sup> passengers to destinations beyond the Love Field Service Area; however, it restricted the airline from advertising this service.<sup>118</sup> As Southwest now met competition at vacant Love Field, it joined the DFW Board and cities in a petition to the D.C. Circuit to review the interpretation of the DOT.<sup>119</sup> Southwest argued that the Wright Amendment barred an airline like Continental from operating at Love Field because Continental was an "interlining"<sup>120</sup> carrier, and as such, was restricted under section (c)(1) of the Wright Amendment.<sup>121</sup> Southwest's interpretation would prevent competition

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them at their request—DFW Regional. They have deliberately been precluded from providing interstate transportation at Love Field, and the Department should so declare. .

*Id.* at 12.

<sup>116</sup> Love Field Amendment Proceeding, Order No. 85-12-81, 51 Fed. Reg. at 467. The Department of Transportation concluded that:

[b]ased on its review of the comments and other relevant materials, including the Amendment's legislative history, the Department has decided that: (1) Continental's proposed service between Love Field and Houston, Texas, does not violate the Love Field Amendment; (2) the Amendment does not apply to flights by intrastate carriers or intrastate service by "air carriers"; (3) upon the request of passengers, Continental or its agents may sell "double tickets" to passengers continuing on a different aircraft and flight beyond an authorized destination from Love Field; (4) however, neither Continental nor its agents may list in any manner, including a computer reservation system, a flight from Love Field as a "connection" to a point beyond the Love Field authorized service area; (5) Delta, or any other airline, may list in its computer reservation system flights from Love Field by a certificated carrier using small aircraft in the same manner a commuter carrier flights; and (6) carriers may provide service between Love Filed and other points within the state of Texas so long as they do not use this service to avoid the Love Field Amendment's restrictions on interstate air service.

*Id.*

<sup>117</sup> See *Cont'l Air Lines*, 843 F.2d at 1455. The court stated that the DOT definition of double ticketing

involves the purchase by a passenger of two separate tickets: one for service from Love Field to a point within Texas or the four adjacent states (Love Field Service Area), and a separate, second ticket for service from that destination to a point beyond the authorized Love Field Service Area.

*Id.* (quoting the DOT brief to the court).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> An interlining carrier is one which has connecting flights with other airlines. *Id.*

<sup>121</sup> *Id.* at 1447.

at Love Field from larger airlines since most major carriers were interlined. When Southwest fought so hard in the past to be the only airline at Love Field, it was clear why Southwest would want such a broad restrictive interpretation of the Wright Amendment.<sup>122</sup> Ironically, Southwest found itself supporting the DFW board and did not want the courts to permit Love access to the “largest and best established [airlines] in the country.”<sup>123</sup> Ultimately, the U.S. Court of Appeals upheld the DOT’s interpretation of the Wright Amendment and allowed Continental and other airlines the right to use Dallas Love Field.<sup>124</sup>

Continental’s request to the DOT established clarity to the issue of “double ticketing” as a measure around the Love Field Service Area.<sup>125</sup> The DOT order stated that an airline could not in any way solicit or advertise a connecting service outside of the Love Field Service or provide a reduced fare when a passenger purchased “double tickets.”<sup>126</sup> At the time, Continental provided non-stop service from Houston to Miami, Florida.<sup>127</sup> The new DOT interpretation would allow Continental to begin a Love Field–Houston service.<sup>128</sup> A passenger could, therefore, fly from Love Field to Miami, Florida using a “double ticket.” However, the DOT interpretation requires that the passenger purchase two tickets and operate each leg as its own flight, col-

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<sup>122</sup> See generally Brief of Petitioner Sw. Airlines, Co., *Cont’l Air Lines, Inc. v. Dep’t of Transp.*, 843 F.2d 1444 (D.C. Cir. 1988) (Nos. 86-1026, 86-1039, 86-1040). Southwest was likely pleased with the non-competitive Wright Amendment arrangement as it argued that:

Beyond doubt, DOT’s construction of the law will make these economic and social policies, in this Court’s words, ‘more difficult of fulfillment.’ Permitting wider access to Love Field by a larger group of airlines which includes not merely short-haul specialist carriers but some of the largest and best established firms in the country can only exacerbate those local concerns which prompted Congress to enact this unique solution to a unique problem. It will tend toward replacing the fragile peace achieved through compromise with rancor and divisiveness which plagued the courts, Congress and the parties for so many years.

*Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Cont’l Air Lines*, 843 F.2d at 1444, 1449 (deferring to the DOT’s reasonable interpretations of the Wright Amendment under the *Chevron* standard).

<sup>125</sup> *Id.* at 1449.

<sup>126</sup> See Allen, *supra* note 60, at 1022 (explaining the restrictions of “double tickets”).

<sup>127</sup> Airhive.com, Continental Timetable, <http://www.airhive.com/SITE%20PAGES/TIMETABLES-CONTINENTAL.html> (last visited Oct. 30, 2007).

<sup>128</sup> *Cont’l Air Lines*, 843 F.2d at 1444.

lecting bags in Houston and checking them again for the flight to Miami. As Continental could not discount this double ticket in any way, this measure was both inconvenient and expensive.<sup>129</sup>

An additional provision of the Wright Amendment that awaited interpretation was section (a)(2).<sup>130</sup> Although Southwest argued that this exception should be read as two restrictive clauses,<sup>131</sup> the court dismissed this in favor of the DOT interpretation.<sup>132</sup> Airlines, and even Congress, would soon find a way to expand this interpretation, even at the protest of the DOT.

### C. EXPANDING THE WRIGHT AMENDMENT

Upset that it was not included within the Love Field Service Area, the state of Kansas filed suit to have the Wright Amendment invalidated on constitutional grounds in hopes of luring Southwest Airlines to their state.<sup>133</sup> The case was dismissed on summary judgment,<sup>134</sup> but Kansas would soon bring the Wright Amendment back to the floors of Congress.<sup>135</sup>

Meanwhile, Legend Airlines announced plans to manipulate the seating configuration of its aircraft to comply with the fifty-six seat exception within section (c)(1) of the Wright Amendment.<sup>136</sup> When Legend sought the approval of the DOT, the department issued a ruling that "unless the aircraft is originally configured to hold fifty-six or fewer passenger, the exception does not apply."<sup>137</sup> Hope was not lost, as one year later both

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<sup>129</sup> See Allen, *supra* note 60, at 1011.

