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Constitutional Law — Interstate Travel — The Validity of a State Airport Facilities Tax Measured by Enplaning Passengers

The growth of civil aviation has outpaced national and state predictions¹ and, as a result, has created serious problems in terms of providing adequate airport facilities.² A state can finance the increasing costs for such facilities through general fund appropriations, although these appropriations have not proved satisfactory because of the limited local resources available and the acute demands of the major traffic generating hubs.³ In addition, the state can enact special measures providing for the collection of fees in consideration for the use of its public airport by virtue of its proprietary interest in its public property.⁴ The state's power to levy for the use of its public facilities is, however, not unlimited; but determining the permissible scope within which the state may act in imposing such charges often gives rise to considerable difficulty. For example, several state legislatures have enacted measures providing for collection of fees from commercial aircraft measured by enplanement.⁵ Because of the peculiarly interstate nature of aircraft transportation, such measures, though labeled a service charge, pose serious constitutional questions. In particular, constitutional challenges are based on the proposition that an enplaning fee bears no reasonable relationship to the use of the facility for which it was collected and therefore abridges: (1) the constitutionally protected right of interstate commerce to be free of unreasonable burdens and (2) the fourteenth amendment due process clause, which requires a sufficient nexus between the taxed business and the taxing state. Moreover, Supreme Court cases suggest at least four provisions of the Constitution as the basis for

¹ Over the past five years, the certified air carrier fleet has increased from substantially a piston fleet of 2,079 aircraft to an almost completely jet fleet of 2,586 aircraft. In terms of capacity, the seat-miles flown have increased from 94.8 billion to 210 billion. By 1980, it is estimated that the domestic certified airlines will enplane 420 million passengers, almost tripling the 1969 figure. *Hearings on H.R. 14,465 Before the Subcomm. on Avi. of the Senate Commerce Comm.*, 91st Cong., 1st and 2d Sess. (1969-70). See FAA, AVIATION DEMAND AND AIRPORT FORECASTS FOR LARGE TRANSPORTATION HUBS THROUGH 1980 (Aug. 19, 1967).

² The most serious manifestation of the problem has been congestion. It has been estimated that aircraft delays at airports cost the airlines in excess of \$50 million a year. This is exclusive of the substantial cost to the passenger in terms of lost time and inconveniences.

³ Facilities and appropriation forecasts have proved to be only about two-thirds of the actual needs in most states; see note 1 *supra*.

⁴ *Hendrick v. Maryland*, 235 U.S. 610 (1915); *Dixie Ohio Express* 1221 (1960). A discussion of the cases involving aircraft taxation can be found in Annot., 98 L.Ed. 982 (1953).

⁵ Five states specifically provide by statute for enplaning fees: Montana, MONT. REV. CODES ANN. § 1-829 (Supp. 1969); Nebraska, NEB. REV. STAT. § 48-159 (3 AV. L. REP. ¶ 13,060) (1969); New Hampshire, N.H. REV. STAT. ANN. § 423:43 (1959); New Jersey, ch. 200 § 15.15 [1969] N.J. Acts 70 (passed over veto); and Virginia, VA. CODE ANN. §§ 5.1-77 to 82 (Supp. 1968). In at least one state, Indiana, a municipal ordinance imposes a levy upon enplaning passengers. *Evansville-Vanderburgh Airport Authority District, Ind.*, Ordinance 33 (1968). Various agencies or municipalities in California, Hawaii, North Carolina, and Washington have considered imposing enplaning fees upon passenger air carriers, but have refused to act after receiving opinions from the respective attorney generals of those states that such fees would be unconstitutional. See, e.g., *Op. Atty. Gen. Wash.*, 3 AV. L. REP. ¶ 23,245 (1962).

a protected right of travel, which would limit the state in imposing taxation upon interstate passengers: (1) the privileges or immunities clause of the fourteenth amendment, (2) the due process clauses of the fifth and fourteenth amendment, (3) the commerce clause and (4) the equal protection clause of the fourteenth amendment.⁶

