California can restrict, but not close its borders.

Overview

In response to the COVID-19 pandemic, several states have taken steps to limit travel into their states. Governors in Rhode Island, Florida, and Texas implemented interstate travel restrictions. In one instance, a state's governor considered stopping cars with license plates from a specific state suffering more acutely from COVID-19 than others. Going forward, other states may consider similar measures, especially as some states that have benefited from taking strong measures to curb the spread of COVID-19 face the prospect of exposing their citizens to sources from outside their state. In light of recent discussion about the balance of power between the federal and state governments in responding to COVID-19, this article addresses state government authority to restrict travel across their borders.

State governments have the authority to exercise their general police power to impose border controls in the absence of federal action or concurrently with federal action, though the federal government can supplant state measures relating to borders through authority under the Commerce Clause. Even without action by the federal government, state governments must still take care to ensure any protective measures do not discriminate against non-citizens of their state and are sufficiently tailored to limit the burden on the right to interstate travel and on interstate commerce.

Analysis

Our federalist government empowers state governors to act in the absence of federal action.

States have broad discretion to act independently of the federal government. The Tenth Amendment of the U.S. Constitution reserves to the states powers not delegated to the federal government — which has limited, enumerated powers.[1] Because state governments are not limited to the U.S. Constitution as the source of

their power, they "can and do perform many of the vital functions of modern government — punishing street crime, running public schools, and zoning property for development, to name but a few," which the federal constitution's text does not authorize.[2] Courts "refer to this general power of governing, possessed by the States but not by the Federal Government, as the 'police power.'"[3]

For this article, we assume that the federal government has not yet acted.[4] Thus, the only limits to action by state governors or legislatures, aside from state law limits such as those covered in a previous SCOCAblog article, would be challenges to any such action raised in court. If Congress acts to open or close state borders as part of a nationwide pandemic response strategy, that federal act will override the state police power.

State law and federal law often coexist in the same contexts, but when the federal government has the authority to act, federal law can supplant state law based on the Supremacy Clause.[5] For example, "in the absence of an express contrary command of Congress" a state may impose higher regulatory standards than the federal government imposes.[6] But when Congress acts with a "clear and manifest purpose" to preempt state governments, or an irreconcilable conflict exists between federal law (authorized by the U.S. Constitution) and state law, federal law prevails.[7]

The federal government has the authority to regulate commerce "among the several States."[8] This provision is known as the Commerce Clause. The U.S. Supreme Court has read this clause to mean that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce."[9] The high court has applied this clause expansively, permitting federal regulation of a farmer's decision to grow wheat for himself and his livestock, and of a loan shark extorting a neighborhood butcher shop.[10]

Although recent court decisions suggest the U.S. Supreme Court might not apply the Commerce Clause as expansively as it has in the past,[11] closing down a state's border undoubtedly involves the channels of interstate commerce, such as people and goods traveling across state lines. And the high court "has upheld as

constitutional any number of federal statutes enacted under the commerce power that pre-empt particular exercises of state police power."[12] Were Congress to pass a statute clearly manifesting an intent to preempt state border closures relating to COVID-19, or that irreconcilably conflicted with a state border closure law, that federal law would prevail.

States have authority to protect the public from viral outbreaks through quarantines and other measures.

More than a century ago, the U.S. Supreme Court recognized the "authority of a state to enact quarantine laws and health laws of every description."[13] The power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants "is beyond question."[14] Courts will only strike down these measures if they have "no real or substantial relation to the protection of the public health and the public safety."[15] In approving a state law requiring vaccination against smallpox, the high court analogized to the unquestioned power to quarantine even an outwardly healthy individual entering the United States.[16] Thus, the numerous quarantine or shelter-in-place orders we have seen in the past several weeks fall squarely within the appropriate use of the state police power.

