

## THE RIGHT TO TRAVEL: A FUNDAMENTAL RIGHT OF CITIZENSHIP<sup>1</sup>

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### ABSTRACT

The right to travel within the United States of America is a fundamental right inherent in citizenship and the nature of the federal union. It existed before the creation of the United States and appears in the Articles of Confederation. The United States Constitution and Supreme Court recognize and protect the right to interstate travel in the U.S. jurisdiction. The travel right entails privacy, leaving citizens free to travel interstate without government interference and intrusion.

In the post-hijacking surveillance society, the imposition of official photo identification for travel, watch-list prescreening programs, and intrusive airport screening and search methods unreasonably burden the right to travel. They undermine citizens' rights to travel and privacy. These regulations impermissibly require citizens to relinquish one fundamental right of privacy in order to exercise another fundamental right of travel.

The original conception of the travel right embodies the right as a broadly-based one that encompasses all modes of transportation. Its explicit articulation in the Articles of Confederation remains implicit in the Privileges and Immunities Clause of the U.S. Constitution. Contrary to arguments in the appellate single mode doctrine, if any mode of travel is abridged, then citizens' constitutionally enshrined right to travel is violated. The Supreme Court needs to articulate an originally consistent and politically robust doctrine of the multi-modal right to travel.

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**INTRODUCTION: TRAVEL AS A FUNDAMENTAL RIGHT OF CITIZENSHIP**

The right to travel is a fundamental political liberty that existed before the adoption of the United States Constitution. The travel right in the U.S. jurisdiction is inherent both in citizenship and the nature of the Union, and may not be abridged. The Constitution and U.S. Supreme Court recognize and protect the right to interstate travel.<sup>4</sup>

The travel right enables U.S. citizens to move interstate in privacy without undue government interference. Regulations requiring citizens to relinquish one fundamental right to exercise another are inherently suspect: “Exercise of the constitutional right to travel may not be conditioned upon the relinquishment of another constitutional right absent a compelling state interest.”<sup>5</sup>

The original conception of the travel right appears explicitly in Article IV of The Articles of Confederation and implicitly in the same article of the U.S. Constitution. It embodies a broadly-based personal, political and economic right that encompasses all modes of travel. If any mode is abridged, the right is violated. The single mode doctrine, articulated in recent years<sup>6</sup> by certain circuit courts,<sup>7</sup> truncates the plenary scope of the travel right. The imposition of governmental

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<sup>4</sup> See *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (the right to travel is “firmly embedded” within the jurisprudence of the Supreme Court); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969); Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* at § 4.8 (2007).

<sup>5</sup> *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973).

<sup>6</sup> See *John Doe No. 1 v. Georgia Dept. Of Pub. Safety*, 147 F. Supp. 2d 1369, 1375 (N.D. Ga. 2001) (“[T]he denial of a single mode of transportation does not rise to the level of a violation of the fundamental right to interstate travel.”).

<sup>7</sup> Including the 2d, 5th, 6th, and 9th Circuits. See, e.g., *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 54 (2d Cir. 2007); *Gilmore v. Gonzales*, 435 F.3d 1125, 1137 (9th Cir. 2006); *Duncan v. Cone*, 2000 WL 1828089 (6th Cir. 2000);

requirements such as official photo identification for travel, watch-list prescreening programs, and intrusive airport screening methods like “whole body scans” and “enhanced” pat-down searches unreasonably burden the right to travel in privacy.

This article traces the evolution of the right to travel, from its robust early conceptualization to its truncated modern-day misconstruction. Part I looks at the historical origins of the travel right. Part II places the travel right in modern context. Part III discusses unjustified appellate limitations on the rights to travel and privacy in a surveillance age. The conclusion argues that the Supreme Court is overdue in returning to an original and historically consistent articulation of an expansive right to travel.

## PART I: THE HISTORICAL ORIGINS OF THE TRAVEL RIGHT

The right to travel precedes the American union. In shaping medieval English law in 1215, the Magna Carta articulated travel rights for personal liberties and unfettered commerce.<sup>8</sup> Blackstone’s *Commentaries on the Laws of England* in 1765 identified freedom of movement as a natural liberty inherent by birth. “This personal liberty consists in the power of loco-motion, of changing situation, or removing one’s person to whatsoever place one’s own inclination may direct, unless by due course of law. ... [I]t is a right strictly natural.”<sup>9</sup>

The right to travel is well established in U.S. history. In 1770, Thomas Jefferson argued that freedom of movement is a personal liberty of all men by birth. “Under the law of nature, all men are born free, every one comes into the world with a right to his own person, which includes the liberty of moving and using it at his own will. This is what is called a personal liberty.”<sup>10</sup> Explicit recognition in The Articles of Confederation of 1777 of a right to travel in Article IV informed its implicit inclusion in the Privileges and Immunities Clause of Article IV of the Constitution of 1789. The Articles’ explicit travel right was so fundamental and originally implicit that the subsequent parallel article in the U.S. Constitution needed not spell it out explicitly.<sup>11</sup> For example, the U.S. Supreme Court established in *Gibbons v. Ogden*, that commerce, as intercourse between States, is a right that precedes the creation and adoption of the U.S. Constitution.<sup>12</sup>

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*Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir.1999); *Houston v. F.A.A.*, 679 F.2d 1184, 1198 (5th Cir. 1982); *Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552, 554 (9th Cir. 1972).

<sup>8</sup> Peter Linebaugh, *Magna Carta Manifesto: Liberties and Commons for All* 179 (2008). Nicholas Vincent, *Magna Carta, A Very Short Introduction*, 118 (2012). “All merchants are to be safe and secure in leaving and entering England, and in staying and traveling in England...”

<sup>9</sup> William Blackstone, *Commentaries on the Laws of England: Book the First of the Rights of Persons* at 130 (1765). The Delaware Chancery Court agreed with Blackstone, in *Douglass v. Stephens*, 1. Del. Ch. 465, 471 (1821), and established that freedom of movement is fundamental for “the enjoyment and defense of liberty.”

<sup>10</sup> Thomas Jefferson, Argument in the Case of Howell v. Netherland, *The Writings of Thomas Jefferson* (1892).

<sup>11</sup> Article IV of the Articles of Confederation says: “The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other State of which the owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any State, on the property of the United States, or either of them.”

<sup>12</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824).

Early courts confirmed and extended this broad conception. In the 1823 decision in *Corfield v. Coryell*,<sup>13</sup> the Supreme Court recognized the right to travel by explicating the relationship between the “free ingress and regress” clause in Article IV of the Articles of Confederation and the U.S. Constitution’s Privileges and Immunities Clause.<sup>14</sup> The Court also affirmed that the privileges and immunities of citizenship encompass several fundamental rights, including “the right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuit, or otherwise.”<sup>15</sup> The imperative of free interstate travel was “better to secure and perpetuate mutual friendship” of the states.<sup>16</sup>

Historically, the original conception of the right to travel is broadly-based and encompasses all available modes of travel. The 1831 Court ruling in *Beckman v. Saratoga & Schenectady R.R.*<sup>17</sup> established that whenever there is a compelling public interest in a technology available for the public, for instance, a new mode of transportation, then all citizens are equally entitled to enjoy its benefits and to access it and its instrumentalities. This ruling also established transportation service providers as common carriers<sup>18</sup>—scheduled passenger transport services by any means.

### The Right to Travel Across the American Union

The right to interstate travel has fostered the connective sinews of this country since its inception. It is fundamental and structural to maintaining the strong political and economic union of the sovereign states. “The Court views the concepts of the federal union and personal liberty rights in the Constitution as closely related. Their union requires that all citizens be free to travel, uninhibited by regulations that unreasonably burden their movement.”<sup>19</sup> In the 1849 *Passenger Cases*, the Court declared that the right to travel within the United States may be exercised without interference. The Court established that state taxation of imports and exports was an unconstitutional imposition on commerce and interstate travel.<sup>20</sup> The Court ruled against the states of New York and Massachusetts imposing taxes on alien passengers arriving from out-of-state ports.<sup>21</sup> To ensure uniformity of treatment of citizens across different states, and to help bind together the Union, the Constitution gave the power to regulate commerce (intercourse) between the United States and among the States only to Congress.<sup>22</sup>

The right to travel is “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”<sup>23</sup> The Court emphasized in the 1867 case of *Crandall v. Nevada*, for example, that interstate travel is necessary to exercise other personal rights and liberties. The charge was “a

<sup>13</sup> 6 F. Cas. 546 (1823).

<sup>14</sup> U.S. Const. art. IV, § 2.

<sup>15</sup> *Corfield*, 6 F.Cas. at 552.

<sup>16</sup> *Id.* (citing Articles of Confederation art. IV).

<sup>17</sup> 3 Paige Ch. 45 (N.Y. 1831).

<sup>18</sup> “[T]he public [has] an interest in the use of the road, and the owners of the franchise are liable to respond in damages, if they refuse to transport an individual or his property upon such road, without any reasonable excuse, upon being paid the usual rate of fare.” *Beckman*, 3 Paige Ch.at 75.

<sup>19</sup> Ronald Kahn, *The Supreme Court and Constitutional Theory, 1953-1993*, at 50 (1994).

<sup>20</sup> *The Passenger Cases*, 48 U.S. 283 (1849).

<sup>21</sup> Congress may and does impose taxes on common carriers and ports. However, these taxes are strictly regulated and uniform throughout the nation since, in accordance to the Constitution: “all duties, imposts and excises shall be uniform throughout the United States.” U.S. Const. art. 2, § 8, cl.1.

<sup>22</sup> *The Passenger Cases*, 48 U.S. at 492. (Chief Justice’s dissenting opinion).

<sup>23</sup> *Griswold v. Connecticut*, 381 U.S. 479, 493 (1964) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

tax on the passenger for the privilege of passing through the State by the ordinary modes of transportation.”<sup>24</sup> Even one state electing to impose a tax on those exiting that state could prove detrimental to the overall federation of states. “If one State can [levy such a tax], so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other. . . .”<sup>25</sup>

The Court determined that it was an unconstitutional limitation on citizens’ right to travel for the state of Nevada to impose a per passenger tax on railroad or stagecoach companies for passengers transported out of the state. The tax levied by the state of Nevada on passengers for the privilege of passing through Nevada was an unconstitutional burden on the right to travel.<sup>26</sup> “We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States.”<sup>27</sup> The tax could prohibit them from exercising other fundamental rights, such as the right to approach the government for redress of grievances and the right to access ports through which commerce was conducted.<sup>28</sup>

In *The Slaughter House Cases*,<sup>29</sup> as in *Corfield*, the Court in 1873 affirmed the existence of the right to travel, determining that “the privileges and immunities intended [in Article IV of the U.S. Constitution and Article IV of the Articles of Confederation] are the same in each.”<sup>30</sup> By asserting that link so clearly, the Court confirmed that the right to interstate travel is protected, as it was in the Articles of Confederation, by the Constitution’s Commerce Clause and as a Privilege and Immunity of citizens under Article IV.<sup>31</sup> In *Williams v. Fears* in 1900, the Supreme Court declared, “Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily of free transit from or through the territory of any State is a right secured by the 14th amendment and by other provisions of the Constitution.”<sup>32</sup>

In 1966, the Court articulated in *United States v. Guest* that the right to travel was not explicitly mentioned in the Constitution because “a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.”<sup>33</sup> “The constitutional right to travel from one State to another...occupies a position so fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized...”<sup>34</sup> Then, as now, the right to travel remains crucial in the formation and ongoing prosperity of our political union and common market.

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<sup>24</sup> *Crandall v. Nevada*, 73 U.S. 35, 49 (1867).

<sup>25</sup> *Id.* at 35.

<sup>26</sup> The Court described that the tax had a power “being in its nature unlimited,” which interfered with the powers of the federal government. See *id.* at 36, 46-48.

<sup>27</sup> *Id.* at 49.

<sup>28</sup> See *id.* at 43-44.

<sup>29</sup> *The Slaughter House Cases*, 83 U.S. 36, 79 (1873).

<sup>30</sup> *Id.* at 75.

<sup>31</sup> Reaffirmed in *Ward v. Maryland*, 79 U.S. 418 (1870) and *Hoxie v. New York, N.H. & H.R. Co.*, 82 Conn. 352 (1909).

<sup>32</sup> *Williams v. Fears*, 179 U.S. 270 (1900), quoted in *Schactman v. Dulles*, 225 F.2d 938.

<sup>33</sup> 383 U.S. 745, 758 (1966).

<sup>34</sup> *Id.* at 757

Because Congress does not possess a “general police power,” its authority is limited to what the Constitution expressly grants it.<sup>35</sup> The Ninth and Tenth Amendments reserve all other unenumerated rights to the states and the people, ensuring that those rights not delegated to the Federal and State governments cannot be stripped from citizens without due process of law under the Fifth and Fourteenth Amendments: as the Supreme Court noted in 1958 in *Kent v. Dulles*, “[t]he right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law.”<sup>36</sup>

In addition to Fifth Amendment due process guarantees,<sup>37</sup> the Court established in the 1941 case *Edwards v. California*,<sup>38</sup> that the Fourteenth Amendment extends Constitutional due process protection to all citizens of the United States. It thereby protects citizens from infringement by states, as well as by the federal government. The right to travel is also one of the implied and unenumerated rights reserved to the people of the United States by the Ninth Amendment and is inherent in intercourse among the states.

The Court spoke to the importance of such connectivity in *Shapiro v. Thompson*.<sup>39</sup> In *Shapiro*, “[t]his Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”<sup>40</sup> The Court added: “[t]his constitutional right ... is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards.”

*Shapiro* reaffirmed the long-standing opinion that the right to travel, “is a right broadly assertable against private interference as well as governmental action.”<sup>41</sup> Yet again, travel should be free of regulations that unreasonably burden or restrict it. The right to travel is a “fundamental right” and personal liberty, which the government may not abridge.

*Dunn v. Blumstein* in 1972 ruled, quoting *Guest*, that, “Freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.” The *Dunn* court held, “Since the right travel was a constitutionally protected right, any classification which serves to penalize the exercise of the right....is unconstitutional.”<sup>42</sup>

In *Saenz v. Roe* in 1999, the Court most recently affirmed the existence of the fundamental constitutional right to travel. Among its three components, the first is most relevant to interstate travel: “citizens have the right to enter and leave another State.”<sup>43</sup> The Court held as unconstitutional a state statute that discriminated against new residents. The ruling agreed with

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<sup>35</sup> See, e.g., Lawrence H. Tribe, *American Constitutional Law* § 5-2 (1988).

<sup>36</sup> *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

<sup>37</sup> See, e.g., *United States v. Guest*, 383 U.S. 745, at 759 n. 17 (1966); *Kent*, 357 U.S. at 125.

<sup>38</sup> 314 U.S. 160 (1941).

<sup>39</sup> 394 U.S. 618 (1969). As Justice Brennan added in his concurrence in *Zobel v. Williams*, 457 U.S. 55 (1982), the origin of the travel rights “unmistakable essence [is] that document that transformed a loose confederation of States into one Nation.”

<sup>40</sup> *Shapiro v. Thompson*, 394 U.S. 618, at 629.

<sup>41</sup> *Id.* at 630-631.

<sup>42</sup> *Guest*, 383 US 745; *Dunn v. Blumstein* 405 U.S. 330, 338 (1972) (striking down a residency requirement restricting voting rights.)

<sup>43</sup> *Saenz v. Roe*, 526 U.S. 489 (1999) at 498, 500.

*Shapiro* in that “a classification that has the effect of imposing a penalty on the right to travel violates the Equal Protection Clause ‘absent a compelling governmental interest.’”<sup>44</sup> While *Saenz* focused on state-to-state travel, the Court’s holding was not state-specific; thus, the case paints a picture of a broad travel right that extends across the entire nation.

