Wright Amendment: The Constitutionality and Propriety of the Restrictions on Dallas Love Field, The

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I. INTRODUCTION

SOUTHWEST AIRLINES flies from Dallas Love Field to Albuquerque. It also flies from Albuquerque to Los Angeles. But if you tell a Southwest Airlines ticketing representative that you would like to fly from Dallas to Los Angeles, the representative will respond that no such arrangement is available, and that you should try another airline. The informed traveller, however, will recognize that the representative is bluffing and will inquire further. In fact, if you specifically tell the representative that you would like to purchase two separate tickets, and that you don’t mind rechecking your luggage and waiting at least forty-five minutes in between flights, then the representative will gladly make the necessary reservations for your trip to Los Angeles.

This bizarre situation is a result of what is commonly known as the “Wright Amendment.” Named after its au-

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1 International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 29, 94 Stat. 35, 48-49 (1980) [hereinafter Wright Amendment]. The Wright Amendment provides:

Sec. 29. (a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other 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 trans-
Author, then-House Majority Leader Jim Wright of Fort Worth, Texas, the Wright Amendment prohibits commercial air carriers from providing service between Dallas Love Field and destinations located outside of Texas and its four surrounding states—Oklahoma, Arkansas, Louisiana and New Mexico. Further, under the Wright Amendment, air carriers are prohibited from advertising or listing "connecting" flights from an authorized Love Field flight to a point beyond the Love Field service area.

The purpose of this Comment is to (1) explore the history and purpose behind the Wright Amendment, (2) determine whether the Wright Amendment is a constitutional means of accomplishing the goals for which

portation 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 herefore 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.

Id.

2 Id.

it is intended, (3) analyze whether the goals of the Wright Amendment have been satisfied and, if so, whether it should be repealed, and (4) discuss the proper legislative response to noise pollution issues if the Wright Amendment is repealed.

Although focusing on Dallas Love Field, the scope of this Comment covers issues that pertain to a number of different airports throughout the country, particularly those with perimeter rules. Airport perimeter rules generally establish maximum permissible distances of non-stop flights into and out of a given airport. Two noted examples of airports restricted by perimeter rules are Washington, D.C.'s National Airport and New York City's LaGuardia Airport. This Comment will explore why the perimeter rules at those two airports were found constitutional and, based on those precedents, whether the Love Field perimeter rule would likewise survive constitutional challenge. Also explored, through the example provided at Love Field, is the impact of perimeter rules on the local economy and on the consumers who fly into or out of restricted airports. Finally, the Comment will try to determine which level of government—federal or local—is best suited to impose perimeter rules.

II. HISTORY OF THE BATTLE OF LOVE FIELD

The Wright Amendment represents a culmination of what has been, and continues to be, a long and intense rivalry between the cities of Dallas and Fort Worth for the business of commercial aviation and commercial air carriers. Both cities intended to end this rivalry when they joined together to build the Dallas/Ft.Worth Regional Airport (DFW), located approximately midway between

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Dallas and Fort Worth. Prior to construction of DFW, both Dallas and Fort Worth—located 31 miles apart—operated separate major airports. Love Field, located six miles from the center of downtown Dallas, had served as the sole commercial airport in Dallas since 1927. Until the mid-1960's, the two cities could not agree on how to consolidate all commercial air carrier services in one airport. This situation caused unnecessary expense for air carriers and area taxpayers and resulted in inadequate and incomplete services for both cities.

In 1964, the Civil Aeronautics Board (CAB) provided the impetus for creation of a new airport by ordering the two cities to designate a single airport through which all CAB-regulated carriers would serve the Dallas-Fort Worth area. Four years later, the cities jointly adopted the 1968 Regional Airport Concurrent Bond Ordinance, which authorized the issuance of Dallas-Fort Worth Regional Airport Joint Revenue Bonds for the financing of the new airport. Through this ordinance, the cities agreed 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

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6 Id.; S. SCOTT & L. DAVIS, supra note 4, at 1-3. Meacham Field, located five to six miles north of Fort Worth, served as Fort Worth's primary airport until 1953 when Fort Worth opened a new airport, Greater Southwest International Airport (GSIA), located midway between Dallas and Fort Worth. See id. at 5-23.
7 Id.; S. SCOTT & L. DAVIS, supra note 4, at 6.
9 Id. Dallas Love Field and Fort Worth's GSIA were located only twelve miles apart; the two airports competed against one another for both passengers and carriers. See S. SCOTT & L. DAVIS, supra note 4, at 27-35.
10 City of Dallas, 371 F. Supp. at 1020; S. SCOTT & L. DAVIS, supra note 4, at 49.
11 Dallas, Tex., Regional Airport Concurrent Bond Ordinance 12,352; Fort Worth, Tex., Regional Airport Concurrent Bond Ordinance No. 6021 [hereinafter, jointly, Bond Ordinance].
12 City of Dallas, 371 F. Supp. at 1020.
operations at [DFW].

The bond ordinance made clear that Dallas and Fort Worth intended that all certificated air carriers serving the Dallas-Fort Worth area be located at DFW. To this end, both cities agreed in the bond ordinance to undertake no action relating to the existing municipal airports—Love Field, GSIA, Meacham Field, and Redbird—that would be competitive with or in opposition to the optimum development of DFW.

To carry out the mandate of the bond ordinance, the DFW Airport Board executed letters of agreement in 1974 with each of the eight CAB certificated air carriers then serving the Dallas-Fort Worth area. The letters of agreement required each signatory airline to “move all of its Certificated Air Carrier Services serving the Dallas-

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13 Bond Ordinance, supra note 11, § 9.5(A).
14 Id. § 9.5(B). Section 9.5(B) states the following:
   In addition to the covenant of the Cities contained in paragraph A, next above, regarding the transfer of Certificated Air Carrier Services, the Cities further agree that they will through every legal and reasonable means promote the optimum development of the lands and Facilities comprising the Regional Airport at the earliest practicable date, thus to assure the receipt of Gross Revenues therefrom to the maximum extent possible, and neither the Cities nor the Board will undertake with regard to the Regional Airport, Love Field, GSIA, Meacham Field or Redbird, any action, implement any policy, or enter into any agreement or contract which by its or their nature would be competitive with or in opposition to the optimum development of the Regional Airport and use of its lands and Facilities at the earliest practicable date; and none of the airports of the Cities shall be put to or developed for any use which by the nature thereof the optimum use and development of the Regional Airport, including its air and land space, at the earliest practicable date will be impaired, diminished, reduced, or destroyed. It is provided, however, that nothing in this paragraph shall be construed to prohibit the promotion and full development of the operation or reasonable Aircraft uses (other than Certificated Air Carrier Services) at Love Field, Redbird and Meacham Field, or Aircraft operations of any type at GSIA if the same shall be made a part of the Regional Airport. Otherwise, Aircraft uses at GSIA shall not be permitted after the Regional Airport becomes operational.

Fort Worth area to [DFW] . . . to the extent required under the terms of the 1968 Regional Airport Concurrent Bond Ordinance.'

Through these agreements, every CAB-regulated airline then serving Love Field legally committed itself to move its operations to DFW once the airport was completed.

On June 18, 1971, after the other airlines committed themselves to DFW, but before the airport’s completion, Southwest Airlines commenced purely intrastate operations as a “commuter airline” offering flights from Dallas Love Field to Houston and San Antonio, pursuant to Certificate of Public Convenience and Necessity No. 22 issued by the Texas Aeronautics Commission (TAC). This certificate authorized Southwest to serve the Dallas-Fort Worth region through any airport in the area. On October 20, 1971, Southwest informed the Regional Airport Board that it intended to remain at Love Field when the eight CAB certificated airlines moved from Love Field to DFW.

Because of this decision by Southwest, the cities of Dallas and Fort Worth and the Dallas-Fort Worth Regional Airport Board, DFW’s operator, sued for a declaratory judgment that they were entitled under federal and state law to exclude Southwest from Love Field once DFW opened. The plaintiffs in City of Dallas v. Southwest Airlines Co. were motivated by fear that Southwest’s continued operation at Love Field would undermine the financial success of the new airport.

The district court in City of Dallas held that because Southwest provided purely intrastate services, Southwest was not subject to the 1964 CAB ruling that all CAB regu-

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16 Id. at 1021.
17 Id.
18 Id.
19 Id. Southwest also discontinued its participation in planning sessions for the transfer of airline service from Love Field to DFW. Id.
20 Id. at 1019.
21 See id. at 1025.
lated carriers be moved to one airport. At that time, no carrier could provide interstate air transportation with large aircraft without a certificate granted by the CAB authorizing such service. Because Southwest's services were purely intrastate, however, Southwest did not need certification from the CAB. Thus, the court found that the CAB had no jurisdiction over Southwest. The court then concluded that, under federal and state law, Southwest Airlines could not be excluded from using Love Field as long as it remained open as an airport.

For several years, Southwest operated flights only within Texas. After Congress enacted the Airline Deregulation Act of 1978, however, Southwest requested operating authority from the CAB for a Love Field-New Orleans route under the new statute's liberalized procedures. The Airline Deregulation Act substantially changed the federal government's regulatory control over air transportation. This Act contains a provision known as the Automatic Market Entry (AME) program that allowed carriers to enter certain markets prior to complete route deregulation without a CAB finding that entry was needed. The CAB concluded that, under the AME pro-

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22 Id. at 1021-22.
24 City of Dallas, 371 F. Supp. at 1022.
25 Id.
26 Id. at 1035. The court concluded that the airport phase-out provisions of the Regional Airport Concurrent Bond Ordinance did not apply to Southwest Airlines. Id. In section 9.5 of the ordinance, Dallas pledged to phase out services at Love Field to the extent legally possible. See supra note 13 and accompanying text. "Since the Court has found that the exclusion of Southwest Airlines from Love Field would not be legally permissible, in part because it would violate presently outstanding legal commitments or covenants, the phase-out provision of the Ordinance is declared not applicable to Southwest Airlines." City of Dallas, 371 F. Supp. at 1035.
29 DOT Order, supra note 3, at 3.
30 Airline Deregulation Act of 1978, § 12, 49 U.S.C. § 1371(d)(7) (1982). The AME provision states the following: Not later than the sixtieth day after the date on which the [CAB] receives an application from an applicant under this subparagraph,
vision, Southwest could provide interstate service from Love Field.  

III. THE WRIGHT AMENDMENT

The CAB ruling allowing Southwest to provide interstate service from Love Field heightened fear that Love Field would draw unacceptable levels of traffic from DFW.  No doubt, many feared that the relationship between Love Field and DFW might become similar to that between Washington, D.C.'s National Airport and Dulles Airport. Although expansive and modern, Dulles continues to suffer from a shortage of passengers, largely because the older and overcrowded National Airport is conveniently located, making it the airport of choice for most passengers travelling to and from Washington, D.C. Many Texas officials, particularly those in Fort Worth, worried that Southwest and other airlines would begin to fly all over the country from Love Field, thus drawing traffic away from DFW and endangering DFW's

the [CAB] shall issue a certificate to such applicant for the nonstop service specified in such application, unless within such sixty-day period the [CAB] determines that the applicant is not fit, willing, and able to provide such nonstop service and to conform to the provisions of this Act and the rules, regulations, and requirements of the [CAB] issued under this Chapter.


Southwest Airlines, Automatic Market Entry, CAB Order No. 79-9-192 (Sept. 28, 1979). The CAB stated,

We are persuaded by the clear language of section 401(d)(7) and the legislative history of the automatic market entry section of the Act that our authority to deny a [sic] application is highly circumscribed unless the carrier is unfit and that, on the facts before us, we have no discretion to deny the application.

Id. at 2-3.

See generally Holsendolph, Wrangle Over Texas Airport, N.Y. Times, Nov. 28, 1979, § 4, at 1, col. 4 (discussing positions of various legislators during the debate over passage of the Wright Amendment).

See City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982). National Airport lies directly across the Potomac River from downtown Washington D.C. and is conveniently served by Washington D.C.'s subway network. Id. at 1186. Dulles, on the other hand, is 30 miles from downtown, and travel time to the airport generally exceeds 45 minutes. Id. at 1187.
financial stability.\footnote{See Zimmerman, Southwest, Love Field’s Strong Ties, Dallas Morning News, Jan. 8, 1989, at H1, col. 2.}

One such official was Congressman Jim Wright of Fort Worth, who in 1979 introduced an amendment to the International Air Transportation Competition Act (IATCA) that effectively prohibited \textit{all} interstate air service at Love Field.\footnote{H.R. Conf. Rep. No. 96-716, 96th Cong., 2d Sess. 24 (1980); DOT Order, supra note 3, at 3. \textit{See generally} Holsendolph, \textit{supra} note 32.} The final legislation eventually adopted by both houses, however, provided a more flexible limitation on interstate commercial passenger service. Found in section 29 of the IATCA,\footnote{Wright Amendment, \textit{supra} note 1.} the “Wright Amendment” was designed to except Love Field from the liberalized market entry provisions of the Airline Deregulation Act.\footnote{Continental Air Lines v. Department of Transp., 843 F.2d 1444, 1446 (D.C. Cir. 1988) (upholding DOT interpretation of Wright Amendment which permitted service at Love Field by Continental Air Lines).}

The Wright Amendment contains three subsections, each expressed in what one court characterized as “dreadfully framed language.”\footnote{\textit{Id.}} Subsection (a) essentially states a general rule prohibiting all interstate passenger service to or from Love Field. Two of the three exceptions to this ban on interstate passenger service are contained in subsection (a). This subsection permits the operation of ten interstate charter flights each month to and from Love Field,\footnote{Wright Amendment, \textit{supra} note 1, § 29(a)(1).} and allows interstate commuter service by airlines operating aircraft with a capacity of fifty-six passengers or less.\footnote{\textit{Id.}} Subsection (b) grandfathers all commercial interstate passenger service existing at Love Field prior to November 1, 1979.\footnote{\textit{Id.} § 29(b).} Subsection (b) is aimed specifically at Southwest’s Love Field-New Orleans route, the only service falling within the statute’s terms in 1979.\footnote{H.R. Conf. Rep. No. 96-716, 96th Cong., 2d Sess. 25 (1980).} This subsection, however, is rendered meaningless by subsection (c).
Subsection (c) provides the most significant exception to the Wright Amendment's ban on commercial interstate passenger service. This subsection permits turnaround service between Love Field and points inside the four states contiguous to Texas: Louisiana, Arkansas, Oklahoma, and New Mexico (the "Love Field Service Area"). Subsection (c) contains additional language stating that an air carrier may provide interstate service only if it (1) does not offer or provide any through service or ticketing with another air carrier, and (2) does not offer connecting service to points outside the Love Field Service Area.

