

**EPIDEMICS, OUTSIDERS, AND LOCAL PROTECTION:
FEDERALISM THEATER IN THE ERA OF THE SHOTGUN QUARANTINE**

*Polly J. Price**

Litigation has begun over restrictive quarantines imposed during the recent Ebola scare. Alleging excessive political interference, these lawsuits raise questions about state and local quarantine authority. It is widely assumed that states have absolute control over public health threats within their boundaries. This article suggests that the presumption of limited federal authority within states is overly restrictive and not constitutionally mandated.

The history of the “shotgun quarantine” during the yellow fever epidemics of the late nineteenth century led to protracted debate about the federal government’s ability to preempt or abrogate unnecessary, over-reaching quarantines imposed by local governments. The human suffering and disruption to commerce caused by the local shotgun quarantine led the South to implore Congress for legislation to remedy it – a significant instance in which the post-Civil War South united in favor of ceding state’s rights to the federal government. The controversy faded as effective measures against yellow fever were found. Because Congress never acted, we have largely forgotten these legal debates.

In recovering that history, this Article offers a new perspective not only on the protection of public health in our federal system, but also on state protectionism generally and the exclusion of outside threats from local communities. The yellow fever “shotgun quarantine” tested our constitutional structure for response to public health emergencies, and found it wanting

TABLE OF CONTENTS

INTRODUCTION.....	370
I. YELLOW FEVER AND THE SHOTGUN QUARANTINE.....	373
A. <i>Epidemics in the South, 1878–1905</i>	374
B. <i>The Best Defense: Quarantine?</i>	376
C. <i>The Mechanics of the Shotgun Quarantine</i>	379
II. GOVERNING DISEASE BY MARTIAL LAW.....	382
A. <i>State and Local Quarantine Authority</i>	383
B. <i>The Refugee Problem</i>	386
C. <i>Commercial Disruption, Rivalry, and Rumor</i>	391
D. <i>Regional Solutions?</i>	394

* Professor of Law and Professor of Global Health, Emory University School of Law. I am grateful for the opportunity to workshop earlier drafts at the University of Southern California, Vanderbilt, and St. Louis University law schools, and also to the following for their comments and suggestions: Al Brophy, Mary Dudziak, Deborah Dinner, James Ely, Martha Fineman, Robert Gatter, Robert Parrish, Edward Shoemaker, and Sasha Volokh.

1. <i>Mobile Convention, 1898</i>	395
2. <i>Memphis Convention, 1898</i>	396
3. <i>Chattanooga Convention, 1905</i>	397
III. LAW IN THE TIME OF QUARANTINE: DEBATING FEDERAL AUTHORITY	398
A. <i>The U.S. Supreme Court, Quarantine, and Interstate Commerce</i>	399
B. <i>1878–1893: First Reactions to the Shotgun Quarantine</i>	402
C. <i>The 1897 Epidemic: Toward a National Quarantine Law</i> .	405
1. <i>Public and Private Advocacy</i>	407
2. <i>Deficiency of Existing Law: Hearings Before Congress</i> ...	408
D. <i>The 1905 Epidemic: A Narrow Defeat for Federal Intervention</i>	413
IV. MODERN ECHOES: FROM QUARANTINE TO SYRIAN REFUGEES.....	419
A. <i>Federal Quarantine Authority Today</i>	420
B. <i>Ebola Controversies, and a Preview of the Zika Virus?</i>	422
C. <i>Syrian Refugees, Toxic Waste, and Other Perceived Threats to Local Communities</i>	425
CONCLUSION.....	427

INTRODUCTION

There can be no question as to the suffering in the State of Mississippi. Half the towns and cities have quarantined themselves against the living world. . . . Around villages are cordons of armed men, ready to shoot down the first invader. Traffic has been extinguished. Hundreds if not thousands of laborers have been thrown out of employment. . . . How much longer will the Southern States continue in this madness?¹

In September 1897, Oscar Wilson attempted to return to his home in Meridian, Mississippi. He had traveled to Nashville, Tennessee, to consult a physician about a bone tumor in his shin. But a “shotgun quarantine” interrupted his return rail journey near the Mississippi state line. Oscar was compelled to leave the train at Livingston, Alabama, and, as his money ran out, he had to walk some thirty-five miles to his home, where his leg was

¹ *Fruits of Local Quarantine*, WASH. POST, Oct. 10, 1898, at 6.

amputated. Like countless others caught up in the epidemic, Oscar had no symptoms of yellow fever, nor had he traveled from any area where yellow fever was present. No matter; with threat of force, Mississippi had quarantined itself against the world.²

From the 1870s through the first decade of the twentieth century, local governments throughout the South defended their towns against epidemic disease by imposing a form of quarantine by martial law, popularly known as the “shotgun quarantine.” Facing the annual terror of yellow fever, armed men guarded their towns to prevent the entry of persons from anywhere yellow fever might be present.

