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State Taxation of Interstate Travel: Alternative Constitutional Limitations—*Northwest Airlines v. Joint City-County Airport Board*

In today's context of expanded human mobility, an individual's right to travel from,¹ through,² or to³ any of the United States without state restriction on⁴ or regulation of⁵ his admission⁶ or departure⁷ enjoys well-settled constitutional protection originating from two distinct sources. The interstate transportation of persons is governed by the commerce clause⁸ under which state power to regulate and tax the admission and departure of interstate passengers is restricted, but not entirely forbidden.⁹ Furthermore, the right to travel is a recognized privilege or immunity of citizenship¹⁰ which is afforded absolute immunity from state infringement¹¹ under the fourteenth amendment.¹²

¹ *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

² *United States v. Guest*, 383 U.S. 745, 768 (1966).

³ *Edwards v. California*, 314 U.S. 160 (1941).

⁴ *Id.*

⁵ *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

⁶ *Edwards v. California*, 314 U.S. 160 (1941).

⁷ *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

⁸ U.S. CONST. art. I, § 8. See *Mitchell v. United States*, 313 U.S. 80 (1941); *United States v. Hill*, 248 U.S. 420, 423 (1919); *Caminetti v. United States*, 242 U.S. 470, 491 (1917); *Hoke v. United States*, 227 U.S. 308, 320 (1913); *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204, 218 (1894); *Leisy v. Hardin*, 135 U.S. 100, 112 (1890); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885).

⁹ “. . . the States are not wholly precluded from exercising their police power in matters of local concern even though they may thereby affect interstate commerce.” *Edwards v. California*, 314 U.S. 160, 172 (1941) (holding exclusion of indigents not a proper exercise of police power). See *California v. Thompson*, 313 U.S. 109, 113 (1941).

¹⁰ *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867).

¹¹ *Northwest Airlines, Inc. v. Joint City-County Airport Bd.*, — Mont. —, 463 P.2d 470 (1970). See *Edwards v. California*, 314 U.S. 160, 178 (1941) (concurring opinion), stating that a state may not restrict entry of indigents; *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867), holding that a state may not restrict egress of persons by hired carrier; and *The Passenger Cases*, 48 U.S. (7 How.) 283 (1848), indicating that states may not restrict ingress of foreign immigrants.

¹² *United States v. Guest*, 383 U.S. 745, 768 (1966). See *Edwards v. California*, 314 U.S. 160, 178 (1941) (Douglas, J., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 74, 79 (1872). But see *United States v. Wheeler*, 254 U.S. 281, 299 (1920), attempting to limit the right to travel to a journey to the seat of national government. This view was regarded as dictum by Douglas, J. concurring in *Edwards v. California*.

An historical lack of judicial unanimity exists over which of these overlapping doctrines should control the efforts of a state to tax an interstate traveller passing within its borders. The United States Supreme Court once declared that the proper vehicle for limiting this restrictive taxation was the commerce clause.¹³ Its subsequent decisions, however, have not supported such a unitary view.¹⁴

The Montana Supreme Court, in the recent case of *Northwest Airlines v. Joint City-County Airport Board*,¹⁵ declared a one dollar emplaning tax unconstitutional because it violated the interstate passenger's fundamental constitutional right to travel. A state enabling statute¹⁶ had authorized localities to collect the tax from an interstate airline. The court viewed the levy as a restriction on the passenger.¹⁷ The case, decided without application of the commerce clause, denied the state the power to impose a tax that restricts entry into and departure from its territory.¹⁸

The concept of the right to travel as a sphere of individual freedom protected from state infringement was an integral part of the Articles of Confederation.¹⁹ Though denied express mention in the Constitution, this right was early held by the Supreme Court to be a basic attribute of national citizenship.²⁰ The leading case of *Crandall v. Nevada*²¹ had

¹³ U.S. CONST. art. I, § 8. See cases cited note 8 *supra*.

¹⁴ *Edwards v. California*, 314 U.S. 160 (1941); *United States v. Guest*, 383 U.S. 745, 768 (1966).

¹⁵ — Mont. —, 463 P.2d 470 (1970).

¹⁶ MONT. CODE REV., ch. 1, § 829-32 (1947).

¹⁷ — Mont. —, see 463 P.2d 470 (1970).

¹⁸ *Id.*

¹⁹ Articles of Confederation, Art. IV.