A state could argue that its police powers include regulating vehicle traffic across a state's border for a quarantine. The U.S. Supreme Court also recognizes state authority to regulate vehicles traveling on roads — as by vehicle registration, licensing of drivers, and charging reasonable fees. "This is but an exercise of the police power uniformly recognized as belonging to the states and essential to" preserving health and safety.[17] These vehicle regulations do "not constitute a direct and material burden on interstate commerce."[18] But "[t]he reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress."[19] State action also remains subject to court challenge based on the federal constitutional right to travel and the dormant Commerce Clause, as explained below.

Any border closures or actions implicating the right to travel must be narrowly tailored to serve a compelling government interest.

Courts will apply strict scrutiny to state quarantine orders that significantly affect

travel across state borders. The U.S. Supreme Court has long held that the U.S. Constitution protects a right to interstate travel.[20] This right stems from Article IV, section 2, clause 1. Known as the Privileges and Immunities Clause, that provision bars discriminating legislation against citizens of other states, gives citizens of each state "the right of free ingress into other States, and egress from them," and "secures to them in other States the equal protection of their laws."[21] Interstate travel is a fundamental right, and when a state burdens such rights the challenged law must be both "necessary to further a compelling state interest"[22] and it must be narrowly tailored to serve that interest.[23]

In *Saenz v. Roe*, the U.S. Supreme Court identified three components of the right to interstate travel: "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."[24]

A state closing its borders implicates the first of those components, and closing borders only to non-citizens of that state would implicate the second and third components. "[T]he right of a citizen of one state to enter and leave another state" prohibits "direct impairment of the right to move between the states, that is, the right to go from one place to another, including the right to cross state borders while en route."[25] Preventing a citizen of a state from entering another state through a border closure implicates the right to interstate travel. Such a measure would qualify both as "the erection of actual barriers to interstate movement" and as citizens of other states "being treated differently from intrastate travelers."[26]

States likely can show that protecting their citizens against the spread of a global pandemic such as COVID-19 is a compelling government interest.[27] But that's not all a state would need to show for a border closure or other measure regulating travel into the state to survive strict scrutiny.

Even with a compelling interest, government measures must be narrowly tailored to achieve that interest — that is, the measures must be "the least restrictive means" to accomplish the government's goal.[28] If "any other methods exist to achieve the

desired results," then "a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'"[29] Thus, states would need to show that they considered other less restrictive measures than a total ban on all travel into their states, and show that those solutions were inferior. For example, consider the governor deploying National Guard troops to seal California's borders to all traffic to address the compelling interesting in reducing the spread of COVID-19. Surely a less restrictive means to addressing the spread of COVID-19 into the state exists, and the state would face an uphill battle in arguing that completely sealing the borders to all traffic was the "least restrictive means" to accomplish its goal. Because the strict scrutiny review courts impose on interstate travel restrictions is so difficult to satisfy, states need to either assemble a truly compelling case for outright border closure, or look to more moderate solutions (like those discussed below) to satisfy or avoid this level of review.

Instead of outright sealing their borders, states could consider requiring self-quarantining for 14 days of anyone traveling into their state (whether a citizen of that state or not) who remains in any one location for longer than two hours (much longer than it would take to offload a truck shipment or to stop for fuel), as well as prohibiting any travelers entering the state who do not wear proper face coverings to reduce the risk of spread of COVID-19. Those measures would not amount to a total barrier to interstate movement. And these measures should apply to that state's citizens as well as citizens of other states — only narrowly tailored and nondiscriminatory measures will survive constitutional scrutiny.

Although one could still argue that these alternative measures are not the *least* restrictive means in a court challenge, that challenge is far weaker than one addressing a complete closure of the border to all travel. Additionally, as explained below, a state could argue that these less restrictive measures do not implicate the right to interstate travel at all.

Alternatively, state actions that involve only minor burdens or intrastate travel do not implicate the right to interstate travel.