Travel is an instrumentality of commerce, which Congress has the authority to regulate in order to encourage commercial activities and intercourse. In *Kent v. Dulles*, the Court established that the Interstate Commerce Clause<sup>45</sup> protected interstate travel and its instrumentalities against governmental infringement.<sup>46</sup> It reasoned that *Guest* affirmed “[t]he constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.”<sup>47</sup> The Court reaffirmed that the right to engage in interstate commerce encompasses both the freedom of movement and the instrumentalities of transportation required to do so.

Congress may not pass legislation that imposes unreasonable burdens on the right to travel. This right to travel within the jurisdiction of the United States may be exercised without impediments imposed by the government. “One has the right, as against any prohibitory or other restrictive legislation, whether by Congress,<sup>48</sup> or by the States, to engage in the interstate or foreign commerce, that is, to transport persons or articles from State to State, or to or from a foreign country.”<sup>49</sup> Thus, Congress must eschew infringing upon the right to travel for all citizens.

The travel right ensures the vitality of the government not merely through the free movement of citizens, but also through their more purposive travel as well. Specifically, the right preserves and facilitates citizens’ ability to journey to their representative seats of government, both statewide and nationally, in order to petition under the First Amendment to have their grievances redressed. To foreclose such a right in any fashion would have been anathema to the Founders, who operated against the backdrop of suspicion of government overreach into citizens’ rights. They therefore laid down protections for expressing political speech and association inherent in the underlying travel right. Even when there were comparatively few modes of travel available, the Founders conceived of the travel right as a broad and plenary right.

Moreover, requirements for a passport, identification, or permit to travel domestically hamper exercising the right to interstate travel, and invert the proper relationship between citizens and

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<sup>44</sup> *Id.* at 490.

<sup>45</sup> U.S. Const., art. I, § 8, cl. 3. Daniel A. Farber, “National Security, The Right to Travel, and the Court,” *Sup. Ct. Rev.* 1981, 263-287.

<sup>46</sup> President Wilson would not proceed to abridge the American citizens’ rights to travel and engage in commerce, even during wartime. Woodrow Wilson, “President Wilson’s Letter to Senator Stone Announcing His Stand on Armed Liner Issue,” *The New York Times*, February 25, 1916. In response to a letter by Sen. W. J. Stone suggesting that “this government tak[e] definite steps toward preventing American citizens from embarking upon armed merchant vessels,” Wilson wrote, ““For my own part, I cannot consent to any abridgement of the rights of American citizens in any respect....To forbid our people to exercise their rights for fear we might be called upon to vindicate them would be a deep humiliation indeed.” <http://americainclass.org/wp-content/uploads/2012/02/wilson-stonefeb1916.pdf>

<sup>47</sup> *Guest*, 383 U.S., at 757.

<sup>48</sup> “Congress can set the regulations, conditions, or prohibitions regarding the permissibility of interstate travel or shipments if the law does not contravene a specific constitutional guarantee.” Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* at § 4.8 (2007).

<sup>49</sup> Frederick H. Cooke, “The Right to Engage in Interstate and Foreign Commerce as an Individual or as a Corporation,” 8 *Mich. L. Rev.* 458, 459 (1910).

their government.<sup>50</sup> Government derives its “license” to operate from the people: when the government instead requires the people to first obtain a license to travel, it abrogates foundational rights. As Justice Ruth Bader Ginsburg stated in a public forum: “[t]here is a right to travel. We have had a common market in that respect from the very beginning; you can go from one state to another without any passport.”<sup>51</sup>

In short, the right to travel existed before the invention of modern means of transportation like railroads and airplanes. It was conceived as a liberty inherent in individuals themselves because it was an aspect of citizenship and personhood. The right was not linked to the instrumentalities used to exercise this personal liberty. Accordingly, the right to travel is not tied to any mode of transportation, and it must therefore encompass all modes of travel.

### The Right to Travel as Fundamental to Citizens and Union

The right to interstate travel encompasses personal, political, and commercial movement rights and privileges. This nexus of individual rights with the nature of the nation guarantees unrestricted geographical mobility to citizens within the entire jurisdiction of the American political and economic union. Politically, the right to interstate travel is based on the Founders’ desire to structure the nature of the federal union under the Constitution to create one strong political union and one common market composed of the free sovereign states. The Privileges and Immunities Clause in Article IV of the Constitution, by “place[ing] the citizens of each State upon the same footing with citizens of other States,”<sup>52</sup> guarantees them the freedom to move from state to state and set up residence anywhere within. In that security, they are entitled to the same privileges and immunities as the citizens of any state.

From an individual rights standpoint, the ability to move freely within the jurisdiction of the United States is a personal liberty, inherent by birth and in U.S. citizenship. The travel right is essential to guarantee equality of opportunities, and the *pursuit* of happiness among the citizens of the federal union. Freedom of personal movement is an essential natural liberty to guarantee citizens the ability to exercise other fundamental rights and privileges.

A principal aspect of the notion that the states belong to a broader union manifests in the right to travel between the states on a basis of equality.<sup>53</sup> The Court recognized that without this

<sup>50</sup> Richard Sobel & John A. Fennel, “Troubles with Hiibel: How the Court Inverted the Relationship between Citizens and the State,” 48 *South Texas L. Rev.* 3 (2007)

<sup>51</sup> Associate Justice of the Supreme Court Ruth Bader Ginsburg responding in a public discussion to a question by Dr. Richard Sobel, Northwestern University, 15 September 2009. “A Conversation with Justice Ruth Bader Ginsburg.” C-SPAN Video Library. <http://www.c-spanvideo.org/program/288900-1>. Justice Louis Brandeis, the coauthor of “The Right to Privacy,” 4 *Harvard Law Review*. 193 (Dec, 15, 1890) and the privacy dissent in *Olmstead v. U.S.*, 277 U.S. 438 (1928) also concluded that the Fourteenth amendment protects the right to travel: “...the 14th amendment due process clause...had to be applied ...to protect ...fundamental rights--speech, education, choice of profession, and the right to travel...” Melvin Urofsky, *Louis D. Brandeis, A Life*, 2009, at 562.

<sup>52</sup> *Paul v. Virginia*, 75 U.S. 168, 180 (1869). See also Sonia Sotomayor, “Statehood and The Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights,” *Yale Law Journal*, Volume 88, Number 5, April 1979. See also her comments at Northwestern Law School on March 7, 2011 distinguishing travel rights for constitutional versus statutory citizenship. See Pat Vaughn Tremmel, “Long Way Up to Highest Court of the Land” (not discussing the distinction). <http://www.northwestern.edu/newscenter/stories/2011/03/sotomayor-trienens-judicial-scholar.html>

<sup>53</sup> Seth F. Kreimer, “The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism,” 67 *NYU L. Rev.* 451, 519 (1992).

expansive provision “the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.”<sup>54</sup> Thus the right to travel is fundamental and structural to the nature of a large union, and without it the Founders’ vision of a transcontinental nation could not have been fulfilled.

As a commercial union, the United States is a common market that must enjoy the right of free interstate movement of people and goods in order to guarantee its economic prosperity as a political union. “The Founders had a desire to create one nation with regard to economic movement and change... The Founders established national control of commerce<sup>55</sup> to encourage individuals who seek to move from state to state for economic reasons.”<sup>56</sup>

Our political history and Supreme Court crafted the right to travel as a fundamental one accruing naturally to every U.S. citizen and to the nation. The Court has repeatedly recognized a fundamental right to travel as a right of citizenship preceding and informing the Constitution’s establishment. Although the constitutional text no longer explicitly mentions the right to travel of the Articles of Confederation, Articles I and IV, and the First, Fifth, Ninth, Tenth, and Fourteenth Amendments protect the right. Here facilitation of ports and exports (Article 1, Section 9) coincide with the Privileges and Immunities of citizens of all states (Article IV). Due process and equal protection (Fifth and Fourteenth Amendments) intersect with reserved rights to the people and states (Ninth and Tenth Amendments).<sup>57</sup>

## PART II: THE MODERN CONTEXT OF THE RIGHT TO TRAVEL

Fundamental rights expand to encompass new technologies and evolving case law, yet they retain their essence. When the right to travel was written into the Articles of Confederation, for example, it preceded the formulation of the related right to privacy; yet the travel right continues to drive that construction. The travel right also preceded and catalyzed progressive non-discrimination policies, like those embedded in current federal definitions of and access to

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<sup>54</sup> *Paul*, 75 U.S. at 180.

<sup>55</sup> Article 2, § 8 of the U.S. Constitution enumerates the powers of Congress, which include the power to regulate commerce. This power is regulated in Article 2, § 9 of the U.S. Constitution.

<sup>56</sup> Ronald Kahn, *The Supreme Court and Constitutional Theory, 1953-1993* 39 (1994).

<sup>57</sup> More broadly, freedom of movement within the territory of a country is internationally recognized as a fundamental right. The right to travel is embodied in several national constitutions. Most pertinent is The Mexican Constitution’s (1917) guarantee of the right of any person to enter, leave, or travel within the Mexican territory without the need of any means of identification. The Argentinean Constitution of 1994, Spanish Constitution of 1978, German Basic Law of 1949, Romanian Constitution of 1991, Croatian Constitution of 1990, Turkish Constitution of 1982, Indian Constitution of 1949, and South African Constitution of 1996, mention explicitly the right to move freely within the respective countries. International law recognizes the right to travel. It is defined as fundamental by international governmental organizations and is included in international treaties: the American Declaration of the Rights and Duties of Man (ADRD) of 1948, American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, April 1948, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003), 43 AJIL Supp. 133 (1949); the Universal Declaration of Human Rights (UDHR) of 1948, particularly Article 12, Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948): 71; the Convention for the Protection of Human Rights and Fundamental Freedoms (1953), Convention for the Protection of Human Rights and Fundamental Freedoms, 3 September 1953, 213 UNTS 221; the Helsinki Act (1975), Conference on Security and Co-operation in Europe Final Act [OSCE Final Act], Helsinki 1975, 1 August 1974, <http://www.osce.org/item/4046.html>. (to which the U.S. and thirty-five countries are signatories); the African Charter on Human and Peoples’ Rights, African Charter on Human and Peoples’ Rights, 21 October 1986, 1520 UNTS 217; and the International Covenant on Civil and Political Rights (ICCPR),” 23 March 1976, 999 UNTS 171.

common carriers. Here government sought more equal and uniform protection of rights to common carriage. Definitional evolution parallels the track of citizens' right to travel. But evolution may not fundamentally alter the original right. A modern invention that inaptly collides with the travel right is the single mode doctrine.

### Intersection of the Right to Travel and the Right to Privacy

The right to privacy has evolved from a focus on the protection of an individual's physical property,<sup>58</sup> to encompass a broader swath of privacy safeguards and expectations pertaining to an individual as person.<sup>59</sup> The oldest protection to personal privacy resides in the Fourth Amendment safeguards against unreasonable searches and seizures, absent probable cause of criminal activity.<sup>60</sup>

The fundamental right to privacy protects the free choice of individuals to conduct their personal lives free from government interference.<sup>61</sup> The Court established in *Griswold v. Connecticut* that the right to privacy protected individuals engaging in private acts from government interference.<sup>62</sup>

The U.S. Constitution recognizes and protects the right to privacy in travel.<sup>63</sup> The intersection of the right to travel and the right to privacy as fundamental liberties allow individuals to engage in travel in privacy and anonymity. Indeed anonymous travel represents the concurrent exercise of overlapping personal liberties. The right to travel entails a right to privacy in its basis of individual choice on when, where and how to move.<sup>64</sup>

The right to travel in anonymity, without having to identify oneself or carry identification documents, underlies *Kolender v. Lawson*.<sup>65</sup> Edward Kolender was an African-American who liked to wander in white California neighborhoods and was repeatedly stopped by the police and asked for identification. In *Kolender*, the Court dealt with the California statute that required "persons who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer."<sup>66</sup> The Court struck down the

<sup>58</sup> See, e.g., *Boyd v. United States*, 116 U.S. 616 (1886). ("a search and seizure [was] equivalent [to] a compulsory production of a man's private papers" and "an 'unreasonable search and seizure' within the meaning of the Fourth Amendment").

<sup>59</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1964).

<sup>60</sup> See Rotunda and Nowak, § 18.26. The oldest constitutional right to privacy is that protected by the Fourth Amendment's restriction on governmental searches and seizures. See also Sobel, Horwitz and Jenkins, "The Fourth Amendment Beyond *Katz*, *Kyllo* and *Jones*: Reinstating Justifiable Reliance as a More Secure Constitutional Standard for Privacy," *Public Interest Law Journal*, Vol. 22, No. 1, 2013.

<sup>61</sup> The right to privacy was used in *Meyer v. Nebraska*, 262 U.S. 390 (1923) to protect the freedom of schools to teach subjects in languages other than English; in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) to protect the parents' decision to have their children attend private schools, and in other cases to protect the intimate and family lives of citizens. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

<sup>62</sup> *Griswold*, 381 U.S. 479 (1965). While better known in other contexts, *Roe v. Wade*, 401 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 822 (1982) also upheld the bodily autonomy of individuals. See also the transcript of Affordable Care Act oral argument on March 27, 2012, when Chief Justice Roberts references "means of travel," at 43.

<sup>63</sup> See *supra* Part I.

<sup>64</sup> *Kent* and *Shapiro* established that the right to travel must be free from government interference, thus implying a right to privacy associated with the exercise of the right to travel. See *supra* notes 36 and 40.

<sup>65</sup> *Kolender v. Lawson*, 461 U.S. 352, 353-354 (1983).

<sup>66</sup> *Id.* at 353.

statute on the basis that it was “constitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a ‘credible and reliable’ identification.”<sup>67</sup>

The decision on vagueness in *Kolender* affirmed the Ninth Circuit Court’s judgment that the statute violated the Fourth Amendment. “The appellate court determined that the statute was unconstitutional in that it violates the Fourth Amendment’s proscription against unreasonable searches and seizures, it contains a vague enforcement standard that is susceptible to arbitrary enforcement, and it fails to give fair and adequate notice of the type of conduct prohibited.”<sup>68</sup> Moreover, Justice Brennan concurred that, had the statute not been vague, it would have violated the Fourth Amendment: “[e]ven if the defect identified by the Court were cured, however, I would hold that this statute violates the Fourth Amendment.”<sup>69</sup>

The Court reaffirmed in *Hiibel v. Nevada*<sup>70</sup> that absent reasonable suspicion and an enabling state statute, individuals may not be required to provide identification. Unlike previous cases where, for instance, *Kolender* had simply been walking, *Hiibel* (although a pedestrian when confronted) was pursued under reasonable suspicion based on a report that an offense had been committed in a motor vehicle. The Nevada statute required *Hiibel* to disclose his name, without having to produce an identification document.<sup>71</sup> Nonetheless, the demand in *Hiibel* for identification contradicts the now-famous principles in *Miranda v. Arizona*<sup>72</sup> and a series of cases of strong dicta, protecting individuals’ right to remain silent.<sup>73</sup>

Thus, an individual wandering or moving freely has the right to be private in his or her affairs, free from government intrusion. Hence, the demand for identification, without reasonable cause that the individual is engaging in an illegal activity, interferes not only with privacy, but also with travel rights. In short, the right to travel entails the right to privacy and to travel anonymously free from governmental infringement.<sup>74</sup> In the concurrent exercise of two fundamental rights, one

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<sup>67</sup> *Id.* at 353-354.

<sup>68</sup> *Kolender*, 461 U.S. at 355.

<sup>69</sup> *Id.* at 362. (Brennan, J. concurring).

<sup>70</sup> 542 U.S. 177 (2004).

<sup>71</sup> *Id.* at 185.

<sup>72</sup> 384 U.S. 436 (1966).