²⁰ Following the only partially successful alliance created under the Articles of Confederation, the constitutionally founded efforts to create a stronger federal union continued into the first half of the nineteenth century. Under Article IV, § 2, of the United States Constitution, this union was held to have conferred on its citizens greater rights by virtue of general national citizenship than individual states could confer. See 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1804-06 (5th ed. 1891). Article IV of the Articles of Confederation had provided that the "people of each State shall have free ingress and regress to and from any other State." See THE FEDERALIST, No. 42 (Hamilton). While this right finds no explicit mention in the Constitution, the reason has been suggested that "a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *United States v. Guest*, 383 U.S. 745, 758 (1966).

See L. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 185 (1956). See also *United States v. Wheeler*, 254 U.S. 281, 294 (1920) (argued in terms of individual intervention).

The rights considered fundamental to the citizens of all free governments were

permanently engrafted the right to travel on the developing fabric of nineteenth century constitutional law before the passage of the fourteenth amendment.²² *Crandall* applied the rationale of prior holdings which had denied state control over the travel of foreign immigrants²³

early held to include "the right of a citizen of one State to pass through or to reside in any other State, for the purpose of trade, agriculture, professional pursuits, or otherwise. . . ." *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823) (dictum declaring a state statute impeding economic activity by outsiders void). Was this a right to travel case, or was it decided under principles since recognized in the commerce clause?

The Constitution was viewed as intended to inhibit "discriminating legislation against [citizens] by other States; it gives [American citizens] the right of free ingress into other States and egress from them . . ." *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868). See 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1804-06, n.4(a) (5th ed., 1891). However, the early cases erroneously envisioned the right to travel as an incident of state citizenship. See *Edwards v. California*, 314 U.S. 160, 180 (1941) (concurring opinion). Principal among these early cases were *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868); and *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870).

²¹ 73 U.S. (6 Wall.) 35 (1867).

²² The post-civil war setting of *Crandall* has been accurately characterized as an era of re-establishment and exploratory assertion of lately challenged national power over state actions. In *Crandall*, the Supreme Court held that the newly admitted state of Nevada could not impose a tax on a person leaving the state by railroad, stage coach, or vehicle transporting for hire, because the person's right to leave was an attribute of his national citizenship. 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 415 (rev. ed. 1926). The nature of this national citizenship was perhaps best defined by listing the distinctions between it and state citizenship. It was believed to be as different from state citizenship as the functions of the two governments are different from each other. 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS, 822, n.1 (8th ed. 1927). Assuming, in line with the judicial opinions of the era, that the envisioned function of the federal government was the redevelopment and extension of unity among the states, the holding in *Crandall* seems thoroughly justified on policy grounds.

That the Supreme Court entertained vivid memories of the Civil War seems apparent in the holding which rested in part on the general proposition that the national government had at all times the right to require the services of its citizens at the seat of government and that they had the correlative right to visit the seat of government. In *Crandall*, the federal government protected its power to transport troops by the most expeditious method. Had the Court held differently, this power would have existed at the mercy of any state through which the individual might be required to pass. While these policy grounds may have further strengthened the decision in 1868, the right to travel is not now limited to the transportation of soldiers. See *Edwards v. California*, 314 U.S. 160 (1941). But see *United States v. Wheeler*, 254 U.S. 281, 299 (1920).

²³ The Passenger Cases, 48 U.S. (7 How.) 283 (1848). In *Henderson v. Mayor of New York*, 92 U.S. 259, 266 (1875), it was suggested that the decision in *The Passenger Cases* turned on the commerce clause. The majority of the Court in *Crandall* did not

to the interstate travel of American citizens.²⁴ Its principles have found periodic reaffirmation by the Supreme Court for over a century.²⁵ In this process of evolution, the right to travel has come to be regarded as a privilege or immunity of citizenship protected from state infringement by the fourteenth amendment.²⁶

adopt this view. See also *City of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837) (dissenting opinion).

²⁴ The most significant extracts of *The Passenger Cases*, as viewed by *Crandall*, were those advanced by the dissenting opinion of Chief Justice Taney. The Chief Justice believed that a state tax on foreigners was valid, but a similar tax on American citizens would be void. *The Passenger Cases*, 48 U.S. (7 How.) 283, 464 (1848). The Court in *Crandall* relied in part on Taney's observations as to American citizens.