To justify its border restrictions in court, a state can make two arguments. If the burden is minimal, the right to travel is not implicated, and the constitutional test is

unnecessary. And if the burden is more than minimal, the state still has narrowly tailored its solution to the least restrictive means for addressing this compelling interest.

Some measures, such as a state requiring proper face coverings for all individuals entering the state, could avoid the constitutional inquiry entirely because those measures are only minor burdens on interstate travel. State laws merely having some impact on travel are insufficient to raise a constitutional issue. Rather, a state law implicates the right to travel only "when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right."[30] Thus, minor burdens impacting travel "such as gasoline taxes" or "toll roads," do not violate the right to interstate travel.[31] Nor do burdens on a single mode of transportation.[32] Even if a court disagreed and found a state's measures were more than a minimal burden, the state may still argue that the measures are narrowly tailored to serve a compelling interest. The bottom line is that forethought and restraint will insulate state measures from court challenge, whether it is by avoiding the constitutional inquiry entirely or by satisfying strict scrutiny.

States could consider other limits on where interstate travelers may proceed within the state, including a requirement to self-quarantine if remaining in the state without traveling for a particular amount of time. For states (like California) in the Ninth Circuit, there is less concern about protecting travel within the state because the Ninth Circuit has not yet recognized a right to *intra*state travel.[33] Even if a right to intrastate travel exists, that right may not entitle one to a "right to cross a *particular* parcel of land, enter a *chosen* dwelling, or gain admittance to a *specific* government building."[34]

A state's border with another country is another important consideration because non-citizens do not have a right to interstate travel.[35] Thus, states may consider more restrictive measures for their borders with other countries. But those more restrictive measures could still face a challenge under the dormant Commerce Clause, as explained below.

States must also be aware of the dormant Commerce Clause, though state

action is more likely to survive scrutiny under this doctrine.

Any state action relating to border closures or regulating travel into the state would also face a challenge under the dormant Commerce Clause. Under this doctrine, "state legislation may be unconstitutional because of its effect on national or foreign commerce even in the absence of Congressional action."[36] The question is whether a state law discriminates against out-of-state goods or nonresident economic actors. Discriminatory state laws are subject to a version of strict scrutiny: they survive only if narrowly tailored to advance a legitimate local purpose.[37] But when "the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," courts will uphold the law unless the burden on commerce is "clearly excessive" as balanced against the local interest.[38] This is known as *Pike* scrutiny. Because state laws "frequently survive this *Pike* scrutiny,"[39] it benefits a state to ensure it regulates even-handedly for a legitimate local purpose.

As discussed above, state measures to address the COVID-19 pandemic likely qualify as a compelling government interest — protecting citizens from a global viral outbreak. If an interest qualifies as compelling, then it necessarily satisfies a requirement to show a legitimate purpose. States can also argue that the burdens on interstate commerce are "incidental" and "unavoidable" in legislating "to safeguard the health and safety of [their] people."[40] That argument will be stronger if states avoid discriminating against interstate travel based on the origin of that travel (e.g., California residents returning from out-of-state versus non-California residents traveling into the state).[41]

As in the context of the right to travel, when considering dormant Commerce Clause claims courts may consider whether the state's interest could be promoted with a lesser impact.[42] In both contexts, states must consider how to minimize the burden on interstate commerce to ensure measures addressing travel into the state survive constitutional scrutiny.

Conclusion

Given the lack of federal action in response to COVID-19, it is no surprise that state governors and state governments have acted to protect their citizens. To ensure that

these measures survive legal challenges, states must not discriminate between citizens of their own state and other citizens. States also need to consider tailoring their measures to minimize the burden on the right to interstate travel and on interstate commerce. To that end, a complete border closure might not be a viable path. But states can consider other measures that safeguard their citizens from outside sources of exposure to COVID-19 while still permitting travel into (and through) their states.

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[1] U.S. Const., Amdt. 10; *McCulloch v. Maryland* (1819) 17 U.S. 316, 405.