In *Northwest Airlines, Inc. v. Joint City-County Airport Board*⁷ the Montana Supreme Court considered constitutional objections to a statute authorizing the collection of a one dollar fee for every passenger embarking commercial aircraft at public airports located within the state.⁸ Rejecting the argument that the fee is a valid use charge, the court reached a novel and unexpected decision by holding the fee invalid because it fell directly on an integral aspect of interstate travel, indicating that the statute was in violation of an *absolute* ban on state interference with the passenger's constitutional right to travel.⁹

Using *Northwest Airlines* as a framework for analysis, this note will consider the constitutional vulnerability of state legislation providing for a service charge measured by enplaning passengers and the extent, if any, a passenger's right to travel limits an otherwise valid statute.

I. CONSTITUTIONAL LIMITATIONS ON PUBLIC FACILITIES TAXATION

A. Due Process and Commerce Clause Restrictions

The restrictions of the commerce clause and the fourteenth amendment due process clause upon a state charging for the use of its public facilities

⁶ The right to travel was grounded upon the privileges and immunities clause of article IV, § 2 in *Paul v. Virginia*, 79 U.S. (8 Wall.) 168 (1869); *Ward v. Maryland*, 75 U.S. (12 Wall.) 418 (1871); see also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (No. 3230) (C.C.E.D. Pa. 1825). Reliance was placed on the privileges and immunities clause of the fourteenth amendment in *Twining v. New Jersey*, *supra*; *Edwards v. California*, 314 U.S. 160, 183-85 (1941) (concurring opinion); compare *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868). In the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), and *Edwards v. California*, *supra*, the Court employed a commerce clause approach. The due process clause of the fifth amendment was utilized in the passport cases where the Court upheld the right to travel outside the country. See *Kent v. Dulles*, 357 U.S. 116 (1958). Finally, the source of the right was dismissed as "basic" in *United States v. Guest*, 383 U.S. 745 (1966), and "fundamental" in *Shapiro v. Thompson*, 394 U.S. 618 (1969). See generally, CHAFFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 184-87 (1956) [Hereinafter cited as CHAFFEE] Vestal, *Freedom of Movement*, 41 IOWA L. REV. 6 (1955). A discussion of article IV would be irrelevant for purposes of this note, as it is settled that it only prevents a state from discrimination against citizens of other states in favor of its own. *Hague v. CIO*, 307 U.S. 496, 511 (1939).

⁷ 463 P.2d 470 (Mont. 1970).

⁸ MONT. REV. CODES ANN. § I-829 (Supp. 1969):

Every city or county which constructs, operates or maintains, individually or jointly, a public airport with funds contributed in whole or in part, directly or indirectly, by the state, county, city or other public authority, is authorized and empowered to require every passenger air carrier for hire which uses the airport for commercial use of aircraft to pay a service charge of one dollar (\$1) for each passenger enplaning upon its aircraft at any such public airport as a point of origin for transportation purposes.

⁹ Subsequent to the *Northwest Airlines* decision, a New Jersey lower court enjoined the enforcement of ch. 200 § 15.15 [1969] N.J. Acts 70, authorizing enplaning fees in that state. *Allegheny Airlines, Inc. v. Sills*, No. C 993-69 (Superior Ct. N.J. Ch. Div., Essex Cy, April 22, 1970). The basis of the decision was the same as in *Northwest Airlines*, and the court relied heavily upon that case. The constitutionality of the Indiana statute is presently being contested in the courts of that state. *Evansville-Vanderburgh Airport Dist. v. Delta Airlines, Inc.*, No. 869S179 (Ind. Sup. Ct., filed —, 1970). The New Hampshire Supreme Court, rendering an advisory

overlap because of the similar tests used to determine whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the states and whether a state complies with due process nexus requirements. As to the former, the Supreme Court has held that "[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys."¹⁰ In determining whether a state tax falls within the confines of due process, the Court has said that the "simple but controlling question is whether the state has given anything for which it can ask returned."¹¹ Because of the similarity of the two tests, the Court has held that in some cases satisfaction of due process nexus requirements for tax purposes will also satisfy the "reasonable burden" test of the commerce clause.¹² Where, however, the state charges for the use of its facilities, i.e., an enplaning fee, an answer to an attack under one clause will not necessarily preclude an attack under the other. For example, the nexus requirement would seem satisfied by the fact that the aircraft is required to pay the fee. Where the fee is imposed on the carrier for airport use, but the amount of the fee is measured by a subject having no relation to the airport, the statute would probably be struck as an unreasonable burden on interstate commerce.¹³ To allow for this distinction, draftsmen of such statutes should be diligent to make the charge compensatory for the use of the airport for which the fee is levied.¹⁴