²⁵ *United States v. Guest*, 383 U.S. 745 (1966). See *New York v. O'Neill*, 359 U.S. 1, 6-8, 12-16 (1959) (dissenting opinion); *Edwards v. California*, 314 U.S. 160, 174 (1941) (concurring opinion); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908); *Williams v. Fears*, 179 U.S. 270, 274 (1900). But see *Wickard v. Filburn*, 317 U.S. 111 (1942).

²⁶ See cases cited note 12 *supra*. It has been suggested that while *Crandall v. Nevada* was not decided under the then nonexistent fourteenth amendment, its provisions are now translatable as privileges and immunities thereunder. CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION, S. DOC. NO. 39, 88th Cong., 1st Sess. 1078 (1964). But see *Madden v. Kentucky*, 309 U.S. 83, 93 (1940), *overruling Colgate v. Harvey*, 296 U.S. 404 (1935).

In *United States v. Guest*, 383 U.S. 745 (1966), the Court indicated that the "constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. Although there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel, there is no need here to canvass those differences further. All have agreed the right exists We reaffirm it now." *Id.* at 757, 759.

Guest appears to constitute conclusive recognition that in 1966, the century-old doctrine propounded by *Crandall* under different circumstances (Civil War reconstruction) and for different reasons (uniting a federation of independent states versus protecting the personal civil rights of a citizen) retained its full validity and force as a vehicle for individual relief against governmental oppression. This result is suggested not only by the majority opinion, but in the concurring opinion of Justice Clark, joined in by Justices Black and Fortas, wherein agreement with the majority position against state interference with the right to travel is indicated. *Id.* at 761. Mr. Justice Harlan forcefully agrees that there is an established constitutional right to travel between states free from unreasonable governmental interference, but would not extend this protection to deny private interference. *Id.* at 763. Historically he regards the *Crandall* doctrine as a method of breaking down state provincialism and creating a true federal union. Likewise, the opinion of Mr. Justice Brennan, joined in by Chief Justice Warren and Mr. Justice Douglas, implies acceptance of the right to travel as constitutionally protected. *Id.* at 767.

In *Guest*, the majority of the Court relied in part on the earlier case of *United States v. Moore*, 129 F. 630 (C.C.N.D. Ala. 1904) for explicit recognition of the right. However, the statement in *Moore* cited neither constitutional nor judicial authority and was dictum.

The concurring opinion in *Crandall*, based upon the commerce clause, presaged the eventual majority application of the commerce clause to the carriage of interstate passengers.²⁷ Shortly thereafter, the Supreme Court stated that "commerce among the States . . . includes the transportation of persons. . . ." ²⁸ This view prevails today, with the result that state taxation of interstate passenger transportation is restricted, but not entirely denied, under the commerce clause.²⁹ It was earlier believed that the judicial expansion of the commerce clause had tolled the demise of *Crandall* as a limitation on state power to tax.³⁰ However, the Supreme Court has in the last three decades twice resurrected the principle enunciated in *Crandall*, indicating that it is still viable and translatable as a privilege or immunity of citizenship guaranteed by the fourteenth amendment.³¹ The court has shown an apparent willing-

²⁷ Whether the carriage of persons from one state to another was a branch of interstate commerce was a question the Supreme Court was able to side-step in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the earliest and possibly the most lucid statement of the guiding principle whereby the Court could adjust the powers of the states under the commerce clause. See CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION, S. DOC. NO. 39, 88th Cong., 1st Sess. 207 (1964).

It was suggested in *The Passenger Cases* that the carriage of persons across a state line was commerce. That decision, however, dealt only with foreign immigrants and rested largely upon treaties and acts of Congress.

In 1872 in the leading case delineating the rights of a state to tax interstate commerce, the Court held that the transportation of passengers was a subject of interstate commerce. *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1872).

²⁸ *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885). This is the present status of the law. See *United States v. Guest*, 383 U.S. 745 (1966); *Edwards v. California*, 314 U.S. 160 (1941); *United States v. Hill*, 248 U.S. 420, 423 (1919); *Hoke v. United States*, 227 U.S. 308 (1913); *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204 (1894). See also *Gooch v. United States*, 297 U.S. 124 (1936); *Caminetti v. United States*, 242 U.S. 470 (1917). For a time it was believed that the right to travel doctrine had been rejected in favor of the commerce clause. *Helson v. Kentucky*, 279 U.S. 245, 251 (1929); *Colgate v. Harvey*, 296 U.S. 404, 436 (1935) (dissenting opinion). *Colgate* was subsequently overruled by *Madden v. Kentucky*, 309 U.S. 83, 93 (1940). In the light of subsequent cases this has proven to be untrue. See cases cited note 16 *supra*.