Shotgun quarantines halted trains, devastated commerce, and imposed misery for thousands of refugees. State governments attempted to end local shotgun quarantines but could not do so. As state legislative efforts to control local shotgun quarantines failed, southern politicians and business leaders turned to Congress for federal aid.

For nearly four decades, the shotgun quarantine set the terms of debate over the constitutional authority of the national government to manage epidemics. Congress explored whether the federal government had the authority to override state and local quarantines in order to prevent the wider harm these actions imposed on the region. Could the national government veto quarantines authorized by lower levels of government and which were viewed to be unnecessary?

Fast-forward to the present. Litigation has begun over quarantines imposed by state governments during the recent Ebola scare.³ Four state governors imposed far stricter quarantines within their states than the CDC and medical experts recommended, leading to charges of excessive political grandstanding in the face of unreasonable public fear.⁴ Although relatively few persons experienced these restrictive quarantines, the episode has set precedent for future public health emergencies. State and local public health measures, when unnecessary and fueled by local politics, could cause disproportionate harm on a much wider scale.

This was the problem posed by the shotgun quarantine in the South. The public response to the nineteenth-century shotgun quarantine provides

2 See *Wilson v. Ala. G.S.R. Co.*, 28 So. 567 (Miss. 1900) (differentiating between an ostensibly reasonable quarantine and the overzealous quarantine actually in place).

3 See Sheri Fink, *Connecticut Faces Lawsuit over Ebola Quarantines*, N.Y. TIMES, Feb. 8, 2016, at A20; Justin Wm. Moyer, *Kaci Hickox, Rebel Ebola Nurse Loathed by Conservatives, Sues Chris Christie over Quarantine*, WASH. POST (Oct. 23, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/10/23/kaci-hickox-rebel-ebola-nurse-loathed-by-conservatives-sues-chris-christie-over-quarantine/>; see also *ACLU and Yale Global Health Justice Partnership, Fear, Politics, and Ebola: How Quarantines Hurt the Fight Against Ebola and Violate the Constitution* (Dec. 2015), <https://www.aclu.org/report/fear-politics-and-ebola>.

4 See *infra* Part IV.B.

a window into developments in constitutional federalism, municipal and state government relationships, the police power of the state, and martial law. The legislative debates exploring the boundaries of state and federal authority centered around and reacted to the shotgun quarantine, but the underlying principles at issue echo far more broadly. At least three U.S. Presidents and many members of Congress believed the federal government had the authority to override a state-imposed quarantine.⁵ But federal legislative efforts to control the shotgun quarantine failed, and the question has never been tested in court.

The federal government's quarantine authority remains ambiguous today. The modern federal government in the United States has interstate quarantine authority by statute,⁶ but what does that really mean? Prior accounts have not considered the yellow fever scares of the late nineteenth century as a key development in public health federalism. Furthermore, scholars have been insufficiently attentive to the fact that states and municipalities could legally prevent the movement of commerce and large numbers of people. Whether the federal government could remedy the situation occupied Congress for nearly three decades.

There are some surprising results. A contemporary noted that the South "had been impelled by the ravages of the yellow scourge to forget their extremes State's rights theories and become champions of placing in the hands of the federal government far greater powers than it had hitherto exercised for the purpose of protecting the public health."⁷ When southern states did ask for federal intervention, it was because they could not control independent-minded local governments even within their own states, let alone trust other states to control theirs.

While the days of the shotgun quarantine are in the distant past, the threat of widespread epidemics is not. Congress came close to authorizing a federal override of any state or local inland quarantine,⁸ and the debates about this possibility teach much about how the participants understood constitutional structure (the Commerce Clause in particular), and the powers of state and local political institutions and agencies. In the end, however, no legislature—state or federal—was able to lay the shotgun quarantine to rest. Instead, the controversy faded as effective measures against yellow fever were found. But this history is of relevance in modern

⁵ See *infra* note 173 and accompanying text.

⁶ See *Legal Authorities for Isolation and Quarantine*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 2015), <http://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html> (summarizing legal definitions and authorities for federally-enacted quarantines).

⁷ Edwin Maxey, *Federal Quarantine Laws*, 43 AM. L. REV. 382, 388–89 (1909).

⁸ See *infra* Parts III.C, III.D.

public health emergencies. The protection of public health has not been viewed consistently as subject to the federal government's powers under the Commerce Clause, particularly the "dormant" variety.

Currently, the common view is that the federal government may interfere with a state's or municipality's choice to impose population-based quarantine restrictions only when a state asks for assistance, or when it fails to act to prevent an epidemic crossing state lines.⁹ I suggest this belief is a misunderstanding derived from inaction in the past. Federal authority here is inherent and is not structurally limited by the U.S. Constitution, and indeed is supported by, among others, a constitutional "right to travel" and the Dormant Commerce Clause. There should be a federal role to preempt or override unnecessary state and local geographic quarantines. The need for regulatory standards and clear federal authority remains, notwithstanding the distant era of the shotgun quarantine. In recovering that history, this Article offers a new perspective not only on the protection of public health in our federal system, but also on state protectionism and the exclusion of outside threats from local communities.