There are, however, more subtle distinctions. The Supreme Court in *Hendrick v. Maryland*¹⁵ required that any particular public facility tax on interstate carriers should be fixed according to some uniform, fair and practical standard. Thus, a given statute is compensatory *presumptively* established as valid where there appears: (1) a declaration by the state legislature that the fee is in consideration for the use of the facility afforded by the state,¹⁶ or (2) an allocation of the proceeds of the fee for facility purposes¹⁷ or (3) a tax formula based on actual or potential facility use.¹⁸ Since *Capitol Greyhound Lines v. Brice*,¹⁹ the carrier may be limited to

opinion in an uncontested proceeding, sustained the validity of the New Hampshire statute on state constitutional grounds. The court did not consider the proposed legislation's constitutionality under the federal Constitution. Opinion of the Justices, 102 N.H. 73, 150 A.2d 522 (1959).

¹⁰ *Freeman v. Hewitt*, 329 U.S. 249, 253 (1945), quoted with approval in *Nat'l Bellas Hess v. Dept. of Revenue*, *supra* at 756; see also *Northwestern Cement Co. v. Minnesota*, 358 U.S. 450, 462 (1958); *Greyhound Lines v. Mealey*, 334 U.S. 663 (1947).

¹¹ *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940); quoted with approval in *Nat'l Bellas Hess v. Dept. of Revenue*, *supra* at 756.

¹² *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919); *Pacific Tel. & Tel. Co. v. Tax Commn.*, 297 U.S. 403 (1936); *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949).

¹³ See *Hendrick v. Maryland*, 235 U.S. 610 (1915).

¹⁴ In *Aero Mayflower Transit Co. v. Board of R.R. Commrs.*, 332 U.S. 495 (1947), the tax was specifically declared by the statute to be "in consideration of the use of the public highway of this State." See also *Dixie Ohio Express Co. v. State Revenue Commn.*, 306 U.S. 72, 77 (1939).

¹⁵ 235 U.S. 610 (1915).

¹⁶ *Aero Mayflower Transit Co. v. Board of R.R. Commrs.*, 322 U.S. 495 (1947).

¹⁷ *Clark v. Poor*, 274 U.S. 554 (1937).

¹⁸ *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 (1931).

¹⁹ 339 U.S. 542 (1950).

attacking the presumptive validity of the statute on the sole ground that the amount of the fee is unreasonable. In *Capitol* the Court held valid a two per cent ad valorem tax levied on interstate motor carriers. Although the Court recognized the "congenital infirmities" of the challenged tax, it nevertheless refused to weigh them, indicating that this type of evaluation should be made by Congress.²⁰ Moreover, if the statute contains a declaration of compensation for facility use, not only may the carrier be limited in its constitutional attack, the effect of *Capitol* also appears to make the declaration conclusive and leaves the question of reasonableness to the legislature. This is so because the establishment by the taxpayer of the worth of reasonable compensation would seem to be an insuperable difficulty.²¹ The resulting consequences are well illustrated by the fact that since *Capitol* the Court has never upset a public facility charge as unreasonable.²²

B. *The Right to Travel as a Limitation*

From the earliest cases involving the question, the Supreme Court has held valid a right to travel from one state to another and, necessarily, to use the instrumentalities of interstate commerce to do so.²³ Yet, nowhere in the Constitution is ingress and egress given specific protection, and there is considerable debate among the commentators and jurists about what clause in the Constitution provides the right.²⁴ The explanation recently accepted by the Court does not delineate any specific clause or provision, but rather recognizes the right as arising from, and perhaps before, the Constitution.²⁵ Notwithstanding the character of the right, a problem remains concerning the proper test in determining the extent to which