The precise meaning of the additional restrictions found in subsection (c) were not fully explored until Continental Air Lines attempted to establish passenger service between Love Field and Houston in 1985. The cities of Dallas and Fort Worth and the Dallas-Fort Worth International Airport Board (the "DFW parties") opposed this move. Their opposition first took the form of a request that the Department of Transportation (DOT) formally interpret subsection (c). When the DOT construed the subsection against the interests of the DFW parties, however, they petitioned the D.C. Circuit for review of the DOT's order.

The DFW parties first argued that subsection (c)(1) bars from Love Field any carrier that provides interline services anywhere on their systems, even if no interlining service is provided on flights serving Love Field. "Interline service" occurs when a carrier has connecting flights with

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43 Wright Amendment, supra note 1, § 29(c).
44 Id. § 29(c)(1).
45 Id. § 29(c)(2).
46 See DOT Order, supra note 3, at 4-5.
47 Id. at 1. The DFW parties' opposition to Continental's proposed service apparently rested on the presumption that expanded interstate operations at Love Field would harm DFW Airport. See id. at 2-3.
48 Id.
49 Continental, 843 F.2d at 1445.
50 Id. at 1447; DOT Order, supra note 3, at 4.
other airlines. Under the DFW parties' interpretation, Continental Air Lines would be prohibited from using Love Field; although Continental did not intend to provide interline service in Houston for its Love Field flights, it did have interline agreements with other carriers elsewhere on its system. On the other hand, this interpretation would not affect Southwest Airlines because it did not interline with other carriers elsewhere on its system. The DOT, however, rejected this interpretation. The DOT found that the subclause did not prohibit noninterline service at Love Field by an air carrier providing interline service elsewhere on its system. The United States Court of Appeals for the District of Columbia Circuit upheld the DOT's interpretation, thus permitting Continental to provide commercial passenger service to Houston from Love Field.

Continental’s battle to establish Love Field service also helped clarify subsection (c)(2) of the Wright Amendment. The DOT concluded that subsection (c)(2) does not preclude an airline from “double ticketing.” As described by the D.C. Circuit in Continental, 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.” When double ticketed, the passenger must endure certain inconveniences not ordinarily associated with air travel. For instance, the passenger must pay

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51 Continental, 843 F.2d at 1445.
52 Id. at 4 n.4.
53 Id. at 4.
54 Id. at 5.
55 Id.
56 Continental, 843 F.2d at 1453-54. To date, Continental has not implemented such service.
57 Wright Amendment, supra note 1, § 29(c)(2). For the text of subsection (c)(2), see supra note 1.
58 DOT Order, supra note 3, at 11-12.
59 Continental, 843 F.2d at 1455 (quoting DOT's brief).
separate fares and must reclaim checked baggage upon arrival at the connecting point and recheck it on the next flight on his or her itinerary.\textsuperscript{60}

Interestingly, although the DOT found that double ticketing was perfectly legal, it decided that airlines were prohibited from advertising, promoting, or otherwise affirmatively soliciting double ticketing passengers.\textsuperscript{61} The prohibition on advertising was apparently based on the language in subsection (c)(2) prohibiting air carriers from offering for sale transportation to or from any point outside the Love Field Service Area.\textsuperscript{62} The DOT further found that the prohibition against advertising double ticketing service applied to other related activities. Specifically, the DOT found that an air carrier could not (1) display in its computer reservations system connecting service from the Love Field Service Area to points outside that area, (2) display Love Field connecting service in its flight schedules, or (3) offer a constructed fare (a fare different from the sum of the local fares) for double ticketing service originating or terminating at Love Field.\textsuperscript{63}

The DOT stated, however, that the prohibition against offering to sell double ticketing service did not prevent an airline from providing that service, so long as the service was unsolicited.\textsuperscript{64} The DOT concluded that a carrier that simply "responds to a customer's unsolicited request . . . has not proposed to sell air transportation, but, rather, has accepted a proposal to buy such transportation from the customer . . . ."\textsuperscript{65} This policy creates the perverse situation in which a travel agent or airline ticketing representative may only provide double ticketing service if the would-be traveller is sophisticated enough to expressly request such service.

\textsuperscript{60} See DOT Order, supra note 3, at 10-11.
\textsuperscript{61} Id. at 11.
\textsuperscript{62} Wright Amendment, supra note 1, § 29(c)(2).
\textsuperscript{63} DOT Order, supra note 3, at 12.
\textsuperscript{64} Id. at 11-12.
\textsuperscript{65} Id. at 11.
IV. CONSTITUTIONALITY OF THE WRIGHT AMENDMENT

A. Prior Constitutional Challenges to Perimeter Rules

To date, no court has addressed the constitutionality of the Wright Amendment.66 Similar restrictions at other major airports, however, have been challenged on constitutional grounds. Perimeter rules imposed at both Washington, D.C.’s National Airport (National) and New York’s LaGuardia Airport (LaGuardia) have withstood constitutional challenges.67 The cases involving these two perimeter rules demonstrate the types of issues and legal theories that would likely shape a court’s ruling on the constitutionality of the Wright Amendment. Although the perimeter rules at both National and LaGuardia were held constitutional, there are unique characteristics of the Wright Amendment and the situation at Love Field, as will be shown below, that establish a more credible case for the unconstitutionality of the Wright Amendment.

1. City of Houston v. FAA

The first and most comprehensive decision involving a constitutional challenge to an airport perimeter rule was City of Houston v. FAA.68 In this suit, Houston sought review of a 1000 mile perimeter rule imposed on Washington, D.C.’s National Airport.69 National’s perimeter rule,

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66 A private citizen recently challenged the Wright Amendment on constitutional grounds, but the court dismissed the case for lack of standing and did not address the underlying claim. Cramer v. Skinner, No. 3-89-1029-G (N.D. Tex. Apr. 11, 1990). At the time of publication the case was on appeal to the Fifth Circuit.


68 Id. at 1184.

69 National’s 1000 mile perimeter rule was expanded to 1250 miles in 1986 as part of the Metropolitan Washington Airports Act of 1986, 49 U.S.C. §§ 2451-2461 (Supp. V 1987). The new perimeter rule states that “an air carrier may not operate an aircraft nonstop in air transportation between Washington National Airport and another airport that is more than 1,250 statute miles away from Washington National Airport.” 49 U.S.C. § 2461. For an overview of the
promulgated by the airport proprietor, the FAA,\textsuperscript{70} prohibited nonstop carrier service between National and any airport more than 1000 miles away from National.\textsuperscript{71} The perimeter rule required travellers flying to National from a city outside the perimeter to stop or change planes in a city within the 1000 mile perimeter.\textsuperscript{72} The restriction on National was designed to serve several purposes: (1) assure full utilization of nearby Dulles airport, (2) preserve the short and medium haul nature of National, and (3) reduce the noise pollution and congestion at National.\textsuperscript{73}

Most of the Fifth Circuit’s reasoning in upholding the statute focused on whether the Federal Aviation Act\textsuperscript{74} granted the FAA authority to impose a perimeter rule\textsuperscript{75} and whether the FAA violated the Administrative Procedure Act\textsuperscript{76} by acting arbitrarily or without a rational basis in promulgating the 1000 mile perimeter rule.\textsuperscript{77} The \textit{City of Houston} court concluded that the FAA had not exceeded

\textsuperscript{70} City of Houston, 679 F.2d at 1186.
\textsuperscript{71} Id. at 1189 n.8.
\textsuperscript{72} Id. at 1187.
\textsuperscript{73} Id. at 1188. The origin of the perimeter rule can be traced to a noise abatement suit brought by a coalition of citizen groups and individuals against the DOT, the FAA, and eleven major airlines. \textit{Id., referring to Virginians for Dulles v. Volpe}, 344 F. Supp. 573 (E.D. Va. 1972), aff’d in part, rev’d and remanded in part, 541 F.2d 442 (4th Cir. 1976). In Virginians for Dulles the court ordered the FAA to prepare an Environmental Impact Statement (EIS) concerning National and Dulles. Virginians for Dulles, 541 F.2d at 445-46. The 1000 mile perimeter rule was first proposed in the EIS. City of Houston, 679 F.2d at 1188.
\textsuperscript{75} City of Houston, 679 F.2d at 1193-96. In determining whether the FAA possessed authority to impose a perimeter rule, the court considered two aspects of the Federal Aviation Act: (1) the powers granted to local airport proprietors (49 U.S.C. app. § 1305 (1982)), and (2) the powers granted specifically to the FAA (49 U.S.C. app. §§ 1303, 1348(a), 1353(a), 1354(a) (1982)).
\textsuperscript{76} 5 U.S.C. § 706(2)(a) (1982). The Administrative Procedure Act prohibits agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or other prescribed methods of administrative action. Id., quoted in City of Houston, 679 F.2d at 1190.
\textsuperscript{77} City of Houston, 679 F.2d at 1190-93.
its authority by imposing the perimeter rule\textsuperscript{78} and that the perimeter rule had a rational basis.\textsuperscript{79}

The Fifth Circuit also considered two constitutional challenges to National's perimeter rule. First, the court considered whether the perimeter rule violated the port preference clause, which reads: "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall vessels bound to, or from one State, be obliged to enter, clear or pay Duties to another."\textsuperscript{80} Houston argued that the FAA's actions essentially granted a preference to the ports of states falling within the perimeter because only those airports within 1000 miles were privileged to offer nonstop service to National.\textsuperscript{81}

The court began its analysis by noting that the term "port" includes airports.\textsuperscript{82} After surveying the relevant case authority involving the port preference clause,\textsuperscript{83} the court created a formula for use in determining whether an act violates the port preference clause. The Fifth Circuit held as follows:

Government actions do not violate the Clause even if they result in some detriment to the port of a state, where they occur (i) as an incident to some otherwise legitimate government act regulating commerce or (ii) more as a result of the accident of geography than from an intentional governmental preference.\textsuperscript{84}

\textsuperscript{78} Id. at 1196.
\textsuperscript{79} Id. at 1190-91. For further discussion of the holding of City of Houston, see Cross, supra note 69, at 101.
\textsuperscript{80} U.S. Const. art. I, § 9, cl. 6.
\textsuperscript{81} City of Houston, 679 F.2d at 1196.
\textsuperscript{82} Id. at 1196 n.18.
\textsuperscript{83} Alabama Great S. R.R. v. United States, 340 U.S. 216 (1951) (upholding an Interstate Commerce Commission order which allegedly favored the port of New Orleans); South Carolina v. Georgia, 93 U.S. 4 (1876) (upholding the federal government's actions in dredging the Savannah River even though dredging hindered access to a South Carolina port); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856) (upholding a federal statute which provided for construction of a bridge in West Virginia that blocked some vessels from entering the port of Pittsburgh).
\textsuperscript{84} City of Houston, 679 F.2d at 1197.
The court found that any detriment suffered by the ports outside the perimeter was an accident of geography and not a product of deliberate discrimination against the western states. Hence, the court held that the perimeter rule did not violate the port preference clause. The second constitutional challenge considered was whether the perimeter rule violated the passengers' constitutional right to travel. On this issue, the court cited Shapiro v. Thompson as the landmark decision involving the right to travel. In Shapiro, the Supreme Court struck down a state residency requirement for welfare recipients on the ground that it violated the constitutional right to travel freely from state to state. The City of Houston court narrowly interpreted Shapiro, concluding that, because the perimeter rule did not act as a residency requirement, the right to travel was not implicated. Finally, the court noted that passengers have no right to the most convenient form of travel, apparently referring to the fact that passengers outside the perimeter could fly nonstop to Dulles or take a non-nonstop flight to National.

2. Western Air Lines, Inc. v. Port Authority of New York & New Jersey

The most recent court decision involving a perimeter
rule is *Western Air Lines, Inc. v. Port Authority of New York & New Jersey*,\(^9\) where both the District Court for the Southern District of New York and the Second Circuit upheld a 1500 mile perimeter rule at LaGuardia Airport. The Port Authority of New York and New Jersey, LaGuardia's proprietor,\(^9\) imposed a perimeter rule prohibiting airlines from running nonstop flights beyond a 1500 mile perimeter.\(^9\) The purpose behind the rule was to reduce ground congestion and maintain LaGuardia as a short and medium haul airport by diverting longer haul traffic to nearby Kennedy and Newark Airports.\(^9\)

Western Air Lines, which maintains its major hub in Salt Lake City, almost 2000 miles from LaGuardia, alleged that LaGuardia's proprietor exceeded its authority by imposing the perimeter rule.\(^9\) Specifically, Western argued that the perimeter rule impermissibly regulated Western's routes and services in violation of section 105(a)(1) of the Deregulation Act.\(^9\) The district court rejected this claim, concluding that the imposition of a perimeter rule fell within the proprietary power\(^9\) of the Port Authority to


\(^{94}\) 658 F. Supp. at 953.

\(^{95}\) *Id.* The 1984 perimeter rule replaced an informal 2000 mile perimeter rule that had been in effect since the late 1950's. *Id.* The Port Authority imposed the formal perimeter rule when Air Canada Airlines threatened to violate the informal one. Cross, *supra* note 69, at 104.

\(^{96}\) *Western Air Lines*, 658 F. Supp. at 953. LaGuardia is the smallest of the three airports. *Id.*

\(^{97}\) *Id.* at 954-58. For a more detailed analysis of this claim, see Cross, *supra* note 69, at 111-13.