I. YELLOW FEVER AND THE SHOTGUN QUARANTINE

City is barricaded against city, town against town, and village against village . . . the channels of commerce are dammed, and the entire country in which the barbarous embargo is operated is given over to chaos, hardship, and frenzied fear.

These assumptions of dictatorship over everything terrestrial [sic] by every little community . . . against all the people on earth who reside outside their community limits, have been carried to ruinous lengths.¹⁰

Yellow fever is an acute disease with a high mortality rate.¹¹ It is marked by a rapid onset of symptoms—bleeding from the mouth, nose, and copious

⁹ Indeed, recent scholarship emphasizes the inability of states, acting alone, to effectively respond to a major epidemic without federal assistance and coordination. *See, e.g.*, John Thomas Clarkson, *Phase Six Pandemic: A Call to Re-Evaluate Federal Quarantine Authority Before the Next Catastrophic Outbreak*, 44 GA. L. REV. 803, 807–13 (2010) (describing the ability of the federal government to respond to a public health emergency); Wendy E. Parmet, *After September 11: Rethinking Public Health Federalism*, 30 J.L. MED. & ETHICS 201 (2002) (exploring the Commerce Clause and police power of states). Such authority is already provided by statute if a state fails, or is unable, to take effective measures against interstate spread of disease. This proposition is not really controversial as a constitutional matter. Instead, this Article examines what can be considered the opposite problem: a state or local government engages in protectionism (economic or political) beyond the necessity to do so, disrupting commerce and the movement of persons, among other harms to national interest.

¹⁰ *The Foolish Shotgun Quarantine*, WASH. POST, Oct. 17, 1897, at 6.

amounts of “black vomit,” with delirium from high fever and jaundice turning the skin yellow prior to death.¹² Yellow fever is not endemic to the United States but can be imported from areas where it is. Both Ebola and yellow fever are subject to federal quarantine for persons entering the United States.¹³ The International Health Regulations place special significance on vaccination against yellow fever.¹⁴

As is well-documented by historians, yellow fever periodically wreaked havoc in the South over many decades, especially during the post-Civil War period through the early twentieth century.¹⁵ The disease had an especially high mortality rate and proved able to evade ship quarantine and disinfection measures.¹⁶

A. *Epidemics in the South, 1878–1905*

The South notoriously had the worst health in the nation throughout the nineteenth century and the first half of the twentieth.¹⁷ Poverty and geography played a primary role. Hookworm, pellagra, and malaria were among the health problems retarding economic growth, such that FDR in

11 See JOHN R. PIERCE & JIM WRITER, *YELLOW JACK: HOW YELLOW FEVER RAVAGED AMERICA AND WALTER REED DISCOVERED ITS DEADLY SECRETS* 1, 7 (2005).

12 *Id.*

13 See 42 C.F.R. § 71 (2012) (providing for the prevention of “the introduction, transmission, and spread of communicable disease from foreign countries”, as well as designating yellow fever vaccination centers); Exec. Order No. 13,295, 68 Fed. Reg. 17,255 (Apr. 9, 2003), *as amended by* Exec. Order No. 13,375, 70 Fed. Reg. 17,299 (Apr. 5, 2005) (extending coverage to potentially pandemic-causing influenza viruses); *Legal Authorities for Isolation and Quarantine*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 2015), <http://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html> (summarizing legal definitions and authorities for federally enacted quarantines).

14 See *International Health Regulations*, WORLD HEALTH ORG., *International Certificate of Vaccination or Prophylaxis* (2005), http://www.who.int/ihr/ports_airports/icvp/en.

15 See generally KHALED J. BLOOM, *THE MISSISSIPPI VALLEY’S GREAT YELLOW FEVER EPIDEMIC OF 1878* (1993); JO ANN CARRIGAN, *THE SAFFRON SCOURGE: A HISTORY OF YELLOW FEVER IN LOUISIANA, 1796–1905* (1994); MOLLY CALDWELL CROSBY, *THE AMERICAN PLAGUE: THE UNTOLD STORY OF YELLOW FEVER, THE EPIDEMIC THAT SHAPED OUR HISTORY* (2006); JOHN DUFFY, *SWORD OF PESTILENCE: THE NEW ORLEANS YELLOW FEVER EPIDEMIC OF 1853* (1966); JOHN H. ELLIS, *YELLOW FEVER AND PUBLIC HEALTH IN THE NEW SOUTH* (1992); DEANNE STEPHENS NUWER, *PLAGUE AMONG THE MAGNOLIAS: THE 1878 YELLOW FEVER EPIDEMIC IN MISSISSIPPI* (2009); PIERCE & WRITER, *supra* note 11; MARGARET HUMPHREYS, *YELLOW FEVER AND THE SOUTH* (1992).