²⁰ It is significant that during various periods sharp debate has divided the Supreme Court on the question of whether there exists a judicial function *at all* under the commerce clause with respect to state laws affecting interstate commerce. See, e.g., the dissenting opinions of Justices Swayne and Davis in the Case of the State Freight Tax, 82 U.S. (15 Wall.) 232, 282 (1872), and Chief Justice Waite and Justices Field and Gray in their dissent in *Robbins v. Shelby Co. Taxing District*, 120 U.S. 489, 499 (1887). Compare *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 188-99 (1940), with *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950). Shortly after his appointment to the Court, Justice Black strongly objected to the doctrine that the Court has the power to invalidate a statute in the absence of actual discrimination against Congress. *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 454 (dissenting opinion). His subsequently expressed views have been consistent, but milder. See, e.g., *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 301-02 (1944) (concurring opinion) (Court must proceed cautiously until Congress acts); *McCarroll v. Dixie Greyhound Lines, Inc.*, *supra* (dissenting opinion) (case by case lawmaking unsatisfactory to protect interstate commerce); *Capitol Greyhound Lines v. Brice*, *supra*; *accord*, *Norfolk & W. R. Co. v. Tax Commn.*, 390 U.S. 317, 330-32 (1967). As can be seen from *Capitol*, the Black viewpoint would permit almost unlimited latitude to the states. See generally, Kunst, *State Taxation of Income from Interstate Commerce: New Dimensions of an old Problem*, 14 Sw. L.J. 1 (1960).

²¹ This rescission of a tax formula as one criterion of testing tax validity is logically acceptable, since the real issue is whether the charge is a *quid quo pro* within the practical limits of tax administration. See notes 10-12 and accompanying text. Insofar as airport facilities are concerned, there appear to be two ways in which reasonable compensation could be established: (1) assessment of the costs incurred by the grantor of the privileges, or (2) subjective valuation of benefits accruing to the grantee. The latter criterion cannot be ascertained, of course, without reference to the business done by the taxpaying airline in question.

²² *Bode v. Barrett*, 344 U.S. 583 (1953); see *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967).

²³ *United States v. Guest*, 383 U.S. 745, 458 (1965) (concurring opinion).

²⁴ See note 6, *supra*.

²⁵ See, e.g., *United States v. Guest*, 383 U.S. 745 (1965).

the right to travel among the states may limit the legitimate exercise of state taxation for the use of public facilities.

1. *Privileges and Immunities of Citizens.* To abridge the privileges or immunities clause of the fourteenth amendment,²⁶ the challenged state action must contravene a right inherent in national, as opposed to state, citizenship.²⁷ On the authority of *Crandall v. Nevada*²⁸ these privileges have repeatedly been said to include the right of interstate travel,²⁹ presumably for the reason assigned in *Crandall*: state restrictions on travel interfere with intercourse between the national government and its citizens.³⁰ To a certain extent this restriction duplicates the protection afforded by other constitutional provisions, but a definition of the right as a privilege or immunity of national citizenship has considerable significance in terms of legitimate state taxation versus a direct or indirect impact on the right, because the use of that clause might be overly restrictive. For example, there is authority for the proposition that if passing from state to state is a privilege or immunity protected by the fourteenth amendment, then, whether by implication as in *Crandall* or by the express terms of the amendment, no state can abridge it.³¹ Therefore, if a taxpayer is moving interstate a strict interpretation of the clause would allow immunity from taxation, even though there was extended use of public facilities while the taxpayer passed through a particular state. The Supreme Court has been extremely reluctant to create "constitutional refuges for a host of rights traditionally subject to regulation."³²

The reason for this reluctance to enlarge the scope of the clause has been well understood since the decision of the Slaughter-House Cases . . . If its restraint upon state action were extended more than is needful to protect relationships between the citizens and the national government, and it did more than duplicate the protection of liberty and property secured to persons and citizens by other provisions of the Constitution, *it would enlarge judicial control of state action and multiply restrictions upon it to an extent difficult to define, but sufficient to cause serious apprehension for the rightful independence of local government* [Emphasis added].³³

Furthermore, the Court has specifically held that Congress, pursuant to its commerce power, may empower the states to tax interstate commerce, including persons moving in commerce, which would otherwise be pro-

²⁶ "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

²⁷ *Bell v. Maryland*, 378 U.S. 226 (1964).

