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Freedom to Fly: An Analysis of the Constitutional Right to Air Travel

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FREEDOM TO FLY: AN ANALYSIS OF THE CONSTITUTIONAL RIGHT TO AIR TRAVEL

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FOR MANY PEOPLE, THE THOUGHT of not being allowed to fly may be hard to imagine. Flying across the state, across the country, and even internationally has become so common that some would argue the ability to fly is a necessity to function in today's society. People travel by air for nearly every conceivable purpose, such as business, education, medical services, and tourism; over 650 million passengers boarded planes in the United States in 2014.¹ But do we actually have a constitutional *right* to fly?

Some travelers would certainly think so. Anyone who has spent time in an airport has likely seen these entitled passengers: ticketed passengers who were bumped from a flight or whose flight was significantly delayed or canceled altogether and who proceeded to harass the ticket agent, demanding that the airline put them on a flight immediately. Or those people who are "victims" of their local airport closing or airline drastically cutting flights to and from the airport and who write letters to the airport or airline executives, petitioning for the flights to be returned. This sector of Americans acts as though, and perhaps genuinely believes, that they have a fundamental right to fly.

Other people, especially in the legal profession, know better however. There is no guarantee to air travel in the Bill of Rights (never mind that the Wright brothers' first flight took place more than 100 years after the Constitution was ratified).² These people likely agree that air travel is a luxury, not a right.³ The opportunity to fly commercially is granted to those who can afford to buy a ticket, who live in relatively close proximity to a commercial airport, and who are willing to subject themselves and their belongings to potentially invasive security procedures. The opportunity to fly certainly must not be extended to every American as a matter of right. Or must it?

Imagine for a moment that you were denied the ability to fly. The government has placed you on the No-Fly List, not because

¹ Bureau of Transp. Statistics, U.S. DEP'T OF TRANSP., <http://transtats.bts.gov> (last visited Nov. 18, 2015). Statistic encompasses enplaned passengers on U.S. flights from June 2013 to May 2014.

² *The Wright Brothers & Invention of the Aerial Age: Inventing a Flying Machine*, SMITHSONIAN NAT'L AIR AND SPACE MUSEUM, <http://airandspace.si.edu/exhibitions/wright-brothers/online/fly/1903/triumph.cfm> (last visited Nov. 18, 2015).

³ Traveling by air is analogous to driving a car, and as many parents remind their sixteen-year-old children, "driving is a privilege, not a right." See *Berberian, P.A. v. Petit*, 374 A.2d 791 (R.I. 1977) (holding that the right to drive a motor vehicle is not a fundamental right, despite the relation to the fundamental right of interstate travel).

you are a security threat to the country (assuming you are not a security threat to the country), but because they are the federal government and you do not have a protected right to air travel. Even if you are afraid or simply hate to fly, you would likely take issue with the government's decision. You may even instinctively be thinking of avenues to challenge such a decision. You might posit that your fundamental, inherent right has been violated. But what is that right and where does it come from?

This article explores the constitutional right to fly. Part I begins with a discussion of the history of the right to travel as it has evolved into a right to international air travel. Part II introduces a theory regarding the right to fly. In Part III, the limitations to any such constitutional right are addressed. Finally, in Part IV, the consequences on aviation safety are considered, should the Court declare a fundamental right to air travel.

I. EVOLUTION OF THE RIGHT TO TRAVEL

A. THE RIGHT TO TRAVEL

Gregory Hartch's article *Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases*, provides a descriptive history of the right to travel between states and acknowledges that the right has long been established in American jurisprudence.⁴ The Articles of Confederation guaranteed that "people of each State shall have free ingress and regress to and from any other State."⁵ Although language enumerating the right of travel between the states was not included in the Constitution, in 1823, the Pennsylvania court in *Corfield v. Coryell* recognized as fundamental "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."⁶ In 1867, the Supreme Court also acknowledged the importance of the right to freely travel between the several states in *Crandall v. State of Nevada*.⁷ The Court confirmed this idea in *Williams v. Fears* holding the "right of locomotion . . . is an attribute of personal liberty . . . secured by the 14th Amendment and by other provisions of the Constitution."⁸

⁴ Gregory B. Hartch, *Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases*, 21 WM. MITCHELL L. REV. 457 (1995).

⁵ *Id.*; ARTICLES OF CONFEDERATION, art. IV.

⁶ *Corfield v. Coryell*, 6 F. Cas. 546, 552 (D. Penn. 1823).

⁷ 73 U.S. 35 (1867).

⁸ *Williams v. Fears*, 179 U.S. 270, 274 (1900).

Then, as Hartch explains, "the expansion of the right's scope reached its zenith during the Warren and Burger Courts."⁹ The significance of the right to travel was reinforced by the Supreme Court when it held in *United States v. Guest* that *private* interference with travel also fell within the scope of the right.¹⁰ The Court declared that the right to travel "occupies a position fundamental to the concept of our Federal Union."¹¹ As to its connection to the 14th Amendment, the Court concluded:

The right to interstate travel is a right that the Constitution itself guarantees, as the cases cited in the text make clear. Although these cases in fact involved governmental interference with the right of free interstate travel, their reasoning fully supports the conclusion that the constitutional right of interstate travel is a right secured against interference from any source whatever, whether governmental or private. In this connection, it is important to reiterate that the right to travel freely from State to State finds constitutional protection that is quite independent of the Fourteenth Amendment.¹²

In 1969, the Court decided *Shapiro v. Thompson*, this time acknowledging the right to travel as a fundamental right under equal protection, in which "all citizens [are] free to travel throughout the length and breadth of our land uninhabited by statutes, rules or regulations which unreasonably burden or restrict this movement."¹³ In response to the dissent's claim that the Court was "'pick[ing] out particular human activities, characteriz[ing] them as 'fundamental,' and giv[ing] them added protection," Justice Stewart in his concurrence reiterates:

To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands. The constitutional right to travel from one State to another has been firmly established and repeatedly recognized. This constitutional right, which, of course, includes the right of entering and abiding in any state in the Union is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. . . . As we made clear in *Guest*, it is a right broadly assertable against private interference as well as govern-

⁹ Hartch, *supra* note 4, at 460.

¹⁰ *United States v. Guest*, 383 U.S. 745 (1966); Hartch, *supra* note 4, at 460.

¹¹ *Guest*, 383 U.S. at 757; Hartch, *supra* note 4, at 460.

¹² *Guest*, 383 U.S. at 759 n.17.

¹³ *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969); see Hartch, *supra* note 4, at 460-61.

mental action. Like the right of association, it is a *virtually unconditional personal right*, guaranteed by the Constitution to us all.¹⁴

The strong language used by the Court in describing the right to travel demonstrated the importance the right had in our society at the time. However, the Rehnquist Court brought in a new era and, with it, the fall from prominence of the right to travel.¹⁵

B. NO RIGHT TO THE MOST CONVENIENT FORM OF TRAVEL

The Court's "hostility to the right to travel"¹⁶ became evident when it held that people do not enjoy "a constitutional right to the most convenient form of travel."¹⁷ In a rather whimsical and entertaining opinion (as far as court opinions go), the Fifth Circuit addressed the issue of convenient travel in *City of Houston v. FAA*.¹⁸ In this case, American Airlines and the City of Houston were challenging a regulation of the Federal Aviation Administration that imposed a "perimeter rule" around Washington National Airport, now Reagan National, near Washington, D.C.¹⁹ The regulation prohibited air carriers from flying nonstop into Washington National Airport from an airport more than 1,000 miles away; thus, American Airlines was prevented from offering non-stop flights from Houston, Texas, to Washington, D.C. via Washington National.²⁰ In upholding the agency's regulation, the court found that the plaintiff's argument "reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel. That notion, as any experienced traveler can attest, finds no support whatsoever in *Shapiro* or in the airlines' own schedules."²¹ Notably, however, the court commented that "[n]o one has ever attempted completely to bar travelers from distant cities from flying to National Airport. Such an attempt might well give rise to a constitutional claim."²²

The Ninth Circuit seemed to reject that idea in 2006 with *Gilmore v. Gonzales*.²³ Gilmore sued Southwest Airlines, the United

¹⁴ *Shapiro*, 394 U.S. at 642–43 (emphasis added) (Stewart, J., concurring) (internal quotation marks omitted).