16 BLOOM, *supra* note 15, at 30–32; George Sternberg, *Yellow Fever and Quarantine, Public Health Papers and Reports*, AM. PUB. HEALTH ASS’N, at 351–57 (1880), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2272542/>.

17 James O. Breeden, *Disease as a Factor in Southern Distinctiveness*, in *DISEASE AND DISTINCTIVENESS IN THE AMERICAN SOUTH* 8–10, 12–13 (Todd L. Savitt & James Harvey Young eds., 1988) (specifying certain phenomena and diseases as being particularly precipitous in causing the South to lag far behind the rest of the country as a result of the lack of health safety throughout the region).

1938 famously labeled the South “the nation’s No. 1 economic problem.”¹⁸ But even though malaria and other diseases caused more deaths in the southern region, yellow fever was more terrifying, causing widespread panic wherever it appeared.

Following the American Revolution, points to the north were hit hard by yellow fever (particularly Philadelphia in 1793), but by the mid-nineteenth century yellow fever had become primarily a southern phenomenon.¹⁹ For over fifty years in the era following the Civil War, annual visitations of yellow fever in the South were predictable. Starting in late spring, people feared yellow fever’s appearance through the end of the “season,” generally the first frost.²⁰ The Texas governor, for example, issued annual proclamations authorizing quarantine when and where yellow fever appeared, effective April 1 of each year.²¹

Why did yellow fever subside in the North after 1800? Although seaports along the North Atlantic coast employed stringent port quarantine measures throughout the nineteenth century, the shift of yellow fever to southern regions did not necessarily reflect a superiority of quarantine method. Instead, the nature of commerce had changed. Mercantile traffic from the Caribbean – yellow fever points of origin – shifted markedly to southern rather than northern ports.²²

Major epidemics originating in southern port cities occurred in 1878, 1897, and 1905. The 1878 epidemic alone is estimated to have stricken 120,000 people, resulting in at least 20,000 deaths in the region and “a pecuniary loss of not less than 100 million dollars.”²³ The entire Mississippi River Valley from St. Louis south was affected. Tens of thousands fled the stricken cities of New Orleans, Vicksburg, and Memphis.²⁴ Similarly, the 1897 outbreak affected nine states and caused cities and towns throughout the region to impose shotgun quarantines.²⁵ The 1905 epidemic was

18 Louis Stark, *South Is Declared ‘No. 1’ by President in Economic Need*, N.Y. TIMES, July 6, 1938, at 1. Letter from President Franklin D. Roosevelt to the Members of the Conference on Economic Conditions in the South (July 5, 1938), in NATIONAL EMERGENCY COUNCIL, REPORT ON ECONOMIC CONDITIONS OF THE SOUTH, 1–2 (1938) (requesting a report from the various government agencies on what the President describes as “the Nation’s problem”).

19 See K. David Patterson, *Yellow Fever Epidemics and Mortality in the United States, 1693–1905*, 34 SOC. SCI. & MED. 855, 856 (1992).

20 See *Waiting for Frost*, WASH. POST, Aug. 8, 1879, at 1; NUWER, *supra* note 15, at 19.

21 *Judgments Must Be Paid*, ATLANTA CONST., Mar. 23, 1901, at 3.

22 *Round Table Discussion on Yellow Fever*, PBS: AMERICAN EXPERIENCE (Sept. 29, 2006) <http://www.pbs.org/wgbh/amex/fever/sfeature/experts.html> (explaining that the “main factor in yellow fever’s spread in the nineteenth century [had] to do with shipping and commerce from the tropics”).

23 See PIERCE & WRITER, *supra* note 11, at 69; see also Maxey, *supra* note 7, at 387–88.

24 See HUMPHREYS, *supra* note 15, at 137–38.

25 *Id.*

America's last major outbreak, for reasons that are not entirely clear.²⁶ All told, in the nineteenth century yellow fever is believed to have killed 100,000 Americans, with three-quarters of the deaths occurring after 1805.²⁷ Given unreliable data, one historian has suggested the total "could well be 150,000 or more."²⁸

Yellow fever was such a prominent annual risk that life insurance companies included a standard clause voiding the policy if the insured traveled below a "yellow fever line," a geographic demarcation that included the entire southern region—Washington, D.C., to St. Louis, Missouri, to El Paso, Texas.²⁹ Policy-holders who died of yellow fever forfeited any claim unless they had previously paid an additional amount for a "southern waiver" for yellow fever.³⁰

Anyone who previously survived yellow fever was believed to be immune, as were African-Americans as a group, and those who had lived for some time in yellow fever-prone areas were said to be "acclimated."³¹ Nonetheless, those who could do so left southern coastal areas every summer to avoid yellow fever. They returned when cooler weather set in; experience taught that outbreaks subsided soon after the first frost. As one November headline alerted readers: "No More Quarantine; All the Cities Have Called it off This Year."³²

B. *The Best Defense: Quarantine?*

The transmission of yellow fever by mosquitoes would not be understood until the turn of the twentieth century.³³ The southern climate, combined

26 See Patterson, *supra* note 19 (speculating that various changes in technology contributed to the decline).

27 *Id.* at 859.