²⁸ 73 U.S. (6 Wall.) 35 (1868).

²⁹ See, e.g., *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908).

³⁰ Without reference to the fourteenth amendment, the Supreme Court in *Crandall* enjoined a Nevada tax of one dollar on each passenger leaving the state by common carrier. The Court maintained that as the federal government has a "right" to summon its citizens to the national capital, "the citizen also has correlative rights" to go to the federal government for purposes of transacting business. 73 U.S. (6 Wall.) at 44 (1868).

³¹ See *Bell v. Maryland*, 378 U.S. 226, 250 (1964) (concurring opinion).

³² *Id.*

³³ *Colgate v. Harvey*, 296 U.S. 404, 445 (1935); see *Madison v. Kentucky*, 309 U.S. 83 (1940), discussed *infra* at note 38.

hibited by the negative implications of the commerce clause.³⁴ That the fourteenth amendment is not binding upon Congress³⁵ demonstrates that a fortiori a privilege or immunities clause objection to a state tax falling upon interstate travel is highly questionable.

Apparently for the above reasons, even the rationale of *Crandall* came under serious attack in *Helson & Randolph v. Kentucky*,³⁶ where the Court stated that "[t]o impose a tax upon the transit of passengers . . . between the states is to regulate commerce and is beyond the state power . . . The doctrine of *Crandall v. Nevada* . . . so far as it is to the contrary, has not been followed."³⁷ The privileges or immunities clause was reasserted by the concurring Justices in *Edwards v. California*,³⁸ but since that decision not one Justice has given recognition to the clause as a possible valid restriction in the five occasions that the Court has examined the question.³⁹

2. *Due Process*. In addition to the nexus requirement imposed upon the state when it levies a tax, the due process clause can restrict this power when it unreasonably restricts the freedom of interstate travel. Both the fifth and fourteenth amendments to the Constitution contain provisions that no person shall be deprived of "life, liberty or property without due process of law." These clauses have impact not only on procedural techniques, but also on substantive law, and in a number of cases the due process concept has been used to limit actions of states encroaching on the right to travel.⁴⁰ The Supreme Court squarely ruled on the matter in *Kent v. Dulles*,⁴¹ where the Court said that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law . . . Freedom of movement across frontiers . . . and inside

³⁴ *Prudential Ins. Co. v. Benjamin*, 228 U.S. 408 (1946).

³⁵ *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916); *Shapiro v. Thompson*, 394 U.S. 618, 646 (1969) (dissenting opinion).

³⁶ 279 U.S. 245 (1929).

³⁷ *Id.* An argument can be made that Justice Sutherland, speaking for the majority, was referring to that part of *Crandall* which denied that the tax was forbidden by the commerce clause, rather than the assertion that the right of ingress and egress was a privilege of national citizenship. In the subsequent case of *Colgate v. Harvey*, 296 U.S. 404 (1935), however, Justice Sutherland re-asserted that interstate travel was a privilege of national citizenship in holding a state tax unconstitutional which discriminated against income from out-of-state investments. As a result, Justice Reed, joined by Brandies and Cardozo, in a rigorous dissent, pointed out that Sutherland, himself, had overruled *Crandall* so far as the "latter referred to the protection of such commerce to the privileges or immunities, rather than the commerce clause." *Id.* at 444. *Colgate* was overruled in *Madison v. Kentucky*, 309 U.S. 83 (1940), where the Court denied that the carrying out of an incident of trade is a privilege of national citizenship. Justice Reed, for the majority, did not expressly deny, however, that the right of ingress and egress was such a privilege. Also, *Crandall* must still be distinguished from the fourteenth amendment, because that case did not necessarily require state action. Thus, apparently *Crandall* may be asserted against *private* restrictions on the right to travel. *United States v. Guest*, 383 U.S. 745 (1966). *But see*, *Williams v. Fears*, 179 U.S. 270 (1900).