¹⁵ Hartch, *supra* note 4, at 464.

¹⁶ *Id.* at 465.

¹⁷ *City of Houston v. FAA*, 679 F.2d 1184, 1198 (5th Cir. 1982).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 1188–89.

²¹ *Id.* at 1198.

²² *Id.* at 1192.

²³ 435 F.3d 1125 (9th Cir. 2006).

States Attorney General, and a host of other defendants alleging that the government's policy requiring passengers to present identification before boarding an airline violated his constitutional rights.²⁴ Gilmore claimed that when he refused to either present identification or go through a heightened security search, the airline refused to allow him to board his flight to Washington, D.C. in violation of his right to travel.²⁵ The court rejected Gilmore's argument holding that "the Constitution does not guarantee the right to travel by any particular form of transportation."²⁶ While not questioning his allegation that "air travel is a necessity and not replaceable by other forms of transportation," the court nevertheless found that, because other forms of travel were available, Gilmore "[did] not possess a fundamental right to travel by airplane even though it is the most convenient mode of travel for him."²⁷

The Second Circuit also articulated this "single mode doctrine"²⁸ in the 2007 case *Town of Southold v. Town of East Hampton*.²⁹ The plaintiffs in this case, a ferry service and the Towns of Southold and Shelter Island, sued the Town of East Hampton seeking a declaration that the town's ferry law was unconstitutional.³⁰ The law required ferry operators to obtain special permits and restricted the types of ferries that were allowed to use local terminals.³¹ The court upheld the law stating:

[T]ravelers do not have a constitutional right to the most convenient form of travel, and minor restrictions on travel simply do not amount to the denial of a fundamental right. . . . [T]he Ferry Law does not interfere with interstate travel so as to implicate a constitutionally-protected right. "If every infringement on interstate travel violates the traveler's fundamental constitutional rights, any governmental act that limits the ability to travel interstate, such as placing a traffic light before an interstate bridge, would raise a constitutional issue."³²

²⁴ *Id.* at 1129.

²⁵ *Id.*

²⁶ *Id.* at 1136.

²⁷ *Id.* at 1136–37.

²⁸ See Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 J. INFO. TECH. & PRIVACY L. 639, 655 (2014).

²⁹ 477 F.3d 38 (2d Cir. 2007).

³⁰ *Id.* at 41–42.

³¹ *Id.*

³² *Id.* at 54 (quoting *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991)).

C. RIGHT TO INTERNATIONAL TRAVEL

Although courts have held that a passenger has no right to the most convenient form of travel, the Supreme Court has long held the right to *international* travel.³³ In 1992, the Ninth Circuit decided *DeNieva v. Reyes*.³⁴ The plaintiff, a Philippine citizen who resided in the Commonwealth of the Northern Mariana Islands (CNMI), sued the government of CNMI and Reyes, the Acting Chief of its Immigration and Naturalization Office, for confiscating and refusing to return her Philippine passport.³⁵ The court noted:

[The] retention of DeNieva's passport infringed upon her ability to travel internationally. . . . With respect to the substantive right at issue, the Supreme Court has explicitly recognized the right to international travel since 1958, when, in ruling that the Secretary of State was not authorized to deny passports to members of the Communist Party, it stated that "the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment" . . . Moreover, the Court has consistently treated the right to international travel as a liberty interest that is protected by the Due Process Clause of the Fifth Amendment.³⁶

A decade later, the Ninth Circuit again acknowledged a constitutional right to international travel, yet failed to treat the right as fundamental.³⁷ In *Eunique v. Powell*, a passport applicant was denied a passport because she failed to pay court-ordered child support.³⁸ The court recognized that "[i]t is undoubtedly true that there is a constitutional right to international travel"; nevertheless, the court upheld the regulation under rational basis standard of review.³⁹

D. RIGHT TO INTERNATIONAL AIR TRAVEL

Not only have courts recognized a right to international travel, but recently courts also have begun to recognize a right to international *air* travel. These cases have largely emerged as a result of the 9/11 terrorist attacks and the federal government's

³³ See *Kent v. Dulles*, 357 U.S. 116 (1958).

³⁴ 964 F.2d 480 (9th Cir. 1992).

³⁵ *Id.* at 481–82.

³⁶ *Id.* at 485 (internal brackets omitted).

³⁷ *Eunique v. Powell*, 302 F.3d 971 (9th Cir. 2002).

³⁸ *Id.* at 972.

³⁹ *Id.* at 973.

institution of a "No-Fly List."⁴⁰ In *Tarhuni v. Holder*, the District Court of Oregon analyzed the plaintiff's claims for substantive and procedural due process violations of his right to international travel and of his right to interstate travel.⁴¹ Plaintiff, Tarhuni, was a United States citizen of Libyan descent who was placed on the No-Fly List after traveling to Libya three times as a volunteer in the wake of the country's revolution.⁴² During his time in Libya, Tarhuni "provided cultural, language, and logistical assistance . . . by helping deliver medicine, medical equipment, and supplies to Libya, and [he] often worked with Libyan and Tunisian government and humanitarian organizations."⁴³ Tarhuni was prevented from returning to the United States after his last trip to Libya because of his placement on the No-Fly List.⁴⁴ As for Tarhuni's substantive due process claim, the court confirmed that the right to international travel is a protected right under substantive due process, but went a step further noting that:

Plaintiff alleges "air travel is the only practical means of passenger travel between the North American continent and Europe, Asia, Africa, the Middle East, and Australia." Although this may be the sort of conclusory allegation that ordinarily is not entitled to acceptance as true at this stage of the proceedings, it is, nevertheless, consistent with the realities of the modern world. . . . Perhaps with the exception of a relatively few countries in North and Central America, travel by air is not merely the most convenient form of international travel, but, given time and financial realities, travel by air is the *only* practical mode of international travel for the vast majority of travelers. . . . Thus, the practical necessity of traveling by air to travel internationally means being on the No-Fly List is virtually a complete bar to such travel by American citizens. Accordingly, the Court concludes such a bar is sufficient to implicate a citizen's substantive due-process right to international travel.⁴⁵

However, relying on *Gilmore*, the court stopped short of holding that Tarhuni had a protected liberty interest in *interstate* air

⁴⁰ See *Tarhuni v. Holder*, 8 F. Supp. 3d 1253 (D. Or. 2014); *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014).

⁴¹ *Tarhuni*, 8 F. Supp. 3d at 1253.

⁴² *Id.* at 1262.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 1271.

travel stating that “burdens on a single mode of transportation do not implicate the right to interstate travel.”⁴⁶

As Emily Landeros recently discussed in *Air Travel and the No Fly List—The District of Oregon Recognizes a Constitutional Right to Fly*, the Oregon court again acknowledged a liberty interest in flying.⁴⁷ In *Latif v. Holder*, a group of thirteen plaintiffs, comprised of citizens and lawful permanent residents of the United States, including four veterans, were placed on the government No-Fly List and were prohibited from flying to or from the United States.⁴⁸ The plaintiffs sued the government claiming they had a protected interest in their rights to travel internationally by air.⁴⁹ The court agreed, holding:

Many of these Plaintiffs cannot travel overseas by any mode other than air because such journeys by boat or by land would be cost-prohibitive, would be time-consuming to a degree that Plaintiffs could not take the necessary time off from work, or . . . are not physically well enough to endure such infeasible modes of travel.

