

STAY-AT-HOME:

Coronavirus and Its Impact on the Right to Intrastate Travel

By Mitchell F. Crusto



Signs in Jackson Square in New Orleans urging residents to socially distance and stay at least six feet away from others. *Photo by Barbara Baldwin.*

On March 11, 2020, Louisiana Gov. John Bel Edwards declared a statewide Public Health Emergency¹ in response to the coronavirus (COVID-19) pandemic.² Just 10 days later, he issued a statewide stay-at-home order for “all individuals within the state of Louisiana” (hereinafter Order) “to protect the health and safety of the public, to mitigate the impact of the virus, and to disrupt its spread.”³ As authority for the Order, the Governor cited a Louisiana state statute, which provides, “During a state of public health emergency, . . . the governor may . . . control ingress and egress to and from a disaster area, *the movement of persons within the area*, and the occupancy of premises therein” (emphasis added).⁴

This article analyzes whether Gov. Edwards’s Order negatively impacts the right of persons to travel within the state of Louisiana, “the right to *intrastate* travel.”⁵ Parenthetically, it recognizes that there are also issues relative to *interstate* travel,⁶ and it acts as a thoughtful guide as the government contemplates travel restrictions.

Do We Need an “Emergency Constitution”?

An “emergency constitution” refers to a scholarly debate on whether civil liberties should be suspended in times of emergency.⁷ The question of an emergency constitution was raised during the Hurricane Katrina crisis.⁸ Facing the government’s response to the COVID-19 pandemic, the question should be revisited: Should there be an emergency constitution that suspends civil liberties during emergencies?

In assessing the constitutionality of Gov. Edwards’s stay-at-home Order, it must be determined whether there is a constitutional right to intrastate travel. If such a right exists, we can evaluate how the Order stacks up against a constitutional standard. If there is a constitutional violation, we can ask whether it is permissible to suspend rights under the concept of an emergency constitution.

A Fundamental/ Constitutional Right to Intrastate Travel?

First, it is helpful to provide an overview of the constitutionality of the “right to travel” in general. Over the years, the U.S. Supreme Court has stated that the right to travel is fundamental, but has viewed this in many different ways, depending on the context of the case.⁹ In doing so, the Court has *not* provided a broad-based, all-encompassing, comprehensive right to travel.¹⁰ While many of the Court’s decisions related to the right to travel apply to legal issues that are relevant to the COVID-19 pandemic, several are outside the scope of this article.

Does a Person Have the Right to Travel Among States?

The Supreme Court has stated on several occasions that there is a fundamental right to *interstate* travel.¹¹ In *Saenz v. Roe*,¹² Justice John Paul Stevens, writing for the majority, stated that the Constitution protects three aspects of interstate travel: 1) the right to enter one state and to leave another (historically protected in the Articles of Confederation); 2) the right to be treated as a welcomed visitor, rather than a hostile stranger (protected by the Privileges and Immunities Clause in Article IV, §2); and 3) the right for permanent residents in a state to be treated equally to native-born citizens (protected by the 14th Amendment’s Privileges and Immunities Clause).¹³ Further, in *Shapiro v. Thompson*,¹⁴ the Court recognized that both the nature of the Federal Union and the constitutional concept of personal liberty require that all citizens have an unfettered right to travel through the “length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.”¹⁵

Does a Person Have the Right to Travel Within a State?

One might logically conclude that the right to interstate travel implies or requires the right to intrastate travel. However, the Supreme Court has not clearly stated this. In *Bray v. Alexandria*

Women’s Health Clinic,¹⁶ the Court considered whether anti-abortion protesters who obstructed abortion clinics violated the Civil Rights Act of 1871 by conspiring to deprive women seeking abortions of their right to interstate travel. The Court concluded that the activities of Operation Rescue only restricted intrastate travel, noting that “intrastate travel is devoid of constitutional protection.”¹⁷ Some note that “the Supreme Court has expressly declined to rule on [the intrastate travel] issue, although in *Bray*, the Court indicated that the right [to travel] may be confined solely to interstate travel.”¹⁸

Thus, the Supreme Court has never expressly declared that intrastate travel is a fundamental right,¹⁹ leaving the issue to interpretation by the federal Circuit Courts.²⁰ Some Circuit Courts contend that the rights to interstate and intrastate travel are so interrelated that the constitutional source applies to both.²¹ However, others have rejected this conclusion.²² This split in case law leaves open the question: Is the right to intrastate travel a fundamental or constitutional right? It has been suggested that, for various legal and policy reasons, the answer should be, “yes.”²³