³⁸ 314 U.S. 183 (1941).

³⁹ *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Zemel v. Rusk*, 381 U.S. 1 (1965); *United States v. Guest*, 383 U.S. 745 (1966); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

⁴⁰ *See, e.g.*, the dissenting opinions of Justices Bradley and Swayne in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 111, 124 (1873), maintaining that due process imposed substantive limits upon state economic regulation.

⁴¹ 357 U.S. 116 (1958).

frontiers as well, was a part of our heritage"⁴² These remarks were echoed in *Aptheker v. Secretary of State*,⁴³ where the Court held unconstitutional a federal statute regulating the application of passports.

While *Kent* and *Aptheker* only dealt with the question of federal governmental limitations of international travel, it has been pointed out that fourteenth amendment due process provides no less protection against the states than does the fifth amendment clause against the federal government.⁴⁴ Since there are no established guideposts, the fifth amendment merely requiring that due process be accorded,⁴⁵ the extent of the due process limitation remains. This problem will undoubtedly cause the Court some vexation in the future, perhaps when it is faced with the precise question of the constitutionality of an enplaning fee. Nevertheless, due process has the advantage of allowing a balancing process between legitimate state fiscal interests and the restriction which the right to travel has on those interests.

3. *Commerce Clause.* The Constitution gives Congress the power to regulate commerce among the several states,⁴⁶ and the movement of persons from state to state has been held to fall within that provision in *Edwards v. California*.⁴⁷ The Supreme Court in *Edwards* held that the right to travel is guaranteed against oppressive state legislation by the commerce clause and declared unconstitutional a California statute restricting the entry of indigents into that state. Such an analysis, while arguably more difficult to reach than the privilege or immunities clause or due process approach, allows a direct impact on the right to travel to be set against the legitimate fiscal interests of the states, and commerce clause adjudication has traditionally been the means of reconciling these interests.⁴⁸ Thus, the "reasonable burden" test, applied to make commerce, i.e., persons moving in commerce, bear a fair share of the cost for the use of public facilities is the limitation applicable under the commerce clause. Again, the holding of *Capitol* creates a problem in measuring the scope of the limitation.

4. *Equal Protection.* The equal protection clause of the fourteenth amendment provides that "no state shall make or enforce any law which shall . . . deny to any person . . . the equal protection of the law."⁴⁹ The fact some people use a public facility without being required to pay a charge may create an equal protection objection to a use charge such as an enplaning fee. Supreme Court practice, however, has been to review a challenged statute on equal protection grounds only where a "fundamental" interest or a "suspect" classification is involved.⁵⁰ In *Shapiro v.*

⁴² *Id.* at 125-26.

⁴³ 378 U.S. 500 (1964).

⁴⁴ *Shapiro v. Thompson*, 394 U.S. 618, 646 (1969) (dissenting opinion).

⁴⁵ See Note, 23 UNIV. CHI. L. REV. 260 (1956).

⁴⁶ U.S. CONST. art. III,

⁴⁷ 314 U.S. 160 (1941),

⁴⁸ See notes 10-22 and accompanying text. For a criticism of the commerce clause rationale, see CHAFEE, at 186.

⁴⁹ U.S. CONST. fourteenth amendment.

⁵⁰ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

*Thompson*⁵¹ the Supreme Court, by holding unconstitutional a state welfare requirement statute that was theretofore considered neither "suspect" nor "fundamental,"⁵² suggested that *any* time a statutory distinction affects the exercise of the right to travel, that distinction will be "suspect" and will accordingly invite wide-ranging review by the courts. Recognition of the interest in interstate travel as "fundamental" and therefore protected by the equal protection clause has significant consequences in terms of state fiscal limitations, valid or otherwise. An analysis of *Shapiro* shows that state classification of indigents for purposes of determining eligibility for welfare by residence requirements is constitutionally invalid for two reasons. First, since the freedom of interstate travel is a "fundamental" right, statutory classifications which are adverse to this right are invalid unless necessary to advance a "compelling" state interest. Second, although the state's interest may be "compelling," because of the "fundamental" right involved, the statute may nevertheless be struck as functionally unrelated to the purpose or is unnecessarily restrictive in light of available alternatives for achieving it. Therefore, the reasonable relation test in measuring the validity of a public facility tax, denounced in *Capitol Greyhound Lines v. Brice*,⁵³ may arguably be reasserted, and the courts will again appraise values to see whether one is compelling enough to sacrifice the other, under the guise of equal protection.⁵⁴