. . . .

The Court concludes international travel is not a mere convenience or luxury in this modern world. Indeed, for many international travel is a necessary aspect of liberties sacred to members of a free society.⁵⁰

As Landeros commented, “the court’s recognition of a constitutional right to fly will undoubtedly impact future cases. The court’s establishment of a liberty interest in air travel represents a shifting attitude regarding the importance of the freedom to travel abroad.”⁵¹

In summation, the courts have established a constitutional right to interstate travel, although not a right to the most convenient form of travel; they have recognized not only a right to international travel, but more recently a right to international *air* travel. In each case that has addressed the issue, however, the courts have stopped short of establishing a right to interstate air travel, i.e., a right to fly domestically. Although, one must ask, given the Oregon court’s recent opinion in *Latif v. Holder*, how

⁴⁶ *Id.* at 1273 (quoting *Gilmore v. Gonzales*, 435 F.3d 1125, 1137 (9th Cir. 2006)).

⁴⁷ Emily Landeros, Note, *Air Travel and the No Fly List—The District of Oregon Recognizes a Constitutional Right to Fly*, 79 J. AIR L. & COM. 163 (2014).

⁴⁸ *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014).

⁴⁹ *Id.* at 1142–43.

⁵⁰ *Id.*

⁵¹ Landeros, *supra* note 47, at 171.

much longer until the courts determine that domestic air travel, too, is “not a mere convenience or luxury in this modern world” but indeed “is a necessary aspect of liberties sacred to members of a free society”?⁵²

II. SHOULD COURTS RECOGNIZE A RIGHT TO AIR TRAVEL?

This next part entails a consideration of whether Americans are entitled to a general right of air travel and what the scope of that right might be. The right to travel is not expressly provided for in the Constitution—much less the right to air travel specifically. The courts for years have struggled with finding the origin of a right to travel. The Court in *Guest* acknowledged this issue suggesting that the reason for the omission in the Constitution is because “a right so elementary was conceived from the beginning to be a necessary concomitant of the strong Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”⁵³

Compounding on *Guest*, Justice Brennan commented in 1969, “We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.”⁵⁴ Over a decade later, Justice Brennan still struggled with the source of the right in his concurrence in *Zobel v. Williams*:

At the outset, however, I note that the frequent attempts to assign the right to travel some textual source in the Constitution seem to me to have proved both inconclusive and unnecessary. Justice O'Connor plausibly argues . . . that the right predates the Constitution and was carried forward in the Privileges and Immunities Clause of Art. IV. But equally plausible, I think, is the argument that the right resides in the Commerce Clause . . . or in the Privileges and Immunities Clause of the Fourteenth Amendment. . . . In any event, in light of the unquestioned historic recognition of the principle of free interstate migration, and of its role in the development of the Nation, we need not feel impelled to “ascribe the source of this right to travel interstate to a particular constitutional provision.”⁵⁵

⁵² See *Latif v. Holder*, 28 F. Supp. 3d 1134, 1142–43 (D. Or. 2014).

⁵³ *United States v. Guest*, 383 U.S. 745, 758 (1966).

⁵⁴ *Shapiro v. Thompson*, 394 U.S. 618, 630–31 (1969).

⁵⁵ *Zobel v. Williams*, 457 U.S. 55, 66–67 (1982).

The right to travel has additionally been “inferred from the federal structure of government adopted by our Constitution”⁵⁶ and “identified as a substantive value that must be delivered equally as a type of ‘equal-protection-only fundamental right.’”⁵⁷ Given the numerous theories surrounding the origin of the guarantee, it follows that the definition and scope of the right to travel could be susceptible to numerous interpretations.

A. THE ORIGINS OF AMERICAN RIGHTS

Arguably the most well-known rights recognized by American citizens are those articulated in the Bill of Rights. However, American rights and liberties stem from several different sources, including inherent rights afforded to the people not explicitly listed in the Bill of Rights or elsewhere in the Constitution. John Baker describes these unenumerated rights throughout his discussion of the effectiveness of the Bill of Rights, saying:

Alexander Hamilton . . . argued . . . that a bill of rights was not only unnecessary but dangerous. . . . In his view the national government does not give rights; the source of rights is elsewhere. As stated in the Ninth Amendment,⁵⁸ the listing of rights does not negate those retained by the people. *The Federalist* and the Ninth Amendment make two points: (1) that any bill of rights is non-exhaustive, and (2) that the source of rights lies outside the federal government.⁵⁹

As Baker touches on, the Bill of Rights was the result of Anti-Federalist concern over allowing the federal government to have too much power, resulting in the states and the people having too little power.⁶⁰ The result was the Bill of Rights that guaranteed certain protections from the federal government.⁶¹ Many Federalists opposed the Bill of Rights, not because they felt the federal government should be granted a vast amount of power, but because they understood that people have inherent liber-

⁵⁶ Attorney Gen. of New York v. Soto-Lopez, 476 U.S. 898, 902 (1986).

⁵⁷ CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 802 (4th ed. 2013).

⁵⁸ The Ninth Amendment reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

⁵⁹ John S. Baker, *The Effectiveness of Bills of Rights*, 15 HARV. J. L. & PUB. POL’Y 55, 61 (1992).

⁶⁰ *Id.* at 61–62.

⁶¹ *Id.*

ties.⁶² They felt adopting a list of rights would be seen as limiting the rights of the people to those enumerated in the Constitution.⁶³ So while the right to air travel “finds no explicit mention in the Constitution,”⁶⁴ it is not dispositive of whether or not Americans possess a constitutionally protected freedom to fly.⁶⁵

B. A COMPARATIVE VIEW OF CONSTITUTIONAL RIGHTS

At this point, a discussion of what American rights and liberties are, and what they are not, is warranted. As a general statement, American constitutional “rights”—those fundamental rights that are at the core of American society—are “negative” rights.⁶⁶ “More often than not, fundamental rights generally operate as a restraint on the government rather than as a right granted by a sovereign to the people.”⁶⁷ With some exceptions, American rights are generally considered to prevent the government from intervening in certain aspects of the citizen’s life.⁶⁸

On the other hand, many countries throughout the world have adopted constitutions and laws that grant “positive” rights to the people.⁶⁹ Positive rights require that the government provide to the people the subject of the right, not simply refrain from preventing the people to obtain it themselves. For example, the Republic of South Africa’s Bill of Rights provides that

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See *United States v. Guest*, 383 U.S. 745, 758 (1966).

⁶⁵ The Supreme Court has been sporadic with its recognition of inherent rights and whether those unenumerated rights deserve “constitutional” protection. See *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that Americans have a constitutionally protected interest, through the Second Amendment, in “the inherent right of self-defense”). But see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (rejecting the contention that education is necessary to the effective exercise of speech and intelligent voting and holding that there is no right to education explicitly or implicitly guaranteed by the Constitution).

⁶⁶ The author understands that there are several positive rights throughout the Constitution, such as a right to a jury trial and right to an attorney. The focus however is on the general notion of fundamental American rights.

⁶⁷ *Douglas Cty. Sch. v. Heineman*, No. 1028017, 2006 WL 4911463 (Neb. Dist. Ct. Dec. 22, 2006).

⁶⁸ For example, Americans enjoy the freedom of speech, the freedom of the press, the freedom to peaceably assemble, and the freedom to petition the Government without unreasonable interference from the state. See U.S. CONST. amend. I.