<sup>73</sup> The Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 579 (2001), establishes TSA as responsible for security in all modes of transportation. TSA could expand Secure Flight to trains, subways and buses, or create similar pre-screening programs, and implement them on all possible ways to interstate travel, including Amtrak. If this were to happen, it could abridge the right to travel by every single mode. See Thom Patterson, “TSA rail, subway spot-checks raise privacy issues,” CNN.com, January 28, 2012. Jen Quraishi, “Surprise! TSA Is Searching Your Car, Subway, Ferry, Bus, AND Plane,” Motherjones.com, June 20, 2011.

<sup>74</sup> In *The Right to Mobility* (1979), Gerald Houseman identifies how the right to travel is essential for the exercise of other fundamental rights. “Mobility is a right which makes many other rights we hold dear both tenable and possible – the rights of association, privacy, and equality of opportunity, for example, at 7. He notes, further that in the late 1970’s Congress first considered establishing “a system of ‘forgery-proof’ Social Security cards, complete with photographs and plastic lamination, for everyone entitled to have one. While its sponsors denied “that this could easily be turned into a national identification system, it is not difficult to imagine this being done in the name of bureaucratic efficiency, national security, or ... to snoop and perhaps to limit mobility,” at 17. These constitute an “internal passport” which he calls the “hallmark of repressive regimes such as [Apartheid] South Africa, the Soviet Union, or Nazi Germany” at 17. Houseman identified the proposed Social Security card as a national passport – internal passport – by acting as a work ID. “Any potential employer must then refuse to hire anyone who fails to produce this card,” at 42. Houseman argues that a national ID system would face American citizens with “a totalitarian potential of invasion of privacy, harassment, and denial of mobility.” at 43. A national ID can easily become an internal passport, which is an instrument of “mobility control” and a feature of authoritarian governments. See *infra* note 198.

right may not be conditioned on abrogating another.<sup>75</sup>

### Common Carriers in Travel Rights

The right to travel encompasses the right to movement on common carriers. “A carrier becomes a common carrier when it ‘holds itself out’ to the public, or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it.”<sup>76</sup> Any individual or corporation becomes a common carrier by promoting to the public the ability and willingness to provide transportation service, including air travel.<sup>77</sup>

Air transport providers operating within, to, or from the United States act as common carriers under common carrier imperatives.<sup>78</sup> “An air carrier or foreign air carrier may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry.”<sup>79</sup> If there is space available, the fee is paid, and no reasonable grounds exist to refuse the service to an individual, the air carrier is legally bound to provide the transportation of passengers or goods. Denying passage violates federal law.<sup>80</sup>

The federal government exercises broad national jurisdiction.<sup>81</sup> When vehicles are engaged in commerce, the United States claims jurisdiction over the respective vehicle, even when they travel outside the specific area in 18 U.S.C. § 7 (2006).<sup>82</sup> Under aircraft jurisdiction explained in *Special Aircraft Jurisdiction of the United States*,<sup>83</sup> the government of the United States exercises national jurisdiction over its territory and “in-flight” aircraft, even outside national airspace. Therefore, travel conducted between contiguous and non-contiguous United States by air remains within national jurisdiction and requires adherence to U.S. federal law and regulations, the U.S. Constitution generally, and specifically rights and privileges of citizenship. Accordingly, this

<sup>75</sup> *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973). See also *Kroll*, at 886.

<sup>76</sup> Advisory Circular from William T. Brennan, Acting Director of Flight Standards, Federal Aviation Administration, Advisory Circular AC 120-12A (Apr. 24, 1986) (on file with FAA).

<sup>77</sup> But see *Gonzales v. Williams*, 192 U.S. 1 (1904). In the series of “Insular Cases,” the Court considered whether or not to extend full constitutional protection to territories that the U.S. gained in the Spanish-American War; it initially distinguished between travel rights for continental versus territorial citizens, e.g. a U.S. citizen traveling from the non-contiguous U.S. (i.e., Alaska or Hawaii) to the continental part would have more rights than a citizen of a territory or commonwealth like Puerto Rico traveling to the continental U.S. The distinction depends partly on the difference between birth, naturalized or granted (statutory) citizenship (See Sonia Sotomayor, *My Beloved World*, 2013 at 179).

<sup>78</sup> Brennan, Advisory Circular AC 120-12A, 1986.

<sup>79</sup> 49 U.S.C. § 40127 (2006).

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

<sup>81</sup> The federal jurisdiction is explained in detail in *Special Maritime and Territorial Jurisdiction of the United States* defined, 18 U.S.C. § 7 (2006). The U.S. has federal jurisdiction over their territory and over any vessel registered, licensed or enrolled under the United States.

<sup>82</sup> Rail vehicle carrier, motor carrier, and water carrier operations are subject to U.S. jurisdiction when operating within the area defined in 18 U.S.C. § 7 (2006) and outside it when traveling to/from/between U.S. destinations. Motor carriers are exempt when traveling through Canada between Alaska and the contiguous United States. However, they shall still comply with the requirements related to rates and practices applicable to the transportation. See 49 U.S.C. §§ 10501, 13502(a), 13521(a) (2006).

<sup>83</sup> 9 U.S.C. § 1405 (2006). Included in the special U.S. jurisdiction are any “in-flight” civil or military aircraft of the U.S., as well as any aircraft in the U.S., including foreign aircraft that are scheduled to land or last departed from the United States. An aircraft “in-flight” corresponds to an aircraft from the time the door is closed to the time it is opened at the destination. See 49 U.S.C. § 46501 (2006). The law also includes any aircraft leased to an American resident or business, even when the lease is made outside the United States and/or using a non-U.S. registered aircraft.

jurisdiction empowers citizens with the right to travel freely.<sup>84</sup>

*Sovereignty and Use of Airspace* maintains sovereignty of the airspace of the United States to the government and guarantees citizens the right to use and access it.<sup>85</sup> Air commerce and safety regulations provide for the establishment of an air transportation network consistent with public convenience and necessity.<sup>86</sup> The air travel network is a public infrastructure open for use and enjoyment. The government furthers this by ensuring, through legislation, that all citizens have adequate access to the air system.

U.S. law (49 USC § 40103) on sovereignty and use of airspace maintains under “Sovereignty and Public Right to Transit” that (1) “The United States Government has exclusive sovereignty of airspace of the United States. (2) A citizen of the United States has a public right of transit through the navigable airspace.” Moreover, 49 USC § 40101, “Policy,” notes under “General Safety Considerations” that in carrying out regulation the FAA administrator shall consider “the public right to freedom of transit through the navigable airspace.” Hence, under both U.S. sovereignty and public rights, as well as in considering safety, the public's right to freedom of travel includes air travel.

### **The Single Mode Doctrine and Its Infirmities**

Historically and politically, the right to travel within the jurisdiction of the United States is a broad one that encompasses all modes of travel. However, in conflict with the original nature of the right in a large Union, some circuit courts have maintained that limiting one mode of travel does not implicate the right to travel.

In *Monarch Travel Services v. Associated Cultural Clubs*,<sup>87</sup> the Ninth Circuit ruled that the inability of a person to pay the fare of a common carrier, in this case, charter flight fees, was not an unconstitutional limitation of their right to travel, since there was no state action in government interference.<sup>88</sup> In *Miller v. Reed*,<sup>89</sup> the Ninth Circuit used the *Monarch* argument to create the single mode doctrine: “burdens on a single mode of transportation do not implicate the right to interstate travel.”<sup>90</sup> Miller was deprived of his privilege to operate a motor vehicle under that doctrine, but not the right to ride as a passenger or to travel by other means.<sup>91</sup> When the court proffered its opinion, however, it created an unconstitutional limitation on the fundamental interstate travel right.<sup>92</sup> Moreover, in *Gilmore v. Gonzales* the Court inaptly relied on the single mode doctrine and applied the doctrine to restricting freedom of movement based on unwillingness to submit to an identification requirement.<sup>93</sup>

The deficiencies of the single mode doctrine are particularly apparent when a citizen needs to travel between the contiguous and the non-contiguous United States.<sup>94</sup> Commercial air service is the only mode of passenger common carrier transportation available between many points,

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<sup>84</sup> This is true as long as the travel adheres to the U.S. Code statutes respective to the mode of transportation. The same also applies to travel on common carriers by ground or water. The U.S. Code for transportation of goods and passenger is different across modes of transportation. Rail, coach buses, aircraft, and ships, all have different set of rules that they need to follow, and different situations where American jurisdiction will apply. A coach bus for example is outside U.S. jurisdiction when traveling in or through Canada, even if the trip starts and ends in the U.S.

<sup>85</sup> 49 U.S.C. § 40103(a)(2) (2006).

<sup>86</sup> 49 U.S.C. §§ 40101-46507 (2006).

especially U.S. states and territories outside the contiguous union. Particularly with respect to non-contiguous interstate travel, where the only viable means of travel is by airplane, the single mode doctrine imposes on citizens an onerous, irrational, and unjustifiable burden.

In short, contrary to the Ninth Circuit ruling, burdens on a single mode of transportation do implicate the right to interstate travel. This is especially so when there is only one mode of common carrier travel, such as flying by commercial airline, available between the two non-contiguous U.S. locations, for instance, between the mainland and Hawaii.

The only other hypothetical way to reach offshore locations is by ship, but commercial ship service rarely exists.<sup>95</sup> Here, the doctrine proves deficient, since burdens imposed on a single mode of travel abridge entirely the right to interstate travel. Especially in the non-contiguous U.S., when a single mode of transportation become the sole mode of travel, citizen's constitutional protections for travel are broadest. To be plenary, the right to travel must include protections for using all possible modes of travel.

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<sup>87</sup> 466 F.2d 552 (9th Cir. 1972).

<sup>88</sup> The Court did not mention limitations on travel, except those derived from personal wealth. See *Monarch*, 466 F.2d at 554. The Supreme Court established a similar economic argument in *Harris v. McRae*, 448 U.S. 297 (1980), that a woman was free to have an abortion, if she can afford it. The government does not have to allocate funds or resources to facilitate the exercise of the right.

<sup>89</sup> 176 F.3d 1202 (9th Cir. 1999).

<sup>90</sup> *Miller*, 176 F.3d at 1205.

<sup>91</sup> Miller could still use his personal vehicle, but could not legally drive it, since he had no license (indicating the required skills to do so). He could, however, have someone else drive his vehicle for him. Miller could also ride public transit and/or other modes of transportation. For discussion of the right to drive, see also Roger I. Roots, "The Orphaned Right: The Right to Travel by Automobile, 1890-1950," 30 *Okl. City U.L. Rev.* 245, Summer, 2005. [constitution.org/lev/roots/orphaned\\_right.pdf](http://constitution.org/lev/roots/orphaned_right.pdf) and Con Law II Blog (Manheim), Fall 2005, [manheimk.lls.edu/blog/conlaw2/archives/2005/11/the\\_right\\_to\\_tr.html](http://manheimk.lls.edu/blog/conlaw2/archives/2005/11/the_right_to_tr.html) Initially due to constitutional right to travel questions and strong protests, drivers were not required to get license plates with numbers for automobiles or licenses to drive them.

<sup>92</sup> The Ninth Circuit's holding conflicted, for example, with the Supreme Court's emphasis in *Shapiro* that the right to travel should be free of regulations that unreasonably burden or restrict it. See 394 U.S. at 638.

<sup>93</sup> *Gilmore v. Gonzales*, 435 F.3d 1125, (9th Cir. 2006). However, in *Gilmore*, at 1143, the government noted that ID was not absolutely required in order to fly if a passenger became a "selectee" and submitted to a pat down search. On the ability to fly without ID, see also *State of New Mexico v. Mocek* (2011), and *Phillip Mocek v. Albuquerque et al.* U.S. District Court for the District of New Mexico, Case No. 1:11-cv-1009; Filed November 14, 2011; decision, January 14, 2013. A Commentary on the case notes, "Do you have a right to travel by air? Answers Yes. The Airline Deregulation Act of 1978 guarantees the "public right of freedom of transit" by air, and the TSA is required by Federal law (49 USC § 40101) to consider this right when it issues regulations. Airlines are common carriers. Mr. Mocek's attempted trip was an exercise of "the right ... peaceably to assemble," which is guaranteed by the First Amendment. Freedom of movement is also guaranteed by Article 12 of the International Covenant on Civil and Political Rights, a human rights treaty signed and ratified by the U.S. <http://www.papersplease.org/wp/mocek/>

<sup>94</sup> The United States comprises the 48 contiguous states, and the non-contiguous U.S., states of Alaska and Hawaii, plus Puerto Rico, Guam, the U.S. Virgin Islands, and other offshore territories.

<sup>95</sup> A common carrier passenger ship service does not exist to and from Puerto Rico, for example. See Welcome to Puerto Rico, Tourist Information, available at: <http://www.topuertorico.org/tinfo.shtml> (accessed 27 July 2011). The Passenger Vessel Services Act of 1886, see 46 App. U.S.C. §289 (2006), established that passenger transport within the United States could only be carried out on a U.S. registered vessel. This would make any common-carrier scheduled ship passenger service expensive, unprofitable, and therefore non-existent. For Puerto Rico, there is a special section: Transportation of passengers between Puerto Rico and other United States ports; foreign-flag vessels; unavailability of United States flag service, 46 App. U.S.C. § 289c (2006), which authorizes passenger service between the contiguous U.S. and Puerto Rico under certain conditions and permissions. This allows cruise ship services to stop in Puerto Rico when traveling directly between U.S. territories. But still no direct common carrier water passenger service exists between the contiguous U.S. and Puerto Rico. Hence, leisure cruise ships do not provide service between non-contiguous parts of the U.S., since their business purpose and schedule practices are not intended for point-to-point passenger and freight transportation.

The single mode doctrine is also inapt for travel within the contiguous United States. This is especially so because of limitations on national air transportation. The general provisions of the Air Commerce and Safety Regulations<sup>96</sup> recognize that it is in the public's interest<sup>97</sup> to have an air transportation network. This ensures "the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices."<sup>98</sup> The federal government has invested broadly to create and maintain the requisite network.

As Congress recognized through codification, there is a compelling public interest in maintaining a national air transportation network available especially to all citizens.<sup>99</sup> Therefore, the Court's opinion in *Beckman v. Saratoga* requiring that railroad common carrier services be available to all citizens analogously requires the U.S. air transportation network and air common carrier services to be available to all the citizens of the United States, regardless of location.<sup>100</sup> The single mode doctrine contravenes this congressional intent.

Air transportation is typically the most convenient method of even moderately distant interstate travel. In many cases, it is the only feasible mode of interstate and in some cases of intrastate travel.<sup>101</sup> The Eighth Circuit Court held in *United States v. Kroll* that "flying may be the only practical means of transportation"; when limited, it often deprives an individual of the right to travel.<sup>102</sup> Even if other modes of travel exist, the Second Circuit held in *United States v. Albarado*, it is not acceptable to force travelers to forego using air travel because "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."<sup>103</sup> In short, court decisions recognized the unique nature of flight as a necessarily accessible and protected mode of transportation.

Passenger travel by air common carrier constitutes the only mode for covering large distances in a timely manner within the contiguous United States. People today do not have the luxury to journey for days across widely disbursed coastal areas within the United States from California to Maine. Citizens have responsibilities, and time is valuable. Jobs do not allow persons to spend a

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<sup>96</sup> 49 U.S.C. § 40101 (2006).

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

<sup>98</sup> 49 USC 40101(a)(4). To further notion of fairness and good business, recent regulations require airlines to be more transparent with pricing, taxes, and fees, by including all taxes and fees--the full price of the ticket--in promotions and from the beginning of the web search.

<sup>99</sup> See 49 U.S.C. §§ 40101, 40103 (2006).

<sup>100</sup> *Beckman*, 3 Paige Ch. at 75.