\(^{98}\) Federal Aviation Act of 1958, § 105(a)(1), as amended, 49 U.S.C. app. § 1305(a)(1). Section 105(a)(1) is a preemption statute. It provides the following: *No State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.* *Id.*

\(^{99}\) *Id.* § 105(b)(1), 49 U.S.C. app. § 1305(b)(1). Section 105(b)(1) reserves certain powers and rights for the local airport proprietor. It provides the following: *Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more States as the
regulate ground congestion.\textsuperscript{100}

The court next considered whether the perimeter rule impermissibly discriminated against Western Air Lines.\textsuperscript{101} Western argued that the perimeter rule discriminated against carriers that maintained hubs outside the perimeter and made it difficult for those carriers to compete with airlines whose hubs lie inside the perimeter.\textsuperscript{102} Answering this claim, the district court referred approvingly to City of Houston and reasoned that the discrimination suffered by Western was "an accident of geography" and not a result of deliberate discrimination against certain states.\textsuperscript{103} The court stated that the determining test is whether the discrimination is reasonable in light of the legitimate objectives to be achieved.\textsuperscript{104} In this case, the court concluded that imposition of a perimeter rule was a reasonable way to reduce congestion at LaGuardia and maintain its status as a short and medium haul airport.\textsuperscript{105}

\textsuperscript{100} Western Air Lines, 658 F. Supp. at 957-58.


\textsuperscript{102} Western Air Lines, 658 F. Supp. at 958. Western's major competitors operated from a Denver hub explicitly exempted from LaGuardia's perimeter rule. Id.

\textsuperscript{103} Id. at 958-59.

\textsuperscript{104} Id. at 959. "In truth, all regulations tend to discriminate in some way . . . . The critical inquiry is whether the discrimination is unjust . . . ." Id.

\textsuperscript{105} Id. at 960. "In setting in place a formal rule, therefore, and in light of the prospect of ever burgeoning traffic at LaGuardia, it was not unreasonable to impose a 1500-mile limit. This is especially true when access to the New York area remains unimpeded at the other area airports." Id.

B. \textit{Wright Amendment Distinguished from Perimeter Rules at National and LaGuardia Airports}

The perimeter rules at Love Field, National, and LaGuardia are all similar in that they are designed to restrict the use of an older, smaller airport in order to assure the full utilization of a nearby, less convenient airport. It should be noted, however, that the situation at Love Field is different than that at either National or LaGuardia; while the latter two airports currently operate at or above capacity levels,\footnote{In 1982, when the Fifth Circuit reviewed the perimeter rule at National Airport, 17 million passengers per year, and up to 3500 passengers per hour, were passing through National. \textit{City of Houston}, 679 F.2d at 1186. Furthermore, \footnote{Comparing National to Dulles, the Fifth Circuit stated, “As overcrowding plagues National . . ., during most of the day the younger sister pines away, unwanted.” \textit{Id.} at 1187. LaGuardia Airport is equally congested. In upholding LaGuardia’s perimeter rule, the district court in \textit{Western Air Lines} took note of the fact that traffic at LaGuardia is nearly always at capacity levels and sometimes exceeds capacity by as much as 23\%. \textit{Western Air Lines}, 658 F. Supp. at 959.} Love Field operates well below its capacity.\footnote{Love Field currently operates at less than 50\% capacity. For a discussion of Love Field’s capacity level, see infra notes 228-236 and accompanying text.} Furthermore, DFW, unlike Dulles, is presently a fully utilized facility rapidly approaching its own capacity level.\footnote{See infra notes 208-222 and accompanying text.} Therefore, the rationale for imposing a perimeter rule at Love Field on that basis is less convincing than at either National or LaGuardia.

Another important distinction between the Wright Amendment and perimeter rules at other airports is that the perimeter rule at Love Field was imposed not by an administrative agency (National) or by a local proprietor (LaGuardia).\footnote{For a discussion of the perimeter rule at National, see supra notes 68-73 and accompanying text.} Instead, it was promulgated by the
United States Congress. This raises several distinctions making the Wright Amendment more difficult to attack. First, it means that the most significant arguments used to attack the perimeter rules at National and LaGuardia will not be available against the Wright Amendment. Both the City of Houston and Western Air Lines courts were most troubled by the issue of whether the proprietors of those airports had exceeded or contradicted the authority granted local proprietors by Congress. In the case of the Wright Amendment, however, Congress itself passed the statute.

The second distinction is that the commerce clause may not be used to attack the Wright Amendment. Under the current doctrine, courts will uphold commerce-based laws if there is any rational basis upon which Congress could have found some relationship between its regulation and interstate commerce. There can be little doubt that a court would find that the Wright Amendment satisfies this deferential standard. If, on the other hand, a local proprietor had imposed the perimeter rule, the commerce clause could be used to attack the rule as an undue burden on interstate commerce.

Finally, the fact that the Love Field perimeter rule was promulgated by Congress could, and should, affect the level of deference a court will show the legislation. In the recent case of Mistretta v. United States, the Supreme Court stated that "[w]hen this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, . . . it should only do so for the most compelling constitu-

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111 See supra notes 1-2 and accompanying text.
112 See supra notes 74-79 and accompanying text (discussing National) and notes 97-100 and accompanying text (discussing LaGuardia).
114 See, e.g., Western Air Lines, 658 F. Supp. at 958.
tional reasons."\textsuperscript{116} If, on the other hand, the Love Field restrictions had been promulgated by its proprietor, the City of Dallas, a court would likely be less deferential.\textsuperscript{117}

Although the fact that the Love Field perimeter rule was promulgated by Congress creates additional hurdles to judicial review, there are also a number of characteristics of the Wright Amendment and Love Field itself that make the case against the constitutionality of the legislation stronger than the cases against the perimeter rules at National and LaGuardia.

First, the infringement on the passenger's fundamental right to interstate travel is significantly greater under the Love Field perimeter rule than it is at either National or LaGuardia. The perimeter rules at National and LaGuardia require merely that a passenger stop at a city within the perimeter. The Love Field passenger must change planes \textit{and} purchase separate tickets for the two flights. The National or LaGuardia passenger may purchase a through fare and is not, as is the Love Field passenger, required to claim and recheck his or her luggage before boarding a different flight for the final destination. The Wright Amendment's prohibition on advertising of double ticketing services further burdens the Love Field passenger by preventing him from obtaining information necessary to facilitate his crossing certain state borders.

Second, the discrimination against states (and their ports) outside the Love Field perimeter is more extensive

\textsuperscript{116} \textit{Id.} at 661, \textit{quoting} Bowsher \textit{v.} Synar, 478 U.S. 714, 736 (1986) (concurring opinion).

\textsuperscript{117} \textit{See, e.g.}, British Airways Bd. \textit{v.} Port Auth., 564 F.2d 1002, 1010-11 (2d Cir. 1977).

The maintenance of a fair and efficient system of air commerce, of course, mandates that each airport operator be circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules defining the permissible level of noise which can be created by aircraft using the airport. We must carefully scrutinize all exercises of local power under this rubric to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals.

\textit{Id.} at 1011 (citations omitted).
and explicit than the discrimination against states outside the National and LaGuardia perimeters.\textsuperscript{118}

C. The Constitutional Basis for Challenging the Wright Amendment

The following analysis explores the constitutionality of the Wright Amendment from two perspectives: (1) the passenger who attempts to fly from Love Field to a state outside the Love Field Service Area, and (2) the states which lie outside the Love Field Service Area. The passenger's constitutional claim rests on the argument that his fundamental right to travel is unjustifiably infringed upon. This argument was considered (and rejected) by the court in \textit{City of Houston v. FAA},\textsuperscript{119} which involved the perimeter rule at National Airport. States which lie outside of the Love Field Service Area may base their constitutional claim on the fact that the Wright Amendment discriminates between the ports of states not mentioned in the statute and the ports of states explicitly included. Discrimination of this sort was considered in \textit{City of Houston}\textsuperscript{120} and also, in a somewhat different context, in \textit{Western Air Lines, Inc. v. Port Authority of New York & New Jersey}.\textsuperscript{121} Protection from this type of discrimination is found, arguably, in the port preference clause of the United States Constitution.\textsuperscript{122}

1. The Fundamental Right to Interstate Travel

The right to travel between and among the states has

\textsuperscript{118} See \textit{supra} notes 80-86 for a discussion of the port preference clause and its prohibition of discrimination against the ports of one state in favor of the ports of another state.

\textsuperscript{119} 679 F.2d 1184, 1198 (5th Cir. 1982). For a discussion of this claim, see \textit{supra} notes 80-92 and accompanying text.

\textsuperscript{120} \textit{City of Houston}, 679 F.2d at 1198. For a discussion of this claim, see \textit{supra} notes 80-92 and accompanying text.

\textsuperscript{121} 658 F. Supp. 952 (S.D.N.Y. 1986), aff'd 817 F.2d 222 (2d Cir. 1987). In this case, the plaintiff, an air carrier, argued that the perimeter rule at LaGuardia Airport unfairly discriminated against carriers that maintained their hubs outside of the perimeter. \textit{Id.} at 958.

\textsuperscript{122} U.S. Const. art. I, § 9, cl. 6.
been recognized as a fundamental constitutional right.123 Addressing this right, the United States Supreme Court has stated the following:

This court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.124

Locating the source of this right, however, has been an elusive task.125 An overview of the cases in which a fundamental right to travel has been found reveals at least six

123 Attorney Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 911 (1986) (invalidating state constitutional and statutory provisions that gave preference in civil service employment to residents of the state who were veterans of the armed services and who had lived in the state when they entered the military); Hooper v. Bernalillo County Assessor, 472 U.S. 612, 624 (1985) (invalidating state statute that granted a property tax exemption to veterans who became residents of the state before a certain date); Zobel v. Williams, 457 U.S. 55, 65 (1982) (invalidating Alaska statute which distributed state revenues on the basis of length of residency); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 279 (1974) (striking down Arizona statute that required one year residency to receive nonemergency medical care); Dunn v. Blumstein, 405 U.S. 330, 356 (1972) (invalidating state law that required a voter to be a resident of the state for one year before voting); Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (invalidating state and District of Columbia statutes which denied welfare benefits to persons who had not resided within the jurisdiction for at least one year); United States v. Guest, 383 U.S. 745, 760 (1966) (upholding application of the criminal conspiracy sanctions of the Civil Rights Acts to private individuals who attempted to deprive black persons of the right to enjoy public facilities connected with interstate travel); Edwards v. California, 314 U.S. 160, 172 (1941) (invalidating a statute which penalized the bringing into the state of any nonresident person by anyone knowing the individual to be an indigent person); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1867) (invalidating a statute which imposed a tax on railroads for every passenger carried out of the state).

124 Shapiro, 394 U.S. at 629; see Passenger Cases, 48 U.S. (7 How.) 283, 492 (1849).

For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

125 Zobel, 457 U.S. at 60 n.6. "The right to travel and to move from one state to another has long been accepted, yet both the nature and the source of that right have remained obscure." Id.
distinct sources: the equal protection clause, \(^{126}\) the due process clauses, \(^{127}\) the privileges and immunities clause of article IV, \(^{128}\) the privileges or immunities clause of the fourteenth amendment, \(^{129}\) the commerce clause, \(^{130}\) and the "penumbra" of the first amendment. \(^{131}\) In some recent cases, the Supreme Court has found little need to tie the right to travel to a particular textual source. \(^{132}\) For example, Justice Brennan, announcing the judgment of the Court in *Attorney General of New York v. Soto-Lopez*, \(^{133}\) wrote that "in light of the unquestioned historic acceptance of the principle of free interstate migration, and of the important role that principle has played in transforming many States into a single Nation, we have not felt impelled to locate this right definitively in any particular constitutional provision." \(^{134}\) This approach, however, is hardly an example of responsible judicial review. The Court should not, on one hand, declare that the Constitution recognizes a fundamental right to travel, but, on the other, fail to link that right to any particular provision.

\(^{126}\) *Hooper*, 472 U.S. at 618; *Memorial Hosp.*, 415 U.S. at 252; *Dunn*, 405 U.S. at 342; *Shapiro*, 394 U.S. at 632. In recent years, the Supreme Court has couched most right to travel cases in equal protection terms. See, e.g., *Zobel*, 457 U.S. at 60 n.6. "In reality, right to travel analysis refers to little more than a particular application of equal protection analysis." *Id.*

\(^{127}\) *Shapiro*, 394 U.S. at 671 (Harlan, J., dissenting); *Zemel v. Rusk*, 381 U.S. 1, 14 (1965).


\(^{129}\) *Edwards*, 314 U.S. at 178 (Douglas, J., concurring); *id.* at 183 (Jackson, J., concurring).

\(^{130}\) *Id.* at 172; *Crandall*, 73 U.S. (6 Wall.) at 49 (Clifford, J., concurring); cf. *Guest*, 383 U.S. at 767.

\(^{131}\) Cf., e.g., *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). "[F]reedom of travel is ... closely related to rights of free speech and association ... ." *Id.* at 517. "Travel abroad [or] within the country ... may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." *Id.* at 505-06 (quoting *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958)).

\(^{132}\) See *Soto-Lopez*, 476 U.S. at 898; *Guest*, 383 U.S. at 759. "Although there have been recurring differences in emphasis within the Court as to the source ... [a]ll have argued that the right exists." *Id.*

\(^{133}\) 476 U.S. at 898.

\(^{134}\) *Id.* at 902.
Such an approach all too conveniently frees the Court from the constraints of the text or the precedents which have interpreted the text and too often results in unprincipled decisions.135

Instead, the proper approach is to identify a specific textual source for the right to travel, and then inquire whether the statute in question violates the recognized standards of that textual source.136 The critical question at hand, then, is which textual sources may give rise to a claim that a federal statute violates the fundamental right to travel. Several of the historic sources—the commerce clause and the privileges and/or immunities clauses—are generally considered limitations on state and not federal action,137 and have not, in recent years, been relied on as sources of the right to travel.138 Furthermore, the "pen-

135 See generally Schauer, Easy Cases, 58 S. CAL. L. REV. 399, 420-31 (1985). Schauer contends that language (either from the constitutional text or from a rule in a case or series of cases) can be a significant constraint on constitutional interpretation.

If we consider the text to be informative about boundaries, or limits, rather than about centers, or cores, then the text appears far less irrelevant than is commonly assumed. The text presumptively constrains us, or should, from overstepping what are admittedly pretheoretical and almost intuitive linguistic bounds, and thus serves as one constraint on constitutional interpretation.

... An interpretation is legitimate (which is not the same as correct) only insofar as it purports to interpret some language of the document, and only insofar as the interpretation is within the boundaries at least suggested by that language.

_id. at 431.

136 See Comment, A Strict Scrutiny of the Right to Travel, 22 UCLA L. REV. 1129, 1142-43 (1975). For a good example of this approach, see Zobel, 457 U.S. at 74-78 (O'Connor, J., concurring).