⁶⁹ See S. AFR. CONST. (1996); Jean-Francois Akandji-Kombe, POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS, HUMAN RIGHTS HANDBOOKS, No. 7 (2007).

everyone has the right to access adequate housing and health care, and the state must take reasonable efforts to provide these resources.⁷⁰

In other words, in America the right to housing, for example, guarantees that all citizens can obtain adequate housing without government intervention;⁷¹ in South Africa, the right to housing guarantees that the government will make best efforts to provide housing to all citizens.⁷² Positive rights are basic entitlements, whereas negative rights are true “freedoms” from government intervention. This brief reminder of the nature of American constitutional rights is relevant when attempting to define a constitutional right to air travel: the right, should one exist, would guarantee that the government refrain from unreasonable interference in a person’s ability to travel by air. The right would not guarantee that the government provide a person with air travel if he could not secure a flight himself.

C. A CONSTITUTIONAL “RIGHT TO FLY”?

This article has outlined the fundamental right to travel as it has progressed into a right to international air travel, stopping just short of the right to domestic air travel. The author has posited that the right to air travel need not be enumerated in the Constitution and has provided a short summary of what American constitutional rights are as compared to positive rights in other countries around the world. So, should courts recognize an inherent “right to fly”?

1. *The Inherent Right to Fly*

Certainly there is an argument for such a right.⁷³ One theory, advanced in *The Right to Travel and Privacy: Intersecting Fundamen-*

⁷⁰ S. AFR. CONST. (1996), Section 2, para. 26, 27 (“(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. . . . Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security . . . (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights . . .”).

⁷¹ See U.S. CONST. amend. V. The U.S. Constitution’s Takings Clause requires that the government pay an owner just compensation if private property is taken for public use.

⁷² S. AFR. CONST. (1996), Section 2, para. 26.

⁷³ And presumably the Fifth Circuit may agree. See *City of Houston v. FAA*, 679 F.2d 1184, 1192 (5th Cir. 1982) (commenting that an attempt to completely bar a

tal Freedoms by Richard Sobel, is that air travel is a mode of interstate travel and if "any mode of transportation is restricted, then the constitutionally enshrined right of travel is abridged."⁷⁴ Sobel opines that "the travel right is a multi-modal one that encompasses all forms of transport."⁷⁵ The theory essentially proposes that the right to travel is a broad, "virtually unconditional personal right"⁷⁶ and every method of transportation is protected under the right.⁷⁷ This is a compelling argument: After all, the Supreme Court would generally not deny a journalist the constitutional right to publish in newspapers simply because there were other media outlets available. And the Court did not hold that a man had no constitutional guarantee to own a handgun in his home simply because there were other methods of self-defense available.⁷⁸ Likewise, the Court should not find that a passenger has no fundamental right to air travel simply because there are other modes of interstate transportation available.

In theory, the reasoning is sound; in reality, the lower courts have flatly rejected this argument.⁷⁹ The courts instead consider the ends to be the constitutional right, not the means—that is, a person has the freedom to relocate to another state, she does not have the freedom to travel there by any particular means.⁸⁰ As long as there are other methods of traveling interstate available, then a person is afforded no right to any one specific mode of travel.

2. *In Modern Society, Air Transportation is the Only Practical Method of Travel*

Another argument for recognizing a constitutional right to fly is that travel by other means is simply not realistic in today's time. As to the single mode doctrine, the "practical method" advocates would respond by asserting that air transportation is the only method available for many travelers. Sobel adopts this argu-

traveler from flying to a distant city "might well give rise to a constitutional claim").

⁷⁴ Sobel, *supra* note 28, at 666.

⁷⁵ *Id.* at 660.

⁷⁶ See *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (Stewart, J., concurring).

⁷⁷ See Sobel, *supra* note 28, at 666.

⁷⁸ See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁷⁹ See *Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006); *City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982).

⁸⁰ See *Gilmore*, 435 F.3d 1125; *City of Houston*, 679 F.2d at 1184.

ment to attack the single mode doctrine and cites two cases from the 1970s in support.⁸¹ In a footnote in *United States v. Kroll*, the Eighth Circuit was not persuaded by, what would years later become, the single mode doctrine, noting “in many situations, flying may be the only practical means of transportation.”⁸² The court in *United States v. Albarado* likewise acknowledged that “it would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all.”⁸³

Interestingly, William Mann mentioned the idea in a pre-9/11 article discussing the legal issues on banning unruly passengers in the sky.⁸⁴ Mann suggested that “[o]ne could most definitely make a strong case that in today’s lightning-quick world, air transportation is the only ‘practicable’ route of travel if one is to actively participate in society. . . . Thus, banning passengers from air travel seems to implicate the Constitution.”⁸⁵

For many, the ability to board a plane and be in a destination across the country in a matter of hours is more than a luxury, it is a necessity. The same justifications the court gave to establish a right to international air travel can just as easily be said for a right to domestic air travel: It is not necessarily true that air travel “is a mere convenience in light of the realities of our modern world. Such an argument ignores the numerous reasons that an individual may have for wanting or needing to travel [] quickly such as the birth of a child, the death of a loved one, a business opportunity, or a religious obligation.”⁸⁶ In a global world where communication travels in seconds, where documents, pictures, and messages are uploaded, downloaded, and tweeted in the blink of an eye, and where technology is allowing people to work faster, harder and smarter—and across farther

⁸¹ Sobel, *supra* note 28, at 658–59.

⁸² *United States v. Kroll*, 481 F.2d 884, 887 n.2 (8th Cir. 1973) (quotation marks omitted); see Sobel, *supra* note 28, at 658–59.

⁸³ *United States v. Albarado*, 495 F.2d 799, 807 (2d Cir. 1974); see Sobel, *supra* note 28, at 659.

⁸⁴ William Mann, Comment, *All the (Air) Rage: Legal Implications Surrounding Airline and Government Bans on Unruly Passengers in the Sky*, 65 J. AIR L. & COM. 857 (2000). The article is an interesting read considering the complete overhaul of security in the aviation field just a few years after publication.

⁸⁵ *Id.* at 870. Even an author fifteen years ago recognized the significance of air travel in American society. Understandably, the attacks on September 11, 2001, greatly impacted the aviation industry and prompted the government’s No-Fly List (and subsequent litigation). However Mann’s sentiments of air travel and its prominence in the lives of many Americans still holds true today.

⁸⁶ *Latif v. Holder*, 28 F. Supp. 3d 1134, 1148 (D. Or. 2014).

distances, is it fair to say that travel by airplane is still just the most *convenient* mode of travel? Indeed, we would not expect a person to drive across the country for an afternoon job interview. We would not expect a student to forfeit her attendance at an ideal college on the opposite coast because she desires to go home for holidays and family occasions. It is possible that travel by air “is not merely the most convenient form of [] travel, but, given time and financial realities, travel by air is the *only* practical mode of [] travel for [many] travelers.”⁸⁷

On the other hand, some of these same arguments in support of a right to air travel are also some of the best arguments *against* a recognized right to fly. With today’s technology there is seemingly no need to travel across the country for a business meeting or move away from home to attend college.⁸⁸ A larger percentage of the population is working from home and many companies are embracing the technology and culture that allow employees to work remotely.⁸⁹ Products like Skype and FaceTime provide video calling capabilities that enable people to connect with loved ones and be relatively “present” at special occasions.⁹⁰ As the country becomes more cyber-reliant, interstate air travel may in fact become less of a necessity.

3. *When Air Travel is the Only Means to a Constitutionally Protected Ends*

In certain circumstances, it is easy to sympathize with the argument for a constitutional right to fly (the need to travel across the country for a brief but important life event, for example), but many, arguably most, flights do not rise to such significance. A plaintiff likely would find difficulty in convincing a court that he had a fundamental right to fly from Washington, D.C. to New York City, an easy trip by either car, bus, or train.⁹¹ Thus, the

⁸⁷ Tarhuni v. Holder, 8 F. Supp. 3d 1253, 1271 (D. Or. 2014).