<sup>130</sup> Section (a)(2) provides an exception for "air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less." International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980).

<sup>131</sup> Southwest argued that the exception contains two elements—(1) that the airline be a commuter airline, and (2) that it also operate aircraft with 56 seats or fewer. *Cont'l Air Lines*, 843 F.2d at 1454. The DOT interpretation simply reads one element which defines commuter airline—56 passengers or less. *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See generally *Kansas v. United States*, 797 F. Supp. 1042, 1042 (D.D.C. 1992), *aff'd*, 16 F.3d 436 (D.C. Cir. 1994) (claiming standing through the added expense of double ticketing, and asserting violations of the Port Preference Clause, First Amendment rights, and the right to interstate travel).

<sup>134</sup> *Id.* at 1042.

<sup>135</sup> See *infra* note 139 and accompanying text.

<sup>136</sup> See *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 794 (5th Cir. 2000), *cert. denied*, 530 U.S. 1274 (2000); see also International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980).

<sup>137</sup> *Am. Airlines*, 202 F.3d at 794.

Kansas and Legend Airlines would find relief through the 1997 passage of the "Shelby Amendment."<sup>138</sup>

Motivated by the low fares Southwest Airlines provided, Kansas and other state legislators, not pleased with the results in the courts, introduced an amendment that would expand on the restrictions of the Wright Amendment.<sup>139</sup> Senator Richard Shelby of Alabama, among those legislators offended by what he thought were high fares in his state, spearheaded an addition to the Wright Amendment that would add five additional states to the Love Field Service Area.<sup>140</sup> By the time it received approval from both Houses, the "Shelby Amendment" contained only three states—Kansas, Alabama, and Mississippi.<sup>141</sup> In addition, the amendment contained clarification which overturned the DOT's interpretation of the fifty-six seat restriction.<sup>142</sup> As Legend Airlines was previously prevented from conducting their reconfigured aircraft service from Love, the clarification allowed the seat reconfiguration to bypass any congressional restrictions.<sup>143</sup> The new law effectively allowed any airline, including

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<sup>138</sup> See Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 105-66, § 337, 111 Stat. 1425, 1447 (1997).

<sup>139</sup> See *id.*

<sup>140</sup> Catalina Camia, *Shelby Wants Love Field Limits Expanded by 5 States*, DALLAS MORNING NEWS, Oct. 1, 1997, at 3D.

<sup>141</sup> Catalina Camia, *Congress Votes to Make Change at Love Field: Wright Amendment Eased to Extend Nonstop Service*, DALLAS MORNING NEWS, Oct. 10, 1997, at 1D.

<sup>142</sup> See *id.*; see also *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1445 (D.C. Cir. 1988).

<sup>143</sup> *Congress Votes to Make Change*, *supra* note 141, at 1D; see also § 337, 111 Stat. at 1447 (1997). The Wright Amendment was amended as follows:

(a) In General . . . For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.

(b) Inclusion of Certain States in Exemption. The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48 et seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas."

(c) Safety Assurance. The Administrator of the Federal Aviation Administration shall monitor the safety of flight operations in the Dallas-Fort Worth metropolitan area and take such actions as may be necessary to ensure safe aviation operations. If the Administrator must restrict aviation operations in the Dallas-Fort Worth area to ensure safety, the Administrator shall notify the House and Senate Committees on Appropriations as soon as possible that an un-

Southwest,<sup>144</sup> to operate most fifty-six seat configured aircraft to destinations outside the Love Field Service Area.<sup>145</sup>

Although Fort Worth and Dallas had maintained an amicable relationship in comparison to their earlier history, relations began to deteriorate after the passage of the Shelby Amendment.<sup>146</sup> As Fort Worth likely saw the imminent decline of services available at its closest airport, the city filed suit against Dallas and others claiming that allowing Dallas to utilize the additions of the Shelby Amendment violated the 1968 Bond Ordinance.<sup>147</sup> Eventually, the state court ruled in favor of Fort Worth in summary judgment requiring Dallas to prohibit the expanded services allowed through the Shelby Amendment.<sup>148</sup> Subsequently, the DOT commenced its own proceeding to address the same issues before the state court.<sup>149</sup> In a ruling that essentially directly opposed the state court's decision, the DOT ruled:

(i) the City of Fort Worth may not enforce any commitment by the City of Dallas . . . to limit operations at Love Field authorized by federal law, and the proprietary powers of the City of Dallas do not allow it to restrict services at Love Field authorized by federal law; (ii) the ability of the City of Dallas to limit the type of airline service operated at Love Field is preempted by the Wright and Shelby Amendments; (iii) any airline operating aircraft with a passenger capacity of no more than 56 passengers and a gross aircraft weight of no more than 300,000 pounds may operate service with any type of equipment and flights of any length from or

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safe airspace management situation existed requiring the restrictions.

§ 337, 111 Stat. at 1447 (1997).

<sup>144</sup> Southwest Airlines operates a fleet entirely composed of various versions of the Boeing 737. Sw. Airlines Co., Fact Sheet, [http://www.southwest.com/about\\_swa/press/factsheet.html](http://www.southwest.com/about_swa/press/factsheet.html) (last visited Oct. 30, 2007). The largest version of this aircraft at its heaviest weight falls well short of the 300,000 pound limit. See Boeing Co., 737 Airplane Description, [http://www.boeing.com/commercial/737family/pf/pf\\_900ERtech.html](http://www.boeing.com/commercial/737family/pf/pf_900ERtech.html) (last visited Oct. 30, 2007) (giving the technical description of the Boeing 737 aircraft).

<sup>145</sup> See Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 105-66, § 337, 111 Stat. 1425, 1447 (1997).

<sup>146</sup> *In re City of Dallas*, 977 S.W.2d 798, 801 (Tex. App.—Fort Worth 1998, pet. denied).

<sup>147</sup> See *id.*

<sup>148</sup> See Gilbreath & Watler, *supra* note 85, at 233 (interpreting City of Fort Worth, Texas, No. 48-171109-97 (48th Dist. Ct., Tarrant County, Tex. Oct. 15, 1998)).