137 Comment, supra note 136, at 1143 n.76; see J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 113, § 10.3, at 318-20 (discussing applications of the privileges and/or immunities clauses); supra notes 113-114 and accompanying text (discussing futility of commerce clause challenge). But cf. Kurland, The Privileges or Immunities Clause: "Its Hour Come Round at Last?" 1972 WASH. U.L.Q. 405, 416-19 (arguing that the fourteenth amendment's privileges or immunities clause applies to the federal government).

138 See Comment, supra note 136, at 1140-42. But see Zobel, 457 U.S. at 74-78 (O'Connor, J., concurring). Justice O'Connor argues that the privileges and immunities clause of article IV is the proper source of the right to travel and, therefore, provides the standards by which statutes infringing on the right to travel must be judged. Id. The challenged statute in Zobel, however, was a state, not a
"umbra" theory of the first amendment has been explicitly rejected as a source of the right to travel.\textsuperscript{139} Two sources of the right, however, do provide ammunition against a federal statute: the due process clause of the fifth amendment and the equal protection clause.

All government action against individuals must satisfy both the substantive due process requirements and the equal protection requirements of the fourteenth amendment.\textsuperscript{140} The due process limitation on federal actions is found in the fifth amendment.\textsuperscript{141} By its own terms, the fourteenth amendment's equal protection clause applies only to state actions.\textsuperscript{142} An implied equal protection guarantee, however, has been found in the due process clause of the fifth amendment.\textsuperscript{143}

The methods of analysis for the due process and equal protection limitations are different.\textsuperscript{144} The doctrine of substantive due process insists that the government justify any interference with an individual interest.\textsuperscript{145} The equal

\textsuperscript{139} Zemel, 381 U.S. at 16; see also Comment, supra note 136, at 1141.

\textsuperscript{140} McCoy, Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?, 28 Vand. L. Rev. 987, 988 (1975).

\textsuperscript{141} U.S. Const. amend. V. The pertinent part of the fifth amendment reads as follows: "[No person] shall be compelled in any criminal case to be a witness against himself, nor shall be deprived of life, liberty, or property, without due process of law . . . ." Id. See generally J. Nowak, R. Rotunda & J. Young, supra note 113, § 13.1, at 451-52.

\textsuperscript{142} U.S. Const. amend. XIV, § 2. The pertinent part of the fourteenth amendment reads as follows:

\begin{quote}
No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
\end{quote}

\textit{Id.} (emphasis added).

\textsuperscript{143} See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973); Bolling v. Sharpe, 347 U.S. 497 (1954). "Thus, if a classification would be invalid under the Equal Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." Johnson v. Robison, 415 U.S. 561, 564-65 n.4 (1974).

\textsuperscript{144} J. Nowak, R. Rotunda & J. Young, supra note 113, § 14.1, at 524.

\textsuperscript{145} Id. at 524-25.
protection guarantee, on the other hand, concerns the equal treatment of individuals by the government. Specifically, the doctrine of equal protection prohibits the unequal treatment of different classes of persons by state action without adequate justification for that inequality.\textsuperscript{146}

\textbf{a. Substantive Due Process Analysis}

Under the substantive due process analysis, when a statute regulates an individual interest that may be characterized as "fundamental," the regulation must be the least restrictive method available for the effectuation of an extremely important or "compelling" state interest.\textsuperscript{147} Because the right to travel has been recognized as fundamental,\textsuperscript{148} any legislation that impinges on that right is subject to this high level of judicial scrutiny. When applied to the Wright Amendment, the substantive due process test raises three issues: (1) whether the Wright Amendment infringes on the right to travel, (2) whether the Amendment promotes a compelling state interest, and (3) whether the Wright Amendment is the least restrictive method for promoting that compelling interest.

Under the substantive due process test, a colorable argument can be made that the Wright Amendment is unconstitutional. This argument rests on two conclusions. First, it seems clear that the Amendment does infringe on the fundamental right to interstate travel. The Wright Amendment makes travel from Dallas to states outside the

\textsuperscript{146} See generally McCoy, supra note 140, at 988.

\textsuperscript{147} See, e.g., Roe v. Wade, 410 U.S. 113, 155 (1973); see also McCoy, supra note 140, at 989. Determining which rights may properly be characterized as "fundamental" is difficult. "All that can be said with certainty is that the justices have selected a group of individual rights which do not have a specific textual basis in the Constitution or its amendments and deemed them to be 'fundamental.'" J. Nowak, R. Rotunda & J. Young, supra note 113, § 11.7 at 369. The Supreme Court has found six rights that are fundamental and, thus, worthy of strict scrutiny: (1) freedom of association, (2) right to vote and to participate in the electoral process, (3) right to fairness in the criminal process, (4) right to fairness in procedures governing individual claims against governmental deprivations of life, liberty, or property, (5) right to privacy, and (6) right to interstate travel. Id. at 370-71.

\textsuperscript{148} Shapiro, 394 U.S. at 618.
Love Field Service Area\textsuperscript{149} less convenient and more costly. Passengers whose flights originate at Love Field must endure certain inconveniences in order to cross interstate borders implicated by the statute. These inconveniences include (1) the inability to obtain certain information necessary to facilitate passage across the implicated borders due to the advertising ban imposed by the statute,\textsuperscript{150} (2) the double ticketing procedure that requires passengers to claim and recheck their baggage, which imposes at least a forty-five minute waiting period between flights,\textsuperscript{151} and (3) the prohibition on customarily lower-priced "through fares."\textsuperscript{152} The right to interstate travel is offended by these inconveniences because they are imposed only when a passenger attempts to cross specified interstate borders.

After establishing that the right to interstate travel is infringed upon by the Wright Amendment, the second conclusion necessary to find that this interference is violative of the fifth amendment substantive due process right is that either (1) the Wright Amendment serves a government purpose which, although legitimate, fails to rise to the level of "compelling" or extremely important, or (2) the means chosen are not the least restrictive method by which to promote that interest. The interest served by the Wright Amendment has traditionally been identified as the economic protection of DFW.\textsuperscript{153} The government, no

\textsuperscript{149} The Love Field Service Area includes the states of Texas, Louisiana, Arkansas, New Mexico, and Oklahoma. For a discussion of the Wright Amendment, see \textit{supra} notes 1-2 and accompanying text.

\textsuperscript{150} DOT Order, \textit{supra} note 3, at 12.

\textsuperscript{151} Id. at 10-11. The waiting period necessarily results because the Wright Amendment requires that bags be claimed and re-checked before a passenger may board a "connecting" flight. \textit{Id.; see supra} notes 59-60 and accompanying text.

\textsuperscript{152} DOT Order, \textit{supra} note 3, at 12. The DOT has forbidden airlines from creating a fare which "could be sold and constructed for service from Love Field to a point outside the restricted service area that is different from the sum of the local fares (Love Field and to a point in the authorized area, plus that point to a point outside the service fare)." \textit{Id.} The DOT considers any such arrangement a through fare, which is prohibited by the Wright Amendment. \textit{Id.; see supra} note 60 and accompanying text.

\textsuperscript{153} \textit{See} Continental Air Lines v. Department of Transp., 843 F.2d 1444, 1446
doubt, would argue that the Wright Amendment serves other interests, such as reduction of noise pollution. A court must decide whether any of these interests are so compelling that they justify the restriction of constitutional rights.

Regardless of whether the interest served by the Wright Amendment is compelling, however, the means chosen are clearly not the least restrictive method of achieving that interest. Indeed, several alternatives to the Wright Amendment are less restrictive on the right to interstate travel and still serve the purpose likely advanced by the government. For instance, a perimeter rule like the ones at National and LaGuardia airports could be employed. The perimeter rules at National and LaGuardia protect larger neighboring airports, yet do not utilize state boundaries as the lines of demarcation. Additionally, those perimeter rules impose substantially less inconvenience on the passenger because passengers are not forced to claim and recheck their luggage between flights. Also, passengers need not purchase two separate tickets in order to reach their destination. The Wright Amendment, then, is clearly not the least restrictive method for protecting DFW (assuming DFW still needs protection, an issue discussed in Section IV).

The Wright Amendment is also not the least restrictive method of reducing noise pollution. Changes in noise

(D.C. Cir. 1988) ("The reason for the exception was, of course, to protect DFW from competition at Love Field."); Henigson, House Limits Love Flights to 4 States, Dallas Times Herald, Jan. 31, 1980, at A1, col 6.

154 Since the imposition of the Wright Amendment in 1979, residents living near Love Field have come to appreciate the restrictions on flights. Although noise control is incidental to the Amendment's main purpose (protection of DFW), it is increasingly cited as a reason for maintaining the Wright Amendment. See, e.g., Bryant, Wright Amendment Helps Keep Inner City Livable, Dallas Morning News, Oct. 7, 1989, at 31A, col. 1. For further discussion of the wisdom of maintaining the Wright Amendment for noise control purposes, see infra notes 294-313 and accompanying text.

155 For a discussion of the perimeter rules at National and LaGuardia Airports, see supra notes 68-106 and accompanying text.

156 For a discussion of these perimeter rules, see supra notes 68-73 (National Airport), 93-96 (LaGuardia Airport) and accompanying text.
levels are determined more by changes in the aggregate number of operations performed at an airport than by the origins and destinations of additional flights. A flight to Nashville is generally no more noisy than a flight to New Orleans. Alternatives to the Wright Amendment might involve restrictions more rationally related to the reduction of noise pollution, including, perhaps, a curfew on the hours of operation or a limitation on the total operations at Love Field. Because it is not the least restrictive method of promoting the state interest and because it infringes on the passenger's fundamental right to interstate travel, one can argue that the Wright Amendment is unconstitutional under the fifth amendment due process clause.

b. Equal Protection

The Wright Amendment also potentially violates the equal protection guarantee implied by the fifth amendment. As noted above, the doctrine of equal protection prohibits unequal treatment of different classes of persons by government action without adequate justification for that inequality. Traditionally, the Supreme Court has spoken of two different standards for determining whether unequal treatment of individuals is justified. The lower standard,
called the "rational basis" standard, requires merely that any inequality in the treatment of individuals by the state be rationally related to the effectuation of a legitimate state interest. In two types of situations the Court has applied a higher standard, known as the "strict scrutiny" standard. Under the strict scrutiny standard, an inequality may be justified only by a showing that it is absolutely necessary to effectuate a "compelling interest" of the state. This standard has been imposed whenever the class of persons disadvantaged by the unequal treatment is a "suspect class" (i.e., a politically powerless or unpopular minority) or when the unequal treatment has an impact on a "fundamental right."

The court's determination of standard of review is usually outcome determinative. History shows that when a rational basis standard is applied the statute is usually upheld; but when a strict scrutiny standard is applied, courts almost always invalidate the statute. Several Supreme Court decisions have applied the strict scrutiny standard in cases involving the fundamental right to interstate travel. The landmark case applying this standard was Shapiro v. Thompson. Shapiro involved a District of Columbia statute, passed by Congress, and two state statutes that denied welfare benefits to persons who had not resided within the jurisdiction for at least one year for New Equal Protection, 86 HARV. L. REV. 1 (1972). The test for intermediate level of review is generally stated as follows: the means chosen by the legislature (i.e. the classification) must serve important governmental objectives and must be substantially related to achievement of these objectives. See, e.g., Craig v. Boren, 429 U.S. 190 (1976). Some commentators argue that an intermediate standard is creeping into right to travel cases. See, e.g., J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 113, § 14.3, at 533. For further discussion of this view, see infra notes 173-188 and accompanying text.

165 See Gunther, supra note 160, at 8.
166 See Soto-Lopez, 476 U.S. at 898; Memorial Hosp., 415 U.S. at 250; Shapiro, 394 U.S. at 618.
167 394 U.S. at 618.
year. The majority opinion found that the residency requirements deterred the entry of indigent persons into these jurisdictions, thus limiting their right to engage in interstate travel. The court held that, because the right to engage in interstate travel is a fundamental constitutional right, the classification distinguishing old residents from new ones had to be invalidated unless it was “shown to be necessary to promote a compelling governmental interest.” The Court found none of the purposes asserted by the government sufficient to satisfy the compelling interest test. Since Shapiro, the Court has continued to invoke the strict scrutiny standard in right to interstate travel cases.

Some commentators argue that not all laws which restrict interstate mobility need be subject to close judicial scrutiny. They assert that the strict scrutiny standard should apply only when the statute in question is a direct barrier to interstate movement or when governmental benefits are allocated on the basis of length of residence in the state. When the statute serves reasonable state interests unrelated to deterring travel, however, a lower standard should apply.

Indeed, in several recent interstate travel cases, the Supreme Court has appeared reluctant to embrace the strict scrutiny standard. In Zobel v. Williams, the court avoided defining the appropriate standard of review for state actions impeding the right to travel. In Zobel, the

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168 Id. at 622-28.
169 Id. at 634.
170 Id.
171 Id. at 648-42. The states argued that the residency requirement served several purposes, including: (1) preservation of the financial integrity of the state welfare program by preventing an influx of indigent newcomers, (2) providing an objective test of residency, and (3) discouraging fraudulent collection of payments from more than one state. Id.
172 See Memorial Hosp., 415 U.S. at 250; Dunn, 405 U.S. at 330.
174 Id.
175 Id.
176 457 U.S. at 55.
177 Id. at 60-65.
Court struck down an Alaska statute that distributed state money to residents based on the length of their residency in the state. Chief Justice Burger wrote that "if the statutory scheme could not pass even the [minimum rationality] test proposed by the state, we need not decide whether any enhanced scrutiny is called for."\(^{178}\) This same approach was later adopted in *Hooper v. Bernalillo County Assessor*.\(^{179}\) There the Court held that it need not address the proper standard of review in right to travel cases because "if the statutory scheme cannot even pass the minimum rationality test, our inquiry ends."\(^{180}\) Similarly, there was not a majority of the Court in favor of any particular standard of review in *Attorney General of New York v. Soto-Lopez*.\(^{181}\) In this case, the Court struck down a New York civil service employment preference for veterans that applied only to those veterans who were New York residents at the time they entered the military. The plurality opinion embraced the strict scrutiny standard.\(^{182}\) Chief Justice Burger, on the other hand, contended in his concurrence that the Court need not address the standard of review because the law could not withstand even the most deferential level of scrutiny.\(^{183}\) Justice White, in his concurrence, concluded that the rational relationship standards should apply because the right to travel was not sufficiently implicated by the statute.\(^{184}\)

Despite the recent reluctance of the Court to frame its analysis in "strict scrutiny" terms, any conclusion that the Supreme Court is abandoning strict scrutiny review in right to travel cases is premature. At most, these cases merely stand for the proposition that when a statute fails

\(^{178}\) *Id.*

\(^{179}\) 472 U.S. at 612.