⁸⁸ With cyber-meeting technology and online classes, it is possible to remain in one location and still be present at business, education, and social events.

⁸⁹ See Peter Mateyka et al., *Home-Based Workers in the United States: 2010, Current Population Reports*, U.S. CENSUS BUREAU (Oct. 2012), <https://www.census.gov/prod/2012pubs/p70-132.pdf>.

⁹⁰ Christopher Breen, *Video Chatting with Family: How to Use FaceTime, Skype, or Google Hangouts to Keep in Touch*, MACWORLD (Dec. 25, 2014, 4:22 AM), <http://www.macworld.com/article/2863332/video-chatting-with-family-how-to-use-face-time-skype-or-google-hangouts-to-keep-in-touch.html>.

⁹¹ See maps.google.com (the drive by car could be around four hours); www.greyhound.com (a trip by bus would take approximately four and a half hours); www.amtrak.com (a train trip could be as quick as three hours).

court's reluctance to recognize a universal right to fly when other modes of transportation are available is understandable.

The focus, therefore, should not be on the importance of the air travel itself but on the object of that air travel. The freedom to fly should be a constitutional guarantee only when the underlying purpose of the air travel is a protected right and when flight is the only practical way to achieve that purpose. Justice Scalia used a similar analysis in *Heller*.⁹² Part of the Court's reasoning in striking down D.C.'s ban on handguns was essentially that "the inherent right of self-defense [is] central to the Second Amendment" and handguns are the preferred method of self-defense in the home; therefore, by banning the most preferred method to achieving a person's underlying, pre-existing right of self-defense, the District of Columbia violated *Heller*'s constitutional right.⁹³ The Court looked to the underlying right (self-defense), the method at issue of achieving that right (owning a handgun), and concluded that a complete ban on handguns was, by extension, an unconstitutional restriction of self-defense in violation of the Second Amendment.

Additionally, James Dwyer recently published a thesis regarding the legality of same-sex marriage that provides a parallel theory to this proposed freedom to fly.⁹⁴ In his article *Same-Sex Cynicism and the Self-Defeating Pursuit of Social Acceptance Through Litigation*, Dwyer suggests that same-sex couples no longer have a "fundamental liberty" to legal marriage because *Lawrence v. Texas*⁹⁵ "render[ed] unconstitutional laws prohibiting intimacy and cohabitation outside of marriage for opposite-sex partners, [thus] legal marriage is no longer a fundamental right in any state for anyone."⁹⁶ Historically many states criminalized anyone who had sex or even cohabitated outside of marriage, meaning "denying a marriage license to [even an opposite-sex] couple was therefore an infringement of a negative liberty, a right to the freedom to fulfill basic human needs and desires,"⁹⁷ including having children.⁹⁸ And as Dwyer states, "that, crucially, is why

⁹² See *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

⁹³ *Id.* at 628.

⁹⁴ James Dwyer, *Same-Sex Cynicism and the Self-Defeating Pursuit of Social Acceptance Through Litigation*, 68 SMU L. REV. 1 (2015).

⁹⁵ 539 U.S. 558 (2003).

⁹⁶ Dwyer, *supra* note 94, at 103.

⁹⁷ *Id.* at 117.

⁹⁸ In other words, some states made it illegal for non-married couples to live together, therefore the only legal way to satisfy a person's fundamental right to intimacy was to get married.

the Supreme Court, in the now-distant past, characterized legal marriage as a matter of 'fundamental liberty': because it was the means by which the state controlled inter-personal intimacy."⁹⁹ When *Lawrence* held the state laws unconstitutional, thus eliminating the underlying liberty of inter-personal intimacy, the status of legal marriage as a fundamental right was also eliminated.¹⁰⁰

The same theory can be said of the right to air travel.¹⁰¹ Flying allows us to fulfill many rights: the right to pursue business and education; the right to visit family and be with loved ones; the right to lobby elected leaders in Washington, D.C.; the right to fulfill a religious obligation.¹⁰² It is when the infringement on the ability to fly completely eliminates the possibility of fulfilling these underlying constitutional rights that the court should recognize a legal right to air travel.

This type of analysis was essentially used by the courts to determine that people enjoy the right to travel generally, and the right to international air travel specifically.¹⁰³ The various courts have reached the conclusion that the right to travel exists after first indicating that the travel served a fundamental purpose.¹⁰⁴ As early as 1823, the *Corfield* court acknowledged "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or

⁹⁹ Dwyer, *supra* note 94, at 117–18. Because legal marriage was the only way to satisfy the right to intimacy, legal marriage itself became a fundamental right: If the state were to take away marriage, it would take away the only avenue to achieve the underlying fundamental right.

¹⁰⁰ *Id.* *Lawrence* allowed for non-married couples to satisfy their fundamental right to intimacy without getting married, therefore marriage lost its "fundamental right" status. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰¹ When the underlying object of the travel (education purposes, business opportunities, religious expression, etc.) is a fundamental right, and air travel—international or domestic—is the only way to achieve that objective, the air travel itself should elevate to fundamental right status.

¹⁰² "The impact on a citizen who cannot use a commercial aircraft is profound. . . . As a practical matter, an affected person is restricted in his ability to visit family and friends An inability to travel by air also restricts one's ability to associate more generally, and effectively limits education, employment and professional opportunities. . . . An inability to fly likewise affects the possibility of recreational and religious travel." *Mohamed v. Holder*, 995 F. Supp. 2d 520, 528 (E.D. Va. 2014); Sobel, *supra* note 28, at 659.

¹⁰³ See *Kent v. Dulles*, 357 U.S. 116, 126–27 (1958); *Crandall v. State of Nevada*, 73 U.S. 35, 44 (1867); *Latif v. Holder*, 28 F. Supp. 3d 1134, 1149 (D. Or. 2014); *Corfield v. Coryell*, 6 F. Cas. 546, 552 (D. Penn. 1823).

¹⁰⁴ See *Kent*, 357 U.S. at 126–27; *Crandall*, 73 U.S. at 44; *Latif*, 28 F. Supp. 3d at 1149; *Corfield*, 6 F. Cas. at 552.

otherwise.”¹⁰⁵ In 1867, the Supreme Court elaborated on the right to travel stating, “[the citizen] has the right to come to the seat of government . . . He has a right to free access to . . . the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.”¹⁰⁶ In describing the social values of the “freedom of movement” abroad,¹⁰⁷ the Supreme Court proclaimed:

Foreign correspondents and lecturers on public affairs need first-hand information. Scientists and scholars gain greatly from consultations with colleagues in other countries. Students equip themselves for more fruitful careers in the United States by instruction in foreign universities. Then there are reasons close to the core of personal life—marriage, reuniting families, spending hours with old friends. Finally, travel abroad enables American citizens to understand that people like themselves live in Europe and helps them to be well-informed on public issues.¹⁰⁸

This focus on the underlying right is especially apparent in *Latif v. Holder*.¹⁰⁹ In its opinion, the court detailed each plaintiff and his or her purpose for travel, concluding that a person has many reasons for traveling overseas and that, air transport being the only practical method of international travel, prohibiting the plaintiffs from flying internationally was a violation of their constitutionally protected liberty interests.¹¹⁰ The court recited the hardships the plaintiffs endured by being placed on the No Fly List, stating:

Latif . . . is unable to travel from the United States to Egypt to resume studies or to Saudi Arabia to perform a *hajj*.¹¹¹

....

Because Knaeble was unable to fly home for a required medical examination, his employer rescinded its job offer for a position in Qatar.