<sup>101</sup> Some cities within Alaska, for instance, Juneau, the capital, are only accessible by air or sea, air being the only timely mode. Intrastate travel in some states is more convenient by air for travel between cities within a state separated by great distances and/or natural barriers, e.g., California, Florida, Illinois, New York, and Texas.

<sup>102</sup> *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973).

<sup>103</sup> *United States v. Albarado*, 495 F.2d 799, 806 (2d. Cir. 1974). However, in *Town of Southold v. Town of East Hampton*, 477 F.3d 38 (2d. Cir. 2007), the Second Circuit stated that travelers do not have "a constitutional right to the most convenient way of travel" and that minor restrictions do not abridge the right to travel. 477 F.3d at 54 (making reference to *City of Houston v. FAA*, 679 F.2d 1184, 1198 (5th Cir.1982)). This decision conflicts with the decisions in *Kroll* and *Albarado*, and with the right of citizens to enjoy the benefits and access to all public transportation modes.

great amount of time traveling.<sup>104</sup> Political rights require timely access for citizens to travel great distances to petition the national government and exercise political liberties.<sup>105</sup>

Traveling long distances within the contiguous United States relies on only one mode of travel: domestic air transportation. Therefore, restricting any single mode of travel, particularly by air, abridges the right to travel and the right to exercise political and personal liberties. The single mode doctrine thus contravenes the right to travel within the modern U.S. territory.<sup>106</sup>

By threatening what is often the only viable method of transportation, air travel, and imposing corollary chilling effects on citizens' right to seek redress from government, the single mode doctrine limits interstate travel. In doing so, it undermines the right to travel that is broadly non-discriminatory. The travel right is a multi-modal one that encompasses all forms and approaches to travel. If any single mode is limited, the right to travel is abridged.

### PART III: UNJUSTIFIED LIMITATIONS ON THE RIGHT TO TRAVEL

As articulated in *Shapiro*, the right to travel is a "fundamental right" guaranteed by the Constitution.<sup>107</sup> "An individual's liberty may be harmed by an act that causes or reasonably threatens a loss of physical locomotion or bodily control."<sup>108</sup>

In recent years, especially in the surveillance age after 9/11, federal impediments to domestic travel, particularly by air transportation, have undermined the rights of millions of travelers. The major limitations on travel rights derive from identification and informational requirements as well as intrusive physical screening. On the one hand, they encompass air identification requirements to fly, and passenger pre-screening schemes to get a reservation. On the other, they involve Whole Body Scanning (WBS) and "enhanced" pat downs (EPD). Each burdens citizens' rights to travel and to privacy. As analyzed below, they abrogate citizens' rights without materially improving security procedures.

Since 1996, passengers have had to provide identification in order to board airplanes. Yet, on Christmas 2009, a man submitted his real name, Umar Farouk Abdulmutallab, for identification

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<sup>104</sup> Air travel has allowed for Congress to remain in session more days throughout the year and for members to return home for every recess and even weekly. Cal Jillson, *American Government: Political Development and Institutional Change* 234 (2009).

<sup>105</sup> An individual who, for example, needs to approach the seat of the federal government in Washington, D.C. or the seat of the state government in Juneau, Alaska to petition the government for redress of grievances, a right guaranteed by the First Amendment, may require traveling by air, which may also be the only available mode to reach the government.

<sup>106</sup> The single mode doctrine is also inconsistent with federal law requiring that modes of transportation be accessible. The federal government mandates that most public buildings, including airports and train stations, be accessible to people with disabilities. See 49 U.S.C. § 40101 (2006) for handicap accessibility and 49 U.S.C. § 41705 (2006) for discrimination laws. See 42 U.S.C. § 4151, et seq. (2006). All transportation buildings must be handicapped accessible. These handicapped-accessibility requirements conflict with the single mode doctrine because its strictures deny access to modes of transportation that handicapped-accessibility laws promote. Similarly, federal law ensures that citizens living in remote areas are entitled to subsidized scheduled air service. A regular minimum air service is maintained to many small communities in the U.S. Territory under the Essential Air Service codified in Small Community Air Service, 49 U.S.C. §§ 41731-41748 (2006). The federal government subsidizes airlines to provide a minimum level of air service to "eligible" small communities in the United States.

<sup>107</sup> *Shapiro v. Thompson*, 394 U.S. 618, 630-631 (1969). In parts not related to the right to travel, it was overruled by *Edelman v. Jordan*.

<sup>108</sup> Elizabeth P. Foley, *Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality* 49 (2006).

and boarded an international flight from Amsterdam to Detroit. This occurred despite being on a British passenger watch list, and the database of the U.S. National Counterterrorism Center. The would-be terrorist had hidden in his clothing a powdered explosive compound, PETN. Both layers of then-current security procedures, physical and watch list, failed to capture the suspect, a task left to his fellow passengers. Investigators later concluded that that the compound would have been unlikely to be detected by even the latest wave of body-scanning devices.<sup>109</sup> As this shows, many air travel requirements and procedures represent what security expert Bruce Schneier has called “security theater,” as they are mainly “measures that make people feel more secure without doing anything to actually improve their security.”<sup>110</sup>

Invasive searches at the airports also violate the fundamental conception of the Fourth Amendment and the right to privacy. They essentially function as mass searches without even the general warrants and writs the Founding Fathers opposed. During a trial against writs of assistance in the pre-Revolutionary colonies, “James Otis attacked the Writ of Assistance because its use placed the liberty of every man in the hands of every petty officer. His powerful argument so impressed itself first on his audience and later on the people of all the Colonies that John Adams was in retrospect moved to say that ‘American Independence was then and there born.’”<sup>111</sup>

The intrusiveness of current airport searches is currently sanctioned by the questionable administrative search doctrine<sup>112</sup> that eroded Fourth Amendment rights over time.<sup>113</sup> This administrative doctrine itself degrades the Fourth Amendment by revivifying the government use of general warrants.<sup>114</sup>

Despite quoting Adams about fighting unreasonable searches without warrants, *Frank v. State of Maryland* in 1959 created non-criminal public safety searches that require no warrants. This first major departure from the founding principles of the Fourth Amendment opened the door to further government mischief. The Court found that a health inspector may enter a home without a warrant to find a public health hazard.<sup>115</sup> It sanctioned an expanding invasion of privacy.<sup>116</sup>

Justice Douglas’s *Frank* dissent eloquently identifies the essence of the majority’s mistake: the Fourth Amendment was not “designed to protect criminals only.”<sup>117</sup> The dissent clarifies, “[t]he security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.”<sup>118</sup> The Douglas dissent also highlights the confusion that arises when administrative searches can lead to criminal penalties or are carried out by a police force: “[t]his is a strange deletion to make from the Fourth Amendment. In some States

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<sup>109</sup> U.S. Government Accountability Office, “Aviation Security: Computer-Assisted Passenger Prescreening System Faces Significant Implementation Challenges.” GAO-04-385. 2004.

<sup>110</sup> Bruce Schneier, “Flying on Someone Else’s Airplane Ticket,” *CRYPTO-GRAM NEWSLETTER*, Aug. 15, 2003, available at: [http://www.schneier.com/blog/archives/2005/02/flying\\_on\\_someo\\_1.html](http://www.schneier.com/blog/archives/2005/02/flying_on_someo_1.html)

<sup>111</sup> *Frank v. State of Md.*, 359 U.S. 360, 364 (1959)

<sup>112</sup> Eva Primus, “Disentangling Administrative Searches,” 111 *Colum. L. Rev.* 254, 262 (2011).

<sup>113</sup> See *Frank*, 359 U.S. at 365; compare e.g., *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924), *Boyd v. U.S.*, 116 U.S. 616 (1886), *Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894), *Trupiano v. U.S.*, 334 U.S. 699 (1948), *McDonald v. U.S.*, 335 U.S. 451, (1948).

<sup>114</sup> See *Frank*, 359 U.S. at 364.

<sup>115</sup> *Frank*, 359 U.S. at 373.

<sup>116</sup> See *id.* at 375.

<sup>117</sup> *Frank*, 359 U.S. at 377 (1959) (Douglas, J., dissenting).

<sup>118</sup> *Id.* at 375.

the health inspectors are none other than the police themselves. In some States the presence of unsanitary conditions gives rise to criminal prosecutions.”<sup>119</sup>

The pivotal place of privacy against unreasonable personal searches has been apparent for over a century in the Supreme Court jurisprudence since the 1886 decision in *Boyd*.<sup>120</sup> While the majority in *Frank* appropriately explored the relation of the Fourth and Fifth Amendment in criminal law, Justice Frankfurter mistook criminality as the key to whether a search is reasonable. Earlier decisions like *Boyd*, which Frankfurter cites, did not require criminality for a search to require a warrant. Instead, *Boyd* states all “official acts and proceedings” apply the Fourth Amendment.<sup>121</sup> *Boyd* placed the primary importance on whether what is being searched for “is a material ingredient, and affects the sole object and purpose of search and seizure,” whether the case involved a crime was merely dicta.<sup>122</sup> The dilution of the distinction in administrative search doctrine by requiring criminality weakens the Fourth Amendment as the *Frank* dissent feared.

The Fourth Amendment protection against unwarranted government searches “applies to governmental actions.”<sup>123</sup> It is “intended as a restraint upon the activities of sovereign authority.”<sup>124</sup> Searches or seizures, like those that occur in airports, are “ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”<sup>125</sup> Certainly, the privacy inherent to the Constitution has eroded over time when the Court undervalues privacy rights. The Court found exceptions to the Fourth Amendment based on administrative convenience or putative necessity.<sup>126</sup> As Justice Scalia wrote in *Kyllo v. United States* “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”<sup>127</sup>

Despite the protections promised by the Fourth Amendment, the historical search and seizure doctrine has been diluted over time.<sup>128</sup> Now government may often search persons to find evidence of a crime with no warrant or reasonable suspicion.<sup>129</sup> Thus, even when the potential criminality making a warrant necessary in *Frank* is present, the administrative search concept allows searching a person’s body without probable cause or writ.

The privacy associated with one’s house should extend to one’s body, more private historically than the home.<sup>130</sup> “Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire, and to direct fishing expeditions into private

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

<sup>120</sup> *Boyd*, 116 U.S. at 633 (1886). See note 58 supra.

<sup>121</sup> *Boyd*, 116 U.S. at 624 (1886).

<sup>122</sup> *Id.* at 622.

<sup>123</sup> *Burdeau v. McDowel*, 256 U.S. 465, 475 (1921).

<sup>124</sup> *Id.*

<sup>125</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). See also William W. Greenhalgh. “In defense of the ‘per se’ rule: Justice Stewart’s struggle to preserve the Fourth Amendment’s warrant clause,” *American Criminal Law Review*, Vol. 31 No. 4, June 1994.

<sup>126</sup> See *Katz v. United States*, 389 U.S. 347, 357 (1967). *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973) (“airport screening searches ... are constitutionally reasonable administrative searches because they are conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings.”).

<sup>127</sup> *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001). Sobel, Horwitz and Jenkins *supra* note 60.

<sup>128</sup> Eva Primus, “Disentangling Administrative Searches,” 111 *Colum. L. Rev.* 254, 262 (2011).

<sup>129</sup> *Elec. Privacy Info. Cert. v. U.S. Dept. of Homeland Sec.*, 653 F.3d 1, 1 (D.C. Cir. 2011).

<sup>130</sup> See *Frank*, 359 U.S. at 375 (1959).

papers on the possibility that they may disclose evidence of crime.”<sup>131</sup> Wide ranging searches into private papers and houses are anathema to liberty guaranteed by the Fourth Amendment. Expeditions into a person’s body are even more repugnant to the Fourth Amendment’s purposes as a cornerstone of liberty. As the Ninth Circuit in *York v. Story* explained, “we cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one’s unclothed figure from view of strangers . . . is impelled by elementary self-respect and personal dignity.”<sup>132</sup>

As *McDonald v. U.S.* noted, “The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals, nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted.”<sup>133</sup>

The Court in *U.S. v. Lefkowitz* previously articulated the notion: “Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime.”<sup>134</sup>

The *Frank* dissent rings even truer now: “We live in an era ‘when politically controlled officials have grown powerful through an ever increasing series of minor infractions of civil liberties.’ One invasion of privacy by an official of government can be as oppressive as another.”<sup>135</sup>

### Airport Searches

Restraint upon government authority restricts airport searches.<sup>136</sup> In *U.S. v. Marquez*, a challenge to a magnetic wand search in the Ninth Circuit for reasonableness, the court found that “even with the grave threat posed by airborne terrorist attacks, the vital and hallowed strictures of the Fourth Amendment still apply: these searches must be reasonable to comport with the Constitution.”<sup>137</sup>

Two federal circuit courts’ rulings in the 1970s apply to airport searches the fundamental principles of the right to travel and privacy together.<sup>138</sup> In *Kroll*, the Circuit court affirmed that relying on warrantless searches at the airport was an invalid procedure after which the court

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<sup>131</sup> *American Tobacco Co.*, 264 U.S. at 305-306 (1924) (citing *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 479 (1894)).

<sup>132</sup> *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963)

<sup>133</sup> *McDonald v. United States*, 335 U.S. at 455-456 (1959).

<sup>134</sup> *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

<sup>135</sup> *Frank*, 359 U.S. at 382 (1959). (Citing Comment, “Health Inspection of Private Dwelling Without Search Warrant,” 17 *U. Chi L. Rev.* 733 (1950)).

<sup>136</sup> *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

<sup>137</sup> *United States v. Marquez*, 410 F.3d 612, 616 (9th Cir. 2005). Because the right to travel is a fundamental constitutional principle, courts need to apply strict scrutiny: that there is a compelling state interest, the restrictions are narrowly tailored and they are incorporated by the least restrictive means. See Stephen A. Siegel, “The Origin of the Compelling State Interest Test and Strict Scrutiny,” *American Journal of Legal History*, Vol. 48, No. 4, p. 355, 2006.

<sup>138</sup> *Kroll*, 481 F.2d at 886, *Albarado*, 495 F.2d at 806-07.

suppressed the evidence gained in this manner.<sup>139</sup> This involved a less invasive procedure than physical searches: the passenger's profile matched a terrorist's and thus he had to pass through a magnetometer before being allowed to embark on his flight. "Because the search was conducted without a warrant, the government is required to show that it was justified by exceptional circumstances. It attempts to meet this burden by contending, first, that the defendant consented to the search and, second, that it was a reasonable search for weapons or explosives."<sup>140</sup> The court found the government failed to do so.<sup>141</sup> On these facts, the search was found to be too invasive and a violation of the traveler's Fourth Amendment rights.<sup>142</sup>

While *Kroll* is unclear on to what extent the court separates the physical search of belongings from the magnetometer scan of the passenger, the principles espoused there show a strong view of liberty. Even magnetometers raise constitutional questions by placing two fundamental rights, travel and privacy, at odds.<sup>143</sup>

*Kroll* also succinctly spells out the constitutional troubles: "[i]n any meaningful sense . . . [c]ompelling the defendant to choose between exercising Fourth Amendment rights and his right to travel constitutes coercion; the government cannot be said to have established that the defendant freely and voluntarily consent[ed] to the search when to do otherwise would have meant foregoing the constitutional right to travel."<sup>144</sup>

*Albarado* explores a similar scenario, in which a man's belongings were subjected to a magnetometer search and then he was subjected to a pat down. Both searches the court ruled as requiring "reasonableness of the total circumstances."<sup>145</sup> These circumstances require sensitivity to the constitutional rights at issue: "[t]o make one choose between flying to one's destination and exercising one's constitutional right appears to us, as to the Eighth Circuit. . . . in many situations a form of coercion, however subtle. While other forms of transportation may be available, 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."<sup>146</sup>

The Second Circuit concluded similarly in *Albarado*: "The court dismissed the notion the government could announce its intention to deprive citizens of Fourth Amendment protection in a widely used medium of travel and then claim citizens using that medium consented to have their rights violated."<sup>147</sup> "Until the Fourth Amendment, which is closely allied with the Fifth, is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched."<sup>148</sup>

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<sup>139</sup> *Kroll*, 481 F.2d at 886

<sup>140</sup> *Id.* at 885.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 887.