28 *Id.*

29 See BLOOM, *supra* note 15, at 29.

30 See, e.g., *Bennecke v. Conn. Mut. Life Ins. Co.*, 105 U.S. 355 (1881). In that case, the insured died of yellow fever in New Orleans during the 1878 epidemic. He had not previously applied for a twenty dollar southern waiver of the life insurance geographic limits. His brother-in-law attempted to do so when news of the epidemic came out, but the insured was already dead by the time the twenty dollars was paid. The Court held that the waiver was invalid and, to add insult to injury, the insurance claim was denied. See also *Globe Mut. Life Ins. v. Wolff*, 95 U.S. 326 (1877) (voiding policy for violation of geographic limit and explaining that allowing the claim would sanction "fraud" by the policyholder).

31 Jo Ann Carrigan, *Impact of Epidemic Yellow Fever on Life in Louisiana*, 4 LA. HIST. 5, 6 (1963).

32 *No More Quarantine*, ATLANTA CONST., Nov. 8, 1899, at 2 (reporting the widespread termination of quarantines).

33 The United States Yellow Fever Commission published results establishing the mosquito as vector in 1900. See MICHAEL B.A. OLDSTONE, *VIRUSES, PLAGUES, AND HISTORY* 65 (1998) (documenting the discovery of the mosquito as a vector at the start of the twentieth century).

with ubiquitous stagnant bodies of water, provided fertile areas for mosquito reproduction. Mosquitoes could not survive year-round except in the Florida Keys, so the annual introduction of yellow fever into the South came by way of coastal shipping from Cuba and other points in the Caribbean.³⁴

Coastal areas proved unable to prevent the introduction of yellow fever by strict maritime quarantine. As a result, the population's best defense was to flee from or avoid travel to coastal areas during the summer months. Those who remained risked being prevented from escape—trapped by inland towns that thought they could achieve with the shotgun what the maritime quarantine could not.

Residents of towns beyond coastal areas believed spread of the disease could only be stopped by prohibiting travelers and infected cargo from entering their towns. The prevailing view in the South was that yellow fever spread from person to person and by contact with infected objects.³⁵ This was partially right—mosquitoes, having a short flight range, required the presence of a yellow fever sufferer in order to infect others. In addition, cargo could harbor mosquitoes, and railroads could speed them throughout the South.³⁶ Hence, the appearance (or rumor) of a single case of yellow fever anywhere set in motion defensive quarantine measures in townships throughout the South.

In the nineteenth century, the standard legal definition for quarantine stated:

[Q]uarantine is the existence of a line or *cordon* around an infected territory, or part of such a territory, beyond which limits no person (and, according to some rules, no goods) may pass until sufficient time may have elapsed to permit proper officers to ascertain whether the persons so desiring to pass from the infected district be, or be not, infected with the disease.³⁷

A barrier or policy prohibiting travelers from entering or leaving an area was also known as a *cordon sanitaire*.³⁸ Then, as now, the governmental power to

³⁴ See HUMPHREYS, *supra* note 15, at 124.

³⁵ See NUWER, *supra* note 15, at 15–16.

³⁶ R. Scott Huffard Jr., *Infected Rails: Yellow Fever and Southern Railroads*, 79 J. S. HIST. 79, 84 (2013) (explaining how railroads and train passengers contributed to the spread of yellow fever).

³⁷ Sherston Baker, *Quarantine and Its Reform*, 254 L. MAG. & REV. 72, 72–73 (Nov. 1884) (defining quarantine as a practice in relation to the yellow fever epidemic). The modern use of the term “quarantine” distinguishes “isolation”: “Isolation separates sick people with a contagious disease from people who are not sick. Quarantine separates and restricts the movement of people who were exposed to a contagious disease to see if they become sick.” CTRS. FOR DISEASE CONTROL AND PREVENTION, *Quarantine and Isolation* (last updated Aug. 15, 2016), <http://www.cdc.gov/quarantine> (describing the distinction between the terms “isolation” and “quarantine”).

³⁸ Donald G. McNeil, Jr., *Using a Tactic Unseen in a Century, Countries Cordon Off Ebola-Racked Areas*, N.Y. TIMES, Aug. 13, 2014, at A10.

quarantine authorized the use of physical force against individuals and groups.³⁹

The medical profession hotly disputed the cause of yellow fever, and even whether it was contagious, until the discovery of the mosquito vector in 1902 became generally accepted.⁴⁰ Before that time, there were two competing theories about how people acquired yellow fever. Medical professionals could not agree on the best method to eliminate the threat of yellow fever, and they also were starkly divided about the necessity of preventing travel from infected areas.⁴¹ If yellow fever could be spread by persons and contaminated objects, which was certainly the popularly-held view, then strict quarantine of travelers and cargo seemed the best defense.