....

¹⁰⁵ *Corfield*, 6 F. Cas. at 552.

¹⁰⁶ *Crandall*, 73 U.S. at 44.

¹⁰⁷ Many of these same social values of traveling abroad apply to traveling among the states as well.

¹⁰⁸ *Kent*, 357 U.S. at 126–27.

¹⁰⁹ 28 F. Supp. 3d at 1149. As the court instructs “[o]ne need not look beyond the hardships suffered by Plaintiffs to understand the significance of the deprivation of the right to travel internationally.”

¹¹⁰ *Id.* at 1143–46, 1149.

¹¹¹ A *hajj* is a religious pilgrimage and Islamic obligation.

Since May 2010 Washburn has been separated from his wife who is in Ireland because she has been unable to obtain a visa to come to the United States and Washburn is unable to fly to Ireland.

....

In February 2010 Ghaleb attempted to travel from Yemen where his wife and children were living to San Francisco via Frankfurt. . . . Because Ghaleb cannot fly, he cannot go to Yemen to be with his ill mother or to see his brothers or sisters.

....

Rana moved to Pakistan to pursue a master's degree in Islamic studies in 2009. . . . In October 2012 Rana was six-months pregnant and again attempted to return to New York to receive needed medical care and to deliver her child. . . . Rana was not able to find a safe alternative to travel to the United States before the birth of her child. In November 2010 the United States government offered Rana a "one-time waiver," which she has not used because she fears she would not be able to return to Pakistan to be with her husband. . . . Mashal owns a dog-training business. Because he is unable to fly, he has lost clients; had to turn down business; and has been prevented from attending his sister-in-law's graduation in Hawaii, the wedding of a close friend, the funeral of a close friend, and fundraising events for the non-profit organization that he founded. . . . Because he is unable to fly, Ahmed was unable to travel to Yemen in 2012 when his brother died and is unable to travel to Yemen to visit his extended family and to manage property that he owns in Yemen.¹¹²

Each of the plaintiffs were prevented from fulfilling basic fundamental rights: pursuing education or business, practicing religion, being present at the birth or death of a family member, or reuniting with a spouse or loved one.¹¹³ Although the court recognized the plaintiffs' rights of *international* air travel, and did not go so far to conclude that they had any rights of *domestic* air travel, certainly interstate travelers seek many of the same purposes as international travelers.¹¹⁴ The occasions may be rare, but occasions nonetheless, when a plaintiff is prohibited from traveling domestically to the detriment of his constitutionally protected liberty interest—a situation where flight is not simply the "most convenient" form of travel, but the only practical mode of travel available to fulfill an inherent, fundamental right. For example, it is just as likely that someone would miss

¹¹² *Latif*, 28 F. Supp. 3d at 1143–46.

¹¹³ *Id.*

¹¹⁴ See *id.*; Landeros, *supra* note 47.

the sudden birth of a baby or death of a family member if they were forced to drive cross-country as it would for someone to cross the ocean. It is possible that a candidate would be passed over for employment opportunities because he was unable to board a flight and instead was forced to make a long drive or take a train. The situation may arise where a passenger was banned from flying and thus prevented from obtaining urgent medical care.

Additionally, a curious issue the court has yet to address when acknowledging a right to international air travel but not domestic air travel is what freedom, if any, do travelers have to flights to the non-continental United States?¹¹⁵ The same justifications used to declare a constitutional right to international travel will certainly pertain to travel to Hawaii for example.¹¹⁶ Yet, the Privileges and Immunities Clause requires that the citizens of all states be entitled to the same rights and privileges.¹¹⁷ Thus if those citizens of the state of Hawaii can claim a constitutionally protected right to air travel to and from their home state, it follows that citizens of every state should be granted a right to air travel to and from their home state.

In summation, when domestic air travel becomes the only practical method of fulfilling other fundamental rights, then it too should be protected under the Constitution. If, however, there are other reasonable avenues of travel available, be it car, boat, rail, or bike, then people have no guaranteed right to fly. As American society becomes increasingly dependent on flight for basic domestic travel, the courts may too evolve their jurisprudence and recognize a constitutional right to fly.

III. LIMITATIONS ON RECOGNIZING A "RIGHT TO FLY"

This next section explores what it means to have a protected right to air travel generally and discusses the practical limitations of that constitutional right. Unless the Supreme Court was to do a 180-degree turn from the lower courts' precedent and embrace, and extend, Justice Stewart's belief that interstate travel is a "virtually unconditional personal right" free from gov-

¹¹⁵ See Sobel, *supra* note 28.

¹¹⁶ See *Latif*, 28 F. Supp. 3d at 1134.

¹¹⁷ U.S. CONST. art. IV, § 2, cl. 1. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Although the Privileges and Immunities clause generally applies to state laws discriminating against nonresidents, the judiciary refusing to recognize the right itself to the majority of the population would certainly offend the purpose of the clause.

ernmental and private interference,¹¹⁸ a constitutional right to fly would not mean that Americans have an unrestricted guarantee to domestic flight. But what would an unencumbered right to fly look like? What would be the consequences of this hypothetical extreme?

A. UNENCUMBERED RIGHT TO FLY

If the freedom to fly was virtually unconditional, the consequences to the airline industry would be disastrous. Inevitably, some plaintiffs would attempt to claim infringement on their constitutional guarantee when they were denied travel because of a weather or technical delay, or more likely, when they were bumped from a flight.¹¹⁹ Airlines would be subject to constant litigation. Additionally, a complete overhaul of the commercial airline industry would likely result. Airlines would have to cease many of their common practices such as overbooking flights, to avoid, not just a few disgruntled passengers, but a few costly lawsuits. Likewise, airlines would be prevented from canceling flights for economic reasons, at least to the extent that any passengers were completely prohibited from flying. The airlines would be limited in their ability to determine their own flight schedules, destinations, and pricing: potential causes of action would lurk behind seemingly exorbitant ticket prices or restricted service to and from certain airports. Commercial airlines are in the business of making money and burdening them with passengers' unencumbered right to fly would critically hinder their ability to function profitably.

Additionally, *any* legislation that prevented a traveler from flying to her desired location would be unconstitutional. Take, for example, the Wright Amendment.¹²⁰ Passed in 1979, the law "prohibited carriers from flying [from Love Field in Dallas] to any point outside Texas, or its four border states (Louisiana, Arkansas, Oklahoma, and New Mexico), unless the aircraft carried no more than fifty-six passengers."¹²¹ In *Cramer v. Skinner*, an air-

¹¹⁸ *Shapiro v. Thompson*, 394 U.S. 618, 642-43 (1969) (Stewart, J., concurring).

¹¹⁹ See Lindsey Ray Altmeyer, Note, *The Montreal Convention—The Eleventh Circuit Embraces Airlines' Practice of "Bumping" to Deny Plaintiffs' Recovery for Personal Injury Under Article 17*, 80 J. AIR L. & COM. 239.

¹²⁰ See Jennifer Wang, Comment, *Time for Congress to Spread Love in the Air: Why the Wright Amendment was Wrong Before, and Why it Deserves Repeal Today*, 70 J. AIR L. & COM. 353 (2005).

¹²¹ *Id.* at 354.

line passenger sued to challenge the law as unconstitutional.¹²² The plaintiff alleged that the amendment infringed on his fundamental right to interstate travel.¹²³ The court disagreed, holding that the amendment did not actually deter travel because he “remain[ed] free to travel unrestricted to points outside the Love Field service area from Dallas by using DFW, or he [could] take a second flight from a point within the Love Field service area.”¹²⁴ Likewise, the State of Kansas, in *Kansas v. United States*, challenged the Wright Amendment as an unconstitutional violation of the right to interstate travel.¹²⁵ The D.C. District Court held that the amendment “operate[d] only as an inconsequential impediment to the right to travel and [did] not implicate the fundamental right.”¹²⁶

However, an “inconsequential impediment” to some may be a complete bar to others. When faced with paying higher prices to fly out of DFW airport or taking advantage of Southwest Airline’s often lower fares out of Love Field, but potentially sacrificing an entire day of travel one-way, some travelers would be forced to simply not travel. A law that would coerce travelers to not fly when faced with two such “evils” would undoubtedly be deemed unconstitutional against a broad right to fly.