\(^{180}\) *Id.* at 618.

\(^{181}\) 476 U.S. 898.

\(^{182}\) *Id.* at 906. "Of course, regardless of the label we place on our analysis—right to migrate or equal protection—once we find a burden on the right to migrate the standard of review is the same. Laws which burden that right must be necessary to further a compelling state interest." *Id.* at 904-05 n.4.

\(^{183}\) *Id.* at 912 (Burger, C.J., concurring in the judgment).

\(^{184}\) *Id.* at 916 (White, J., concurring in the judgment).
to satisfy even the lowest level of review, the Court will not bother to inquire whether a higher standard applies. There is also a conceptual flaw in basing the standard of review on the extent of the infringement on a fundamental right. If the right to interstate travel truly is a fundamental right, the Court should analyze even a minor impairment of this right under strict scrutiny review. As Professor Tribe argues, "[a] $1 fine for choosing to be critical of the government . . . would be as clearly suspect as a $1,000 fine. It would indeed be an odd ‘fundamental right’ whose exercise the government could penalize just a bit without any special justification."185

The weight of authority, in fact, indicates that strict scrutiny remains the prevailing standard of review in right to travel cases.186 The Supreme Court’s latest right to travel pronouncement is Soto-Lopez.187 There the court explicitly embraced strict scrutiny review, stating that the New York statute must be invalidated, “unless New York can demonstrate that its classification is necessary to accomplish a compelling state interest.”188

If the strict scrutiny test is applied, a court would likely invalidate the Wright Amendment.189 A strong argument exists that the Wright Amendment establishes impermissible classes based upon the exercise of the right to interstate travel. A passenger who flies from Love Field to Oklahoma City is treated differently in Oklahoma City.

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185 L. Tribe, American Constitutional Law § 16-8, at 1457 n.18 (2d ed. 1988).
186 See Soto-Lopez, 476 U.S. at 904-05 n.4. But see Jones v. Helms, 452 U.S. 412 (1981) (interference with the right to leave state held to be sufficiently minimal such that strict scrutiny was not triggered). The facts in Jones suggest that this case has limited precedential value. In Jones, a Georgia statute made it a felony for a parent to abandon a child in Georgia and then leave the state; it was only a misdemeanor for him to abandon a child if he remained in the state. The court held the statute to a lower standard of review because the defendant’s own culpable conduct (abandoning his child) qualified his right to travel interstate; it was only this lesser, qualified right which was being interfered with. Id. at 419.
187 476 U.S. at 898.
188 Id. at 906.
189 As Professor Gunther has stated, strict scrutiny review is generally "strict" in theory and "fatal" in fact. Gunther, supra note 160, at 8.
than passengers who arrive from other cities or airports. For instance, the passenger from Love Field may not utilize baggage transfer services when travelling to states beyond the Love Field Service Area. Nor may he remain on board his flight from Love Field once it arrives in Oklahoma City, if the flight continues on to states outside the Love Field Service Area. Passengers who did not originate at Love Field are, of course, free to board that plane wherever it may be going. Under a strict scrutiny test, courts would strike down this classification unless it promoted a "compelling" governmental interest.¹⁹⁰

Under a strict scrutiny approach, the government must prove that the Wright Amendment promotes an extremely important or "compelling" government interest.¹⁹¹ The interest traditionally recognized with respect to the Wright Amendment has been the protection of DFW.¹⁹² Probably, the government would argue that the Wright Amendment also serves other interests, such as reduction of noise pollution.¹⁹³ To survive strict scrutiny review, however, the government must prove more than just the compelling nature of the interest served. The Supreme Court has held that even where a compelling governmental interest is shown to exist, the government must demonstrate that there are no alternative means to achieve that interest which place less burden on the right to travel.¹⁹⁴ As shown above, there are several alternative means of achieving the governmental interest served by the Wright Amendment that are less intrusive on the right to travel.¹⁹⁵ Those means might involve a more traditional and flexible perimeter rule, a curfew on the hours of operation, or a limitation on total operations at Love Field. Thus, if a court found that less intrusive means exist (or are available), it could conclude that the Wright Amendment is unconstitutional.

¹⁹⁰ See supra note 163 and accompanying text.
¹⁹¹ See id.
¹⁹² See supra note 153 and accompanying text.
¹⁹³ See supra note 154 and accompanying text.
¹⁹⁴ See supra notes 155-158 and accompanying text.
Amendment violates the equal protection guarantee even though the Amendment serves a compelling state interest.

2. The Port Preference Clause

In *City of Houston v. FAA*, the plaintiffs, through various claims, maintained that the perimeter rule at National Airport discriminated against cities not falling within the 1000 mile perimeter. The court downplayed the discriminatory effect of the rule by noting: "No one has ever attempted completely to bar travelers from distant cities from flying to National Airport." This comment from the court seems almost a veiled reference to the Wright Amendment, as the prohibition on through ticketing and advertising of double ticketing procedures is, arguably, an attempt to completely bar travellers from cities outside the Love Field service area from flying to Love Field. In light of these restrictions, the Wright Amendment's discriminatory effect is significantly greater than that of the perimeter rule at National Airport.

As in *City of Houston*, this discriminatory effect may be attacked as a violation of the port preference clause. Unfortunately, there is very little case authority interpreting this clause. The existing authority, however, makes clear that the discrimination must be between states and not between particular ports within the same or different states. Thus, one could not argue that Congress vio-

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196 679 F.2d at 1184; see supra notes 68-92 for a detailed analysis of the *City of Houston* decision.
197 *City of Houston*, 679 F.2d at 1192.
198 For further discussion of the restrictions imposed on Love Field by the Wright Amendment, see supra notes 32-65 and accompanying text.
199 U.S. CONST. art. I, § 9, cl. 6. "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another." *Id.*
200 Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856). This case involved a challenge to a federal statute which approved construction of a bridge over the Ohio River near Wheeling, West Virginia. The bridge allegedly blocked some paddle vessels from proceeding up the river to the port of Pittsburgh. In rejecting Pennsylvania's claim that the statute discriminated
lated the port preference clause by favoring DFW over Love Field. Instead, a constitutional challenge to the Wright Amendment based on the port preference clause must focus on the discrimination suffered by states deliberately excluded from Love Field service.

Because case authority is so scarce and because a perimeter rule is at issue, City of Houston is the most relevant source interpreting the port preference clause. Under the Fifth Circuit's test, the Wright Amendment is not violative of the port preference clause so long as the detriment suffered by ports in states outside the Love Field Area occurs "(i) as an incident to some otherwise legitimate governmental act regulating commerce or (ii) more as a result of the accident of geography than from an intentional governmental preference."201

A good argument exists that the detriment suffered by ports outside the Love Field service area is not an "accident of geography" as that term was defined by the Fifth Circuit in City of Houston. There, the court held that National Airport's perimeter rule was an accident of geography.

The perimeter does not discriminate against a named state or states. It does not declare that Texans may not fly nonstop to National. Rather, it sets a limit of 1000 miles on nonstop flights. Some states, e.g. Louisiana, straddle the line. Some Louisiana airports meet this requirement, others do not. Just as the Rocky Mountain states possess beautiful scenery, Texas its reservoirs of oil and natural gas, and California its sandy beaches, so the accident of

against the port of Pittsburgh in violation of the port preference clause, the Court stated:

[What is forbidden is, not discrimination between individual ports within the same or different states, but discrimination between states; and if so, in order to bring this case within the prohibition, it is necessary to show, not merely discrimination between Pittsburgh and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania."

Id. at 435.

201 City of Houston, 679 F.2d at 1198. For a fuller discussion of the Fifth Circuit's test in City of Houston, see supra notes 83-85 and accompanying text.
geography places some states within 1000 miles of National and others beyond.\textsuperscript{202}

The Wright Amendment, however, does not utilize objective distance measurements as its line of demarcation, but instead utilizes state borders. No state lies partially in and partially out of the perimeter.\textsuperscript{203} As a result, Albuquerque, New Mexico, 580 miles from Dallas, may serve Love Field, while Wichita, Kansas, 333 miles away, may not. Particular states, because they are not named specifically by the statute, may not serve Love Field. The Wright Amendment deliberately favors the ports of New Mexico, Oklahoma, Arkansas, and Louisiana at the expense of ports in other states.

The more difficult argument is showing that the detriment suffered by these ports is the sole purpose and effect of the statute, and not simply an incident to a legitimate government act regulating commerce under the statute. Whether the Wright Amendment violates this prong of the City of Houston port preference test depends largely on how "incidental" is defined.

On one hand, one could argue that the clear purpose of the Wright Amendment is to promote DFW, not to discriminate against unnamed states.\textsuperscript{204} Since protecting DFW clearly falls within Congress's authority to regulate commerce,\textsuperscript{205} and since discrimination against states outside the Love Field Service Area is not the statute's

\textsuperscript{202} City of Houston, 679 F.2d at 1198.
\textsuperscript{203} For a more detailed discussion of the particular provisions of the Wright Amendment, see supra notes 32-65 and accompanying text.
\textsuperscript{204} Continental Air Lines, 843 F.2d at 1446. "The Amendment was a compromise solution to a longstanding controversy involving attempts by the cities of Dallas and Fort Worth to prohibit interstate operations at Love Field and other area airports so as to ensure the viability of new Dallas/Ft. Worth Regional Airport." Id. (quoting DOT's brief).
\textsuperscript{205} Under modern commerce clause interpretation, a court will uphold commerce based regulations if there is any rational basis upon which Congress could have found some relation between the regulation and interstate commerce. J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 113, § 4.8, at 148; see, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).
main purpose, the Wright Amendment satisfies the *City of Houston* port preference test.

On the other hand, "incidental" is often defined as something happening merely as a chance or undesigned feature of something else. In the case of the Wright Amendment, the sole mechanism by which the statute seeks to effect its purpose is by discriminating against named states. Therefore, the discrimination suffered by states outside the Love Field Service Area is not merely *incidental* to the purpose of protecting DFW. Under this view, the Wright Amendment violates the first prong of the port preference test as enunciated by the Fifth Circuit in *City of Houston*. If this view is accepted, the Wright Amendment probably violates the port preference clause of the United States Constitution.

V. **Should the Wright Amendment Be Repealed?**

As demonstrated above, serious constitutionality questions are raised by the Wright Amendment. Even if a court should find that the Amendment is constitutional, however, Congress should reevaluate the Wright Amendment in light of the current commercial air service needs of the Dallas-Fort Worth area. It is essentially the thesis of this Comment that the Wright Amendment no longer serves those needs and that new restrictions, which are more rationally related to current needs, should be implemented. Repeal of the Wright Amendment would remove two critical restrictions on Love Field: (1) the restriction that flights can only be operated to points within Texas, Louisiana, Arkansas, New Mexico, and Oklahoma, and (2) the restriction that air service cannot be extended beyond this area by means of through service, connecting service, or interline service.

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Amendment should be repealed because it has achieved the goals for which it was intended; second, repeal would bring substantial benefits to consumers of air carrier services in the Dallas-Fort Worth area; and third, substantial economic benefits would accrue to the surrounding area if the restrictions at Love Field are lifted.

A. The Purpose Behind the Wright Amendment Has Been Served

The Wright Amendment was designed to protect newly built DFW, as many feared that unrestricted air travel out of Love Field would endanger the success of the new airport.²⁰⁷ DFW, however, no longer needs this protection, and thus, the Wright Amendment has outlived its purpose.

Since opening fifteen years ago, DFW has grown and prospered, now ranking as the second busiest airport in the world.²⁰⁸ Officials no longer concern themselves with how to attract traffic to DFW; instead they focus on how to alleviate the strains caused by overcrowding.²⁰⁹ In fact, a broad range of indicia demonstrate that DFW is firmly entrenched and is now suffering not from underuse, but overuse. For instance, both American Airlines and Delta, which operate major hubs at DFW, have gate space shortages.²¹⁰ Also, flight delays due to airport volume are a growing problem at DFW.²¹¹ From March through July

²⁰⁷ Continental Air Lines v. Department of Transp., 843 F.2d 1444, 1446 (D.C. Cir. 1988); see Henigson, supra note 153.
²⁰⁹ See Reed, The Man Who Runs the Place Talks About Its Growth, Ft. Worth Star-Telegram, Jan. 15, 1989, § 2, at 1, col. 1 (interview with Oris Dunham, Executive Director of the DFW Airport Board).
²¹¹ See generally Testimony of Carter, supra note 157. Carter's testimony related to a study done by the Dallas Regional Office of the FTC which studied the effects on consumers, both inside and outside the Dallas area, which may result from removal of the flight restrictions at Love Field. Id. at 2.
1989, DFW experienced over 5300 delays, approximately 18% of which were attributed to airport volume. In fact, flight delays at DFW rose 38% in 1989. Another problem at DFW is parking, which is increasingly difficult to obtain near the terminal.

Currently, the airport's operations are increasing at a rate of 5% per year. In 1988, 675,000 flights arrived at or departed from DFW. To meet some of the demands being made on DFW, the Airport Board has unveiled an elaborate $3.5 billion expansion plan, involving the construction of a new terminal and two additional runways. Under this plan, passenger boardings would double to around fifty-three million annually and aircraft landings and takeoffs would double to 1.2 million. Even if these plans are implemented, however, it is estimated that DFW will reach its capacity sometime around the year 2020.