II. NORTHWEST AIRLINES, INC. v. JOINT CITY-COUNTY AIRPORT BOARD

The Montana Supreme Court in *Northwest Airlines* completely confuses the area of state public facility taxation *vis à vis* the right of interstate travel. Even though the decision is unique, it is significant only in that it reinforces the conclusion that the courts cannot formulate a precise rule to determine the extent state interests can interfere with the right to travel.

In *Northwest Airlines* the constitutionality of the tax was tested by the fact that the taxed airlines carried passengers who were likely to move interstate. The court declared that the rationality of the classification could not be postulated on commerce clause criteria, "where a balance is often struck,"⁵⁵ because imposing a fee measured by enplaned passengers—thereby deterring those individuals from exercising their constitutional right to travel—is *absolutely* banned as an "inherent possibility of complete interdiction of some activity of federal concern."⁵⁶

Furthermore, under the court's analysis, the mere reasonable relationship between the passenger and his use of the airport would not have saved

⁵¹ 394 U.S. 618 (1969).

⁵² 339 U.S. 542 (1940). See notes 19-23 and accompanying text.

⁵³ See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

⁵⁴ "When the Court demands compelling justification in addition to rational relation to purpose, the logic of equal protection is stretched beyond normal limits. The Justices are not simply saying, 'You may do A only if the class of those affected is broadened or narrowed to accord with reasonable distinction,' but rather, 'You must not accomplish objective A if it entails the sacrifice of value B.'" Note, 83 HARV. L. REV. 123, n. 19 (1969).

⁵⁵ 463 P.2d at 464.

⁵⁶ *Id.*

the statute, even though due process nexus or equal protection requirements would have otherwise been satisfied. Citing *Crandall*, the court reasoned that under the privileges or immunities clause of the fourteenth amendment, the states are completely deprived of the power to tax where the assertion of interference with the right to travel is proved.

Several factors appearing in the *Northwest Airlines* decision can be used to confine its impact. First, the court's conclusion that the privileges or immunities clause absolutely protects the right to travel from state taxation is surely unsound. The right of every citizen to enjoy ingress and egress is undoubtedly a substantial constitutionally protected right, but the state's power to affect remotely that right by the legitimate exercise of taxation also can hardly be doubted, especially where Congress has remained silent.⁵⁷ An enplaning fee, levied for the use of municipal airports seems to be an entirely legitimate objective which satisfies the due process nexus requirement and the "reasonable burden" test of the commerce clause. A municipal airport certainly is not obliged to furnish its facilities free of charge; it is entirely rational to charge those who primarily use them. Furthermore, the enplaning fee was levied on the *airlines*, the primary users of facilities such as runways and lighting equipment. By striking the status as an impermissible interference with the passenger's right to travel, the court completely ignores the argument that the number of passengers carried by those airlines are directly reflective of the amount of use of runway and lighting facilities.

Second, it is difficult to conceive that *Crandall*, assuming *arguendo* that its rationale is still good law, is controlling in the instant case. There is no solid foundation that a state public facility tax interferes with the right of citizens of the United States to pass through the state and is consequently invalid according to the doctrine announced in *Crandall*. In that case a direct tax was levied upon *every* mode of public transportation for the privilege of leaving the state, while the Montana statute as most attempts to charge for the use of valuable airport facilities.

