GIBSON DUNN

The Constitutional Consequences of Governmental Responses to COVID-19: The Right to Travel and the Dormant Commerce Clause

Client Alert | May 1, 2020

The COVID-19 pandemic has resulted in unprecedented governmental actions at the federal, state, and local levels. Those actions have raised substantial constitutional questions. In previous alerts, we discussed the constitutional implications of various proposed legislative and executive actions in response to COVID-19, including under the Takings, Contracts, Due Process, and Equal Protection Clauses of the U.S. Constitution.[1] Here, we flag additional business-related constitutional questions raised by the government's restrictions on travel, with a particular focus on the extent of a state's authority to impose restrictions on out-of-state visitors and to restrict interstate travel. As governments continue to take swift and often unprecedented action in response to the pandemic, additional novel constitutional challenges are likely to arise.

As COVID-19 has spread, some state and local governments have erected checkpoints at which they stop, order quarantine of, and even turn away travelers arriving from states with substantial community spread of the virus.[2] Other states have barred short-term rentals to individuals arriving from out of state, making it impractical to travel to those locations.[3] And all over the country, states and localities have imposed significant restrictions on their own citizens' ability to travel even within the state or locality. While some state quarantine restrictions provide broad exceptions for travelers engaging in commerce, others do not, and in the latter group of states businesses may find routine commercial activity—*e.g.*, interstate transport of goods and employee business travel—far more difficult to conduct.[4]

These and similar restrictions implicate the constitutional right to travel. That right—whose textual source has long remained "elusive"[5]—"embraces at least three different components[:] the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). Under Supreme Court precedent, the right to travel is typically applied to an individual who wishes to travel—not necessarily to goods she wishes to transport. But since commercial transport today depends in large part upon the movement of people—from the truck driver to the pilot—restraints on an individual's right to travel necessarily inhibit the transport of goods.

State laws implicate the right to travel where, *inter alia*, they deter, intend to impede, or utilize classifications that punish interstate travel. *Soto-Lopez*, 476 U.S. at 903. And a law that burdens the right to travel is unconstitutional "[a]bsent a compelling state interest." *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972).[6] In keeping with the right's multifaceted nature, courts have relied on it to invalidate state restrictions in a variety of contexts. *See, e.g.*, *Soto-Lopez*, 476 U.S. at 911 (invalidating New York restriction of civil

Related People

Jason Bressler

Akiva Shapiro

service preference to veterans entering armed forces while living in state); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974) (invalidating Arizona 1-year residency requirement for receiving nonemergency hospitalization or medical care); *Crandall v. Nevada*, 6 Wall. 35 (1868) (invalidating Nevada tax imposed on individuals leaving state by railroad, coach, or other vehicle transporting passengers for hire).

Quarantine and travel restrictions may also raise related questions under the dormant Commerce Clause, which is more often litigated in the commercial context. Although the Commerce Clause "is framed as a positive grant of power to Congress," the Supreme Court has "long held that this Clause also prohibits state laws that unduly restrict interstate commerce." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).[7] If a state law affirmatively discriminates against interstate transactions, it is presumptively invalid, passing constitutional muster only if its "purpose could not be served as well by available nondiscriminatory means." *See Maine v. Taylor*, 477 U.S. 131, 138 (1986); *see also Granholm v. Herald*, 544 U.S. 460 (2005). If a law is nondiscriminatory, courts require that the law's benefits to the state exceed its burden on interstate commerce. *See Taylor*, 477 U.S. at 138. But the dormant Commerce Clause doctrine admits two exceptions: (i) state laws authorized by valid federal laws, and (ii) states acting as "market participants," which covers distribution of state benefits and the actions of state-owned businesses. *See Ne. Bancorp v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985); *White v. Mass. Council of Constr. Emp'rs*, 460 U.S. 204, 206–08 (1983).[8] Dormant Commerce Clause analysis is often fact-intensive, especially when the balancing test for nondiscriminatory laws is applied. *See Pike v. Bruce Church*, 397 U.S. 137, 139–42 (1970).