<sup>149</sup> See *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 794 (5th Cir. 2000), cert. denied, 530 U.S. 1274 (2000).

to Love Field, notwithstanding any claim that such service violates any agreement between the Cities of Dallas and Fort Worth; (iv) the Dallas-Fort Worth International Airport Board may not enforce any contract provision that allegedly bars an airline from operating interstate airline service at another airport in the Dallas-Fort Worth metropolitan area; and (v) any airline may offer through service between Love Field and any other point to passengers using a flight between Love Field and another point within Texas operated under subsection (a) of the Wright Amendment, as amended by the Shelby Amendment. . . .<sup>150</sup>

With two differing rulings, Fort Worth appealed the DOT ruling to the Fifth Circuit,<sup>151</sup> while Dallas appealed the state court lawsuit to the Court of Appeals for the Second District of Texas.<sup>152</sup> Although it looked as though both courts would again reach separate opinions, the Texas court issued a staying order to await the opinion of the Fifth Circuit.<sup>153</sup> The DOT order emerged virtually untouched by the Fifth Circuit's opinion.<sup>154</sup> Essentially, the Fifth Circuit, like the DOT, held that the preemption provision of the ADA precluded the 1968 Bond Ordinance's interference of the Wright and Shelby Amendments.<sup>155</sup> In addition, the court stressed that although Dallas owned the airport, proprietary powers do not extend to areas which infringe on the congressional right to regulate commerce.<sup>156</sup> The court cited cases which deferred to proprietary powers; however, it then distinguished the fact patterns from the issues at Love Field.<sup>157</sup> Fundamentally, this took any teeth from the 1968 Bond Ordinance that restricted Dallas from allowing Love Field to operate in accordance with the Wright and Shelby Amend-

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<sup>150</sup> *Id.* at 795 (quoting Love Field Service Interpretation Proceeding, U.S. Dep't of Transp., Order No. 98-12-27 (Dec. 23, 1998)).

<sup>151</sup> *See Am. Airlines, Inc.*, 202 F.3d at 788.

<sup>152</sup> *See Legend Airlines, Inc. v. City of Fort Worth*, 23 S.W.3d 83, 86-91 (Tex. App.—Fort Worth 2000, no pet.).

<sup>153</sup> *See Gilbreath & Watler, supra* note 85, at 235 (citing the staying order, *Legend Airlines, Inc. v. City of Fort Worth*, No. 02-99-00098-CV (Tex. App.—Fort Worth Nov. 2, 1999)).

<sup>154</sup> *See Am. Airlines, Inc.*, 202 F.3d at 813 (holding that the court "will not substitute our judgment on aviation-related issues for [the DOT's] reasonable one").

<sup>155</sup> *Id.* at 788-89.

<sup>156</sup> *See id.* at 806-07 (stating that ADA set an "extremely limited role" for proprietary powers exceptions).

<sup>157</sup> *Id.* (referring to the proprietary enforced perimeter restrictions in place at New York's LaGuardia airport and Washington's National airport which were upheld for their legitimate local need—a need the Fifth Circuit felt Fort Worth did not show). For a detailed analysis of the law behind the Fifth Circuit's opinion, see *Gilbreath & Watler, supra* note 85, at 235-50.

ments.<sup>158</sup> With the Supreme Court denying certiorari<sup>159</sup> and the Texas State Court of Appeals eventually reversing the trial court's judgment, deferring to the DOT,<sup>160</sup> the Shelby Amendment emerged through state and federal courts with a rather broad interpretation.

An important consideration that precluded several airlines from moving to Love Field was the Letter and Use Agreements entered into by the airlines when DFW opened.<sup>161</sup> The court held that "the use agreements are preempted as an impermissible attempt to regulate in an area where the federal government has preempted state regulation."<sup>162</sup> As Continental was a party to the agreements, it and all other airlines were relieved of any contractual duty within the original Bond Ordinance Agreements.<sup>163</sup>

The court also upheld the DOT's interpretation that a fifty-six seat configuration eliminates all restrictions, including through-ticket advertising, of the Wright Amendment.<sup>164</sup> Relying on the original DOT interpretation of the Shelby Amendment, Continental Express maintained a fifty-passenger seat Love Field to Houston service during the litigation.<sup>165</sup> This connection to Continental's hub and the removed advertising restriction led the airline to announce service between Love Field and "the world."<sup>166</sup> As Love Field was now open to an unlimited number of destinations, airlines began to add various flights which were previously banned through the original text of the Wright Amendment.<sup>167</sup> Even with Wright in full force, Southwest, as well as any other airline, has the ability to utilize the freedoms of

<sup>158</sup> See *Am. Airlines, Inc.*, 202 F.3d at 788–89.

<sup>159</sup> *City of Fort Worth v. Dep't of Transp.*, 530 U.S. 1274, 1274 (2000).

<sup>160</sup> See *Legend Airlines, Inc. v. City of Fort Worth*, 23 S.W.3d 83, 95 (Tex. App.—Fort Worth 2000, no pet.). For a thorough analysis of the differences held by the federal and state courts see Gilbreath & Watler, *supra* note 85, at 250–57.

<sup>161</sup> See *City of Dallas v. Sw. Airlines Co.*, 371 F. Supp. 1015, 1020–21 (N.D. Tex. 1973). These agreements generally prohibited airlines from serving the Dallas Love airport. *Supra* Part I.A.

<sup>162</sup> See *Am. Airlines, Inc.*, 202 F.3d at 811.

<sup>163</sup> *Id.*

<sup>164</sup> See Gilbreath & Watler, *supra* note 85, at 248.

<sup>165</sup> *Id.* at 248–49.