⁵⁷ See *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 (1954), where the Court *refused* to preclude a state apportioned ad valorem tax on flight equipment of an interstate air carrier on the ground that Congress, by the Civil Aeronautics Act of 1938, 49 U.S.C. § 176 (1938), had preempted the field. See also, S. REP. No. 1661, 75th Cong., 3d Sess., H.R. Conf. Rep. No. 2635, 75th Cong., 3d Sess. In the Civil Aeronautics Act, however, Congress has declared that, [t]he declaration of what constitutes navigable air space is an exercise of the same source of power, the interstate commerce clause, as that under which Congress has long declared in many acts what constitutes navigable or non-navigable air space. . . . Federal regulation of interstate land and water carriers under the commerce clause has not been deemed to deny all state power to tax the property of such carriers. *Id.*

Where Congress has enacted legislation showing its power, state action which would defeat the purpose of Congress is forbidden. *Buck v. Keykendall*, 267 U.S. 307 (1925). By the Airport and Airway Development and Revenue Acts of 1970, which is comprehensive Congressional legislation regulating national expansion and improvement of the airport and airway system, Congress has occupied much of the field of airport development. In substantial part, this purpose is to be achieved through the imposition of user charges, measured by the purchase of airline tickets, or the act of enplanement. Pub. L. No. 91-258 §§ 203-11 (July 1, 1970). Although Congress has not expressly precluded the state from collecting use fees, on the reasoning of *Braniff Airways*, the preemption may be by implication. See Pub. L. No. 91-258 § 210 (July 1, 1970), and H.R. Rep. No. 601, 91st Cong., 1st Sess. 50 (1969). *But see Aircraft Owners & Pilots Ass'n v. Port Authority of N.Y.*, 305 F. Supp. 93, 105 (1969).

Finally, to the degree that the court is correct in concluding that the right to travel interstate is "fundamental to the concept of our Federal Union,"⁵⁸ under the court's reasoning the various state purposes in imposing reasonable revenue measures would not be particularly weighty. The court's argument in favor of interstate travel, however, simply proves too much. If the states could not act, how would they charge for the use and regulation of public highways? Is not the state's need for reasonable revenue collection as "absolute" as the need to protect the right to travel?

Although the decision in *Northwest Airlines* can be criticized for adopting the privileges or immunities clause as absolutely barring state fiscal restrictions on interstate travel, the result may be in line with the *Shapiro* expansion of equal protection review. Judicial review under *Shapiro* formulations of equal protection turns on considerations substantially similar to those which characterized the substantive due process analysis under *Hendrick v. Maryland*,⁵⁹ and a flat charge based on enplaning passengers, arbitrarily laid without regard to the *actual* use of the airport by the passengers may now be enough to overcome the presumptive validity of the statute. In making the value appraisal, however, courts should give considerable consideration to indirect use, such as runways and lighting facilities, which are "used" by the enplaned passenger as much as he uses the terminal building.

III. CONCLUSION

If the right to interstate travel can find protection only in the commerce clause, the argument could be advanced that the right is a privilege held by citizens only by the grace of the national government, and thus Congress would have the power to regulate and even terminate the movement of persons among the states because they move in interstate commerce.⁶⁰ On the other hand, if the right finds protection only in the equal protection clause or by the privileges or immunities of citizenship, the power of the states to exert legitimate fiscal policy could be unduly restricted, as the *Northwest Airlines* case amply illustrates. It is therefore impossible to formulate a precise rule by which courts may determine whether interstate travel may be regulated by the exercise of government, state or national. This proposition finds further support by the lack of differentiation between the various provisions of the Constitution in more recent Supreme Court right to travel cases. At least one definite conclusion may be drawn: the right to travel is neither absolute, subject to *no* governmental restriction. In making an analysis of a fact situation involving state interest opposing the right to travel, four considerations, which are the same balancing criteria found in substantive due process, would seem relevant:

- (1) What is the constitutional source and nature of the right which is relied on in light of the particular facts?

⁵⁸ 463 P.2d 464.

⁵⁹ 235 U.S. 610 (1915). See note 18 *supra*.

⁶⁰ See notes 46-48 and accompanying text.

- (2) What is the extent of the interference with that right?
- (3) What governmental interests are served by the interference?
- (4) How should the balance of the competing considerations be struck?⁶¹

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⁶¹ See *Shapiro v. Thompson*, 394 U.S. 618, 646 (1969) (dissenting opinion).