[2] *Nat. Fed. of Indep. Bus. v. Sebelius* (2012) 567 U.S. 519, 535–36.

[3] *Id.* (citation omitted).

[4] One could imagine scenarios in which states attempt to outmaneuver federal congressional authority under the Commerce Clause (discussed further below) by implementing measures that only affect non-commercial travel into the state, and Congress responding or acting preventatively by making explicit findings in any of its legislation that ostensibly non-commercial interstate travel still affects interstate commerce. These hypotheticals go beyond this article's scope.

[5] U.S. Const., Art. VI, cl. 2.

[6] *Fla. Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 144.

[7] *Id.* at 141, 146; *Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.* (1985) 471 U.S. 707, 715 (citation omitted).

[8] Art. I, § 8, cl. 3.

[9] *United States v. Morrison* (2000) 529 U.S. 598, 609 (internal quotation marks

omitted).

[10] *Wickard v. Filburn* (1942) 317 U.S. 111, 128; *Perez v. United States* (1971) 402 U.S. 146, 154.

[11] *NFIB*, 567 U.S. at 558; *Morrison*, 529 U.S. at 617.

[12] *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.* (1981) 452 U.S. 264, 292.

[13] *Jacobson v. Commonwealth of Massachusetts* (1905) 197 U.S. 11, 25 (internal quotations and citations).

[14] *Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health* (1902) 186 U.S. 380, 387.

[15] *Jacobson*, 197 U.S. at 31.

[16] *See id.* at 29.

[17] *Hendrick v. State of Maryland* (1915) 235 U.S. 610, 622.

[18] *Id.*

[19] *Id.* at 622–23.

[20] *Shapiro v. Thompson* (1969) 394 U.S. 618, 630–31, *overruled in part on other grounds by Edelman v. Jordan* (1974) 415 U.S. 651, 671; *Attorney General of New York v. Soto-Lopez* (1986)476 U.S. 898, 903 (Brennan, J., plurality opinion).

[21] *Paul v. State of Virginia* (1868) 75 U.S. 168, 180, *overruled on other grounds by United States v. S.-E. Underwriters Ass'n* (1944) 322 U.S. 533. *See Toomer v. Witsell* (1948) 334 U.S. 385, 395 (Article IV, section 2 "was designed to [e]nsure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."). The right to travel interstate, independent of disparate treatment of citizens from other states, is "nowhere expressly mentioned in the Constitution" despite the Court's longstanding recognition of that right. *See San Antonio Indep. Sch. Dist. v. Rodriguez* (1973) 411 U.S. 1, 99–100 (Marshall, J., dissenting); *Zobel v.*

Williams (1982) 457 U.S. 55, 67 (Brennan, J., concurring) (finding the right to interstate travel's "unmistakable essence in that document that transformed a loose confederation of States into one Nation"). In *Saenz v. Roe* (1999) 526 U.S. 489, 500, 503, the Supreme Court noted that the "Privileges or Immunities Clause of the Fourteenth Amendment" protects one component of the right to travel: "the right to be treated like other citizens of that State."

[22] *See Miller v. Reed* (9th Cir. 1999) 176 F.3d 1202, 1205 (noting "[t]he Supreme Court has recognized a fundamental right to interstate travel"); *Peruta v. Cty. of San Diego* (S.D.Cal. 2010) 678 F.Supp.2d 1046, 1060 (citing *Soto-Lopez,* 476 U.S. at 904–05 n.4).

[23] *Reno v. Flores* (1993) 507 U.S. 292, 301–302.

[24] 526 U.S. 489, 500 (1999).

[25] *Chavez v. Illinois State Police* (7th Cir. 2001) 251 F.3d 612, 649.

[26] *Bray v. Alexandria Women's Health Clinic* (1993) 506 U.S. 263, 277 (citing *Zobel v. Williams* (1982) 457 U.S. 55, 60 n.6, internal quotes omitted).