<sup>144</sup> *Id.* at 886

<sup>145</sup> *Albarado*, 495 F.2d at 808.

<sup>146</sup> *Id.* at 806-807 (citing *Kroll*, 481 F.2d at 885).

<sup>147</sup> M. Madison Taylor, "Bending Broken Rules: The Fourth Amendment Implication of Full-Body Scanners in Preflight Screening," 17 *Rich. J.L. & Tech.* 1, 16 (2010).

<sup>148</sup> *Terry v. Ohio*, 392 U.S. 1, 39. (Douglas, J., dissenting).

The two circuits conclude similarly that the government violates the constitutional rights of travelers when it forces individuals to choose between two inherent rights: privacy and travel. Therefore, the use of overly intrusive security measures violates their rights as citizens and inhibits their exercise of the right to travel.

Despite the strong case for civil liberties in airports, the theories espoused in *Kroll* and *Albarado* have given way to those in *Frank*. *Frank*'s conception of reasonable warrantless searches was expanded in *Terry v. Ohio*'s airport progeny, *U.S. v. Epperson*<sup>149</sup> and *U.S. v. Bell*<sup>150</sup> concurring opinion.<sup>151</sup> *Epperson* allowed a hand scan by a magnetic wand because of the danger to passengers in the potential for hijacking even after the drop in hijackings when metal detectors were placed into use.<sup>152</sup> The *Bell* concurrence used similar logic to describe the limitation of scans alone as making searches reasonable.<sup>153</sup>

Despite focusing on increased safety, the circuit decisions do not mean magnetometer usage, much less more intrusive searches, is constitutional. *Terry* involved a stop and frisk scenario based on the suspicion of danger to an officer from a particular individual as considered by a "reasonably prudent man."<sup>154</sup> As Herzog noted in 2005, "[t]he Supreme Court has not decided whether the expansion of the *Terry* doctrine, is constitutional. *Terry* allowed a mere stop and frisk based upon reasonable suspicion; however, at airports, actual searches without suspicion are conducted."<sup>155</sup> Surprisingly, this issue is unresolved by the highest court in the United States.

Indeed, when examining airport security, various circuits use modern tests that arguably violate the Fourth Amendment. Instead, *Kroll* and *Albarado* represent the basic standards for determining the constitutionality of invasive airport searches.

Balancing tests have been used to examine airport security against the Fourth Amendment. In *United States v. Skipwith*<sup>156</sup> in 1973 the Fifth Circuit applied a three-factor test for whether a search violates the Fourth Amendment: (1) public necessity, (2) efficacy of the search, and (3) degree of intrusion. Applying *Skipwith*'s balancing test or *Kroll* and *Albarado*'s holdings identifies what rights are threatened by airport searches. *Skipwith* found for the government but established the basis for prohibiting search techniques that provide little value as a preventative measure against terrorists while simultaneously invading travelers' privacy thoroughly. *Kroll* and *Albarado* support finding more intrusive searches than metal detectors<sup>157</sup> as too invasive.

These three cases look directly at security in the airport, and balance the liberty of the traveler's privacy against the need for security.<sup>158</sup> What they also share in common is to examine the exigency of the circumstances and the government interest in relation to the extent of a liberty infringing upon, in other words, rights balancing.<sup>159</sup> *Skipwith* engages in this more transparently by

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<sup>149</sup> 454 F.2d 769 (4th Cir. 1972).

<sup>150</sup> 464 F.2d 667 (2d Cir. 1972).

<sup>151</sup> Simcha Herzog, "Constitutional Problems Posed by Aviation Security Post September Eleventh," 6 *Fla. Coastal L. Rev.* 361, 372-373 (2005). See *infra* note 259.

<sup>152</sup> *Epperson*, 454 F.2d at 771.

<sup>153</sup> *Bell*, 464 F.2d at 675.

<sup>154</sup> *Terry*, 392 U.S. at 27.

<sup>155</sup> *Herzog*, *supra* note 151.

<sup>156</sup> 482 F.2d 1272, 1276 (5th Cir. 1973)

<sup>157</sup> See *Kroll*, 481 F.2d at 885; *Albarado*, 495 F.2d at 807.

<sup>158</sup> See *Kroll*, 481 F.2d at 885; *Albarado*, 495 F.2d at 807; *Skipwith*, 482 F.2d at 1275.

<sup>159</sup> See *Kroll*, 481 F.2d at 885; *Albarado*, 495 F.2d at 807; *Skipwith*, 482 F.2d at 1275.

spelling out its balancing test, but it also finds that the airport security measures are constitutional.<sup>160</sup> On the other hand, the courts in *Kroll* and *Albarado* examine the need for liberty in travel and privacy more closely, recognizing a stronger need for evidence of the government's intentions due to infringement on two rights, travel and privacy.<sup>161</sup> These courts find the airport security measures are too invasive, and require a stronger showing of the efficacy of the government's actions against a threat.<sup>162</sup>

As recognized in *Kroll* and *Albarado*, forcing the choice between travel and privacy is coercion even in the face of any prior warning: "[w]hat is clear is that the public does have the expectation, or at least under our Constitution the right to expect, that no matter the threat, the search to counter it will be as limited as possible, consistent with meeting the threat."<sup>163</sup> The Founding Fathers "were skeptical of using the rules for search and seizure set by government actors as the index of reasonableness."<sup>164</sup> This means that expectation of being searched in an airport and eroding privacy over time do not change the rights guaranteed by the Founders in the Constitution.

### Identification Requirements to Travel

A further infringement on the domestic right to travel was the requirement to show government identification in order to board an aircraft. The identification requirement was introduced in 1996 to check in and board flights. Presentation of government identification<sup>165</sup> also more recently became necessary for travelers to enter the "sterile" areas<sup>166</sup> in airports.<sup>167</sup>

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<sup>160</sup> *Skipwith*, 482 F.2d at 1275.

<sup>161</sup> *Kroll*, 481 F.2d at 885; *Albarado*, 495 F.2d at 807.

<sup>162</sup> See *Kroll*, 481 F.2d at 885; *Albarado*, 495 F.2d at 807.

<sup>163</sup> *Albarado*, at 807. See also *Kroll*, at 886.

<sup>164</sup> *Virginia v. Moore*, 553 U.S. 164, 169-70 (2008)

<sup>165</sup> Currently, the states set their own criteria to license their resident drivers, the documentation needed and age restrictions, among others requirements. To standardize government-issued ID requirements at a national level, Congress introduced the REAL ID Act of 2005, a national identification scheme (NIDS). The Act gives the Secretary of Homeland Security the power to impose the use of the REAL ID for any purpose. In practice, a REAL ID could be required to board any public transportation vehicle, vote, work, open a bank account, access a national park, or even to merely stand on the street. It would give the federal government broad police power over the citizenry. The REAL ID requirements form the basis of an internal passport, the "hallmark of repressive regimes such as [Apartheid] South Africa, the Soviet Union, or Nazi Germany." Gerald Houseman, *Right to Mobility* 7 (1979). This abridges the right of free movement of citizens within the U.S. as well as free market for movement of people carrying goods in the U.S. There are "23 states that have passed legislation partially or completely prohibiting participation in the REAL ID program." Chad Vander Veen, "Is Pass ID Better Than REAL ID? (Analysis)," Government Technology, August 14, 2009, available at: [www.govtech.com/security/Is-PASS-ID-Better-Than-REAL.html](http://www.govtech.com/security/Is-PASS-ID-Better-Than-REAL.html). The most recent iteration, PASS ID (June 2009) would eliminate some of the burdensome technological requirements, "but keeps in place most of the other REAL ID cornerstones." *Id.* REAL ID was proposed partly because some September 11 terrorists used U.S. IDs to board the aircrafts. U.S. Congress. Senate Committee on Homeland Security and Governmental Affairs. Hearing on the Impact of Implementation: A Review of the Real ID Act and the Western Hemisphere Travel Initiative. 110th Cong., 2nd sess., April 29, 2008, See Richard Sobel, "The Demeaning of Identity and Personhood in National Identification Systems," *Harvard Journal of Law and Technology*, Vol. 15, No. 2, Spring 2002, at 319. See also Richard Sobel, "Citizenship as Foundation," *Triquarterly*, 131, 2008.

<sup>166</sup> "Sterile areas" are the areas in airports located after clearing the security checkpoints. As early as July 18, 1996, in some airports, these areas were only accessible to ticketed passengers and certain approved non-travelers. Douglas Martin, "Explosion Aboard T.W.A. Flight 800: The Aftershocks; Most Passengers are Tense, But Take Comfort in Odds," *New York Times*, July 19, 1996. Ironically, the TWA 800 explosion was proven to have been caused by a mechanical problem,

Absent probable cause or reasonable suspicion, identification demands constitute unwarranted searches.<sup>168</sup> As established in *Kolender v. Lawson*<sup>169</sup> and *Hiibel v. Nevada*,<sup>170</sup> individuals need not provide identification to government authorities without probable cause or reasonable suspicion of wrongdoing, and an enabling state statute.<sup>171</sup> An identification requirement assumes that citizens exercising their right to travel are also engaged in unlawful activities. In itself, this violates the presumption of innocence and the Fourth Amendment guarantee against unreasonable searches. The need to show an official document to travel domestically is a governmental interference in both the right to travel and the rights of citizens not to carry identification.<sup>172</sup>

The proposed purpose of requiring photo identification in air travel is to check that the person traveling is the passenger on the flight ticket.<sup>173</sup> Yet, the photo identification requirement does not eliminate the threat of terrorism or even assure increased security.<sup>174</sup> As incidents since 9/11 have sadly shown, previously unknown terrorists may have valid licenses or passports, and not appear on terrorist watch lists. For example, “[a]ll of the 9/11 terrorists presented photo-IDs, many in their real names.”<sup>175</sup> Although terrorists may train to use and obtain false identification, the 9/11 Commission spent little time examining that problem since the 9/11 hijackers used their own official identification.<sup>176</sup> Further, most of the terrorists involved in 9/11 “were in the U.S. legally and had no record with the FBI or other security agency.”<sup>177</sup> As 9/11 demonstrated, first time terrorists were able to obtain IDs and board aircraft without much added inconvenience and without arousing suspicion. “A [national ID system] offers no security against terrorists who have no record of prior misconduct and are not worried about being identified after the attack....”<sup>178</sup> In short, the identification requirement is ineffective and imposes an unreasonable burden on privacy

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not terrorism, yet the ID requirement remained in place. See NTSB “Aircraft Accident Report,” July 17, 1996, <http://www.nts.gov/investigations/summary/AAR0003.html>

<sup>167</sup> An FAA regulation implementing a nationwide government-issued ID requirement to fly was introduced shortly after the explosion of TWA Flight 800 in July 17, 1996. Edwin McDowell, “Tighter Airline Security Will Add Inconvenience,” *New York Times*, August 11, 1996. Until 2008, passengers could travel without identification if they underwent a more intrusive search, where they would be categorized as “selectees.” See *Gilmore*, 435 F.3d at 1130.

<sup>168</sup> See Richard Sobel and John A. Fennel, “Troubles with Hiibel: How the Court Inverted the Relationship between Citizens and the State,” 48 *S. Tex. L. Rev.* 613 (2007).

<sup>169</sup> 461 U.S. 352 (1983).

<sup>170</sup> 542 U.S. 177 (2004).

<sup>171</sup> See *Brown v. Texas*, 443 U.S. 47 (1979), *Terry v. Ohio*, *Kolender v. Lawson*, and *Hiibel v. Nevada*, 542 U.S. 177 (2004).

<sup>172</sup> By adding procedural barriers to interstate travel, the ID requirements parallel earlier taxes as impediments to travel that states tried to levy upon exiting travelers until the Supreme Court held such taxes unconstitutional. See *supra* note 20.

<sup>173</sup> Transportation Security Administration. ID Requirements for Airport Checkpoints, available at: [http://www.tsa.gov/travelers/airtravel/acceptable\\_documents.shtm](http://www.tsa.gov/travelers/airtravel/acceptable_documents.shtm). (July 28, 2010). When originally implemented in 1996, the ID requirement was often administered simply to establish that someone had an ID, without actually checking it against the ticket.

<sup>174</sup> Within the sterile area, for example, airlines do not require ID to board the aircrafts since the person was already inspected. “This is a classic example of a security failure because of an interaction between two different systems. ... [T]here’s no system to make sure that the name on the photo ID matches the name in the computer.” Schneier, *supra* note 110.

<sup>175</sup> Bruce Schneier, Flying on Someone Else’s Airplane Ticket, *Crypto-Gram Newsletter*, Aug. 15, 2003, available at: [http://www.schneier.com/blog/archives/2005/02/flying\\_on\\_someo\\_1.html](http://www.schneier.com/blog/archives/2005/02/flying_on_someo_1.html) The hijacker could also have flown using their passports, though this might have prompted more scrutiny.

<sup>176</sup> Bob Sullivan, “9/11 Report Light on ID Theft Issues,” *MSNBC*, (Aug. 4, 2004), [http://www.msnbc.msn.com/id/5594385/ns/us\\_news-security/t/report-light-id-theft-issues/#.UBAOb6PriEI](http://www.msnbc.msn.com/id/5594385/ns/us_news-security/t/report-light-id-theft-issues/#.UBAOb6PriEI).

<sup>177</sup> Andrew Clement et al, “National Identification Schemes (NIDS) and the Fight against Terrorism: Frequently Asked Questions,” *Computer Professionals for Social Responsibility*, 2001. Available at: <http://cpsr.org/issues/privacy/natidfaq/>.

<sup>178</sup> “...(possibly because they will be dead).” *Id.*

and anonymity in abridging citizens' exercise of their right to travel. Moreover, many travelers take offense at the idea that they need official "papers" in order to travel.<sup>179</sup> If a law has "no other purpose...than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional."<sup>180</sup>

### Passenger Watch-List Prescreening Programs

Concern about a terrorist threat against the United States contributed to passenger watch-list prescreening programs supposed to root out terrorists attempting to board airplanes to, from, or within the United States.<sup>181</sup> The first pre-screening program introduced in the U. S. was the Computer Assisted Passenger Prescreening System (CAPPS) in 1998.<sup>182</sup> CAPPS was administered by the airlines, which compared information recorded in the Passenger Name Record (PNR) with government lists of individuals banned from flying.<sup>183</sup> It also targeted travelers whose behavior, such as traveling alone, buying a one-way ticket, paying with cash, or not bringing luggage, raised the level of suspicion. The latter flagged half of the 9/11 hijackers, but at the time, those signals only led to x-raying of their checked baggage.<sup>184</sup>

After 9/11, the newly created Transportation Security Administration (TSA) in November 2001 received authority to establish security procedures in U.S. airports toward the goal of "prevent[ing] terrorist attacks and reduc[ing] the vulnerability of the United States to terrorism within the nation's transportation networks."<sup>185</sup> The TSA then introduced the more intrusive CAPPS II system, which went beyond the original CAPPS by further collecting sensitive information about passengers and relying on commercial databases.<sup>186</sup> After controversy over privacy and many unresolved system issues and flaws, President Bush terminated the CAPPS II Program in 2004.

In 2009, however, the TSA began a similar program known as "Secure Flight,"<sup>187</sup> which assigns the TSA the task of executing passenger prescreening.<sup>188</sup> Its purpose was to "more

<sup>179</sup> Robert Hardaway, "The Role of Media, Law, and National Resolve in the War on Terror," 33 *Denv. J. Int'l L. & Pol'y* 104, 122 (2004). *Gilmore v. Gonzales*, 435 F.3d 1125, (9th Cir. 2006).