<sup>166</sup> *Id.*

<sup>167</sup> American, Legend, Continental, and Delta Airlines all began serving destinations outside the Love Field Service Area through the fifty-six-seat aircraft exception including Chicago, Los Angeles, Atlanta, Las Vegas, Washington, D.C., and Cleveland. Dallas Love Field, Love Notes: Chronology of Events, <http://www.dallas-lovefield.com/lovenotes/lovechrono.html> (last visited Oct. 30, 2007).

the generous DOT interpretation. However, Southwest chose to remain inside the original Love Field Service Area.<sup>168</sup> Much to the disappointment of the state lawmakers who expanded the states within the Love Field Service Area, a Southwest Dallas-Love service was never added to the three states amended by the Shelby Amendment.<sup>169</sup> For over twenty years after its passage and through its interpretations, Southwest Airlines remained neutral and, at times, supportive of the Wright Amendment compromise.<sup>170</sup>

#### D. SOUTHWEST COMES OUT AGAINST THE LOVE FIELD RESTRICTIONS

Despite Southwest's long neutrality, on November 12, 2004, Gary Kelly, Chief Executive Officer of Southwest Airlines, officially came out against the Wright Amendment and called for its repeal.<sup>171</sup> Within hours of the announcement, dissent spread among the community, including the city of Dallas—owner of Love Field.<sup>172</sup> Despite the opposition, Southwest launched a full campaign to encourage Congress to repeal the Wright Amendment.<sup>173</sup> In an effort to increase the stakes, Southwest later threatened that if the Wright Amendment remained, the airline might move its headquarters to another location.<sup>174</sup> After a year of lobbying, Southwest eventually obtained a hearing in the Senate Committee on Commerce, Science, and Transportation.<sup>175</sup> With testimony from Southwest, American Airlines, DFW Airport, and cities surrounding the area, Congress eventually added an amendment attached to "Transportation Appropriations

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<sup>168</sup> See, e.g., Sw. Airlines Co., Southwest Airlines, <http://www.southwest.com> (last visited Oct. 30, 2007) (showing, from Dallas, only the Love Field Service Area destinations available to Southwest through the Wright Amendment).

<sup>169</sup> See Sudeep Reddy, *Congress Puts Dent in Wright*, DALLAS MORNING NEWS, Nov. 19, 2005, at 2A.

<sup>170</sup> See FREIBERG & FREIBERG, *supra* note 7, at 26 (quoting Kelleher's stance on the Wright Amendment as "passionately neutral").

<sup>171</sup> Eric Torbenson et al., *Southwest Calling for Repeal of Wright: Airline's Chief Ends Neutrality*, DALLAS MORNING NEWS, Nov. 13, 2004, at 1A.

<sup>172</sup> *Id.* at 15A (reporting adversarial responses from DFW Airport, Fort Worth, and the Dallas mayor).

<sup>173</sup> See, e.g., *Repeal the Restrictions on Dallas Love Field*, *supra* note 1.

<sup>174</sup> See Eric Torbenson & Suzanne Marta *Southwest Renews Talk of Relocation*, DALLAS MORNING NEWS, Oct. 19, 2006, at 1D.

<sup>175</sup> See S. Comm. on Commerce, Sci. & Transp., *Wright Amendment Aviation Hearing*, <http://commerce.senate.gov/hearings/witnesslist.cfm?id=1653> (last visited Oct. 30, 2007).

Bill.”<sup>176</sup> Within the committee, Missouri Senator Kit Bond originally pushed for through-ticketing to states which lie outside the Love Field Service Area, but in a less devastating result to the Wright Amendment, Congress opted for his state, Missouri, to be added to the Love Field Service Area.<sup>177</sup> Soon after the new amendment went into law, Southwest began service to St. Louis and Kansas City, Missouri.<sup>178</sup> In an effort to remain competitive, American Airlines opened new ticket counters and gates in Love Field and cancelled service to less profitable routes at DFW.<sup>179</sup> Despite the new addition, Southwest continued to pledge “full repeal of the Wright law” through its campaign.<sup>180</sup>

#### E. THE END OF AN ERA OR THE START OF SOMETHING NEW

On June 15, 2006, Dallas, Fort Worth, Southwest Airlines, American Airlines, and DFW International Airport released a joint statement<sup>181</sup> in an effort to ultimately resolve the dispute over Love Field airport.<sup>182</sup> The agreement sought an act by Congress consistent with its terms.<sup>183</sup> The parties wanted immediate through-ticketing ability to destinations within the United States. More importantly, the statement requested the elimination of all “remaining restrictions on service from [Dallas Love] after eight years from the enactment of legislation” with, of course, a few exceptions.<sup>184</sup> The restrictions requested included a prohibition on through-ticketing out of Love Field to any in-

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<sup>176</sup> See Todd Gillman, *American, Southwest Square Off Over Wright in D.C.: Senators Hear Kelleher, Arpey Make Flight-or-Flight Arguments*, DALLAS MORNING NEWS, Nov. 11, 2005, at 1A; Transp., Treasury, Housing and Urban Development, The Judiciary, The District of Columbia, and Independent Agencies Appropriations Act, Pub. L. No. 109-115, § 181, 119 Stat. 2396, 2430 (2005) (stating “[t]he first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48) is amended by inserting ‘Missouri,’ before ‘and Texas.’”). See Wright Amendment Aviation Hearing, *supra* note 175 (listing the parties testifying in the Congressional hearing).

<sup>177</sup> Pub. L. No. 109-115, § 181, 119 Stat. 2396, 2430 (2005).

<sup>178</sup> Eric Torbenson, *American Unveils Love Schedule*, DALLAS MORNING NEWS, Dec. 14, 2005, <http://www.dallasnews.com/sharedcontent/dws/bus/wright/stories/121305dnbusaa.698112b.html>.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> Sw. Airlines Co. et al., Joint Statement Among the City of Dallas, the City of Fort Worth, Southwest Airlines, American Airlines, and DFW International Airport to Resolve the Wright Amendment Issues, [http://www.setlovefree.com/pdf/agree\\_amendment.pdf](http://www.setlovefree.com/pdf/agree_amendment.pdf) (last visited Oct. 30, 2007) [hereinafter Joint Statement].

<sup>182</sup> See Repeal the Restrictions on Dallas Love Field, *supra* note 1.

<sup>183</sup> Joint Statement, *supra* note 181, at 1.