Finally, as discussed fully herein, an unencumbered, unlimited right to air travel could create dire safety concerns. The government’s No-Fly List would be unconstitutional thereby foreclosing on a popular, albeit controversial, counterterrorism tool.¹²⁷ Passengers would be allowed to board a flight even if they did not present proper identification or refused to undergo the required security measures. Flight crews would be hindered from removing unruly or suspect passengers from a flight. Even Justice Stewart would have agreed, given these potential consequences to the airline industry and aviation safety, courts are certain to reject a right to air travel that extends to a virtually unconditional liberty against governmental and private interfer-

¹²² *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991); see Wang, *supra* note 120, at 358.

¹²³ *Cramer*, 931 F.2d at 1031.

¹²⁴ *Id.*

¹²⁵ *Kansas v. United States*, 797 F. Supp. 1042, 1052 (D.D.C. 1992), *aff’d sub nom.* State of Kan. v. United States, 16 F.3d 436 (D.C. Cir. 1994); see Wang, *supra* note 120.

¹²⁶ *Kansas*, 797 F. Supp. at 1052.

¹²⁷ Anya Bernstein, *The Hidden Costs of Terrorist Watchlists*, 61 BUFF. L. REV 461 (2013).

ence. After all, most rights, even those sacred to the foundation of our society, are not without limits.¹²⁸

B. STANDARD OF REVIEW

Recognizing the right to air travel as a constitutional guarantee limits the restrictions that can be placed on that right by the government; it does not prohibit the government from placing *any* restrictions on that right. Implementation of the right, often through standards of review, reveals the limitations courts are willing to allow on a constitutional mandate.¹²⁹ The standard of review to be used, thus the extent to which the government could enact restrictions, often depends on the status of the right as "fundamental."¹³⁰

If the Court were to consider the right to domestic air travel as a fundamental right, any law infringing that right would then be subject to strict scrutiny.¹³¹ Under strict scrutiny, laws are unconstitutional unless proven to be necessary to further a compelling state interest; only those laws that are narrowly tailored and essential will pass constitutional muster.¹³² The question becomes, then, should laws restricting domestic air travel be subject to strict scrutiny? The Supreme Court has generally concluded that the right to travel is a fundamental right and therefore subject to strict scrutiny.¹³³ The issue that often arises, especially in cases involving residency requirements as a hindrance to interstate travel, is the point at which "the amount of impact on the right to travel . . . [invokes] the application of heightened scrutiny."¹³⁴ As Justice O'Connor summarized, "heightened scrutiny is appropriate only if the statutory classification penalizes, actually deters, or is primarily intended to im-

¹²⁸ See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

¹²⁹ "No right is absolute, and the extent to which legislation can permissibly burden a right is largely determined by the doctrinal rules, tests, and other devices the Court adopts to 'implement' the right. One prominent way of implementing constitutional mandates is a standard of review, such as strict scrutiny or rational basis, which is used to judge the constitutionality of laws burdening the right." Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 685 (2007).

¹³⁰ *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (O'Connor, J. dissenting).

¹³¹ *Id.*

¹³² *Id.*

¹³³ See *id.*; *Saenz v. Roe*, 536 U.S. 489 (1999); *Zobel v. Williams*, 457 U.S. 55 (1975); *Mem. Hospital v. Maricopa Cty*, 415 U.S. 250 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

¹³⁴ *Soto-Lopez*, 476 U.S. at 921 (O'Connor, J. dissenting).

pede the exercise of the right to travel. . . . [S]omething more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied.”¹³⁵ In other words, not every infringement on travel gives rise to a constitutional claim.¹³⁶

The Court would logically extend the same standard to a right to air travel: strict scrutiny would apply if the classification penalizes, deters, or is intended to impede domestic air travel.¹³⁷ Alternatively, if the Court recognizes a constitutional right to fly in only those circumstances where flight is necessary to exercise an underlying fundamental right, as this article suggests, then the right to fly should by extension be treated as a fundamental right and strict scrutiny should apply.

On the other hand, where the underlying purpose of air travel is not a fundamental liberty, minimal scrutiny would apply and governmental restrictions on the right to fly would be upheld, as long as they were related to a legitimate state interest.¹³⁸ Under rational basis review, courts are highly deferential to the legislature; therefore, many of the government’s current restrictions, such as the No-Fly List, could be upheld.¹³⁹

C. SECTION 1983 LIMITATION

A final limitation to a constitutional right to fly is the availability of redress from a private party in violation of the right. Many complaints regarding air travel are the result of the commercial airlines themselves: flight cancellations, delays, or treatment by the flight crew. To the surprise of many lay Americans, and young law students, the guarantees afforded in the Bill of Rights do not themselves provide for a private cause of action. Not until the passing of 42 U.S.C 1983 (commonly referred to as Section 1983) were “victims” of a constitutional right violation able to bring a cause of action.¹⁴⁰ Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of

¹³⁵ *Id.* at 920–21 (quotation marks and brackets omitted).

¹³⁶ “If every infringement on interstate travel violates the traveler’s fundamental constitutional rights, any governmental act that limits the ability to travel interstate, such as placing a traffic light before an interstate bridge, would raise a constitutional issue.” *Cramer v. Skinner*, 931 F.2d 1020, 1031 (5th Cir. 1991).

¹³⁷ See *Soto-Lopez*, 476 U.S. at 920–21.

¹³⁸ See *id.*

¹³⁹ See MASSEY, *supra* note 57, at 675.

¹⁴⁰ 42 U.S.C. § 1983 (2012).

Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .¹⁴¹

Section 1983 only allows causes of action, however, against the federal and state governments or “state actors” acting under “color of law.”¹⁴² Therefore, except for very limited circumstances, a party would not be able to sue an airline for the alleged violation of his constitutional right.

The determination, then, turns on whether an airline is, or can ever be considered, a “state actor” for purposes of a Section 1983 claim. As the Second Circuit articulated,

Supreme Court cases on the subject of state action “have not been a model of consistency,” and we therefore have “no single test to identify state actions and state actors. Rather, there are a host of factors that can bear on the fairness of an attribution of a challenged action to the State.” Three main tests have emerged: For the purposes of section 1983, the actions of a nominally private entity are attributable to the state . . . (1) [when] the entity acts pursuant to the coercive power of the state or is controlled by the state (“the compulsion test”); (2) when the state provides significant encouragement to the entity, the entity is a willful participant in joint activity with the state, or the entity’s functions are entwined with state policies (“the joint action test” or “close nexus test”); or (3) when the entity has been delegated a public function by the state (“the public function test”).¹⁴³

The plaintiff seeking to recover damages against a commercial airline would, therefore, need to prove that the airline’s actions were attributable to the state.¹⁴⁴

It may seem obvious to some that a commercial airline would be a “state actor” by any measurable test.¹⁴⁵ The industry is highly regulated by the federal government, airlines serve a valuable public function, and airline personnel and government officials work side-by-side throughout the entire travel process—from airline customer service agents and TSA agents assisting with check-in and security, to flight attendants and air marshals

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Fabrikant v. French*, 691 F.3d 193, 207 (2d Cir. 2012).