The more restrictive dormant Commerce Clause standard may well apply in the COVID-19 context, where certain quarantine requirements appear facially discriminatory by applying only to out-of-state travelers. As a result, such requirements would be presumed invalid unless there are no available nondiscriminatory means that can advance its purposes. While a high threshold, this test is not a death knell for the travel restrictions. The Supreme Court and other courts have upheld discriminatory laws at times, with significant deference to the factual findings of lower courts. *See Taylor*, 477 U.S. at 141, 146–48 (upholding Maine restriction on importation of out-of-state baitfish, finding no "clear[] err[or]" in the district court's factual findings regarding the effects of baitfish parasites and non-native species on Maine's wild fish population); *see also Shepherd v. State Dep't of Fish & Game*, 897 P.2d 33, 41–43 (Alaska 1995) (holding that requirements giving hunting preferences to Alaska residents adequately promoted state interest in "conserving scarce wildlife resources for Alaska residents").

Any challenge under either the right to travel or the dormant Commerce Clause would likely be evaluated based on the breadth and severity of the restrictions on travel, the difference (if any) on the treatment of in-state and out-of-state residents, the exigencies and public health needs faced by the geographic area at issue, the impact on interstate commerce of the restrictions challenged, the feasibility and efficacy of alternative, narrower constraints on movement that just as successfully combat the spread of the virus, and whether quarantine requirements and other restrictions are properly calibrated to achieve their public-health objectives. In addressing these issues, courts may also consider whether states are acting pursuant to federal law and, where it is the federal government that is acting, whether it is acting pursuant to the Spending Clause. *See* U.S. Const. art. I, § 8, cl. 1.

In evaluating challenges under both the right to travel and the dormant Commerce Clause doctrines, courts will look to the limited precedent arising in the context of quarantines. In cases that generally pre-date modern jurisprudence on the right to travel and the dormant Commerce Clause, the U.S. Supreme Court has upheld quarantines—particularly those imposed pursuant to states' police powers—for public health reasons. In *Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana*, 186 U.S. 380 (1902), for example, the Court upheld a New Orleans ordinance prohibiting all domestic and foreign travelers—regardless of health status—from entering the city because of a

yellow fever outbreak, noting that it was "not an open question" that state quarantine laws are constitutional, even where they affect interstate commerce. *Id.* at 387. On the other hand, some courts have rejected quarantine measures when imposed against individuals for whom the state had no reasonable basis to suspect individual infection or exposure to the disease. *See, e.g.*, *In re Smith*, 40 N.E. 497, 499 (N.Y. 1895) (rejecting Brooklyn quarantine of individuals who had refused smallpox vaccination as overbroad under New York health law which, because it affected "the liberty of the person," was to be "construed strictly," without explicitly referencing the right to travel).

In the event that states' quarantine requirements in response to COVID-19 face constitutional challenges, courts may be called upon to reconcile these lines of precedent—weighing the fundamental right to free travel and entitlement to equal treatment for out-of-state citizens against the compelling need to prevent the spread of contagion. Courts will likely also consider precedent recognizing the states' well-established "police power" in addressing public health crises. *See, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) (upholding state's mandatory vaccination during smallpox outbreak); *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015) (relying on *Jacobson* in rejecting substantive due process and free exercise challenges to New York mandatory school vaccination requirement). Courts may likewise consider the fact that quarantines necessarily require establishing boundaries, which logically may be drawn using existing state or municipal borders.

Furthermore, in an environment in which states have adopted divergent approaches to quarantines and similar restrictions, courts may bear important principles of federalism in mind. Nearly a century ago, Justice Brandeis lauded the states as "laborator[ies]" for "novel social and economic experiments," *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)—a famous phrase that may sound more literal than metaphorical today. While the Constitution guarantees liberty in interstate travel and trade, it also seeks to protect the autonomy and creativity of the individual states. And those principles may well conflict if, for instance, one state determines that more restrictive quarantine measures are appropriate than a sister state. Resolution of any such conflict may require, as with many issues related to COVID-19, a challenging balance of individual liberty and federalism interests.

As federal, state, and local governments continue to restrict the movement of people and goods in response to COVID-19, it is unclear whether their actions will be challenged under the constitutional provisions outlined above, much less how those challenges would fare in court. Nonetheless, constitutional constraints on governmental action remain significant. Even in these unprecedented times, all levels of government must make sure to implement responses that grant proper deference to the principles and precedent underlying the constitutional provisions discussed above.

---

[1] *See Constitutional Implications of Government Regulation and Actions in Response to the COVID-19 Pandemic* (Mar. 27, 2020), https://www.gibsondunn.com/constitutional-implications-of-government-regulations-and-actions-in-response-to-the-covid-19-pandemic/; *Constitutional Implications of Rent- and Mortgage-Relief Legislation Enacted in Response to the COVID-19 Pandemic* (Apr. 15, 2020), https://www.gibsondunn.com/constitutional-implications-of-rent-and-mortgage-relief-legislation-enacted-in-response-to-the-covid-19-pandemic/; *New York Governor v. New York City Mayor: Who Has the Last Word on New York City's Business Shutdown?* (Apr. 18, 2020), https://www.gibsondunn.com/new-york-governor-v-new-york-city-mayor-who-has-the-last-word-on-new-york-citys-business-shutdown/.