A rival theory argued that yellow fever was a result of poor sanitation.⁴² Yellow fever seemed limited to cities and towns. As one historian noted, “The miasma of cities, resulting from dead animals, the by-products of slaughtering and rendering establishments, and piles of unremoved human excrement, seemed distinctively capable of breeding yellow fever.”⁴³ Under such conditions, it was believed, yellow fever could arise spontaneously, without introduction from another area.⁴⁴ Better sanitation, burning, and fumigation were the best defenses, while quarantine of travelers was useless.⁴⁵

Holders of the sanitation theory were often distinctly unsympathetic to the South. In the year following the devastating 1878 epidemic, one northern journalist wrote about sanitation problems in Memphis:

With all the warning that was given by the fever then, nothing has since been done in the way of drainage or purification. The fact is, Memphis is one of the filthiest towns in all the South. . . . The worst feature of the

³⁹ Modern quarantine authority in the United States permits the use of physical force by law enforcement officers at the request of designated public health officials. The threat of physical force through arrest is usually sufficient to encourage compliance with a quarantine or isolation order, as experience with tuberculosis control measures has shown. See Polly J. Price, *Tuberculosis Control Laws in the U.S.-Mexico Border Region: Legal Framework in the United States*, 5–7 (Emory Univ. Sch. of L., Legal Stud. Res. Paper Series, Paper No. 15-371, 2015), <http://ssrn.com/abstract=2709829> (detailing American quarantine and isolation policies and practices).

⁴⁰ J. M. Lindsley, *Quarantine Regulations Should Be Based Against Yellow Fever upon the Doctrine that It Is Only Conveyed by the Mosquito*, 29 PUB. HEALTH PAPERS & REP. 81 (1903), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2222399/>.

⁴¹ BLOOM, *supra* note 15, at 11–22.

⁴² *Id.*; see also HUMPHREYS, *supra* note 15, at 7.

⁴³ HUMPHREYS, *supra* note 15, at 19 (describing the unhygienic living conditions in urban areas, which was believed to have exacerbated the spread of yellow fever).

⁴⁴ BLOOM, *supra* note 15, at 13.

⁴⁵ *Id.* at 38, 112–13; HUMPHREYS, *supra* note 15, at 53, 151.

sorrow is that the native inhabitants have no ambition to remove the cause⁴⁶

Fumigation became a common practice for ships and railroad cars; a few towns undertook what was termed a “general fumigation” by burning disinfectants in the streets.⁴⁷ Disconcertingly, one health officer reported: “The first two days succeeding a general fumigation, the fumigating crews invariably had trouble with the people who had ‘fumigated themselves’ a day or two before.”⁴⁸

C. *The Mechanics of the Shotgun Quarantine*

The first use of “shotgun quarantine” in the popular press occurred after the devastating 1878 outbreak. A writer for *The Chicago Daily Tribune* employed the phrase in an article about his recent travels in the South:

We asked a dweller in one of these villages if the yellow fever would come again with Midsummer. “No, sir,” he answered: “not if shotguns can keep it out of this town.”

It is most natural for Southern whites to resort to the shotgun in all their troubles. They have adopted the theory that yellow fever is spread solely by contact. . . . They therefore propose to prevent all intercourse between neighborhoods,—to station patrols, armed with shotguns, on all their highways, and to entirely prevent all traveling.

. . . .

It may be that the strictest SHOTGUN QUARANTINE will prove ineffectual against its advance. It is doubtful, however, if the Southern white will ever comprehend this contingency.⁴⁹

Whether this writer coined the phrase or heard it elsewhere, soon thereafter other newspapers discussed the “shotgun quarantine,” and it quickly became the customary terminology used to label any locality’s declaration of a quarantine against entry from points infected, or rumored to be infected, with yellow fever.⁵⁰

46 Margaret Warner, *Local Control Versus National Interest: The Debate over Southern Public Health, 1878–1884*, 50 J.S. HIST. 407, 421 (1984) (quoting Boston’s *Commonwealth*, July 26, 1879).

47 *Yellow Fever Spreads in Small Parishes*, N.Y. TIMES, Sept. 2, 1905, at 3.

48 U.S. TREASURY DEP’T, BUREAU OF PUB. HEALTH AND MARINE-HOSP. SERV., Doc. NO. 2456, ANNUAL REPORT OF THE SURGEON-GENERAL OF THE PUBLIC HEALTH AND MARINE-HOSPITAL SERVICE OF THE UNITED STATES FOR THE FISCAL YEAR 1906, at 155 (1907) (describing an adverse effect of fumigation).

49 *Way Down South*, CHI. DAILY TRIB., Apr. 8, 1879, at 9 (depicting what likely was the first use of the term “shotgun quarantine”).

50 For example, a search of ProQuest Historical Databases (thirteen leading newspapers) between 1878 and 1910 returns more than 250 articles using the term “shotgun quarantine.”