²⁹ See *Joseph v. Carter & Weekes Co.*, 330 U.S. 422 (1947); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948) (dictum indicating that a state may tax that apportioned part of an interstate journey occurring within its borders). In the field of state taxation of interstate commerce, the Court has been viewed as an abiter, serving a quasi-legislative function. CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION, S. DOC. NO. 39, 88th Cong., 1st Sess. 209 (1964). See also P. HARTMAN, *STATE TAXATION OF INTERSTATE COMMERCE* (1953).

³⁰ See cases cited note 8 *supra*.

³¹ See cases cited note 14 *supra*.

ness to expand rather than curtail its applicability to protect an interstate traveller from the threats of discriminatory restriction.³²

The commerce clause has been regarded as a better limiter of state interference with interstate passengers because it offers a longer tradition of decisional law and more refined principles of adjudication. Furthermore, the constitutional limitations on a state's power to tax under the commerce clause lack the absolutism characteristic of the right to travel. The court assumes a quasi-legislative power in deciding such cases on their individual merits.³³

The due process clause³⁴ has recently gained judicial recognition as a third alternative for preventing state and individual interference with the right to travel.³⁵ However, its applicability is neither so definite nor so well established as that of the privileges and immunities or commerce clauses.³⁶ The court has not had occasion to decide whether a state tax on interstate travel violates due process.

In *Northwest*, the Montana court could have relied on the commerce clause or the due process clause, but the decision, reached in affirmation of the right to travel, is correct. It relies on the firmly established and presently viable principle that any state taxation of an interstate traveller's entry or departure violates the privileges and immunities clause of the fourteenth amendment. The Supreme Court has recently decided similar cases under both the privileges and immunities and the commerce clauses, but it has not repudiated one in adoption of the other. Both constitutional provisions safeguard the individual from essentially the same apprehended evil—the imposition of crippling cumulative burdens on any movement that necessitates crossing state lines. The Montana court recognized that the power to tax encompassed the ultimate capacity to prohibit departure entirely, ruling that “the ban on state action in this area must be absolute”³⁷

If extended beyond the facts presented in *Northwest*, however, it is doubtful that the absolute character of the right to travel, as it has presently evolved, will benefit the majority of citizens. It is conceded

³² *United States v. Guest*, 383 U.S. 745, 768 (1966).

³³ See note 8 *supra*.

³⁴ U. S. Const. amend. XIV.

³⁵ *United States v. Guest*, 383 U.S. 745, 768 (1966).

³⁶ The due process concept as envisioned by Chafee appears to gain Supreme Court recognition only in *Guest*.

³⁷ *Northwest Airlines, Inc. v. Joint City-County Airport Bd.*, — Mont. —, 463 P.2d 470, 473 (1970).

that a state should not be allowed to take advantage of its chance position astride the normal channels of interstate movement to swell its coffers at the ultimate expense of the interstate traveller. There is at present, however, neither judicial nor legislative precedent that limits the immunity offered by the right to travel to immunity from taxation alone. Rather, there are indicia that the states are bound not to restrict ingress and egress in any way whatsoever. It is not difficult to imagine the myriad circumstances in which a person's unrestrained entry into a state might gravely imperil the physical well-being of its present inhabitants. If the absolute character of the right to travel guarantees an individual that he will not be denied entry into any state, though he may be infected with a highly contagious disease, or possess other contaminative powers (such as radioactivity) which would make him a threat to the life and safety of a large segment of the state's population, then the harm it threatens may well outweigh the benefit it guarantees.

Limitations should be placed upon the right to travel to ward off the threats its absolute character poses. The rights of each state's citizens should be given protection equal to that given the traveller. A stipulation that the state should have no power to tax an interstate traveller's act of entry into, passage through, or departure from its borders clearly does not imply an admission that it should otherwise have no power to restrict such acts when the public good demands. At present, there are no grounds upon which any restriction by the states may be deemed a valid limitation on the right to travel. Until the right to travel has been tempered to allow a balancing of the various interests affected by its exercise, its application to restrict the regulatory powers of the states should be carefully circumscribed.

J. D. F. III