One Circuit Court presented a comprehensive analysis of Supreme Court travel-related cases and made a compelling argument for a fundamental right to intrastate travel.²⁴ The 3rd Circuit, in *Lutz v. York*, held that the Due Process Clause established a fundamental substantive due process right to localized intrastate travel. In *Lutz*, the plaintiffs challenged a city ordinance outlawing “cruising,” on the grounds that such a statute violated their constitutional right to travel. Stating that “dicta from the recent [Supreme Court] travel cases is largely unhelpful on this score,” the 3rd Circuit discussed several justifications for the right to travel precedent and noted that a “right of localized intrastate movement” could only derive from the Due Process Clause of the Constitution.²⁵ Adopting Justice Scalia’s “narrowest” concept of substantive due process advanced in *Michael H. v. Gerald D.*,²⁶ the 3rd Circuit concluded that “the right to move freely about one’s neighborhood or town, even by automobile,

is indeed” a substantive due process right.²⁷ However, the 5th Circuit drew a different conclusion in the context of a state of emergency.

Does a Person Have the Right to Travel Within a State During an Emergency?

Relative to its response to the COVID-19 pandemic, the government can learn a lot from its response to Hurricane Katrina in 2005. One key case, *Dickerson v. City of Gretna*,²⁸ speaks to the right to travel during an emergency following the controversial City of Gretna Police Department’s barricade of the Crescent City Connection Bridge. That barricade denied pedestrians the ability to comply with a mandatory evacuation order to leave the flooding of New Orleans during Katrina.²⁹ Hundreds of those who were denied the right to travel sued the City of Gretna in federal district court, claiming, *inter alia*, a violation of their constitutional rights to travel from New Orleans to a neighboring parish. The District Court denied this claim, noting that the U.S. Supreme Court had not decided whether the Constitution protects a right to intrastate travel³⁰ and relying on the U.S. 5th Circuit’s decision in *Wright v. City of Jackson*.³¹ The plaintiffs appealed this interim ruling to the 5th Circuit, which upheld it.

As noted, the *Dickerson* court relied on *Wright v. City of Jackson*, which affirmed the dismissal of Jackson, Miss., firefighters’ complaint that the city’s residency requirement abridged their fundamental right to intrastate travel. The *Wright* court stated that “nothing in *Shapiro* or any of its progeny stands for the proposition that there is a fundamental constitutional ‘right to commute’ which would cause the compelling government purpose test in *Shapiro* to apply.”³² Through a narrow interpretation of the right to travel, the 5th Circuit, in both *Wright* and *Dickerson*, effectively rejected the claim that there was a constitutionally protected right to intrastate travel.

In summary, within the jurisdiction of the U.S. 5th Circuit (Louisiana, Mississippi and Texas), there is no right to travel *within* a given state. The 5th

Circuit’s decisions reference a lack of any Supreme Court decision expressly providing for a right to intrastate travel. Although this is a reasonable, principled approach in use of precedent, some would argue that it is illogical; clearly, past Supreme Court decisions have *implied* that there is a right to intrastate travel. It would have been just as correct for the 5th Circuit to read between the lines, to err on the side of finding such a right, as did the 3rd Circuit.³³

Yet, the 5th Circuit’s opinions denying a right to intrastate travel are not conclusive. That authority is in the hands of the Supreme Court. Until that Court decides one way or another, one within the state of Louisiana must assess the Order from the current 5th Circuit decisions denying a fundamental or constitutional right to intrastate travel. However, if the Supreme Court were to decide that this is a constitutional right, then Gov. Edwards’s Order would have to meet a rational-basis test.³⁴

The Constitutionality of Louisiana’s Stay-at-Home Order

Does Gov. Edwards’s Order violate the U.S. Constitution? To answer this question, we will conduct two lines of analysis: the first using the 5th Circuit’s interpretation that there is *no* right to intrastate travel, and the second using the proposition that such a right *does* exist. Under the first line of analysis, in light of the 5th Circuit decisions, the Governor’s Order has a low constitutional hurdle to overcome. If there is no right to intrastate travel, the Order is valid and does not violate the U.S. Constitution.