SHOTGUN QUARANTINE AND WAR ON YELLOW FEVER

THRILLING PHASES OF THE BATTLE
BEING WAGED IN THE STRICKEN
DISTRICTS OF LOUISIANA.

A CLASH OF ARMED FORCES IS THREATENED

Headline, The Hennessee (Okla.) Clipper, September 7, 1905

The earliest use of the term “shotgun quarantine” in the *Washington Post* appeared in 1879 in a headline from Memphis, described as follows:

The quarantine fever has, however, struck Arkansas with more force than ever. The Sheriff of Crittenden, just across the river, has ordered the arrest and imprisonment of all Memphians caught in the act of crossing. The whole riverfront is closely watched by armed police.⁵¹

A sampling of headlines from the *New York Times*,⁵² *The Chicago Daily Tribune*,⁵³ *The Washington Post*,⁵⁴ and other newspapers highlight the shotgun quarantine and the problems it caused:

“Shotguns Keep All Trains on the Move”⁵⁵

“The Shotgun in Alabama: A Quarantine That Evidently Means Business”⁵⁶

“Fight on Quarantine: Louisiana May Use Troops to Lift Local Embargoes . . . Many Towns Without Medicines and Short of Food”⁵⁷

51 *Yellow Fever: Still Spreading in Memphis—The Shotgun Quarantine*, WASH. POST, Aug. 23, 1879, at 1 (employing the first known use of the term “shotgun quarantine” in one of the nation’s premier publications).

52 See generally *A Shotgun Quarantine*, N.Y. TIMES, Sept. 3, 1886, at 1; *Shotgun Quarantine on Mississippi Border to Bar Out Animals Exposed to Anthrax*, N.Y. TIMES, July 21, 1924, at 13.

53 “Shotgun” Quarantine—Panic in the Yellow-Fever Districts Worse Than the Disease, CHI. DAILY TRIB., Aug. 16, 1888, at 5; *A Shotgun Quarantine*, CHI. TRIB., Sept. 22, 1888, at 2.

54 *Shotgun Quarantine*, WASH. POST, Mar. 23, 1898, at 4; *Shotgun Quarantine Denounced*, WASH. POST, Nov. 7, 1897, at 1; *Under Shotgun Quarantine*, WASH. POST, May 21, 1899, at 3; *A Shotgun Quarantine Against Biloxi*, WASH. POST, Oct. 20, 1886, at 1.

55 *Shotguns Keep All Trains on the Move*, ATLANTA CONST., Oct. 13, 1897, at 2.

56 *The Shotgun in Alabama: A Quarantine That Evidently Means Business*, ATLANTA CONST., Sept. 27, 1888, at 2.

57 *Fight on Quarantine*, WASH. POST, Aug. 9, 1905, at 1.

“All Have Shotgun Quarantine”⁵⁸

What constituted a “shotgun quarantine?” The salient features derive from contemporary reports. The shotgun quarantine was characterized by two key concepts:

- *A geographic boundary.* The declaration of a “cordon sanitaire” that prohibited a population from entering or leaving an area. The geographic barrier applied to all persons, whether sick or well, and if not sick, without regard to whether they were likely to become so. Trains attempting to pass through the cordon would either be stopped before entering, or not permitted to discharge passengers or cargo.⁵⁹
- *Armed, deputized deterrence.* Enforcement of the cordon by local or state government authority, to prevent or deter entry by anything or anybody. Rarely were shotgun quarantines the work of vigilantes. Although the term suggests mob rule, shotgun quarantines came at the behest of mayors, town councils, and other political bodies. Formal declarations gave official imprimatur to enlist citizens or militias to aid sheriffs in guarding the line or in preventing trains from stopping there.⁶⁰

Shotgun quarantines were usually declared “against” other towns or areas where yellow fever was believed to be present. For example, the *Washington Post* reported:

The quarantine against portions of Harrison County, Miss., has been removed. The citizens of Pass Christian have established a strict shotgun quarantine against Biloxi, armed guards being placed at all avenues of ingress from that town and vigilance will be maintained day and night.⁶¹

In another example, the *Indianapolis Journal* reported in 1888: “Special telegrams from Grenada, Corinth and other Mississippi towns report shotgun quarantine having been established against Decatur, Ala., Jackson, Miss., and other infected points.”⁶²

Shotgun quarantines could be put in place quickly, relying on deputized volunteers where militias or law enforcement officers were lacking. In one episode, as the *Washington Post* described,

It is probable that there was never a more rigid quarantine established than that with which Meridian, Miss., sought to protect herself from the invasion of the yellow fever. As soon as the fever appeared in Mississippi, quarantine was declared against the infected place, and when the fever

58 *All Have Shotgun Quarantine*, CHI. DAILY TRIB., Sept. 23, 1888, at 13.

59 See sources cited *infra* notes 61–64.

60 See, e.g., *A Big Scare in Texas*, N.Y. TIMES, Sept. 7, 1897, at 1 (noting, in the sub-heading, “Talk of Reorganizing the Shotgun Quarantine Force”).