<sup>180</sup> *United States v. Jackson*, 390 U.S. 570, 581 (1968).

<sup>181</sup> U.S. Government Accountability Office. "Aviation Security: Computer-Assisted Passenger Prescreening System Faces Significant Implementation Challenges." GAO-04-385. 2004.

<sup>182</sup> U.S. Government Accountability Office, 2004.

<sup>183</sup> The PNR is used by airlines to maintain and share passengers' reservations and personal information for operational purposes. "A PNR may include each passenger's full name, home address, home telephone number, and date of birth, as well as some information about that passenger's itinerary." 68 Fed. Reg. 45266, Aug. 1, 2003.

<sup>184</sup> See 911 Commission Report, at 392, that the CAPPS system flagged half of the 911 hijackers only led to the x-raying of their checked baggage. <http://www.9-11commission.gov/report/911Report.pdf> "Ten out of the 19 hijackers (including 9 out of 10 on the two American Airlines flights) were identified by the CAPPS system." [http://govinfo.library.unt.edu/911/report/911Report\\_Notes.htm](http://govinfo.library.unt.edu/911/report/911Report_Notes.htm)

<sup>185</sup> See 49 U.S.C. § 114; 6 U.S.C. § 202(1); 49 C.F.R. § 1540.107; *Redfern v. Napolitano* at 2 (quoting declaration of Lee R. Kair, Assistant Administrator for Security Operations for TSA).

<sup>186</sup> "The Five Problems with CAPPS II, ACLU post August 25, 2003," available at: <http://www.aclu.org/national-security/five-problems-capps-ii>. CAPPS II was to be administered by TSA. *Id.* These rules cover flights operated by U.S. aircraft operators and flights operated by foreign carriers operating in U.S. airspace, and includes en-route flights over contiguous U.S. Airspace, as specified in the rule and in accord with the U.S. special aircraft jurisdiction.

<sup>187</sup> Transportation Security Administration. "Secure Flight Program," available at: [http://www.tsa.gov/what\\_we\\_do/layers/secureflight/index.shtm](http://www.tsa.gov/what_we_do/layers/secureflight/index.shtm).

<sup>188</sup> 69 Fed. Reg. 65619, Nov. 15, 2004.

effectively and consistently prevent certain known or suspected terrorists from boarding aircraft where they may jeopardize the lives of passengers and others.”<sup>189</sup> The program tries to achieve this goal by comparing the Secure Flight Passenger Data (SFPD) that the airlines collect and transmit to the TSA—including each passenger’s full name, gender, date of birth, and Redress Number or known traveler number—against the Terrorist Screening Database (TSDB), a consolidated watch list maintained by Terrorist Screening Center (TSC).<sup>190</sup> This comparison is meant to enable the TSA to identify and screen “known or suspected terrorists,”<sup>191</sup> and to clear others to board aircraft.

Secure Flight, as well as other passenger watch-list prescreening programs, violates rights to travel, privacy, and the presumption of innocence.<sup>192</sup> Rather than the default being that a citizen may fly absent evidence that the individual poses a danger, the default becomes that one may not fly without proving both identity and innocence. Instead of screening a passenger list if there is intelligence about a possible threat, all flights and all passengers are screened. Rather than conducting further questioning or screening only if there is a match initially based on names, Secure Flight requires declarations of gender and dates of birth for all travelers. In essence, one cannot travel in the U.S., without proving identity at the time of travel and without receiving prior official permission of the U.S. government<sup>193</sup> to fly.<sup>194</sup> Citizens are required to give up their private information to obtain a government pre-clearance or permission to exercise their constitutional right to travel. This reduces travel to a privilege requiring government approval. It restricts travel rights unconstitutionally since the government cannot force an individual to give up a fundamental constitutional right like privacy to exercise another like travel.<sup>195</sup>

<sup>189</sup> 72 Fed. Reg. 43357, Aug. 23, 2007.

<sup>190</sup> 72 Fed. Reg. 48359, Aug. 23, 2007.

<sup>191</sup> 69 Fed. Reg. 65619, Nov. 15, 2004.

<sup>192</sup> In comments to the TSA, several major airlines agreed with the criticism of Secure Flight requirements. Continental Airlines, for example, asserted that “there should be no requirement for a full name, date of birth or gender from customers, which Continental believes would be highly burdensome and intrusive while not producing any meaningful additional security.” Similarly, Northwest Airlines stated that “[o]nly on the occasion that the full name itself was not enough, would there be a need or want to provide additional information. To require date of birth and gender for all, when only a small percentage of the total vetting responses result in a false positive identification, seems a disservice. There is a definite need to minimize the data demands to reduce impositions on passenger privacy and airline resources.” Thomas Frank, *TSA Plan to Gather More Data Protested*, *USA Today*, Nov. 29, 2007 [http://www.usatoday.com/travel/flights/2007-11-29-secure-flights\\_N.htm](http://www.usatoday.com/travel/flights/2007-11-29-secure-flights_N.htm). Moreover, “[a]sking a passenger’s birth date and gender” would create a new level of complication for completing air reservations,” United Airlines wrote to the TSA. “Seeking useless data carries an unacceptably high price tag.” *Id.* Secure Flight is premised on the unlikely prospect of knowing birth dates for terrorists, and it does not validate the dates provided by passengers. On November 1, 2010, nine organizations petitioned the TSA to drop or significantly modify Secure Flight.

<sup>193</sup> If a passenger refuses or fails to provide the information, TSA will not clear her to fly and the airline is not allowed to issue a boarding pass. Though the Secure Flight information is not required until 72 hours before departure, it is not possible to get an advance reservation without providing it. As the Southwest Airlines website notes, “What happens if I choose not to provide my Secure Flight Passenger Data? Airlines are required to provide this data to the TSA before the carrier can issue a boarding pass (either in advance or at the airport)...[Y]ou can choose to provide the personal data directly to the airline at the airport each time you travel. However...you will not be able to purchase a reservation online. You also will not receive a boarding pass or be able to travel until the appropriate data has been collected. [www.southwest.com/html/customer-service/faqs.html?topic=tsa\\_secure\\_flight](http://www.southwest.com/html/customer-service/faqs.html?topic=tsa_secure_flight).”

<sup>194</sup> Once at the airport the person needs to produce “adequate” photo identification or s/he will be denied access to the sterile area. See TSA, *ID Requirement for Airport Checkpoint*, 2010.

<sup>195</sup> *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973). See also *Kroll*, at 886.

Inclusion in the Secure Flight “No-Fly” list, which prevent matched passengers from flying, is directed by suspicion and not by proof of a threat.<sup>196</sup> The government’s use and storage of Secure Flight Passenger Data for the purpose of knowing who travels where and when undermines the constitutional concept of personal liberty by restricting the right to travel until officials clear individuals to exercise what becomes a privilege. “An individual’s liberty may be harmed by an act that causes or reasonably threatens a loss of physical locomotion or bodily control.”<sup>197</sup>

Yet, if there is adequate justification to prohibit someone from flying, the government should get a search or arrest warrant to stop the suspected violent individual before he reaches the airport. If there is sufficient information about a threat to a particular flight or airport, then the TSA can examine passenger lists. The TSA should not subject every flyer and flight to unwarranted provisions and screening of personal information.<sup>198</sup>

Combined with the travel identification requirements, Secure Flight creates the basis for an internal passport system like those in authoritarian regimes.<sup>199</sup> Under such a system, the government may approve (or disapprove) movement within U.S. jurisdiction. In combination with extensive records of the passengers’ itineraries, the government can construct dossiers of where and when individuals travel. Surveillance information on travel can eventually be used to prohibit travel to local or national destinations. Under such a rubric, citizens lose the right to move freely and anonymously around the U.S. territory.

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<sup>196</sup> In a high-profile example, the late U.S. Senator Ted Kennedy (D-Mass.) was notoriously stopped from boarding an aircraft since his name resembled a suspected terrorist’s alias (“Edward Kennedy”). Rachel L. “Swarns, Senator? Terrorist? A Watch List Stops Kennedy at Airport,” *New York Times*, Aug. 20, 2004, at A1. More recently, in June 2010, Sean Kelly, a weekly flier, was included in the No-Fly list for unknown reasons. After months of being treated as a terrorist he decided to apply to the redress program, which required him to submit exhaustive documentation to prove his identity. The system failed and TSA ignored his following redress requests, until he got the press involved, at which point his issue was immediately resolved. Jon Yates, “Frequent Flier has Rough Landing on TSA Watch List,” *Chicago Tribune*, June 3, 2010. Other people with common names like David Nelson are also often mismatched. If the individual is mistakenly and repeatedly identified for screening, he or she may apply for a Redress Number or a Known Traveler Number, which will in theory identify that person when he flies in the future.

<sup>197</sup> Elizabeth P. Foley, *Liberty for All: Reclaiming Individual Privacy in a New Era of Public Morality* 49 (2006). Steve Chapman, “A Radical Idea for Airport Security, The Government Shouldn’t Decide Who Can Fly,” *Chicago Tribune*, July 18, 2010, Steve Chapman, “Why the No-Fly List Doesn’t Fly, Depriving People of the Right to Travel,” *Chicago Tribune*, March 31, 2013, p. 23.

<sup>198</sup> Gerald Houseman, *The Right to Mobility* 7 (1979). As Houseman notes (see *supra* note 74) national identification documents used for work per se restrict the right to travel as internal passports. A more current example of this is under the proposed 2013 “Comprehensive Immigration Reform” bill (S.744) that in order to work in the U.S., American citizens would be required to have their biometric digital photograph in a government database and it would need to be matched by a “photo tool” with a passport or drivers license photo. The same bill calls for a biometric Social Security card (see Houseman, at 17. Combined with security databases and facial recognition capacity these identification systems could prevent e.g. anyone from entering a subway or an airport. See “EPIC sues FBI to Obtain Details of Massive Biometric Database” at [epic.org/2013/04](http://epic.org/2013/04) Hence, both in limiting mobility to take jobs and to enter nodes of transportation, the “comprehensive” parts of immigration reform like biometric Social Security cards and photo identification requirements to fit with facial recognition technology would deform the citizens’ and non-citizens’ rights to travel. See April 2013 *EPIC v. FBI* suit against the FBI biometric databank and facial recognition at [www.epic.org](http://www.epic.org). See also Orin Kerr, “Use Restrictions and the Future of Surveillance Law,” in Jeffrey Rosen and Benjamin Wittes, *Constitution 3.0, Freedom and Technological Change*, 2011. See also “In the Matter of an Application of the United States of America for an order authorizing disclosure of location information of a specified wireless telephone,” U.S. District Court, District of Maryland, August 3, 2011, on the “rights to privacy” in “location” and “movement,” at 22, 31-34.

Moreover, Secure Flight information requirements are easy to bypass for those bent on harm.<sup>200</sup> False matches to the watch list pre-screening programs have degraded the right to travel of many innocent citizens but located no terrorists.<sup>201</sup> In short, Secure Flight requires unnecessary personal information that cannot be matched with potential terrorists not included on the pre-screening watch lists.

### Whole Body Scans and “Enhanced” Pat-Down Searches

Since 2010, the TSA has implemented devices for primary screening that rely on Whole Body Scanning (WBS) technology.<sup>202</sup> According to the TSA, the scanners were introduced to speed up security screening as well as to “enable screeners to find nonmetallic weapons, including concealed powdered and liquid explosives that do not set off metal detectors.” Whole body scanners examine passengers for carrying suspected weapons.<sup>203</sup>

Two varieties of WBS (or AIT, Advanced Imaging Technology), backscatter (x-ray) scanners and millimeter (radio) wave scanners, were hurried into service at dozens of domestic airports.<sup>204</sup> Both can create nude images of passengers’ bodies.<sup>205</sup> The scanners create images for screening

<sup>199</sup> The pre-clearance process misses any terrorists not on the No Fly or selectee lists. Changing the name on a print-at-home boarding pass could evade detection, since no one in the security checkpoints compares the passenger on the boarding pass with the ones on the pre-screening list. The birth date and gender provided during booking are not checked for validity. (If a person could use a false date of birth and gender at the time of booking, the pre-screening would not be able to establish if the person is an alleged danger to air travel.) TSA argues that reservation systems do not print the entire name on boarding passes, so small differences will not affect the travelers’ experience at the airport. (TSA, ID Requirements for Airport Checkpoints, 2010). People with similar names may travel with someone else’s ticket, which may allow an actual terrorist onboard. Individuals with more than one last name may claim that the last name in the ticket is theirs as it matches one of the last names in the photo ID. Also parents and children with the same name could exchange boarding passes.

<sup>200</sup> For a discussion of passengers subject to unjustified scrutiny for FBI mishandling of the No-Fly list, see Kim Zetter, “Threshold for Getting Onto No-Fly List Lowered,” *Wired.com*, (Jan. 6, 2010), [www.wired.com/threatlevel/2010/01/no-fly-list/](http://www.wired.com/threatlevel/2010/01/no-fly-list/). “The Constitution Applies When the Government Bans Americans from the Skies,” Nusrat Choudhury, ACLU, March 25, 2013 about the ACLU suit against No-Fly list restrictions on American citizens. [www.aclu.org](http://www.aclu.org). See also *Latif v. Holder*, U.S. District Court of Oregon, June 29, 2010, and *Latif v. Holder*, memorandum, March 22, 2013 (particularly at 19-22 on the right to travel by plane and ship) on the ACLU website.

<sup>201</sup> Transportation Security Administration. “Screening Management Standard Operating Procedures,” Rev. 3. 2008.  
<sup>202</sup> “AIT currently provides the best available opportunity to detect non-metallic explosives, non-metallic explosive devices and non-metallic weapons.” (TSA, “Passenger Screening Using Advance Imaging Technology,” March 26, 2013, at 7).

<sup>203</sup> Ken Dilanian, “New Concerns Arise Over Body Scanners,” *Los Angeles Times*, 2 June 2010, <http://articles.latimes.com/2010/jun/12/nation/la-na-body-imagers-20100611>. As the article reports, a TSA officer was charged with aggravated battery for attacking a co-worker for joking about his genitalia after going through a body scanner. A similar situation in London’s Heathrow International Airport in England involved an officer making lewd comments about a female colleague as she entered the scanner. “TSA Screener Attacked After Making Fun of Man’s Penis on Body Scanner,” *KTLA News*, May 7, 2010, <http://www.ktla.com/news/landing/ktla-body-scan-penis-tsa-attack.0,2428734.story>.

<sup>204</sup> *Id.* Connecting WBS images with passengers names from governmental identification, boarding passes, or facial recognition creates the possibility of retaining nude images of individual passengers by name. TSA maintains that it will not identify images.

<sup>205</sup> See U.S. Dept. of Homeland Sec., “Privacy Impact Assessment Update for TSA Whole Body Imaging,” 2009, at 2. Although it is beyond the scope of this article, radiation emitted by the scanners has also raised a host of health concerns, including concerns voiced by TSA employees. See, e.g., Sarah J. Welch, “Airport Body Scanners and Health,” *New York Times*, (July 12, 2011), <http://intransit.blogs.nytimes.com/2011/07/12/airport-body-scanners-and-health/?ref=transportationsecurityadministration>; Mark Fogione, “TSA Body Scanners Still Raising Concerns? Here’s Why,” *L.A. Times*, Nov. 18, 2010 (discussing health concerns voiced by pilot unions).