Under the second line of analysis, the Governor’s Order must meet rational-basis scrutiny.³⁵ We must ask: Is the Order, along with its underlying statutory authority, tailored to achieve its stated goal to address a public health crisis, with minimal impact on people’s right to intrastate travel? The enabling statute leaves room for concern due to its breadth: during a public health emergency, the Governor is authorized to control “ingress and egress to and from

a disaster area, the movement of *persons* within the area, and the occupancy of premises therein”³⁶ (emphasis added). This language is open-ended and could be interpreted to apply to *all movement*, including that for protected purposes, such as travel to attend worship or to exercise the right to vote. Further, the term “persons” is not specifically defined in this part of the statute. If the restriction applied to emergency, health and public safety personnel, it would defeat the stated purpose of the Order, which is to protect public health and safety. Additionally, the statute might apply to citizens of other states, which might violate the right to interstate travel.³⁷ Therefore, the enabling authority appears to be constitutionally suspect.

However, in light of the state’s need to address public health and safety, we must consider: Does the Order itself violate the right to intrastate travel? Under the rational-basis test, the first question is this: is the scope of the Order too broad, when it expressly applies to “all individuals within the state of Louisiana”? The Order might run afoul of the protected right to *interstate* travel, as it restricts the ability of citizens of states other than Louisiana to travel to their home state or to other states, under the Privileges and Immunities and Commerce Clauses.³⁸

This leads to the second question under the rational-basis test: Is the Order too restrictive, so as to absolutely prohibit travel by everyone? In its language, the Order does not violate constitutional rights. Mindful of the need for certain classes of persons to perform essential tasks, the Order expressly provides a notable exception, that is, “unless [a person is] performing an essential activity.”³⁹ An open-ended travel restriction reasonably allows for practical exceptions and supports compliance with rational-basis scrutiny.

Parenthetically, the Order does not speak to the unique challenges that vulnerable members of our community face. The stay-at-home directive is nonsensical to unsheltered, homeless people who have no place to stay.⁴⁰ Further, it does not speak to other at-risk populations for whom the Order very

likely increases their risk of contracting COVID-19, including prisoners who generally are not permitted the luxury of social distancing⁴¹ and undocumented immigrants in ICE custody.⁴²

In summary, despite the broad authority provided in the enabling statute, Gov. Edwards's Order meets both the 5th Circuit standard and the rational-basis test. The Order is a measured, reasonable response to a public health emergency. Louisiana's stay-at-home Order meets the rational-basis test: it is not an overbroad means to achieve its stated purpose, and it provides notable exceptions that respect people's right to intrastate travel. By comparison, there are other jurisdictions whose travel restrictions might come closer to infringing on civil liberties when they are accompanied by strict civil and criminal penalties.⁴³

Conclusion

When there is a severe health care emergency, as that of the current COVID-19 pandemic, the government may decide to restrict people's intrastate travel as a strategy to save lives by controlling the spread of a deadly virus. In doing so, the government should take careful measures to minimize its infringement and tread lightly, mindful of our civil liberties. Gov. John Bel Edwards should be commended on his administration's sensitivity to the Constitution. Louisiana's Order is a model for the nation.

FOOTNOTES

1. See State of La., Executive Dept., Proclamation No. 25 JBE 2020, "Public Health Emergency- COVID-19" (March 11, 2020), <http://gohsep.la.gov/portals/0/News/25-JBE-2020-COVID-19.pdf>.

2. See generally La. Dept. of Health, Public Health, Coronavirus (COVID-19), <http://ldh.la.gov/coronavirus/>.

3. See State of La., Executive Dept., Proclamation No. 33 JBE 2020, "Additional Measures for COVID-19 Stay at Home" (March 22, 2020), <https://gov.louisiana.gov/assets/Proclamations/2020/JBE-33-2020.pdf>. It took effect on Monday evening, March 23, 2020.

4. See La. R.S. 29:766 D(7).

5. The "right to intrastate travel" is defined as travel within a state. See generally Mitchell F.

Crusto, "Enslaved Constitution: Obstructing the Freedom to Travel," 70 U. Pitt. L. Rev. 233 (2008).

6. "Interstate travel" is defined as travel among the states, that is, from one state to another state. See, Saenz v. Roe, 526 U.S. 489 (1999).

7. The debate followed the 911 attacks on the World Trade Centers and the enactment of the PATRIOT Act. See, e.g., Amanda L. Tyler, "Suspension as an Emergency Power," 118 Yale L.J. 600, 694 (2008), and Bruce Ackerman, Essay, "The Emergency Constitution," 113 Yale L.J. 1029 (2004).

8. See, e.g., Mitchell F. Crusto, "State of Emergency: An Emergency Constitution Revisited," 61 Loy. L. Rev. 471 (2015) (recommending that the emergency statutes of state governments be amended to expressly protect civil liberties during emergencies).