It is clear, then, that DFW's long-term viability has been established. Even if the Wright Amendment contributed
to the eventual success of DFW, it is clear that DFW no longer needs the Amendment’s help. Oris Dunham, the Director of the DFW Airport Board concluded that “the second-largest airport in the world isn’t going to be jeopardized to any great extent” by repeal of the Wright Amendment.\(^2\)\(^\text{20}\) To the contrary, he stated that repealing the Amendment could help reduce airfield congestion at DFW and might allow DFW to delay some of its capital improvements.\(^2\)\(^\text{21}\) Mr. Dunham estimated that repeal of the Wright Amendment would only extend by two years the date when DFW reaches its capacity.\(^2\)\(^\text{22}\)

The extent to which DFW is insulated from harm resulting from potential future growth of services at Love Field is well-evidenced by a recent study commissioned by the DFW Airport Board.\(^2\)\(^\text{23}\) Conducted by KPMG Peat Marwick, the study first calculated that, if the Wright Amendment remained in place, the number of passengers enplaned at DFW would increase from 21.3 million in 1988 to 40.0 million in the year 2000, a gain of 87.7\%.\(^2\)\(^\text{24}\) Next, the study determined the amount of growth that would occur at DFW if the Wright Amendment was repealed and replaced by a 650 mile Love Field perimeter rule that allowed connecting service to points outside the perimeter.\(^2\)\(^\text{25}\) Under this less restrictive scenario, the number of passengers enplaned at DFW would still increase by 84.5\%, from 21.3 million in 1988 to 39.3 million in the year 2000.\(^2\)\(^\text{26}\) These statistics show that the


\(^{21}\) Id.

\(^{22}\) Testimony of Carter, *supra* note 157, at 8-9 (quoting Oris Dunham, DFW Executive Director, before the Transportation Committee, City Council, City of Dallas, Tex. Public Hearing, (Aug. 15, 1989)).

\(^{23}\) KPMG PEAT MARWICK, EVALUATION OF THE POTENTIAL EFFECTS OF CHANGING THE AIR SERVICE RESTRICTIONS AT LOVE FIELD (WRIGHT AMENDMENT STUDY) (Mar. 1990) (prepared for DFW International Airport Board) (available on file at the *Journal of Air Law & Commerce*).

\(^{24}\) Id. at 44.

\(^{25}\) Id.

\(^{26}\) Id. This conclusion was based on the assumption that only carriers currently not serving DFW could move to Love Field, because airlines currently serving
restrictions on Love Field could be substantially loosened without causing significant harm to DFW.\textsuperscript{227}

While DFW is suffering from overcrowding, Love Field, fifteen miles away, has excess capacity. Love Field's estimated capacity is approximately 450,000 operations per year.\textsuperscript{228} Yet, in 1988, Love Field had only 212,823 operations.\textsuperscript{229} Of these, only 106,534 were commercial operations.\textsuperscript{230} In 1973, eight major airlines operated out of Love Field, making it the eighth busiest airport in the United States.\textsuperscript{231} Today, Southwest is the only major commercial airline serving Love Field.\textsuperscript{232} Prior to the opening of DFW, fifty-five gates and three concourses were utilized at Love Field.\textsuperscript{233} At present, only fifteen gates and one concourse are in use.\textsuperscript{234} Furthermore, the

\textsuperscript{227} The study did indicate that DFW's growth could be significantly impacted if the Wright Amendment was repealed and Love Field was left completely unrestricted. Based on this scenario, the study estimated that enplanements at DFW would increase to 39.0 million by the year 2000, a gain of 83.0%. \textit{Id.} at 44.\textsuperscript{227}

\textsuperscript{228} HARRIS MILLER MILLER \& HANSON INC., ANALYSIS OF POTENTIAL NOISE EFFECTS AS A RESULT OF REPEAL OF THE WRIGHT AMENDMENT 3 (Aug. 10, 1989) (report prepared for City of Dallas Department of Aviation); see also Testimony of Carter, \textit{supra} note 157, at 9 (quoting Oris Dunham, who estimates the capacity of Love Field to be 435,000 operations).

\textsuperscript{229} Dallas Love Field Activity Report, Dallas Love Field Circular (available on file at the \textit{Journal of Air Law and Commerce}).

\textsuperscript{230} \textit{Id.}

\textsuperscript{231} Zimmerman, \textit{supra} note 34.

\textsuperscript{232} \textit{Id.}

\textsuperscript{233} Testimony of Carter, \textit{supra} note 157, at 9.

\textsuperscript{234} \textit{Id.} At least nine additional elevated gates are currently available at Love Field for immediate use. Other gates have been converted for other uses since the opening of DFW. These gates may be reconverted, however, subject to various existing leases. \textit{Id.} at 9 n.24.
city estimates that even during peak periods approximately 40% of the airport’s garage and surface lot is unused. It was perhaps with these facts in mind that the Southern Methodist University Business School’s Center for Enterprising, in urging that the Wright Amendment be repealed, concluded that “Love Field is an underutilized and wasting economic development asset.”

One of the major obstacles to repealing the Wright Amendment is the persistent opposition of Fort Worth officials to any modification in the 1979 law. Fort Worth officials have steadfastly opposed any expansion of Love Field because of fear that their investment in DFW will somehow diminish if Love Field competes with DFW.

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235 Id. at 9-10. Recently the City of Dallas spent $21.5 million renovating the terminal and creating additional parking space at Love Field. Dillon, The New Look of Love, Dallas Morning News, Feb. 4, 1988, at C1, col. 1. Furthermore, additional spaces are available where parking facilities have been located in the past. Testimony of Carter, supra note 157, at 10 n.27.

236 SMU - Edwin L. Cox School of Business, Center for Enterprising, News Release, at 4 (May 15, 1987). The Center for Enterprising’s conclusions regarding Love Field were part of a detailed report by Harold T. Gross and Bernard L. Weinstein examining development strategies for the Dallas area. In their report, Gross and Weinstein concluded that Dallas should concentrate on improving its business climate and infrastructure in order to promote industrial retention and expansion. To that end, they suggested a series of initiatives that Dallas’ public and private sectors should undertake. Two of those initiatives were further development of Love Field and repeal of the Wright Amendment. “The Wright Amendment, which is intended to protect DFW International Airport by restricting interstate air access to Love Field, is an increasingly costly anachronism. Dallas needs two air hubs and should work for repeal of the Wright Amendment.” Id. at 7.


238 Brumley, supra note 237. Fort Worth officials have publicly threatened to sue the City of Dallas if Dallas continues to work toward repeal of the Wright Amendment. The legal basis of such a suit apparently rests in the 1968 Regional Airport Concurrent Bond Ordinance which created DFW. In that Ordinance, the two cities agreed to “promote the optimum development of the lands and Facilities comprising [DFW] at the earliest practicable date” and not to take “any action, implement any policy, or enter into any agreement or contract which by its or their nature would be competitive with or in opposition to the optimum development of [DFW].” Bond Ordinance, supra note 11, § 9.5. In this regard, Fort Worth seems to interpret “optimal development” as meaning “maximum number of flights and passengers.” Dallas, on the other hand, could argue that “optimal development” means “efficient allocation of resources.” When incoming and
Interestingly, they pursue this line of attack while enthusiastically supporting construction of a new airport, Alliance Airport, in Fort Worth.\textsuperscript{239}

The foregoing analysis makes clear that repeal of the Wright Amendment would only have a minor impact (and one that is, arguably, positive) on DFW, the success of which is a foregone conclusion. Furthermore, the following analysis demonstrates that repeal of the Wright Amendment would have substantial positive effects for all consumers of airline services throughout the Dallas-Fort Worth area. In considering repeal of the Wright Amendment, lawmakers should consider the net effect that repeal would have on the Dallas-Fort Worth area. This may involve a balancing test in which lawmakers must balance the number of people benefited by repeal, and the degree to which they benefit, against the number of people who suffer from repeal, and the extent of their injury. The following discussion makes clear that repealing the Wright Amendment will have a pronounced positive impact on the quality of air services offered to travellers to and from the Dallas-Fort Worth area—a positive impact that far outweighs any corresponding harm.

B. Benefits to Consumers from Repeal of the Wright Amendment

1. Lower Air Fares

On September 5, 1989, Thomas B. Carter, the Director of the Dallas Regional Office of the Federal Trade Commission, presented to the Transportation Committee of the Dallas City Council an analysis of the effects on consumers, both inside and outside the Dallas area, that may result from removal of the flight restrictions on Love

\textsuperscript{239} For a discussion of Alliance Airport, see infra notes 319-324 and accompanying text.
Carter concluded that consumers would benefit in a broad range of ways. First, he noted that repeal of the Amendment would probably result in reductions of the price of airline tickets to and from the Dallas-Fort Worth area. Two factors would cause this result. First, DFW airlines would face new competitors for routes not previously served by Love Field. Southwest Airlines, for instance, could offer services to destinations beyond the Love Field Service Area. A second way in which repeal of the Wright Amendment could lower ticket prices would be a reduction of the cost of economic rents embedded in the pricing of airline tickets at DFW. When DFW operates at capacity, the shortage of gates and other scarce airport facilities may give rise to "scarcity rents." "In other words, if DFW cannot keep up with growing demand, airline ticket prices could increase to reflect these scarcities."

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240 Testimony of Carter, supra note 157 at 2. Carter described the FTC's purpose as follows:

The Federal Trade Commission is an independent regulatory agency which for 75 years has been charged with the responsibility of protecting competition and safeguarding the interests of consumers. Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition and unfair or deceptive acts or practices. Pursuant to this mandate, the Commission seeks to serve the public interest by, among other things, protecting the marketplace from unreasonable restraints of trade. Upon request by federal, state, and local governmental bodies, the FTC staff regularly assesses the competitive impact of legislative and regulatory proposals in order to identify provisions that may benefit consumers by promoting competition and reducing prices, and provisions that may harm consumers by impairing competition or increasing costs without offering offsetting benefits.

Id. at 3-4. See also supra note 211.

241 Id. at 12.

242 Id. at 12-13.

243 Id. at 13.

244 Id. "Removal of restrictions at Love Field will increase available airport facilities, which is likely to erode any economic rents embedded in the pricing of airline tickets at D/FW." Id. In explaining the concept of "scarcity rents," Carter states, "When a factor of production, such as an airport gate, is in fixed supply, increases in the demand for that factor will cause its price to rise. If this factor is already earning a competitive return before the price increase, the additional revenue generated by this price is termed a "scarcity rent." Id. at 13 n.32.
Removal of the restrictions at Love Field would make more airport facilities available, and thus prevent the occurrence of "scarcity rents."

To support his argument, Carter analyzed current ticket prices, comparing fares for routes affected by the Wright Amendment to those unaffected by it.²⁴⁵ The results reveal that if Southwest Airlines could compete from Love Field with the airlines at DFW on routes to destinations prohibited by the Wright Amendment, ticket prices to those destinations would decrease.

In his analysis Carter compared the fares of Southwest, the major carrier at Love Field, and American, the major carrier at DFW. The FTC study found that where the two airlines served the same destinations, their ticket prices were substantially the same.²⁴⁶ For example, at the time of the study, the lowest price for a roundtrip Southwest flight from Love Field to either Little Rock, Houston, Austin, or San Antonio was $38.²⁴⁷ American's lowest priced fares from DFW to these cities was also $38.²⁴⁸ The FTC also noted that Southwest's and American's lowest priced flights from Houston to Nashville, Birmingham, and St. Louis—cities outside the Love Field Service Area—are identically priced at $98.²⁴⁹ Comparisons between regular priced fares also reflect substantially similar pricing structures between the two airlines.²⁵⁰ From these comparisons it is clear that when Southwest and American serve the same city-pairs, they generally offer a similar range of fares. These figures suggest that if Southwest were allowed to fly to destinations beyond the current Love Field Service Area, American would price similarly to Southwest on flights from DFW to these destinations.²⁵¹

²⁴⁵ Id. at 12-18.
²⁴⁶ Id. at 17.
²⁴⁷ Id. at 16.
²⁴⁸ Id.
²⁴⁹ Id.
²⁵⁰ Id.
²⁵¹ Id. at 16-17.
The FTC study next compared American’s prices on routes from DFW to destinations that Southwest cannot serve from Love Field with prices on routes from Houston to these same destinations.\textsuperscript{252} The study looked specifically at American’s fares from DFW to Kansas City, Nashville, Birmingham, and St. Louis as well as American and Southwest fares from Houston to these same cities.\textsuperscript{253} The lowest available fares from Houston to Kansas City, Nashville, Birmingham, or St. Louis were significantly lower than the fares from DFW to these destinations. For instance, the lowest available fare from the Houston area to St. Louis was $98 and the lowest available fare from Dallas to St. Louis was $200.\textsuperscript{254} Full fare differentials were even larger. In fact, full fares from DFW were, in some instances, four times more than full fares originating in Houston.\textsuperscript{255} For example, the fare from Houston to Nashville was $168; the same airline’s fare from Dallas to Nashville was $672.\textsuperscript{256}

The FTC’s statistics show that, when serving the same city-pairs, Southwest and American have similar fares. Additionally, prices from DFW to destinations that cannot be served from Love Field are substantially higher than fares from Houston to these same destinations (where Southwest does have routes matching American). As Carter concluded, this evidence “suggests that removal of restrictions may lower fares to consumers flying into and out of Dallas.”\textsuperscript{257} This same conclusion was also reached by a private study commissioned by the City of Dallas.\textsuperscript{258}

\textsuperscript{252} Id. at 17. The study used Houston as a comparison city for several reasons. Both Dallas and Houston have a newer regional airport and an older in-town airport. \textit{Id.} at 14. Also, “the distances of the routes to the listed destinations are comparable, and the cities are of comparable size and location.” \textit{Id.} at 14-15.

\textsuperscript{253} Id. at 17.

\textsuperscript{254} Id.

\textsuperscript{255} Id.

\textsuperscript{256} Id.

\textsuperscript{257} Id. at 17-18.