[2] *See, e.g.*, Fla. Exec. Order No. 20-86 (Mar. 27, 2020) (directing establishment of road checkpoints and mandating self-quarantine for travelers from states with substantial community spread of COVID-19), *available at* https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-86.pdf; R.I. Exec Order No. 20-12 (Mar. 26, 2020),

(requiring travelers from New York to self-quarantine for 14 days), *available at* http://www.governor.ri.gov/documents/orders/Executive-Order-20-12.pdf; *see also* Joe Barrett, *Tourist Towns Say, 'Please Stay Away,' During Coronavirus Lockdowns*, Wall St. J., Apr. 6, 2020 (discussing Florida Keys ban on visitors but not property owners, and Cape Cod petition to turn away visitors and nonresident homeowners from bridges that provide the only road access to the area), https://www.wsj.com/articles/tourist-towns-say-please-stay-away-during-coronavirus-lockdowns-11586165401?.

[3] *See, e.g.*, Fla. Exec. Order No. 20-87 (Mar. 27, 2020) (suspending certain vacation rentals on the basis that "vacation rentals and third-party platforms advertising vacation rentals in Florida present attractive lodging destinations for individuals coming into Florida"), *available at* https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-87.pdf.

[4] *Compare, e.g.*, Fla. Exec. Order No. 20-86 (exempting "persons involved in any commercial activity" from self-quarantine requirement), *with Second Supplementary Proclamation – COVID-19*, Office of the Governor, State of Hawaii (Mar. 21, 2020) (exempting only "persons performing emergency response or critical infrastructure functions who have been exempted by the Director of Emergency Management" from Hawaii out-of-state self-quarantine requirement), *available at* https://governor.hawaii.gov/wp-content/uploads/2020/03/2003152-ATG_Second-Supplementary-Proclamation-for-COVID-19-signed.pdf.

[5] *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 902 (1986). The right to travel "has been variously assigned to the Privileges and Immunities Clause of Art. IV, to the Commerce Clause, and to the Privileges and Immunities Clause of the Fourteenth Amendment." *Id.* (citations omitted); *see also Jones v. Helms*, 452 U.S. 412, 418 (1981) ("Although the textual source of this right has been the subject of debate, its fundamental nature has consistently been recognized by this Court."). The Supreme Court has also stated that the right is "part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (plurality opinion).

[6] The Supreme Court has distinguished the constitutional right to interstate travel from the freedom to travel abroad; the former is "virtually unqualified," while the latter is "no more than an aspect of the 'liberty' protected by the Due Process Clause [and] can be regulated within the bounds of due process." *Haig v. Agee*, 453 U.S. 280, 306–07 (1981) (quoting *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978)).

[7] In recent years, "some Members of the [Supreme] Court have authored vigorous and thoughtful critiques" of the dormant Commerce Clause. *Tenn. Wine*, 139 S. Ct. at 2460 (collecting opinions of Justices Gorsuch, Scalia, and Thomas). "But," the Court noted last term, "the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law." *Id.*

[8] Where governmental actions are challenged on a basis other than the dormant Commerce Clause (*e.g.*, the Due Process Clause), other considerations may of course be relevant to an analysis of the action's constitutionality.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For additional information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Coronavirus (COVID-19) Response Team or its Appellate or Public Policy practice groups, or the following authors:

Akiva Shapiro - New York (+1 212.351.3830 , ashapiro@gibsondunn.com)
Avi Weitzman – New York (+1 212-351-2465, aweitzman@gibsondunn.com)
Patrick Hayden - New York (+1 212.351.5235, phayden@gibsondunn.com)
Alex Bruhn* - New York (+1 212.351.6375, abruhn@gibsondunn.com)
Jason Bressler - New York (+1 212.351.6204, jbressler@gibsondunn.com)

Parker W. Knight III* - New York (+1 212.351.2350, pknight@gibsondunn.com)

** Not admitted to practice in New York; currently practicing under the supervision of Gibson, Dunn & Crutcher LLP.*

Related Capabilities

Appellate and Constitutional Law

Litigation

Public Policy