9. See, generally *supra*, note 6, Saenz v. Roe.

10. See Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255-56 (1974).

11. See *supra*, note 8.

12. 526 U.S. 489 (1999).

13. *Id.* at 500.

14. 394 U.S. 618 (1969).

15. *Id.* at 629.

16. 506 U.S. 263 (1993).

17. Gregory B. Hartch, "Comment, Wrong Turns: A Critique of the Supreme Court's Right to Travel Cases," 21 Wm. Mitchell L. Rev. 457, 465 (1995).

18. "Search and Seizure-Automobile Exception-Search of Passengers' Belongings," 113 Harv. L. Rev. 255, n.59 (1999).

19. Kathryn E. Wilhelm, Note, "Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel," 90 B.U.L. 2461, 2463 (2010).

20. Nicole I. Hyland, "Note, On the Road Again: How Much Mileage is Left on the Privileges or Immunities Clause and How Far Will It Travel?," 70 Fordham L. Rev. 187 (2001).

21. See *supra*, note 17, at 470.

22. See *infra*, note 24, and *supra*, note 19.

23. Kia Rahnama, "The Right to Move Freely: How We Lost It, and Why It Matters," Slate (Jan 13, 2020, 9 a.m.), <https://slate.com/news-and-politics/2020/01/right-to-free-movement.html>.

24. Lutz v. York, 899 F.2d 255 (3 Cir. 1990).

25. *Id.* at 259.

26. *Id.*, (citing 491 U.S. 110 (1989), that the Due Process Clause substantially protected unenumerated rights "so deeply rooted in the traditions and conscious of our people as to be ranked as fundamental.")

27. 899 F.2d at 268.

28. 2007 U.S. Dist. LEXIS 29460 (E.D. La. March 30, 2007). Or, No. 05-6667, 2007 WL 1098787, at *1-3 (E.D. La. March 30, 2007).

29. *Id.* See also Mitchell F. Crusto, *Involuntary Heroes: Hurricane Katrina's Impact on Civil Liberties*. Durham, N.C.: Carolina Acad. Press, (2015).

30. *Id.* at *5, 11.

31. 506 F.2d 900 (5 Cir. 1975).

32. *Id.*

33. See *supra* note 24.

34. Lutz, 899 F.2d at 256.

35. To pass the rational-basis test, the statute or ordinance must have a legitimate state interest,

and there must be a rational connection between the statute or ordinance's means and goals. http://www.law.cornell.edu/wex/rational_basis_test.

36. La. R.S. 29:766 D(7).

37. See *supra* Part II, B.

38. Lutz, 899 F.2d at 262.

39. See *supra*, note 3. The Louisiana declaration lists six such activities: 1) obtaining food, medicine or other similar goods, 2) obtaining non-elective medical care and treatment, 3) going to and from an individual's workplace to perform a job function necessary to provide goods or services . . . or otherwise deemed essential worker functions, 4) going to and from the home of a family member, 5) going to and from an individual's place of worship, or 6) engaging in outdoor activity, provided individuals maintain a distance of six feet from one another and abide by the 10-person limitation on gathering size.

40. See generally CDC, "Interim Guidance for Responding to Coronavirus Disease 2019 (COVID-19) among People Experiencing Unsheltered Homelessness," <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>.

41. See, e.g., Paige St. John, "Prison Lawyers Seek Emergency Order on Coronavirus, including Release of Inmates," L.A. Times (March 25, 2020 8:57 p.m.), <https://www.latimes.com/california/story/2020-03-25/prison-lawyers-emergency-order-releases-coronavirus>.

42. See, e.g., Ariane de Vogue, "Federal Judge Orders Release of Some Immigrants in Detention due to Coronavirus Outbreak, Blasts ICE," CNN.com (last updated March 27, 2020, 1:54 p.m.), <https://www.cnn.com/2020/03/27/politics/ice-release-immigrants-in-detention-coronavirus/index.html>.

43. The City of El Paso, Texas, established civil penalties, a misdemeanor, with a fine up to \$1,000 and up to 180 days in jail, in an otherwise reasonable "stay home, work safe" order, which excludes essential personnel. See Aaron Montes, "El Paso Officials Issue 'Stay Home, Work Safe' Order to Battle the Spread of Coronavirus," El Paso Times (last updated March 24, 2020, 6:29 p.m.), <https://www.elpasotimes.com/story/news/2020/03/24/el-paso-considering-shelter-in-place-to-slow-coronavirus/2905827001/>.

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