<sup>184</sup> *Id.*

ternational destination, a reduction in gates allowed to operate in conjunction with the Dallas Love Field Master Plan, and several penalties on both American and Southwest if air service was attempted at other area airports outside of DFW or Love Field.<sup>185</sup> Concurrently, Herb Kelleher held a news conference claiming the public was the only true winner in the compromises and urging Congress to adopt the agreement as legislation.<sup>186</sup>

Of course, not every party affected by changes to the Wright Amendment was a party to the joint statement. Soon after the agreement was released to the public, JetBlue Airways and other carriers spoke out against the agreement.<sup>187</sup> The main complaint by other airlines was that the reduction of gates combined with the guarantee to extend the leases held by American, Continental, and Southwest, effectively shut out any other airline from serving Love Field.<sup>188</sup> Also upset were area communities

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<sup>185</sup> *Id.* at 1–3.

<sup>186</sup> Repeal the Restrictions on Dallas Love Field, *supra* note 1. Kelleher stated:

I have been involved in litigation, legislative struggles, and cuss fights over Love Field since 1972—a period of 34 years. The fact that Southwest Airlines stands here today—stands here with Fort Worth, DFW Airport, American Airlines, and the City of Dallas indicates, I believe, that there must be hope for world peace. And peace—and good will—is the essence of our agreement—not to mention certainty, stability, and tranquility. Under the perseverant Leadership of the Mayors of Dallas and Fort Worth—who have literally worked day and night to bring this “Peace Pact” into being, our swords are truly being turned into plowshares. As with any difficult and complicated transaction, all sides, all parties, have been compelled to make sacrifices—to yield on firmly held positions—to moan and groan and agonize over decisions and mutual concessions. The only victor—the only sure fire winner—from this agreement—is the public—the public citizen who will find it easier and far less expensive to travel to and from North Texas for business and personal reasons—the citizens who will reap vast economic benefits in their communities from enhanced travel and tourism—at a lower cost. On behalf of the public, we stand shoulder to shoulder with American Airlines, DFW Airport, and with the Mayors of Dallas and Fort Worth, in urging the City Councils of Dallas and Fort Worth—and in urging the U.S. Congress—to speedily approve the implementation of our agreement. Peace—truly enduring peace—be with all of you—and with all of us.

*Id.*

<sup>187</sup> See Sudeep Reddy & Robert Dodge, *JetBlue Urges FAA to Block Wright Deal*, DALLAS MORNING NEWS, June 20, 2006, at 2D.

<sup>188</sup> *Id.* (stating that in a letter to key leaders in the House and Senate, JetBlue founder and chief executive David Neeleman called the proposal “an anticompetitive and discriminatory arrangement that protects two carriers by permanently

concerned with the effect on airports with the eighty-mile restriction<sup>189</sup> contained in the proposal.<sup>190</sup> Fuel was added to the fire when a leaked memorandum from the U.S. Justice Department's Antitrust Division made its way into the newspapers. The memo indicated that the twenty-gate cap would prevent airlines from operating at Love Field and that airfares would not receive the expected cost breaks from the removal of the Wright Amendment.<sup>191</sup>

However, on September 29, 2006, Congress passed the Wright Amendment Reform Act of 2006 and President George W. Bush then signed the bill on October 13, 2006.<sup>192</sup> Section two of the Wright Amendment Reform Act repeals the Wright Amendment after an eight-year waiting period and immediately provides for through-ticketing to any destination, foreign or domestic, from Love Field.<sup>193</sup> The main text in the sections that follow contain a prohibition on nonstop international service from Love Field, a reduction of the gates at Love Field to twenty, and a significant amount of language likely aimed at thwarting any antitrust lawsuits.<sup>194</sup> What will remain of Wright may depend on the new variety of litigation attacking yet another version of restrictions on Love Field.

#### IV. THE WRIGHT POLICY

While slated for repeal, the Wright Amendment has proven itself to be a formidable opponent in the court system.

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excluding all competitors.""); *see also* Sudeep Reddy, *Hearing Won't Include JetBlue: Foe of Wright Accord Can Submit Written Arguments to Panel*, DALLAS MORNING NEWS, July 6, 2006, at 2D.

<sup>189</sup> *See* Joint Statement, *supra* note 181, at 3. The Joint Agreement precludes American or Southwest Airlines from beginning service at any other airport within 80-miles of Love Field. It also includes language which suggests the parties will work jointly to encourage flights into DFW International. *Id.* at 1.

<sup>190</sup> *See* Robert Dodge & Sudeep Reddy, *Tweaks Made to Love Accord: Some Lawmakers Fear Plan Hurts McKinney, Other Airports*, DALLAS MORNING NEWS, July 13, 2006, at 1A.

<sup>191</sup> *See* Robert Dodge & Sudeep Reddy, *Wright Deal Raises Antitrust Questions Justice Memo*, DALLAS MORNING NEWS, Sept. 30, 2006, at 1A; *see also* S. 3661, 109th Cong. (2d Sess. 2006).

<sup>192</sup> *See* Sudeep Reddy, *Congress Repeals Wright; Many Praise Legislation; Legal Challenges Could Still Be in Wings*, DALLAS MORNING NEWS, Sept. 30, 2006, at 1A.

<sup>193</sup> Wright Amendment Reform Act of 2006, Pub. L. No. 109-352, 120 Stat. 2011 (codified as amending section 29 of the International Air Transportation Completion Act of 1979).

<sup>194</sup> *Id.*

## A. COMMERCE CLAUSE

Since the inception of the U.S. Constitution, Congress has been charged with regulating commerce "among the several States."<sup>195</sup> The Supreme Court has defined that Commerce Clause as having broad powers to regulate interstate commerce.<sup>196</sup> Congress continues to hold great power over the airline industry through this Commerce Clause. In 1978, when Congress enacted the ADA, it later carved out an exception for Dallas Love Field Airport in reaction to what it saw as a potentially unjust situation for the cities of Dallas and Fort Worth.<sup>197</sup> Withstanding many legal attacks, this exception, the Wright Amendment, remains an area of law where Congress has great deference to regulate.