\textsuperscript{258} \textit{Reese and Company, The Impact on Air Traffic Activity at Dallas Love Field Resulting from Repeal of the Wright Amendment} (July 31, 1989) (available on file at the \textit{Journal of Air Law and Commerce}).
That study indicated that once Southwest is allowed to compete with the airlines at DFW for routes outside of the Love Field Service Area, the major carriers at DFW would most likely increase the availability of lower priced and less restrictive fares as necessary to counter any loss of passenger traffic.\(^{259}\)

2. **Reductions in Delay Time**

A second major way in which consumers would benefit from repeal of the Wright Amendment would be a reduction of delay time suffered by passengers flying into and out of the Dallas-Fort Worth area. There are many indications that DFW is approaching capacity level.\(^{260}\) One indication of this problem is that delay time is increasing at DFW.\(^{261}\) Delay time is the time imposed on passengers on flights waiting to use a runway.\(^{262}\) One of the major causes of delay time is airport volume.\(^{263}\) FAA statistics

\(^{259}\) Id. at 10. Concern at the local level over the Wright Amendment’s effect on air fares to and from Dallas-Fort Worth area is well evidenced by a small article in *D Magazine*, a Dallas based magazine which focuses on current events and issues in Dallas and the surrounding area. *D Magazine* concluded that the Wright Amendment costs consumers money by preventing Southwest Airlines from competing with the major airlines at DFW. Posey, *Something ’Spensive in the Air*, *D Magazine*, Mar. 1990, at 28. To support this conclusion, *D Magazine* compared DFW air fares to selected cities (outside of the Love Field Area) with the fares of cities that allow full competition between the budget airlines and the major airlines. This study compared the lowest round-trip rates to selected cities from Austin, Oklahoma City, Tulsa, and Dallas as of February 3, 1990.

<table>
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<th>TUL</th>
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<td>$338</td>
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\(^{260}\) Zimmerman & Stahl, *supra* note 208 (citing the need for additional runways and gates at DFW).


\(^{262}\) Testimony of Carter, *supra* note 157 at 18-19.

\(^{263}\) Id. at 19.
reveal that DFW suffered over 5300 delays from March through July 1989.264 Approximately 18% of this delay time was attributable to airport volume.265

The FTC noted in its report that “a reduction in operations when an airport is near its capacity can have a significant impact on delay time.”266 One particular study estimated that if there were twenty departures per runway per hour, a 1% increase in commercial air carrier departures would cause an increase in the average delay of 2.9%.267 Likewise, if there were twenty arrivals per runway in the same hour, a 1% increase in commercial air carrier arrivals per runway would increase departure delays by an additional 1.6%.268 These statistics suggest that delay time may be reduced by decreasing traffic volume at peak hours.

The overcrowded situation at DFW, on the other hand, is in marked contrast to that at Love Field. Once the eighth busiest airport in the country,269 Love Field currently operates far below capacity level.270 In 1973, Love Field enplaned over 6.6 million passengers.271 In 1988, that number was under 2.5 million.272 The FAA estimates that Love Field can accommodate approximately twice as many flights as it handled in 1988.273 Furthermore, the FAA notes that from March through July 1989, Love Field suffered only 349 delays.274 None of these delays were at-
tributed to airport volume.\textsuperscript{275}

The comparison between flight delays at DFW and Love Field suggests that, if flights were allocated more efficiently between the two airports, all passengers to and from the Dallas-Fort Worth area would suffer less delay time. For example, the FTC study concluded that two types of passengers will benefit if operations are expanded at Love Field: (1) those passengers who shift from using DFW to the below-capacity Love Field and (2) the passengers who continue to use DFW after its excess traffic is shifted to Love Field.\textsuperscript{276} Specifically, the study indicated that if 10\% of the commercial flights to and from DFW were transferred to Love Field, the passengers remaining at DFW would save over $19.3 million in reduced delays.\textsuperscript{277} Under the same formula, the passengers who shift to Love Field would save about $6.8 million per year in reduced delays.\textsuperscript{278} This is a clear example where, if the Dallas-Fort Worth area utilized all of its available resources, the overall quality of commercial air passenger service would improve.

Critics will, of course, argue that any shifting of traffic away from DFW is harmful to DFW. This argument fails, however, because the long-term goal for DFW should be to find the level of operations at which it operates most efficiently and profitably, and should not be to simply maximize the number of flights in and out of DFW. To the extent that Love Field can be utilized in order to more effectively allocate flights between the two airports, DFW will only benefit from expansion of operations at Love Field.

\textsuperscript{275} Id.
\textsuperscript{276} Id. at 25-26.
\textsuperscript{277} Id. at 27. This computation is based on the assumptions that the average delay at DFW is 10 minutes, the elasticity of delay with respect to operations equals three, and the average value of passengers' time equals $10 per hour. Id. at 25-26.
\textsuperscript{278} Id. at 26.
3. Savings in Commuting To and From the Airport and Reduced Parking Rates

Commuting and parking rates represent two final areas where consumers can expect savings after repeal of the Wright Amendment. Love Field is ten miles closer to downtown Dallas than DFW. The large number of passengers who commute from downtown to DFW would experience significant long term savings if they could use Love Field. The FTC study notes that passengers commuting from downtown could save, in reduced travel time alone, up to an estimated two million dollars per year. The FTC further concludes that there are substantial direct costs in travelling the ten additional miles to DFW. Passengers who shift from DFW to Love Field could potentially save over three million dollars per year in out-of-pocket expenses.

Consumers will also save on airport parking rates if traf-
fic shifts from DFW to Love Field. The daily parking rate close to the terminal at DFW is $10. At Love Field, however, where all parking is near the terminal, the daily covered garage rate is $6 while outside parking is $4.50. DFW does have remote parking at rates comparable to those at Love Field, but these lots necessarily require that ground transportation be utilized to get to the terminal, thus involving additional time and inconvenience. As a result, increased operations at Love Field would potentially save passengers in airport parking fees.

C. Economic Impact of Repeal of the Wright Amendment

Love Field is a tremendous economic asset to the Dallas-Fort Worth economy. In December 1989, the North Central Texas Council of Governments released a study on Love Field's role in the Dallas economy. That study revealed that Love Field has an annual economic impact of $2 billion. Additionally, over twenty-four thousand jobs are attributable to Love Field. These figures demonstrate the great economic value of Love Field to the surrounding area.

Although Love Field has a significant impact on the surrounding economy, its true economic potential is substantially constrained by the Wright Amendment. In July 1989, the City of Dallas commissioned a study to determine the additional economic impact that would result

282 See generally id. at 22-23.
283 Id.
284 North Central Texas Council of Governments, Economic Impact of Dallas Love Field (Dec. 1988) (available on file at the Journal of Air Law and Commerce). Direct impacts totaled $467,930,000. Id. at 4. Direct impacts include expenditures by firms that carry passengers, firms that serve the general aviation function, governmental agencies which support aviation, the ground transport firms, firms that maintain aircraft and others. Id. at 3. Indirect impacts, including expenditures made by air passengers who visit the region, expenditures by the region's residents, and value added impacts of firms that depend on the airport totaled $291,819,000. Id. at 3-4. Finally, induced economic impacts, resulting from the "multiplier effect," totaled $1,241,955,000. Id. at 3-4. The multiplier effect was determined using the multiplier coefficients specific to the Dallas/Fort Worth region. Id.
285 Id. at 13.
from repeal of the Wright Amendment.\textsuperscript{286} The study results were expressed in terms of additional economic impact that would have occurred in 1987 had the operating restrictions not been in effect.\textsuperscript{287} The study first predicted that direct economic expenditures would have been almost $5 million greater had the Wright Amendment not been in effect.\textsuperscript{288} The indirect costs of the Amendment, however, were even greater; the study concluded that visitor expenditures such as lodging, food, and ground transportation would have been almost $80 million greater, but for the restrictions.\textsuperscript{289} Finally, the study calculated the induced impacts, based on the “multiplier effect” of respending the direct and indirect funds throughout the local economy. This amount was close to $139 million.\textsuperscript{290}

In totaling these figures, the study concluded that the Wright Amendment, in 1987 alone, cost the Dallas area

\textsuperscript{286} Wilbur Smith Associates, Additional Economic Impacts on Love Field as a Result of Repeal of the Wright Amendment (Aug. 14, 1989) (available on file at the Journal of Air Law and Commerce). The study looked at both positive and negative implications of repeal of the Wright Amendment. The study summarized the negative effects of repeal as follows:

It can be expected that the increased economic activity would be accompanied by some negative impacts. This would result from increased ground traffic in the Love Field vicinity, and increased air carrier flight operations. However, activity levels would remain considerably below those that were experienced prior to the opening of Dallas-Fort Worth International Airport. Also, these impacts would be mitigated to some extent by the Love Field fleet mix requirement to use quieter Stage 3 aircraft and by current and forecast improved motor vehicle emissions performance, which reduces air pollutants.

\textit{Id.} at 6-7.

\textsuperscript{287} Id. at 1.

\textsuperscript{288} Id. at 2.

\textsuperscript{289} Id. at 2, 5. The indirect impact categories are as follows:

<table>
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<th>Expenditure Category</th>
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<tr>
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<tr>
<td>Food</td>
<td>23,402,000</td>
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<tr>
<td>Entertainment</td>
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<tr>
<td>Ground Transportation</td>
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</table>

\textsuperscript{290} Id. at 6.
$223,547,000. The study further found that the increased economic activity would result in the creation of over four thousand jobs in the surrounding area. The vast majority of jobs would be created in the hospitality industry, although some additional jobs would be located at Love Field itself.

VI. AFTER THE WRIGHT AMENDMENT: MINIMIZING AIRPORT NOISE

During 1989, the wisdom of the Wright Amendment faced intensified scrutiny. Legislation was introduced in Congress to repeal the Amendment. The Dallas City Council, moreover, issued a resolution calling for replacement of the Amendment with a 650-mile perimeter rule very similar to the perimeter rules imposed at National and LaGuardia airports. The wide range of benefits that would result from the total lifting of restrictions at Love Field demonstrates that ample room exists for the improvement of the quality of air carrier service in the Dallas-Fort Worth area.

Nevertheless, strong opposition to repeal of the Wright Amendment has developed during the course of public debate. Fear of increased noise and congestion has caused neighborhood groups near Love Field to oppose the Amendment's repeal. Indeed, one study has shown that repeal of the Wright Amendment could cause a sig-

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291 Id.
292 Id.
293 Id.
295 Dallas, Tex., Resolution 893150 (Sept. 27, 1989) (available on file at the Journal of Air Law and Commerce). The city later rescinded the resolution because of fear that repeal of the Wright Amendment would hurt DFW and increase noise at Love Field.
297 The town council of one nearby community, Highland Park, unanimously passed a resolution opposing repeal of the Wright Amendment. Zethraus, HP Gives Backing to Love Rule, Council Opposes Repeal of Wright Amendment, Dallas Morning News, Oct. 18, 1989, at A29, col. 1; see also, Zethraus, Clamoring for Quiet, High-
nificant noise increase in the surrounding areas if Love Field is allowed to reach capacity.\textsuperscript{298} Reduction of noise pollution is a common and valid reason for implementation of perimeter rules.\textsuperscript{299}

Congress, however, did not tailor the current restrictions to minimize noise.\textsuperscript{300} Imposing restrictions on flight destinations may be an effective tool for protecting DFW, but it is an exceedingly inefficient method of controlling noise pollution. Any change in noise levels after repeal of the Wright Amendment will occur as a result of increases in the aggregate number of operations, not as a result of changes in the origins and destinations of the additional flights.\textsuperscript{301} It should be noted, moreover, that an increase in traffic does not necessarily imply a corresponding increase in noise; old and noisy Stage 2 aircraft are slowly being phased out and replaced by newer and quieter Stage 3 aircraft.\textsuperscript{302}

Incidental noise reduction is no reason, in and of itself, to maintain the Wright Amendment. If Congress or the Dallas City Council believes that Love Field should be constrained in order to protect the quality of life in the area surrounding Love Field, then new restrictions should be imposed which are more rationally related to that purpose. As a practical matter, the opposition groups un-


\textsuperscript{298} Harris Miller Miller \& Hanson Inc., \textit{supra} note 228, at 4-6. Interestingly, this same study predicted that in the year 2000, based upon predicted growth rates for an unrestricted Love Field, there would be no noticeable increase in noise above the 1986 levels. \textit{Id.} at 4-5. The study concludes that the increases in total activity would be largely offset by a shift toward more modern and quieter Stage 3 aircraft. \textit{Id.} at 5-6.

\textsuperscript{299} Noise control was a significant factor in the decision to implement perimeter rules at both National and LaGuardia Airports. \textit{See supra} notes 73, 96 and accompanying text.

\textsuperscript{300} \textit{See supra} note 207 and accompanying text.

\textsuperscript{301} \textit{See generally} Testimony of Carter, \textit{supra} note 157, at 12.

\textsuperscript{302} \textit{See Harris Miller Miller \& Hanson Inc., supra} note 228, at 5. In 1986, Stage 3 aircraft accounted for 40\% of all operations at Love Field and 47\% of those at night. \textit{Id.} In the 1990 forecast, the percentages are 66\% and 47\%, respectively. \textit{Id.} Furthermore, in the 1995 forecast, Stage 3 aircraft are expected to account for 79\% of all operations and 65\% of those at night. \textit{Id.}
doubtedly support the Wright Amendment not because it is good legislation, but out of fear that it will not be replaced with new restrictions, or if such restrictions are put in place, they will not be as restrictive as the Wright Amendment. Such fear should not stand in the way of overhauling outdated, overly-restrictive legislation such as the Wright Amendment.

Before considering the types of restrictions that should replace the Wright Amendment, the focus should be on determining which level of government is best suited to impose those restrictions. The current Love Field restrictions were imposed by Congress to protect DFW.\footnote{See supra note 207 and accompanying text.} Because this purpose has been achieved,\footnote{See supra notes 207-238 and accompanying text.} any new restrictions enacted to replace the Wright Amendment would likely be designed to serve a different goal—noise control.