<sup>206</sup> *Id.*

that so expose travelers that the American Civil Liberties Union referred to the TSA's WBS as conducting "virtual strip searches."<sup>206</sup> The scanners impose a burden on travelers to give up their constitutionally guarded privacy and protection against unreasonable searches, as well as travel rights, for the sake of questionable security technology.<sup>207</sup> Negative media exposure of the TSA's deployment and use of these devices has left many in the public all-too-familiar with the nude images from Whole Body Scanners.<sup>208</sup>

Passengers may "opt out" of the scanning but then must undergo an "enhanced" pat down search instead.<sup>209</sup> These "enhanced" pat-downs are intrusive, physical searches.<sup>210</sup> Hence, passengers faced the "option" to appear "virtually" naked in an x-ray photograph before one government agent, or to be virtually "molested" by another.<sup>211</sup> Both "options" violate personal privacy.<sup>212</sup>

The ineffectiveness of the body scans may render them unreasonable and unrelated to the objectives of the search.<sup>213</sup> TSA scans also take no account of age or sex of the subject, or whether the passengers may have been abused in some way rendering the process particularly harmful.<sup>214</sup> Thus, Whole Body Scans are overbroad in their application to all flyers, and

<sup>207</sup> "ACLU Backgrounder on Body Scanners and 'Virtual Strip Searches,'" ACLU (Jan. 8, 2010), available at: <http://www.aclu.org/technology-and-liberty/aclu-backgrounder-body-scanners-and-virtual-strip-searches>. "The lawfulness of a strip search depends on whether the circumstances reasonably justify such an intrusive invasion of privacy." *United States v. Cofield*, 391 F.3d 334, 336 (1st Cir. 2004).

<sup>208</sup> Europe has banned the x-ray scanners due to the risk for cancer, but no data exists for the cancer risk of scanners using radio waves. David DiSalvo, "Europe Bans Airport Body Scanners for 'Health and Safety' Concerns," *Forbes*, (Sep. 15, 2011), <http://www.forbes.com/sites/daviddisalvo/2011/11/15/europe-bans-airport-body-scanners-over-health-and-safety-concerns>.

<sup>209</sup> See, e.g., Laura Riparbelli, "TSA Screenings Outrage Some Airline Passengers," *ABC News*, (July 16, 2011), <http://abcnews.go.com/US/airport-security-measures-prompt-outrage-elderly-children/story?id=14081084>; Leonora LaPeter Anton, "Scan of Girl, 12, Upsets Parents," *St. Petersburg Times*, July 18, 2010, at B1; David Ovalle, "Miami Airport Screener Accused of Attack After Jeers at Genitals," *Miami Herald*, May 7, 2010. Fox 8 News Staff. "TSA Agent Brawls over Full Body Scan." Fox 8 News Cleveland. (7 May 2010), <http://www.fox8.com/news/wjw-full-body-scan-tsa-brawl.0.4672707.story>. The *Gilmore* court indicated "selectees" got a "light body patdown," at 1158.

<sup>210</sup> Meagan Kelleher, "Body Scanner Unveiled at KCI," *Fox4kc.com*, (March 16, 2010), television broadcast available at: <http://www.fox4kc.com/wdaf-body-scanners-kci-airport-031610.0.3922967.story>.

<sup>211</sup> The Fourth Amendment protects against frisk searches. See *Terry v. Ohio*, 392 U.S. 1, 16 (1968). "[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.' Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a 'petty indignity.' It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."

<sup>212</sup> "[The] U.S. Court of Appeals for the 3rd Circuit... stressed that screening procedures must be both 'minimally intrusive' and 'effective' - in other words, they must be 'well-tailored to protect personal privacy,' and they must deliver on their promise of discovering serious threats." Jeffrey Rosen, "Why TSA Pat-Downs and Body Scans are Unconstitutional," *Washington Post*, November 28, 2010.

<sup>213</sup> Privacy violations form the grounds, in part, for three recent suits brought against the TSA's WBS protocols. In the first, *EPIC v. the Department of Homeland Security*, Case No. 10-1157 (D.C. Cir. filed July 2, 2010), the D.C. Court of Appeals found that the TSA violated the Administrative Procedure Act and indicated that the claimed constitutional violations would prove unconvincing. At the District Court level, in *Redfern & Pradhan v. Napolitano*, Slip Copy, 2011 WL 1750445, D.Mass., May 09, 2011, a court did not reach the constitutional complaint, finding that the TSA's statutory authority granted exclusive jurisdiction to Courts of Appeals. A D.C. District Court reached the same conclusion in *Roberts v. Napolitano*, WL 2678950 (D.D.C. 2011).

<sup>214</sup> Government Accountability Office, GAO report number GAO-12-541T Transportation Security Administration, "Progress and Challenges Faced in Strengthening Three Key Security Programs," March 26, 2012. Available at: [www.gao.gov/assets/590/589588.txt](http://www.gao.gov/assets/590/589588.txt) See also *Corbet v. TSA*, 12-CV20863, SD FL. (2012).

<sup>215</sup> See Kate Dailey, "For Survivors of Sexual Assault, New TSA Screenings Represent a Threat," *Newsweek*, (Nov. 17, 2010), <http://www.thedailybeast.com/newsweek/2010/11/17/tsa-screenings-worry-sexual-assault-survivors.html>.

disparately impact particular passengers, especially women and/or those experiencing previous physical trauma.

In response to mounting public outcry over these nude images and pat downs, on July 20, 2011,<sup>215</sup> TSA Administrator John Pistole announced that the millimeter wave scanners' software would be upgraded to "enhance privacy by eliminating passenger-specific images."<sup>216</sup> Dubbed "stick figure" software,<sup>217</sup> such modifications of scans do not remove privacy concerns, even if the still-graphic initial scan can be filtered into a generic outline. It was "unclear whether the body scanners are capable of capturing, storing, or transferring the underlying graphic naked image."<sup>218</sup> Additionally, without knowing more about the method of data transmission between scanner and display, vulnerabilities over potential interception of raw graphic images remains a concern.<sup>219</sup> Since the possibility for abuse remains if the scans may be converted into more graphic images, whether the silhouette body scanners may impose less unreasonable burdens on travelers is unclear.<sup>220</sup>

"Scanners will not detect material concealed in the groin or in body cavities."<sup>221</sup> Tests show it is unclear whether the scanners would have detected the PETN that the so-called "underwear bomber" Abdulmutallab smuggled on board a flight in December 2009.<sup>222</sup> Yet scanners' effectiveness is assumed by TSA as in its presentation in *EPIC v. DHS* in 2011.<sup>223</sup>

<sup>216</sup> See, e.g., Gary Stoller, "Backlash Grows Vs. Full-Body Scanners, Fliers Worry About Privacy, Health Risks," *USA Today*, (July 13, 2010), at A1. By Evann Gastaldo, "So How Many Terrorists Has the TSA *Actually* Caught? None—that it's publicized, at least," Nov 20, 2010. <http://www.newser.com/user/37321/evann-gastaldo.html?type=stories>. Juliet Lapidus, "Does the TSA Ever Catch Terrorists? If they do, for some reason they won't admit it." Nov. 18, 2010. [http://www.slate.com/articles/news\\_and\\_politics/explainer/2010/11/does\\_the\\_tsa\\_ever\\_catch\\_terrorists.html](http://www.slate.com/articles/news_and_politics/explainer/2010/11/does_the_tsa_ever_catch_terrorists.html). But see, "TSA Top 10 Good Catches of 2011," January 5, 2012, <http://blog.tsa.gov/2012/01/tsa-top-10-good-catches-of-2011.html> For a list of "prohibited, dangerous and illegal items" found by TSA, see TSA "Passenger Screening Using Advanced Imaging Technology," March 26, 2013, at 21-22. The filing does not indicate that any attacks have been halted by this means. Moreover, recently TSA has re-permitted small knives on flights. See Chapman, "Allowing Knives on an Airplane?" *Chicago Tribune*, April 28, 2013, at 23, for the contradictory nature for airline safety.

<sup>217</sup> "TSA Announces Installation of 'Stick Figure' Software for Some Body Scanners," *EPIC*, (July 21, 2011), <http://epic.org/2011/07/tsa-announces-installation-of.html>. TSA replaced nude scanners with stick figures. <http://www.tsa.gov/press/news/2013/01/17/security-effectiveness-and-efficiency>. Adam Snider, "TSA pulls plug on 'naked' body scanners," January 18, 2013, <http://www.politico.com/story/2013/01/tsa-pulls-plug-on-naked-body-scanners-86421.html>

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

<sup>219</sup> *Id.* In a session about the EPIC suit at the Cato Institute on April 2, 2013, lead attorney for EPIC, Ginger McCall suggested that the modified scanners still obtained the nude images (and potentially could retain them) and could not detect powdered explosives. "Travel Surveillance, Traveler Intrusion," [www.cato.org/events/travel-surveillance-traveler-intrusion](http://www.cato.org/events/travel-surveillance-traveler-intrusion) See also details in [epic.org/privacy/body\\_scanners/epic\\_v\\_tsa.html](http://epic.org/privacy/body_scanners/epic_v_tsa.html) on body scanners' retention of images and powder detection.

<sup>220</sup> M. Madison Taylor, *supra* note 147. (Citing *Albarado*, 495 F.2d 799, 807 n.14 (2d Cir. 1974)).

<sup>221</sup> "[T]he Dutch use scanners known as ProVision ATD... If the software detects contraband or suspicious material under a passenger's clothing, it projects an outline of that area of the body onto a gender-neutral, blob-like human image, instead of generating a virtually naked image of the passenger. The passenger can then be taken aside for secondary screening." Rosen, *supra* note 212.

<sup>222</sup> United Press International, "Experts: Whole Body Scanners Can be Fooled," *UPI.COM*, 16 June 2010, available at: [http://www.upi.com/Top\\_News/US/2010/06/13/Experts-Whole-body-scanners-can-be-fooled/UPI-84861276469712/](http://www.upi.com/Top_News/US/2010/06/13/Experts-Whole-body-scanners-can-be-fooled/UPI-84861276469712/). Especially problematic is not requiring passengers to go through a magnetometer, which detect metal, before a scanner or pat down, which might miss a metal object.

<sup>223</sup> Stephen Lord, of the Government Accountability Office (GAO), speaking to Congress in March 2010.

<sup>224</sup> *Elec. Privacy Info. Ctr. v. DHS*, 653 F.3d at 1. TSA, "Passenger Screening Using Advanced Imaging Technology," March 26, 2013, at 7

Passengers are expected not to be shocked or offended by having to pass through either a scanner producing a picture of their (or their children's) nude body or an invasive pat down by a government official. In unrolling those new technologies, the TSA has often been marked for tactless and aggressive application of new protocols.<sup>224</sup> This treatment represents a drastic reversal from the constitutionally protected presumption of innocence. Because of their questionable effectiveness and invasiveness, TSA does not have compelling evidence to submit all passengers to such intrusive searches as primary screening tools.<sup>225</sup>

### Constitutional Questions about Whole Body Scans and Enhanced Pat Down

When viewing "strip searches," even without physical contact, courts balance the value of the search over the loss of an individual's privacy.<sup>226</sup> The Sixth Circuit in *Reynolds v. City of Anchorage* stated that the virtual strip search violates the rights guaranteed by the Fourth Amendment unless the "scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the [subject of the search] and the nature of the infraction."<sup>227</sup> Under this test, with the default to scan anyone, Whole Body Scans violate the Fourth Amendment prohibitions of unreasonable searches and seizures.

*Kroll* and *Albarado* would also find searches like Whole Body Scans and Enhanced Pat Downs too invasive to pass constitutional muster.<sup>228</sup> In looking to the liberty of travelers, the government also fails balancing tests like *Skipwith* because WBS are ineffective and violate Constitutional rights without protecting safety. An ineffective search is *per se* unreasonable.<sup>229</sup>

Using the balancing tests in *Skipwith*, Whole Body Scans and Enhanced Pat-Downs are unreasonable, invasive, and unnecessary in the three factor test for violating the Fourth Amendment: public necessity, efficacy, and intrusion.<sup>230</sup> Although protection from a terrorist attack in a plane is a public purpose, Whole Body Scans fail the next two *Skipwith* prongs of efficacy and intrusion. The searches themselves fail to protect the public. Considering the likely evasion by the so-called "underwear bomber" even had a scanner been in use, as well as the inherent weaknesses of the technology, as the GAO report demonstrates,<sup>231</sup> body scanners simply provide terrorists with a hurdle a fanatic can easily overcome. Little evidence exists that shows

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<sup>225</sup> See, e.g., Ben Mutzabaugh, "TSA Under Fire for Enhanced Pat Down of 6-Year-Old Girl," *USA Today*, April 13, 2011, available at <http://travel.usatoday.com/flights/post/2011/04/tsa-screening-controversy/155793/1>; Joel Johnson, "One Hundred Naked Citizens: One Hundred Leaked Body Scans," *Gizmodo*, (Nov. 16, 2010), <http://gizmodo.com/5690749/these-are-the-first-100-leaked-body-scans?skyline=true&s=i>.

<sup>226</sup> Recently the TSA has begun phasing out back-scatter (nude) scans for stick figure machines. Whether the stick figures could be converted into nude scans is unclear. See *supra* note 217.

<sup>227</sup> *Reynolds v. City of Anchorage*, 379 F.3d 358, 361 (6th Cir. 2004) (The police officer defendant conducted a virtual strip search, in which she inspected but did not touch the plaintiff she instructed to disrobe).

<sup>228</sup> *Id.*

<sup>229</sup> See *Kroll*, 481 F.2d at 885; *Albarado*, 495 F.2d at 807.

<sup>230</sup> See William W. Greenhalgh, "In defense of the 'per se' rule: Justice Stewart's struggle to preserve the Fourth Amendment's warrant clause," *American Criminal Law Review*, Vol. 31 No. 4, June 1994

<sup>231</sup> 482 F.2d 1272, 1276 (5th Cir. 1973).

<sup>232</sup> Transportation Security Administration: "Progress and Challenges Faced in Strengthening Three Key Security Programs," *supra* note 214.

the efficacy of the WBS to prevent terrorist attacks.<sup>232</sup> In short, applying *Skipwith* today, the body scanners fail.<sup>233</sup>

Yet a circuit court used this balance as recently as *Elec. Privacy Info. Cert. v. U.S. Dept. of Homeland Sec.* in 2011.<sup>234</sup> The DC Circuit Court described the necessity to balance two factors, “degree to which the search intrudes upon an individual’s privacy and the degree to which it is needed for the promotion of legitimate governmental interests”<sup>235</sup>

The court found that WBS passed the test, but the decision barely discussed the facts of the case and ignored the ineffectiveness of the scans.<sup>236</sup> *EPIC* restates fewer prongs of what is necessary than *Skipwith*, because this decision does not as clearly require efficacy. Since efficacy matters, the scans fail the test, because they do not work to increase safety against the type of explosive they are supposed to detect. As with the more obtrusive nude body images, the new stick figure software scans fail to mitigate concerns that even upgraded devices will not be able to detect powdered explosives such as PETN.<sup>237</sup> Nor can the scans find internally concealed weapons. In short, as generally ineffective, WBS are not reasonable, and fail *Skipwith*’s second prong (efficacy).

In response to the court order in *EPIC v. DHS*, the TSA issued “Passenger Screening Using Advanced Imaging Technology,” on March 26, 2013. It claims that “the TSA was created to ensure freedom of movement for people and commerce...[and] effectively securing all modes of transportation, including aviation.”<sup>238</sup>

Other technologies that are not as intrusive as the WBS provide better layers of security. They also protect travelers’ constitutional rights. These include metal detectors for weapons and hand swabs to detect explosive particles.<sup>239</sup> On the other hand, “[u]nlike metal detectors, the body imagers rely on TSA employees to accurately read the image.”<sup>240</sup> Moreover, the rate of detection by employees reading X-ray screenings of baggage is “disastrously low, and it’s no better than it was on 9/11.”<sup>241</sup> Yet, the operation of the Whole Body Scanners depends on the same employees, but with the added distraction of viewing nude human images. Thus, body scanners are no more

<sup>233</sup> See Michael Kelly, “The Government Admits that TSA Body Scanners are a Huge Waste of Money,” *Business Insider*, (May 10, 2012) [http://articles.businessinsider.com/2012-05-10/politics/31650296\\_1\\_tsa-to-advanced-imaging-technology-scanners](http://articles.businessinsider.com/2012-05-10/politics/31650296_1_tsa-to-advanced-imaging-technology-scanners).