B. THE WRIGHT AMENDMENT WILL REMAIN STRONG LAW  
IF ALLOWED1. *Constitutional Issues*

Repealing the Wright Amendment restrictions on constitutional grounds will likely remain fruitless. Courts have consistently rejected arguments that the Wright Amendment violates the right to interstate travel.<sup>198</sup> As the Fifth Circuit noted, "If every infringement on interstate travel violates the traveler's fundamental constitutional rights, any governmental act that limits the ability to travel interstate, such as placing a traffic light before an interstate bridge, would raise a constitutional issue."<sup>199</sup> In a similar attack on the Wright Amendment, the United States District Court claimed that "Congress imposed the Wright Amendment for rational reasons," further elaborating that "[t]here is no constitutional right to the most convenient form of transportation."<sup>200</sup> The same court also rejected an attack on First Amendment rights to receive commercial information through the advertisement ban of the Wright

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<sup>195</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>196</sup> See *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (identifying three broad categories of activity that Congress may regulate under the commerce clause power).

<sup>197</sup> See Allen, *supra* note 60, at 1018–19.

<sup>198</sup> See *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991); see also *Kansas v. United States*, 797 F. Supp. 1042, 1052 (D.C. 1992).

<sup>199</sup> *Cramer*, 931 F.2d at 1031.

<sup>200</sup> *Kansas*, 797 F. Supp. at 1052.

Amendment.<sup>201</sup> Courts have upheld the constitutionality of the restriction at Love Field because this type of regulation is the exact realm of control which should be held by Congress.<sup>202</sup> The Constitution grants broad congressional commerce powers that were used in the 1979 Wright Amendment to resolve an inequity created by the ADA.<sup>203</sup> Any destruction of this law would create the same inequitable result which was alleviated in 1979.

## 2. Deference to Administrative Agency Interpretation

With the Amendment in firm constitutional standing, opponents turned to attack the interpretation of the Wright and Shelby Amendment language. In 1998, when the DOT issued its findings in the Love Field Service Interpretation Proceeding, courts deferred to the interpretation of the DOT.<sup>204</sup> Deference is consistently given to the DOT in its reasonable interpretations on the restrictions of Love Field through a *Chevron* analysis.<sup>205</sup> The *Chevron* case states that when the intent of a congressional statute is not clear, courts will defer to the reasonable interpretation of the agency charged with interpreting it.<sup>206</sup> As the DOT is the "superintending agency" in the administration of the ADA and is also the agency over aviation laws in general, DOT interpretations of aviation laws will receive significant deference through *Chevron*.<sup>207</sup> The DOT is well connected to the industrial ramifications of aviation law changes. Thus, the Wright Amendment is likely in more capable hands when compared to court interpretation.<sup>208</sup> Using this deference, current DOT interpretations of the restrictions at Love Field will likely continue to be upheld by any future court challenge.

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<sup>201</sup> See *id.* at 1054 (holding that "the Wright Amendment's restrictions on commercial speech do not impermissibly abridge the First Amendment").

<sup>202</sup> See *supra* Part IV.A.

<sup>203</sup> *Id.*

<sup>204</sup> See, e.g., *Am. Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 813 (5th Cir. 2000); *Legend Airlines, Inc. v. City of Fort Worth*, 23 S.W.3d 83, 96-97 (Tex. App.—Fort Worth 2000, pet. denied).

<sup>205</sup> *Id.*

<sup>206</sup> See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (holding "a court may not substitute its own constriction of a statutory provision for a reasonable interpretation made by the administration of an agency").

<sup>207</sup> *Am. Airlines*, 202 F.3d at 805.

<sup>208</sup> See *Am. Airlines*, 202 F.3d at 813 (stating that interpretations of aviation law are within the expertise of the DOT and the court "will not substitute our judgment on aviation-related issues for [the DOT's] reasonable one").

## C. COSTLY LOW FARES

Gaining wide consumer support for an action which would make some air travel cheaper is a simple task. It is likely no surprise that Southwest Airlines' business model allows it to enjoy operating costs less than that of non-low-cost carriers.<sup>209</sup> Southwest can operate the same route as any other major airline, charge the same fare, use the same aircraft, and consistently turn a profit higher than that of a major full service airline.<sup>210</sup> There is no question that if the Wright Amendment is repealed, and Southwest Airlines expands its service to the areas outside of the Shelby and Wright Amendments, it will be able to offer fares lower than that of competing airlines currently operating those routes from Dallas-Fort Worth Airport.<sup>211</sup> Southwest's campaign touts a phenomenon called the "Southwest Effect," which originated from a 1993 DOT study on Southwest's effect on air fare.<sup>212</sup> Southwest uses this DOT finding to show an increase in passenger traffic due to the low fares the airline brings when it begins new service, creating a feeling as the people's airline.<sup>213</sup> What Southwest neglects to mention are the many negative findings behind the 1993 "Southwest Effect" study acknowledged by the DOT.<sup>214</sup> The DOT notes that while many consumers enjoy the low prices of Southwest, the margins erode the ability for existing airlines to compete.<sup>215</sup> The DOT feels that without that competition, "[o]ver time, Southwest's fares will increase to cover cost inefficiencies that will creep in, and to extract monopoly profits."<sup>216</sup> The Department noted that Southwest's prices increased where it forced out its compe-

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<sup>209</sup> Dennis J. Keithly, Comment, *To Trap the White Tiger and Unicorn, The Government Needs Better Traps: An Examination of the Viability of Predatory Pricing Claims in the Airline Industry*, 69 J. AIR L. & COM. 837, 848-51 (2004); see generally FREIBERG & FREIBERG, *supra* note 7 (discussing the many ways Southwest shaves costs to maintain an efficient product).

<sup>210</sup> Keithly, *supra* note 209, at 848-57 (stating that "[a]s a low cost carrier that offers few amenities, Southwest does not need to fill as many seats at a comparable price to that of a major airline, such as United, in order to turn a profit").

<sup>211</sup> RANDALL D. BENNETT ET AL., OFFICE OF AVIATION, DEP'T OF TRANSP., AIRLINE DEREGULATION CONTINUES: THE SOUTHWEST EFFECT 3 (1993), available at [http://ostpxweb.dot.gov/aviation/X-50%20Role\\_files/Southwest%20Effect.DOC](http://ostpxweb.dot.gov/aviation/X-50%20Role_files/Southwest%20Effect.DOC).

<sup>212</sup> See Sw. Airlines Co., *The Southwest Effect and the Wright Amendment*, <http://www.setlovefree.com/southwesteffect.html> (last visited Oct. 30, 2007).