[27] *See, e.g., Johnson v. City of Cincinnati* (6th Cir. 2002) 310 F.3d 484, 502 (holding interest in enacting ordinance "to enhance the quality of life in drug-plagued neighborhoods and to protect the health, safety, and welfare of citizens in those areas" was "a compelling government interest").

[28] *Id.* at 503.

[29] *Id.* (citing *Dunn v. Blumstein* (1972) 405 U.S. 330, 343).

[30] *Soto-Lopez,* 476 U.S. at 903.

[31] *Miller,* 176 F.3d at 1205 (citation omitted).

[32] *Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc.* (9th Cir. 1972) 466 F.2d 552, 554.

[33] *See Lauran v. U.S. Forest Serv.* (9th Cir. 2005) 141 F.Appx. 515, 520

("[N]either the Supreme Court nor the Ninth Circuit has recognized a protected right to *intra*state travel.") (citing *Nunez ex rel. Nunez v. City of San Diego* (9th Cir. 1997) 114 F.3d 935, 944 n.7. Other circuits have reached different conclusions on the existence of a right to interstate travel. *See Fruitts v. Union Cty.* (D. Or. Aug. 17, 2015) No. 2:14-CV-00309-SU, 2015 WL 5232722 at *6 n.8, *report and recommendation adopted* (D. Or. Sept. 8, 2015) 2015 WL 5232696.

[34] *Williams v. Town of Greenburgh* (2d Cir. 2008) 535 F.3d 71, 76.

[35] *See Saenz*, 526 U.S. at 500 (referring to "the right of a citizen of one State"); *Selevan v. New York Thruway Auth.* (2d Cir. 2009) 584 F.3d 82, 103 (refusing to extend protections under the Privileges and Immunities Clause of Article IV to "residents of foreign countries, even U.S. citizens residing in foreign countries" while acknowledging "the Privileges and Immunities Clause of the *Fourteenth Amendment*" protects "the rights of U.S. citizens residing in foreign countries").

[36] *Pac. Merch. Shipping Ass'n v. Goldstene* (9th Cir. 2011) 639 F.3d 1154, 1177.

[37] *Tennessee Wine & Spirits Retailers Ass'n v. Thomas* (2019) 139 S.Ct. 2449, 2461 (citation omitted). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," the Supreme Court has "generally struck down the statute without further inquiry." *Granholm v. Heald* (2005) 544 U.S. 460, 487 (citation omitted).

[38] *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142 (courts may also consider whether the local interest "could be promoted as well with a lesser impact on interstate activities.").

[39] *Dep't of Revenue of Ky. v. Davis* (2008) 553 U.S. 328, 339.

[40] *City of Philadelphia v. New Jersey* (1978) 437 U.S. 617, 623–24.

[41] *See id.* at 626–27 (reasoning that, whatever the state's "ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."); *Minnesota v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456,

471–72 (concluding a state statute did "not discriminate between interstate and intrastate commerce" because it regulated evenhandedly "by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers, without regard to whether the milk, the containers, or the sellers are from outside the State.").

[42] *See Pike*, 397 U.S. at 142 (courts may also consider whether the local interest "could be promoted as well with a lesser impact on interstate activities."). But the Ninth Circuit has expressed some doubt that alternatives are still relevant to nondiscriminatory regulation under the Supreme Court's *Pike* test. *See Nat. Assn. of Optometrists & Opticians v. Harris* (9th Cir. 2012) 682 F.3d 1144, 1156–57 ("Because the [nondiscriminatory] challenged laws do not impose a significant burden on interstate commerce, it would be inappropriate for us to set them aside based on a conclusion that the State's purposes could be served as well with alternative laws."). While this doubt might leave room for a state in the Ninth Circuit to ignore alternatives, that state risks those measures failing to survive constitutional scrutiny if a court finds the measures are discriminatory or impose more than a minimal burden.