MAY A STATE OR THE FEDERAL GOVERNMENT CLOSE STATE BORDERS TO PEOPLE OR GOODS DURING A PANDEMIC?

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“Pestilence, like war, disrupts society, and silences the law. It may excuse delay where there has been reasonable diligence, and demands the most careful application of rules adapted to a normal state of affairs.

...”

Sims v. State, 72 Tenn. 357, 360 (1880).
COVID-19 State Border Restrictions

- Last week, Rhode Island Governor Gina Raimondo, issued an executive order commanding that: "Any person coming to Rhode Island from New York State must immediately self-quarantine for 14 days."

- Gov. Raimondo also ordered that:
  - anyone entering Rhode Island from New York State by car, bus or train be stopped and interrogated.
  - State Police must stop New York licensed motorists entering the State.
  - The Governor deployed the Rhode Island National Guard with instructions to go “door-to-door” in the state’s coastal communities, asking if anyone has come from New York and requesting their contact information.

- Gov. Raimondo asserted: “Right now we have a pinpointed risk” of coronavirus transmission. “That risk is called New York City.”
New York’s Response and Rhode Island’s Escalation

- New York Gov. Andrew Cuomo threatened to sue Rhode Island.
- Such a suit would be heard by the U.S. Supreme Court.
  - *The Constitution requires that “Controversies between two or more States” must be filed directly in the Supreme Court.* U.S. Const. art. III § 2.
- Gov. Raimondo issued a new order *expanding her prior Order to*
  - “*all visitors from any state, by any mode of transportation who are coming in Rhode Island for non-work purposes and plan to stay.*”
Alaska, Hawaii, and Florida Follow Suit

- Florida Gov. Ron DeSantis issued an Executive Order requiring anyone that arrives by plane in Florida from New York, New Jersey, or Connecticut must self-quarantine for 14 days upon arrival.

- Alaska and Hawaii issued similar orders applicable to anyone who arrives from the lower 48.
The Constitutional Right to Trade and Travel

“The people of these United States constitute one nation.” This demands the freedom of people to freely travel “from all quarters of the nation, and no power can exist in a State to obstruct this right . . . .” Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 44 (1868).

The Constitution “protects the right of a citizen of one State to enter and to leave another State” and “the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State . . . .” Saenz v. Roe, 526 U.S. 489, 500 (1999).
The Constitutional Right to Trade and Travel

- The Constitution prohibits any law that “blocks the flow of interstate commerce at a State’s borders.”
  

- Permitting a State to “isolate” itself “would be to invite a speedy end of our national solidarity. The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”
  
The principal objective of the Constitutional Convention was the establishment of a nationwide free-trade zone.
We’ve Been Here Before

- Between 1879 and 1905 the Southeastern U.S. suffered annual summer Yellow Fever outbreaks, which killed hundreds of thousands. The disease is manifested by horrifying symptoms, similar to Ebola.

- During the 1878 outbreak, more than 20,000 Southeastern residents died and the region suffered $100 million in economic losses — approximately $2.7 billion today.

- Modern science understands that Yellow Fever is spread by mosquitos who become infected when biting an infected person and spread it to others.

- But 19th century leaders believed that the disease was highly contagious and spread by infected people and goods.
We’ve Been Here Before

- State and local governments enacted “shotgun quarantines” — closing their borders to people and goods at the first report of infection in a neighboring state.

- Posses guarded state borders at all entrance points.

- Entry — if permitted at all — was often conditioned on providing a card evidencing that the possessor had previously suffered and recovered from Yellow Fever — demonstrating presumed immunity.

- Such cards, notably, did not exempt goods in the passenger’s possession from disinfection or destruction.
The Supreme Court Is Asked to Weigh in

- In 1900, Louisiana sued Texas in the Supreme Court after Texas closed its borders to Louisianans — stopping trains at the border and refusing to allow vessels from Louisiana to dock at Texas’s ports in the Gulf and Red River.

- Louisiana claimed that Texas was using Yellow Fever as a pretext to engage in protectionism.

- The Court invoked a technicality to avoid deciding the case.

*Louisiana v. Texas, 176 U.S. 1 (1900).*
What Would the Court Say?

- While state laws closing borders to goods from other states are "virtually" always unconstitutional "per se," a State may do so if its law can pass "strict scrutiny"
  
  - The restriction is the "least restrictive means of achieving a compelling state interest" — i.e., there must not be a less restrictive way to effectively accomplishing this goal. *Maine v. Taylor*, 477 U.S. 131, 141 (1986).

  - This test is often said to be "strict in theory, but fatal in fact." *Bernal v. Fainter*, 467 U.S. 216, 219 (1984).
What Would the Court Say?

- The Court found that a Maine law banning importation of bait fish satisfied strict scrutiny because Maine had proven that neighboring states’ populations of the fish were widely contaminated with non-native parasites. *Maine v. Taylor*, 477 U.S. 131, 141 (1986).

- In the 19th century, the Court stated that States may block the importation of goods “*which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased.*” *Bowman v. Chicago Ry.*, 125 U.S. 465, 489 (1888).

- The Court has *never* addressed a ban on *people*, nor has it addressed a ban on commerce generally.
What Can the Federal Government Do?

- The Public Health Service Act authorizes the president, through the Secretary of Health and Human Services, to close U.S. points of entry, to “apprehend[d] and examin[e]” and prevent interstate travel by “any individual reasonably believed to be infected with a communicable disease.” 42 U.S.C. § 264.

- For example, the famous federal “no-fly list” includes individuals known by the CDC to be infected with communicable diseases.

- The statute does not explicitly authorize generalized border closure — only restraints on passage of specific infected individuals.

- Fed’l law also “may not be construed as superseding any provision under state law.” 42 U.S.C. § 264.
Emergency Power?

■ Is there any emergency power which may be invoked?

■ Usually — even in emergencies — when Congress has provided the president with specific power, this is deemed to implicitly deny the president any greater powers.


■ “Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency.”