If noise control is indeed the purpose for implementation of a new perimeter rule and other restrictions, Congress and Love Field’s proprietor, the City of Dallas, must seriously inquire whether Congress is the appropriate body to issue such regulations. As the current attempt to repeal the Wright Amendment demonstrates, Congress is often too slow to respond and too detached from local concerns to adequately regulate a particular airport. The local proprietor is in a superior position to (1) consider the actual air service needs of the community and (2) quickly re-evaluate the restrictions it imposes as those needs change.\footnote{See British Airways Bd. v. Port Auth., 558 F.2d 75 (2d Cir. 1977) [hereinafter British Airways I]; see also Global Int’l Airways v. Port Auth., 727 F.2d 246, modified, 731 F.2d 126 (2d Cir. 1984) (permitting local proprietor to require air carriers to utilize newer technology).} This view was adopted by the Second Circuit Court of Appeals in \textit{British Airways Board v. Port Authority},\footnote{British Airways I, 558 F.2d at 75.} which stated, “[t]he inherently local aspect of noise control can be most effectively left to the operator, as the unitary local authority who controls airport access.
It has always seemed fair to assume that the operator will act in a rational manner in weighing the commercial benefits of proposed service against its costs, both economic and political.\(^{307}\)

If Congress repealed the Wright Amendment, the City of Dallas would be acting well within its authority by drafting and adopting its own perimeter rule or other restrictions so long as the new restrictions did not unduly burden interstate commerce or inhibit the accomplishment of national goals.\(^{308}\) Although noise regulations imposed by the local proprietor may face a higher level of judicial scrutiny than do federal statutes,\(^{309}\) the right of the local proprietor to impose such restrictions has been repeatedly upheld.\(^{310}\)

\(^{307}\) British Airways I, 558 F.2d at 83; see also British Airways Bd. v. Port Auth., 564 F.2d 1002, 1011 (2d Cir. 1977) [hereinafter British Airways II] (stating that “[i]t seemed fair to assume that the proprietor’s intimate knowledge of local conditions, as well as his ability to acquire property and air easements and assure compatible land use, . . . would result in a rational weighing of the costs and benefits of the proposed service.”).

\(^{308}\) See British Airways II, 564 F.2d at 1010-11; see also City of Houston v. FAA, 679 F.2d 1184, 1196 (5th Cir. 1982); Western Air Lines, Inc. v. Port Auth. of N.Y. & N.J., 658 F. Supp. 952, 958 (S.D.N.Y. 1986), aff’d, 817 F.2d 222 (2d Cir. 1987); Blackman & Freeman, Environmental Consequences of Municipal Airports: A Subject of Federal Mandate?, 53 J. Air L. & Com. 375, 389-96 (1987) (discussing scope of judicial review of noise and access regulations). The Fifth Circuit in City of Houston stated, We find that the FAA, acting in its proprietary capacity as the owner/operator of National and Dulles, had express authority under the Federal Aviation Act to promulgate reasonable regulations concerning the efficient use of the navigable airspace. The perimeter rule falls within its grasp as a means of promoting such efficiency. City of Houston, 679 F.2d at 1196. The Western Air Lines court concluded, “[I]n the absence of conflict with FAA regulations, a perimeter rule, as imposed by the Port Authority to manage congestion in a multi-airport system, serves an equally legitimate local need and fits comfortably within that limited role, which Congress has reserved to the local proprietor.” Western Air Lines, 658 F. Supp. at 960.

\(^{309}\) See supra note 117 and accompanying text. But see Blackman & Freeman, supra note 311, at 389-96. Blackman and Freeman argue that courts generally apply a deferential standard of review to noise control regulations imposed by local proprietors. Id. They contend that this is the correct approach because the local proprietor is in a superior position to the federal government to determine acceptable levels of noise pollution. Id.

\(^{310}\) City of Houston, 679 F.2d at 1196 (upholding perimeter rule at National Airport imposed by FAA, the local proprietor); British Airways I, 558 F.2d at 85-86 (upholding local proprietor’s temporary ban on SST flights at Kennedy Airport);
A local perimeter rule would also have several advantages. First, it would insure that the people who bear the costs of unrestricted air traffic—citizens living near Love Field—have a convenient forum in which to protect their interests. Second, the local proprietor is in a superior position to weigh those costs against the corresponding benefits enjoyed by consumers when air traffic services are left unrestricted. If the perimeter rule is drafted at the local level, the parties most affected by it, both positively and negatively, have a role in its creation.

Clearly the party who would most strongly oppose granting Dallas more control over its own airport would

\[\textit{Western Air Lines}, 658 \text{ F. Supp. at 958} \text{(upholding perimeter rule at LaGuardia Airport imposed by local proprietor)}; \textit{Aircraft Owners & Pilots Ass'n v. Port Auth.}, 305 \text{ F. Supp. 93} \text{(E.D.N.Y. 1969)} \text{(upholding local proprietor's imposition of a “takeoff” fee on certain small aircraft for the purpose of reducing airport congestion).}

The major case cited as a limitation on the power of municipal authorities to impose noise restrictions is \textit{City of Burbank v. Lockheed Air Terminal}, 411 U.S. 624 (1973). There, the Court struck down a municipal ordinance which imposed a curfew on jet air traffic at a local airport. \textit{Id.} The Court ruled that the municipal ordinance was preempted due to the "pervasive nature of the scheme of federal regulation of aircraft noise." \textit{Id.} at 633. The precedential effect of this case, however, is limited. The City of Burbank was not the actual proprietor of the airport but instead used its governmental powers, or police powers, to impose limits on the airport. The Court explicitly refused to address the existence of any limitations on a municipality's authority to impose noise regulations when acting as the airport's proprietor. \textit{Id.} at 635 n.14; \textit{see also Western Air Lines}, 658 F. Supp. at 956 (distinguishing \textit{City of Burbank} on these grounds). The Court, in limiting the breadth of its holding, noted a letter by the Secretary of Transportation, which was quoted with approval in the Senate Report on section 611 of the Federal Aviation Act, 49 U.S.C. § 1431 (1970), which stated that

[T]he proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

\textit{City of Burbank}, 411 U.S. at 635 n.14 (quoting S. REP. No. 1353, 90th Cong., 2d Sess. 6 (1968)). Based on the limiting language in \textit{City of Burbank}, several courts have held that a municipality may impose noise regulations when acting as a proprietor. \textit{See}, e.g., \textit{Santa Monica Airport Ass'n v. City of Santa Monica}, 659 F.2d 100, 104 (9th Cir. 1981); \textit{British Airways I}, 558 F.2d at 83. For a further discussion of the limitations of \textit{City of Burbank}, see Blackman & Freeman, \textit{supra} note 311, at 381-87.
be the City of Fort Worth. Fort Worth officials contend that any growth in services at Love Field will harm their investment in DFW. By keeping the regulation of Love Field in the hands of the national government, Fort Worth is able to retain some political control over Love Field.

Fort Worth’s concerns, however, should not be allowed to block the revamping of the restrictions at Love Field or the granting of more control to Dallas. As a practical matter, Love Field will never challenge the success of DFW. Dallas has its own reasons for preventing Love Field from expanding too much. Dallas itself incurred substantial levels of debt in developing DFW and has a vested interest in its success. Also, several large residential communities now surround Love Field. The citizens who oppose unrestricted growth at Love Field are large in number and politically well-organized. The presence of large groups of local citizens adversely affected by Love Field guarantees that Love’s growth will always be constrained.

Another reason why Fort Worth’s concerns should not prevent Dallas from acquiring more control over Love Field is that the vast majority of people significantly impacted by Love Field reside in Dallas. The number of Dallas citizens affected by repeal of the Wright Amend-

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311 See supra note 238 and accompanying text.
312 Undoubtedly, control decreased significantly when 12th District Congressman Jim Wright, from Fort Worth, resigned as Speaker of the House of Representatives in 1989.
313 In total, the DFW Airport Board has been responsible for 36 bond issues that have raised $1.94 billion, including almost $1.4 billion in debt outstanding. The Airport Board recommends the sale of bonds for different projects; however, the cities of Dallas and Fort Worth actually issue the securities. Weiss, Bond Issues Pave the Way for Growth, Dallas Morning News, Jan. 8, 1989, at K11, col. 1.
314 Dallas City Councilwoman Lori Palmer, who represents much of the area surrounding Love Field, notes that 40,000 people are affected by noise at the airport. Collins, Love Field Limits Costly, Council Told, Dallas Times Herald, Sept. 6, 1989, at K11, col. 2.
315 See Zethraus, Clamoring for Quiet, supra note 297; Collins, supra note 317, at A17, col. 2; Austin, supra note 296. One organization, the Love Field Citizens Action Committee, hints that it may file suit against the city if Love Field is expanded. Id. Austin, supra note 297.
ment, and the extent to which they will be affected, is large. Fort Worth citizens, on the other hand, are much less directly affected by the happenings at Love Field. Even if Fort Worth’s interest in DFW is somehow harmed by an expanded Love Field, the detriment suffered by Fort Worth pales in comparison to the corresponding benefit enjoyed by Dallas.

Finally, Fort Worth’s position on Love Field is particularly untenable in light of the fact that Fort Worth itself is currently constructing a new airport, Alliance Airport, just sixteen miles from DFW.\footnote{See generally Friend, Alliance of Visionaries, Dallas Times Herald, Dec. 10, 1989, at D1, col. 1.} Intended as an industrial cargo airport, Alliance boasts a 9600-foot runway—the nation’s biggest new runway since DFW opened in 1974.\footnote{Id.} Thus far, Fort Worth has committed $32 million dollars to its construction.\footnote{Id.} Alliance has already begun to compete with DFW for industrial and cargo distribution business.\footnote{See generally Steffy, Feeling the Force of Competition, Observers Say D/FW Just Beginning to See the Magnetic Powers of Alliance Airport, Dallas Bus. J. Bus. Press, Nov. 1989, at 2B, col. 1. Steffy discusses the developing competition between Alliance and DFW for industrial and cargo distribution business. Steffy notes that United Parcel Service is currently debating whether to locate its new regional hub at DFW or Alliance. Id. The importance of cargo operations to DFW is underscored by the fact that DFW is currently devoting about 65% of its development efforts to increasing cargo operations. Id. (quoting Terry Parent, DFW marketing director).} For example, American Airlines is building a $400 million maintenance base at Alliance;\footnote{Id.} DFW had originally been considered the prime candidate for the base.\footnote{Id.} Indeed, it is ironic that Fort Worth, while building and promoting a new airport of its own, attempts to block expansion at Love Field by arguing that such expansion will harm DFW.

Ultimately, then, control over Love Field should be left

\begin{footnotes}
\footnote{See generally Friend, Alliance of Visionaries, Dallas Times Herald, Dec. 10, 1989, at D1, col. 1. Alliance Airport will serve as the centerpiece of an 18 thousand-acre industrial development project. Id. The project is a joint public-private partnership between The Perot Group, the Federal Aviation Administration, and the City of Fort Worth. Id. The City of Fort Worth will own the airport, but intends to contract with The Perot Group for management. Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{See generally Steffy, Feeling the Force of Competition, Observers Say D/FW Just Beginning to See the Magnetic Powers of Alliance Airport, Dallas Bus. J. Bus. Press, Nov. 1989, at 2B, col. 1. Steffy discusses the developing competition between Alliance and DFW for industrial and cargo distribution business. Steffy notes that United Parcel Service is currently debating whether to locate its new regional hub at DFW or Alliance. Id. The importance of cargo operations to DFW is underscored by the fact that DFW is currently devoting about 65% of its development efforts to increasing cargo operations. Id. (quoting Terry Parent, DFW marketing director).}
\end{footnotes}
to its proprietor, the City of Dallas. Once the Wright Amendment is repealed, the City of Dallas could determine what restrictions to place on Love Field. In this regard, one can expect that noise control considerations would be paramount. Some of those restrictions include (1) a perimeter rule prohibiting nonstop flights to or from Love Field in excess of 650 miles, (2) differential landing fees for Stage 3 and Stage 2 aircraft, and (3) construction of ground barriers to reduce noise. Indeed, a host of factors would determine what restrictions are placed on Love Field. The citizens of Dallas would bring a broad range of views to the discussion over the proper level of restrictions at Love Field. Importantly, so long as the restrictions are imposed at the local level, problems such as those caused by the Wright Amendment will be more easily avoided in the future. Local residents and consumers would have a convenient forum to express their views. Furthermore, when local air travel conditions change, existing restrictions could be reevaluated more quickly and efficiently.

VII. Conclusion

Congress passed the Wright Amendment because of fear that continued use of Love Field would hinder the growth of DFW. To help insure DFW's success, Congress prohibited commercial air carriers from providing service between Love Field and destinations outside of Texas and its four surrounding states.

Although protection of DFW was, at the time, a legitimate goal, there is a strong argument that the means chosen exceed the bounds prescribed by the Constitution. The Supreme Court has long recognized a fundamental right to interstate travel. The Wright Amendment infringes on that right by making travel from Dallas to states outside the Love Field Service Area less convenient and more costly. Both the substantive due process doctrine

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322 Dallas, Texas, Resolution 893150 (Sept. 27, 1989).
and equal protection doctrine require that infringements on a fundamental right serve a compelling state interest and be the least restrictive method of serving that interest. The Wright Amendment fails this difficult standard because less restrictive alternatives, such as those found at National and LaGuardia airports, are available. The Wright Amendment is also potentially unconstitutional as a violation of the port preference clause, which prohibits Congress from favoring the ports of one state over the ports of another.

Regardless of whether a court finds the Wright Amendment constitutional, however, Congress should repeal it. The airport once perceived as needing protection from Love Field in order to establish itself is today the second busiest airport in the world. DFW no longer needs the protection of the Wright Amendment. In fact, because of DFW's tremendous growth, airport officials are currently contemplating a massive expansion at DFW. In this era of burgeoning air travel to and from the Dallas-Fort Worth metropolitan area, it makes little sense to restrain Love Field so tightly. Love Field's resources will remain underutilized so long as the Wright Amendment remains in place.

Many opponents of repeal maintain that the Wright Amendment is necessary as a limit on noise pollution. The growth of residential neighborhoods around Love Field undoubtedly means that reasonable noise restrictions are needed at Love Field. The Wright Amendment, however, is an extremely poor device to accomplish this purpose. There is little or no correlation between the origins and destinations of flights serving Love Field and the noise levels suffered by the surrounding neighborhoods. The Wright Amendment is the wrong solution. It should not remain in place merely because it has the incidental effect of reducing noise.

New restrictions, more rationally related to the purpose of reducing noise pollution, are needed at Love Field. Which level of government should impose the restrictions
that replace the Wright Amendment, however, is as important an issue as the type of restrictions adopted. Perhaps the single most important lesson of the Wright Amendment is that Congress is not well suited to impose the types of restrictions currently in place at Love Field. A city's air travel needs are subject to change over a relatively short period of time. Congress is too slow to respond to such changes and is often insensitive to the interests of the parties most affected by the airport restrictions. The local airport proprietor is more in tune with the needs and concerns of the surrounding community and the consumers who use the airport. Therefore, any new restrictions on Love Field replacing the Wright Amendment should be imposed by the City of Dallas, not Congress. The new restrictions, of course, must be reasonable and cannot hinder the accomplishment of national goals.