<sup>213</sup> *Id.*

<sup>214</sup> BENNETT ET AL., *supra* note 211, at 8-9.

<sup>215</sup> *Id.* at 7.

<sup>216</sup> *Id.* at 9.

tion.<sup>217</sup> The “Southwest Effect” essentially drives out market competition, thus reducing the service options available to consumers on the whole.<sup>218</sup> Not only do consumer choices dwindle, but the airport and city hosting the airline become prey. Southwest currently enjoys a highly reduced landing fee at Love Field while the average fee of a comparable airport is 480 percent more expensive.<sup>219</sup> Because of Southwest’s domination of the airport, the airline holds the airport hostage with below market rates to help pay for facilities and maintenance.<sup>220</sup> The “Southwest Effect” bears a striking resemblance to what is similarly coined “The Wal-Mart Phenomenon.”<sup>221</sup> Southwest’s attempts to overturn Wright by concentrating consumer focus on the low fares is similar in that:

Wal-Mart has also lulled shoppers into ignoring the difference between the price of something and the cost. Its unending focus on price underscores something that Americans are only starting to realize about globalization: Ever-cheaper prices have consequences . . . We want clean air, clear water, good living conditions, the best health care in the world—yet we aren’t willing to pay for anything manufactured under those restrictions.<sup>222</sup>

Similarly, Southwest’s low fares have a cost far higher than the price. *The Dallas Morning News* reported that the new addition of Missouri to the Wright Amendment could eliminate flights between DFW and some small cities as well as overseas destinations.<sup>223</sup> True to predictions, American Airlines was forced to discontinue service to six destinations to begin a two-airport service.<sup>224</sup> Lima, Peru was among the cities eliminated.<sup>225</sup> Reduced services hit seven other cities, including several rural Texas cities

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 7.

<sup>219</sup> See Katie Fairbank & Tanya Eiserer, *Love Field Fee Increase Is Proposed*, DALLAS MORNING NEWS, Jan. 10, 2006, at 1B (reporting the current fee as 35 cents per 1000 pounds while the comparable airport market is at \$2.03/1000 pounds).

<sup>220</sup> See generally *id.* (reporting Southwest’s Vice President, Ron Ricks as protesting any increase higher than 20 cents, still far below the market rate).

<sup>221</sup> See generally e.g., KENNETH E. STONE, IMPACT OF THE WAL-MART PHENOMENON ON RURAL COMMUNITIES available at [http://www.seta.iastate.edu/retail/publications/10\\_yr\\_study.pdf](http://www.seta.iastate.edu/retail/publications/10_yr_study.pdf) (last visited Oct. 30, 2007).

<sup>222</sup> Charles Fishman, *The Wal-Mart You Don’t Know*, FAST COMPANY, Dec. 2003, at 68.

<sup>223</sup> Reddy, *supra* note 169, at 2A.

<sup>224</sup> See Torbenson, *supra* note 178.

<sup>225</sup> *Id.*

like Tyler.<sup>226</sup> Cheap flights to Missouri arrived at the cost of six destinations choices for Dallas.<sup>227</sup> Full dissolution of the Wright Amendment will lower fares, but it has the potential to stifle rural city economies and cut Texans from service to destinations throughout the world.<sup>228</sup>

While market-participant-dictated-competition is a staple of the United States' economy, efforts to gain monopolistic advantages are traditionally frowned upon. Southwest correctly contends that, if repealed, the Wright Amendment's absence will lead to more competition in the Dallas market and lower fares.<sup>229</sup> However, Southwest Airlines has an obvious location advantage in the Dallas area. Dallas-Fort Worth Airport is located seventeen miles from downtown Dallas, while Love Field is only six miles from the city.<sup>230</sup> Southwest states that its reason behind its newfound disdain for Wright comes from the decline of the short-haul market since the economic decline of September 11, 2001.<sup>231</sup> However, Southwest has always had the option of locating at Dallas-Fort Worth and operating a long-haul service.<sup>232</sup> The Dallas-Fort Worth Airport Board approached Southwest Airlines several times after Delta Airlines departed in order to negotiate a deal to take over the empty gates.<sup>233</sup> Although the DFW Board reported successful talks with Southwest, the airline surprised the Board by pushing for the repeal of the restrictions on Love Field instead.<sup>234</sup> Southwest claimed that a two-airport operation would disrupt their "lost-cost, efficient model of business" and require the reduction of their Love Field service.<sup>235</sup> Further, Southwest claims that DFW is too congested

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<sup>226</sup> *Id.*; see also Gillman, *supra* note 6, at D2 (reporting on the "dozens" of rural cities who appeared before Congress to urge Congress to uphold Wright).

<sup>227</sup> Torbenson, *supra* note 178.

<sup>228</sup> See, e.g., Gillman, *supra* note 176, at 1A (exposing rural city concerns of long-haul flights from Love which would "hurt their economies and cut off regions from air service"); see ECLAT CONSULTING, *supra* note 7, at 53 (indicating the impact that would occur from an open Dallas Love Airport).

<sup>229</sup> See Sw. Airlines Co., The Wright Amendment, <http://www.setlovetfree.com/pdf/Wright4page.pdf> (last visited Oct. 30, 2007) (showing a condensed example of the argument Southwest Airlines uses to repeal the Wright Amendment).

<sup>230</sup> See Allen, *supra* note 60, at 1062.

<sup>231</sup> Sw. Airlines Co., Economic Impact of Repealing the Wright Amendment, <http://www.setlovetfree.com/caseforrepeal.html> (last visited Oct. 30, 2007).

<sup>232</sup> See Statement of Kevin Cox, *supra* note 109, at 14–15.

<sup>233</sup> *Id.*

<sup>234</sup> See Eric Torbenson, *Drawing a Line in the Tarmac: Southwest's Big Reason for Avoiding DFW?* *American*, DALLAS MORNING NEWS, June 9, 2005, at 1D.