<sup>234</sup> See *Skipwith*, 482 F.2d at 1275.

<sup>235</sup> *Elec. Privacy Info. Cert.*, 653 F.3d at 1. See also, *U.S. v. Hartwell*, 436 F.3d 174, 179-180 (3d Cir. 2006) (The court applied a three part balancing test looking at necessity, the effectiveness of the search, and the level of invasiveness); *U.S. v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (the court describes using the test “no more extensive nor intrusive than necessary under the circumstances.” This in effect is also the same balancing test wherein the government interest and importance of those circumstances are weighed against the effectiveness and intrusiveness of the search being conducted).

<sup>236</sup> *Elec. Privacy Info. Cert.*, 653 F.3d at 10 (quoting *United States v. Knights*, 534 U.S. 112, 118–19 (2001)).

<sup>237</sup> *Id.*

<sup>238</sup> Kelly, *supra* note 233.

<sup>239</sup> TSA, “Passenger Screening Using Advanced Imaging Technology,” March 26, 2013 at 10. See [epic.org/redirect/TSAcomment](http://epic.org/redirect/TSAcomment) on the efficacy of Alternative #3, metal detectors and swabs.

<sup>240</sup> See Steve Chapman, “A Radical Idea for Airline Security,” *Chicago Tribune*, July 18, 2010. The TSA federal register submission notes in Table 9, Regulatory Alternative #3, ETD Screening (Explosive trace detection), “Under this alternative, TSA continues to use WTMDs as the primary passenger screening technology. In addition, TSA supplements the WTMD screening by conducting ETD screening on a randomly selected portion of passengers after screening by WTMD.” Details discussed in Chapter 3 of regulatory evaluation located in this docket (p. 29), which could not be located.

<sup>241</sup> Dilanian, *supra* note 203.

<sup>242</sup> *Id.*

reliable than baggage X-ray machines with the added inability to identify objects under skin folds and in body cavities. These expensive devices unreasonably divert resources that could be better spent on more effective and less intrusive technologies.

More traditional police and intelligence work, for threats both to aviation and other forms of transportation, are also better investments of scarce funds. Individually targeted investigations typically prove more effective in deterring threats *before* they arrive at airports or other travel nodes.<sup>242</sup>

In short, also under the third prong (intrusion) of *Skipwith*, Whole Body Scanners fail the test because the degree of intrusiveness is extreme. The search procedure violates privacy in body scanners' nature as a virtual strip search. Similarly, their alternative, a highly invasive pat down, fails in its intrusiveness as well.

Whole Body Scanners also fails the intrusive prong of the *Skipwith* test because of the psychological trauma that can result from this sort of intrusive violation of personal bodily rights.<sup>243</sup> This includes fear of being touched in a pat down, which can trigger flashbacks and other traumatic experiences.<sup>244</sup> This trauma does not stop at physical contact; for victims of sexual assault that involved being photographed, the Whole Body Scanning can reignite the previous trauma.<sup>245</sup>

Moreover, both body scanners and pat downs have more discriminatory impacts on women and others.<sup>246</sup> "Searches and seizures that create opportunities for sexual oppression, harassment, or embarrassment are unreasonable both as a matter of common sense and constitutional morality, whether one uses the language of privacy or equality or both."<sup>247</sup> Airport searches' disparate

<sup>243</sup> See Steven E. Miller, "After the 9/11 Disaster: Washington's Struggle to Improve Homeland Security," 2 *Axess* 8. Available at: [http://belfercenter.ksg.harvard.edu/publication/254/after\\_the\\_911\\_disaster.html](http://belfercenter.ksg.harvard.edu/publication/254/after_the_911_disaster.html)

<sup>244</sup> Willard Shepard and Brian Hamacher, "Suspicious Package: TSA Worker Jailed After Junk Joke," *NBC*, (May 7, 2010), <http://www.nbcmiami.com/news/local/TSA-Fracas-After-Body-Scanner-Reveals-TMI-92971929.html> (A TSA worker continually mocked due to the size of his genital, which was seen because he walked through a whole body scanner, snapped and violently beat a fellow worker who mocked him).

<sup>245</sup> Dailey, *supra* note 215. "[W]e've had a number of survivors who have had their pictures taken and put online,' as part of a sexual assault, says Lambert. 'So for them, even though [the TSA photo is] deleted, even if the person is in the other room, the idea that the photo's being taken can be difficult to handle.' For adults who were assaulted as children, watching their children go through either invasive photographs or excessive pat-downs can be traumatic as well." All these problems exist even assuming there is no misuse of power by a TSA agent.

<sup>245</sup> The TSA "Passenger Screening Using Advanced Imaging Technology, March 26, 2013, notes that "individuals are directed to stand with arms raised and to remain still for several seconds, while the image is created, at 21. TSA accommodates those passengers whose conditions "make them ineligible for AIT screening because they cannot stand in the necessary pose." The nature of this "necessary pose" as that of a suspect or arrestee also raises issues of demeaning and intrusive official requirements.

<sup>247</sup> Profiling is discriminatory when the TSA targets individuals based on their race or family origins, such as targeting Mexicans and Dominicans. (Harriet Baskas, "Report: TSA Screeners at Newark Airport Targeted Mexicans," MSNBC, (June 14, 2011), <http://overheadbin.msnbc.msn.com/news/2011/06/13/6849790-report-tsa-screeners-at-newark-airport-targeted-mexicans>.) As Daniel Solove suggests, when "[a]n individual fitting a profile" is made to "refrain from doing things he is legally entitled to do," including travel with ease and dignity, then he is "being treated no longer as an equal but as someone who is inherently suspicious. No law-abiding citizen should be treated this way." (Daniel Solove, *Nothing to Hide: The False Tradeoff between Privacy and Security* 197 (2011).) Through its ubiquitous primary screening protocols, the TSA has begun to do to all passengers what it has selectively and illegally done to many of those profiled in the past: treat them as people who are "inherently suspicious." *Id.*

<sup>248</sup> Akhil Reed Amar, "Fourth Amendment First Principles," 107 *Harv. L. Rev.* 757, 808-09 (1994).

impact on women can be extensive.<sup>248</sup> Many women who have been singled out for search feel targeted and other women feel particularly sensitive to violations of their bodily privacy.<sup>249</sup> Over the years, the TSA has received hundreds of complaints by women about mistreatment by TSA agents.<sup>250</sup> Women, or men, who have previously been molested or abused in some way are especially vulnerable and at risk from these searches.<sup>251</sup>

Using multipronged balancing tests in *Skipwith*, the government has evaded the Fourth Amendment in airports, by understating the intrusiveness of the searches and overvaluing their effectiveness in preventing terrorism. In *Electronic Privacy Information. Center v. U.S. Dept. of Homeland Security*, the D.C. Circuit described the necessity to balance two factors of the degree the search “intrudes upon an individual’s privacy” and to which it promotes legitimate governmental interests.<sup>252</sup> *EPIC* specifically dealt with the advanced imaging technologies (AIT or WBS) implemented in lieu of magnetometers. *EPIC* challenged this new policy on a number of grounds, including a violation of the Fourth Amendment on its face.<sup>253</sup> Though restating in fewer prongs *Skipwith*, *EPIC* does not as clearly indicate the essentiality of efficacy for constitutionality.

Although *EPIC* lost the Fourth Amendment challenge, the ineffectiveness of the scans fails the constitutional test. While holding the least intrusive method has never been prescribed by the Supreme Court, the appellate court places too much faith into the efficacy of the scanners.<sup>254</sup> Furthermore, the decision underplays the ineffectiveness of the searches. The Constitution protects against actions not intentions. Ineffective methods are *per se* unreasonable and hence unconstitutional. The court also fails to consider the erosion of the rights to travel and privacy in dismissing the Fourth Amendment claim.<sup>255</sup>

Nonetheless, the D.C. Circuit court required TSA to follow a rule making procedures. It noted that AIT as primary screening “substantively affects the public to a degree sufficient to implicate the policy interests animating notice and comment rulemaking.” In short, the court recognized the widely intrusive nature of whole body scanning required further examination.<sup>256</sup>

Far from offering a solution to preventing terrorist attacks on airlines more intrusive measures like Whole Body Scans and Enhanced Pat Downs are props in “security theater.”<sup>257</sup> “In the absence of clear and convincing evidence of the effectiveness . . . the Court can easily imagine

<sup>249</sup> Kate Merrill, “Many Women Feel Targeted by TSA Agents,” *CBS*, (Feb. 16, 2012), <http://boston.cbslocal.com/2012/02/16/many-female-travelers-feel-targeted-by-tsa-agents/>.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> 653 F.3d at 10 (quoting *United States v. Knights*, 534 U.S. 112, 118–19 (2001)).

<sup>254</sup> *Id.* at 3.

<sup>255</sup> See *id.* at 10.

<sup>256</sup> The *EPIC* opinion is unduly dismissive in accepting that an airport scan is necessary for public safety, and ignores the ineffectiveness and invasion of privacy WBS entails. *Elec. Privacy Infor. Ctr.* 653 F.3d at 10. Additionally, while the court cites *Hartwell* in saying that one does not need the “minimally” intrusive search method to be consistent with the Fourth Amendment, *Hartwell* did not discuss the limits of what level of intrusion would be permissible. The court in *Elec. Privacy Infor. Ctr.* fails to grapple with this issue as well. Compare *United States v. Hartwell*, 436 F.3d 174, 175–76 (3d Cir. 2006) and *Elec. Privacy Infor. Ctr.*, 653 F.3d 10–11 (D.C. Cir. 2011). In *Hartwell*, cocaine was located when the defendant’s bag passed through a magnetometer. While the court argues the test was minimally intrusive, it did “not purport to set the outer limits of intrusiveness in the airport context.” *Hartwell*, 436 F.3d at 180.

<sup>256</sup> *EPIC v. DHS*, 653 F.3d, 1 (DC Cir, 2011) at 6.

<sup>257</sup> Schneier, “Security Theater,” *supra* note 110.

other methods of law enforcement which are less intrusive upon individual rights of Plaintiffs.”<sup>258</sup> WBS fail to do much more than provide false comfort to travelers and the public while limiting their rights and diverting resources.

As casualties of the rhetoric of the government’s “War on Terror” as justification for invasive scans and security regulations, citizens have had to yield to overly burdensome, yet not demonstratively more effective discomforts and indignities associated with the increased security measures.<sup>259</sup> The burdens<sup>260</sup> and the requirements imposed for air transportation further discourage citizens and other persons from exercising their right to travel.<sup>261</sup>

In short, official air identification requirements, passenger pre-screening programs like “Secure Flight,” and “No Fly” lists, and intrusive scans and searches, all raise constitutional questions from their impingements on the right to travel. Each of these and their combination restrict constitutionally guaranteed rights to travel. Each limits travel rights even though their efficacy is questionable and unproven. Moreover, the scans and searches are intrusive on personal privacy in travel beyond their benefits or effectiveness.

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<sup>258</sup> *Shankle v. Texas City*, 885 F. Supp. 996, 1002 (S.D. Tex. 1995).

<sup>259</sup> Although the federal government’s efforts to prevent airplane hijacking have dramatically risen since 2001, the terrorist threat itself has not magnified substantially since 1968, when “[t]he major governmental effort to meet the threat of hijacking began.” *Davis*, 482 F.2d at 897. The last hijacking before September 911 was in 1991. “Note: There were no hijackings in the United States from 1991 through 2000. Data are through 2000 and do not include the hijacking of 4 airplanes used in attacks on the United States by terrorists on Sept. 11, 2001.” Source: U.S. Department of Transportation, Federal Aviation Administration, Office of Civil Aviation Security, *Criminal Acts Against Civil Aviation*, <http://cas.faa.gov/crimacts/pf/crim2000.pdf>, as of Feb. 8, 2002.

<sup>260</sup> Scanners using x-rays, which were banned in Europe for radioactivity concerns, are invasive as they bombard the skin of travelers with radiation. When it comes to violating a person’s privacy or bodily integrity, violating one’s privacy in a harmful fashion is doubly intrusive. Travelers experience a health risk merely by going to the airport and passing the WBS security checkpoint. Ben Mutzabaugh, “Full-Body Scanners Could Pose Cancer Risk at Airports, U.S. Scientists Warn,” *USA Today*, (July 1, 2010), <http://travel.usatoday.com/flights/post/2010/07/full-body-scanners-pose-cancer-risk-at-airports-us-scientists-warn/98552/1>

<sup>261</sup> See TSA, *Screening Management Standard Operating Procedures*, 2008. The manual includes discriminatory policy for individuals of certain nationalities. (Id. at App. 2A-2 (C)(1)(b)(iv)). See also requirement that TSA evaluate the impact on lost travel opportunities for those who reduce or end their air travel because of objections to whole body scanning or enhanced pat downs in TSA, “Passenger Screening Using Advanced Imaging Technology,” March 26, 2013, at 7-8. A similar analysis might apply to those who no longer fly because of objections to being required to provide air identification.

## CONCLUSION: TOWARD A ROBUST RIGHT TO TRAVEL

The right to travel has been a fundamental political liberty since the Magna Carta, Blackstone's *Commentaries*, and the Articles of Confederation. Domestically, it is broadly-based in the privileges and immunities in the U.S. Constitution and encompasses all modes of travel across the federal union.

The travel right encompasses personal, political, and commercial movement fundamental to the United States by effectively stitching the union together. The right to travel guarantees the free movement of people and goods throughout the nation. It allows citizens to exercise other fundamental rights, like petitioning for redress and privacy, guaranteed by the Constitution and Bill of Rights.

The federal government's extensive national jurisdiction provides American citizens with constitutional protection for traveling domestically on common carriers. The single mode doctrine fails for its inconsistencies with the potent original historical and political articulations of travel rights. It also fails for its undue burdens on long distance travel, especially from the non-contiguous United States, necessary to live and carry out economic and political activities also within the contiguous U.S. territory. ID requirements and passenger pre-screening programs similarly abridge the right to travel.

The constitutionality of Whole Body Scans and Enhanced Pat Down searches under travel rights and the Fourth Amendment remains in question due to conflicting circuit court tests because the Supreme Court has not addressed the issues. Under the primary test in *Skipwith* about necessity of the search, efficacy, and intrusiveness, Whole Body Scans and Enhanced Pat Downs fail constitutionally because they are ineffective and unnecessarily intrusive. Whole body scanning and pat down searches as primary screening in airports are too invasive in pitting two fundamental rights against each other: the right to travel and the right to privacy.

The impositions of burdens and regulations like government identification requirements, passenger watch-list programs, and Secure Flight passenger pre-screening and permission programs undermine the nature and exercise of the travel right. They make travel a privilege requiring governmental approval, and they form the basis for a domestic passport system that undermines the right to travel and other fundamental freedoms. Similarly, the imposition of unreasonable searches like Whole Body Scans or Enhanced Pat Downs violates Fourth Amendment rights to privacy complementary to and implicit in the right to travel.

The travel right is multi-modal and encompasses all methods of transportation. Contrary to the crabbed single mode doctrine, if any single mode of transportation is limited, then citizens' constitutionally enshrined rights of travel are abridged. Moreover, the lawful and healthy relationship between the government and those it governs by their consent becomes inverted by requirements for government ID and permission to travel. In the post-9/11 era, overreaching government agencies have assaulted the foundational travel and privacy rights.

Certain circuit courts have misstepped by inaptly construing as narrow the original broad scope and strength of the right to travel, which empowers the very nature of a more perfect union. The Supreme Court of the United States needs to step in now to correct the course by articulating a plenary and multi-modal meaning to the constitutional right to travel.