¹⁴⁴ *Id.*

¹⁴⁵ See Nicholas Poppe, *Discriminatory Deplaning: Aviation Security and the Constitution*, 79 J. AIR L. & COM. 113 (2014).

in-flight, to airline personnel and airport security policing baggage claim and passenger pick-up areas. As Nicholas Poppe reasoned, "Congress envisioned that aircraft security would not simply come under federal regulatory scrutiny, but rather that the federal government would adopt screening and passenger safety as part of its responsibility to protect the American public."¹⁴⁶

However, courts have consistently held that air carriers are not state actors for the purposes of Section 1983.¹⁴⁷ The D.C. District Court held that USAir was not a state actor even though the airline "[held] a certificate to operate from the federal government," was regulated by the federal government, received government assistance, and requested FAA police assistance to remove the plaintiff from the plane.¹⁴⁸ A Michigan court rejected the plaintiffs claim that American Airlines "acted under guise of state authority or acted in concert with [the police]" when the airline "cancel[ed] the flight and call[ed] the police."¹⁴⁹ Additionally, even though a private entity performs a public function, even one as important as air travel, the Supreme Court is reluctant to designate its actions as those "under color of state law."¹⁵⁰

Therefore, even if the Court were to recognize a constitutionally-protected right to interstate air travel, that right would not be without limits. Like all constitutional guarantees, the government could restrict that right within certain classes of people, at most, by showing that the classification is necessary to further a compelling state interest.¹⁵¹ Furthermore, to the extent a passenger's constitutional right was violated by a private party, such as an airline, the passenger would be without a cause of action unless he could succeed in convincing the court to depart from precedent and find that the airline was a state actor acting under color of state law pursuant to Section 1983.¹⁵²

¹⁴⁶ *Id.* at 121.

¹⁴⁷ See *Al-Watan v. Am. Airlines, Inc.*, 658 F. Supp. 2d 816 (E.D. Mich. 2009); *Anderson v. USAir Inc.*, 619 F. Supp. 1191 (Dist. Ct. D.C. 1985) *aff'd* 818 F.2d 49 (D.C. Cir. 1987).

¹⁴⁸ *Anderson*, 619 F. Supp. at 1196.

¹⁴⁹ *Al-Watan*, 658 F. Supp. 2d at 829.

¹⁵⁰ *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

¹⁵¹ See *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (O'Connor, J. dissenting).

¹⁵² See Poppe, *supra* note 145.

IV. AVIATION SAFETY CONCERNS

With every measure to increase public security, there is a corresponding decrease in personal liberty. As Americans, we sacrifice some of our fundamental rights in exchange for safety and peace-of-mind. The balance between liberty and security is a tightrope that the legislatures and courts are constantly walking—a tightrope swinging in the winds of public perception and enemy threats. After the 9/11 terrorist attacks, airline passengers were generally willing to subject themselves to invasive security measures at the expense of their personal privacy in order to prevent future terrorism. However, with the memory of the 9/11 attacks fading and the courts slowly embracing a right to air travel, the winds may soon change away from security and peace-of-mind towards privacy and the freedom to fly. This section provides a discussion of the safety implications a constitutional right to air travel may have on aviation.

As previously noted in this article, commercial airlines are typically not subject to constitutional claims because they are not state actors under Section 1983. However, for the sake of discussion, the Supreme Court could conclude that a right to interstate air travel not only exists but is so fundamental to the core of our society that it is virtually unconditional, free from governmental and private interference. To a lesser extreme, the Court could preempt the lower courts' precedent and find that circumstances may arise where airlines are state actors acting under color of state law. And whether the Court deemed all air travel to be a fundamental right, or following the thesis of this article, found only that air travel taken with a "fundamental purpose" to be a constitutional right, airlines would likely treat *every* passenger as one exercising his fundamental freedom to fly (rarely would an airline take the time and resources to investigate the purpose of each passenger's travel and inquire into available travel alternatives). In either instance, airlines would be liable to passengers for violations of the right to air travel, perhaps to the detriment of aviation safety.

Currently airline personnel are given broad discretion in deciding whether to transport a passenger and whether to abort a flight altogether.¹⁵³ FAA Regulation Section 91.3 provides that the "pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of the aircraft."¹⁵⁴

¹⁵³ *Id.*

¹⁵⁴ 14 C.F.R. § 91.3; see Poppe, *supra* note 145.

Likewise, an airline “may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.”¹⁵⁵ As a result, if an airline captain has reason to believe that a passenger is disruptive or a threat to himself or others, the captain has the authority to remove the passenger.¹⁵⁶ This safety measure would be significantly undermined if the passengers were guaranteed a right to fly.

An airline captain would likely hesitate to remove an unruly traveler for fear of subsequent litigation. This predicament would put pilots in difficult positions, forcing them to make instant decisions as to when the disruption was “disruptive enough” to violate the passenger’s constitutional right. Even seemingly nonthreatening passengers, heavily intoxicated travelers, for example, could inhibit the flight crew from effectively doing their jobs that could result in injury to passengers or crew.

On the other hand, public servants, such as policemen, make these tough decisions every day; they are constantly balancing public safety with an individual’s personal liberties. Society trusts police officers to provide security in our neighborhoods while demanding that they respect each person’s constitutional guarantees. Arguably, airline passengers expect the same from their pilots and flight crew: society trusts the airlines to provide a safe flight, from both mechanical and human factors, but also to be respectful of individual liberties.

Furthermore, every safety law and regulation that abridged the right to air travel of a class of people could be susceptible to strict scrutiny and subject to invalidation. This includes the No-Fly List, requirements for general aviators, and rules governing the use of private airports. Strict scrutiny of these laws essentially ensures that a person’s right to fly, either commercially as a passenger or privately as a pilot, is paramount to the safety of the aviation industry, absent a showing that the law is necessary to the state’s interest. Many in the aviation industry may welcome the idea of purging the thousands of aviation laws and regulations of those that are “unnecessary” to the government’s compelling interests.¹⁵⁷ Ultimately, however, the legislatures, regulatory agencies, and courts will be tasked with ensuring that the freedom to fly is appropriately balanced with aviation safety.

¹⁵⁵ 49 U.S.C. § 44902 (2012); see Poppe, *supra* note 145.

¹⁵⁶ See Poppe, *supra* note 145, at 118–19.

¹⁵⁷ See FAA, Regulations & Policies, https://www.faa.gov/regulations_policies/ (last visited Nov. 18, 2015).

V. CONCLUSION

The fundamental right to travel is well-engrained in this country's jurisprudence.¹⁵⁸ As each new generation becomes more reliant on air travel to thrive in society, the courts are moving closer to embracing a constitutional right to fly.¹⁵⁹ However, a virtually unconditional right to air travel would present undesirable consequences to the commercial airline industry and aviation safety.

Instead of declaring a universal right to interstate air travel, the courts should focus on the underlying purpose of the flight. If the purpose is to exercise a fundamental right—pursuing a business opportunity, fulfilling a religious obligation, or petitioning the government, for example—and if air travel is the only means to fulfill that underlying right, then the court by extension should recognize the individual's freedom to fly interstate.¹⁶⁰ The guarantee is not without limits and the test should be narrowly tailored, satisfied on the basis of each individual. A sweeping proclamation of the right to air travel not only goes against precedent, but becomes an open door for safety concerns and unnecessary litigation.¹⁶¹ However, when a traveler seeks to exercise a constitutionally protected liberty interest and domestic air travel is the only practical means available, the court should honor a person's freedom to fly.

¹⁵⁸ Hartch, *supra* note 4.

¹⁵⁹ *Id.*

¹⁶⁰ See *Latif v. Holder*, 28 F. Supp. 3d 1134 (D. Or. 2014).

¹⁶¹ Mann, *supra* note 84.