<sup>235</sup> Reddy & Dodge, *supra* note 187, at 2D.

and that it is a "fortress hub."<sup>236</sup> What remains strange is that these same obstacles do not hinder Southwest's operation in other cities. Southwest flies out of seven of the country's most congested airports, all with average delays longer than those at DFW.<sup>237</sup> In addition, Southwest conducts split airport operations in many other cities.<sup>238</sup> If Southwest is determined to have a single operation at Love Field, a more equitable solution would be for Southwest to fly outside the Love Service Area within the exceptions of the Wright and Shelby Amendment by utilizing the fifty-six seat exception.<sup>239</sup> No federal law needs to be changed to meet Southwest's new-found expansive business plan for Love Field. What prevents Southwest from a DFW operation is the chance to obtain national service without the pest of competition in an airport that has a ninety-six percent<sup>240</sup> share of the market.<sup>241</sup>

Consequently, each chip away from the Wright Amendment will detract from the original purpose of its enactment. Deregulation of the airline industry opened the door to competition, but much evidence exists that it likely did more to destroy competition.<sup>242</sup> Congress carved out Love Field from the ADA, and because Congress felt deregulation was apropos for every other airport in America, a need to restrict Love Field airport likely existed outside of free market ideals of deregulation. The Wright Amendment respected the policy of the DOT's predecessor when it directed the cities of Fort Worth and Dallas to unify their airport in 1968. Congress saw an inequity within the new deregulation rules and preserved an airport that would likely be

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<sup>236</sup> See Torbeson, *supra* note 234, at 10.

<sup>237</sup> See Statement of Kevin Cox, *supra* note 109, at 14.

<sup>238</sup> *Id.*

<sup>239</sup> See Statement of Kevin Cox, *supra* note 109, at 12. Southwest could reconfigure its 737s to a 56 passenger capacity or purchase compliant regional jets which currently operate out of Love Field through the restriction it has refused to use. *Id.*

<sup>240</sup> Eric Torbenson, *Love's Financial State Disputed*, DALLAS MORNING NEWS, Dec. 19, 2005, at 1D.

<sup>241</sup> See Statement of Kevin Cox, *supra* note 109, at 11 (elaborating that no other major airport in the U.S. has such airline domination); see also *id.* at 22 (citing a study by Professor Bijan Vasigh at Embry-Riddle Aeronautical University as concluding that "Southwest's fortress strategy in repealing the Wright Amendment is not about a more competitive market and lower prices, but rather it is about the concentration of its monopoly power at Dallas Love Field").

<sup>242</sup> See generally GEORGE WILLIAMS, *THE AIRLINE INDUSTRY AND THE IMPACT OF DEREGULATION* (1993) (reviewing the subject of airline deregulation and the underestimation of those who did not predict the consequences).

closed today had Southwest not wedged an exception through aggressive litigation. Love Field should be among the list of other airports which were abandoned for new sites.<sup>243</sup> However, the law is not always perfect, and when the court system fails, our Constitution provides a system of checks and balances to arrive at an equitable solution. Congress patched the hole that Southwest Airlines created when it refused to move from Love Field. It was a solution that allowed airlines, who invested in the cities of Dallas and Fort Worth by moving to an airport that could handle that level of traffic, to operate without the threat of a single airline that used a loophole to get a competitive business edge. That policy has not changed, and Southwest should not have attempted to destroy a law when there are equitable options available which would allow it to compete in the Dallas long-haul market.

## V. CONCLUSION

Southwest had options, but it chose to take the path which would provide the airline with the largest competitive edge at

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<sup>243</sup> See Statement of Kevin Cox, *supra* note 109, at 24–25. Mr. Cox elaborates on the following examples:

In virtually every case where a new airport has been built in recent history, the older, existing airport in the community has been either closed completely or has been permanently limited to general aviation. Examples include Alexandria, Louisiana; Cleveland, Ohio; Detroit, Michigan; Fort Myers, Florida; Kansas City, Missouri; Killeen, Texas; Minneapolis/St. Paul, Minnesota; Northwest Arkansas; and Seattle-Tacoma, Washington, just to name a few.

The two most recent examples, however, are the most compelling. On the day that the new Denver International Airport was open for service, Stapleton, the older inner-city airport, was closed permanently to all operations. Today, the Stapleton area serves as a shining example of redevelopment that is to be envied across the country.

The last major airport to be built was in Austin, Texas. In that case, Robert Mueller Municipal Airport, an older inner-city airport, was also closed completely. At the time, many of the airlines that served Robert Mueller Municipal Airport refused to move to the new airport until there was a contractual commitment on the part of the City of Austin that Robert Mueller Municipal Airport would never again be opened for commercial air service. Southwest Airlines was one of those airlines that benefited from the closure of Robert Mueller Municipal Airport. It, like the other airlines, did not want the older inner-city airport to be reopened at a lower cost structure when all the other airlines had moved and were committed to the financial viability of Austin's new airport.

the expense of public policy. Wright does affect the convenience of travelers who live in the Dallas area, but what the average traveler may not consider is the aggregate consumer loss that comes with low fares close to home. North Texas loses a unified airport that can serve two cities effectively. Southwest made a choice to remain at Love Field since it began service, and in turn, Congress acted in a way which protects the airline service available in North Texas. This protection has consistently been held constitutional and is settled law, according to many courts, until Congress deems otherwise. Policy implications are the only viable tools to sway congressional opinion. The long history leading up to the passage of the Wright Amendment showed that the unique situation in the Dallas area could only be rectified with federal intervention. The Wright Amendment was contrary to federal policy to deregulate the industry, but the inequitable situation was so exceptional that Congress carved out a guideline to prevent an unjust market anomaly. Airlines should compete, and the government should do everything in its power to ensure that the competition is fair and on level grounds. Travel is an essential key to the economy and firmly within the area governed by the Commerce Clause of the Constitution. The Pandora's Box of market realignment which would occur from the congressional repeal would put an unjust strain on an already ailing airline industry at the sole benefit of one of the market's most profitable airlines. Southwest touts a hampered desire to compete in the market, but the fair market is open. It is open at the venue to which Southwest refuses to transfer—DFW. The airline chose not to compete, but rather to garner a ninety-six percent share of the Dallas market at an airport where no other airline could legally operate. With the many financial incentives offered to a Southwest-DFW operation, the cry of unfairness is a classic case of a free bird singing the song of the caged.