61 *A Shotgun Quarantine Against Biloxi*, WASH. POST, Oct. 20, 1886, at 1 (chronicling an instance when one county declared a shotgun quarantine against all residents of another town).

62 *Fever Panic in the South*, INDIANAPOLIS J., Sept. 22, 1888, at 2 (chronicling an instance when a municipality declared a shotgun quarantine against several cities).

began to spread the city shut herself up tight, placing a military guard in the outskirts and forbidding any person to come across the line. The railroads also were forbidden to discharge passengers there”⁶³

The most frequent press reports of shotgun quarantines occurred during the three big epidemics of 1878, 1897, and 1905. Even when armed men were not present, the term “shotgun quarantine” (and, occasionally, “shotgun brigade”⁶⁴) became shorthand for preventing trains from stopping or discharging passengers, and for refusing entry to persons traveling from other areas.⁶⁵

In addition, local authorities might quarantine persons inside a cordon to prevent their escape. In one incident, a sheriff in Columbia, South Carolina, arrested a judge who stepped outside “a ring of special policemen” surrounding the hotel where he was staying, where authorities suspected a resident had contracted smallpox.⁶⁶ The town marshal was fined five dollars “for letting a prisoner escape.”⁶⁷

As related in more detail below, railroads—and their passengers and cargo—bore the brunt of shotgun quarantines throughout the region.

II. GOVERNING DISEASE BY MARTIAL LAW

Pestilence, like war, disrupts society, and silences the law.⁶⁸

Although the shotgun quarantine was a distinctly regional phenomenon, its origin was embedded in the local government law of each state. Efforts to rein in the chaotic shotgun quarantine required greater centralization of state authority. But quarantine was a significant way in which local governments unilaterally could impede interstate commerce, and states found themselves unable to rein them in.

63 *A Southern View of the Case*, WASH. POST, Oct. 24, 1898, at 6 (chronicling an instance when a city prohibited railroads from discharging passengers within its borders); see also *Columbus Bars Montgomery: There is a Shotgun Quarantine Maintained at Some Points*, ATLANTA CONST., Oct. 19, 1897, at 2.

64 James H. McCall, *The Quarantine Laws and National Control of Quarantine*, 72 MED. NEWS 483, 484 (1898) (“One county in Western Tennessee went so far as to station a shotgun brigade on the county line for the purpose of preventing any trains from passing through the county.”).

65 Litigation for commercial loss following yellow fever epidemics is an interesting story in itself, the subject of a subsequent article. For example, railroads were sued, unsuccessfully, by banana shippers whose cargo spoiled en route due to local quarantines. See, e.g., *Ala. & V.R. Co. v. Tirelli Bros.*, 93 Miss. 797, 962–63 (1909) (holding that a railroad carrier was excused for refusing to complete a shipment of bananas due to a force it was unable to control: a local quarantine of bananas).

66 *Sheriff Arrests a Judge*, ATLANTA CONST., Mar. 21, 1901, at 3.

67 *Id.*

68 *Sims v. State*, 72 Tenn. 357, 360 (1880).

A. *State and Local Quarantine Authority*

The right of a state or local government to impose a quarantine existed from the time of independence, based upon pre-existing colonial norms.⁶⁹ In most states this authority was made explicit by legislation granting the power to declare quarantines to the governor as well as to counties and municipalities.⁷⁰ Under these statutes, local shotgun quarantines were legitimate exercises of political power. Local governments scrupulously noted the legality of their actions, bristling at the equation of the shotgun quarantine with mob rule.⁷¹ In reality, it was likely difficult to distinguish measured decision-making from the political persuasion of the mob to compel town governments to act.

Georgia provides a good example. From statehood, the Georgia Assembly recognized that control of contagious disease was a responsibility of local government.⁷² The 1793 Quarantine Act, at more than 2000 words, was one of the most significant and detailed early legislative acts, and its purpose was to prevent the introduction of “plague, smallpox, malignant fever, or any other contagious distemper.”⁷³ Subsequent amendments to the 1793 Act show attempts to clarify which authorities were in charge of quarantine matters, and the extent of their power.

In the 1793 Act, much of which concerned maritime quarantine, local justices of the peace and customs officers were authorized to impose fines on maritime vessels alleged to have violated the terms of the Act, with courts

69 See William Hamilton Cowles, *State Quarantine Laws and the Federal Constitution*, 25 AM. L. REV. 45, 67–69 (1891) (explaining debates in the first Congress and the original terms of federal presence at seaports).

70 See, e.g., Laura K. Donohue, *Biodefense and Constitutional Constraints*, 4 U. Miami Nat'l Sec. & Armed Conflict L. Rev. 82, 99 (2014) (discussing an early Massachusetts quarantine law). See generally *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824) (citing “quarantine laws” as an example of “that immense mass of legislation . . . which can be most advantageously exercised by the States themselves”); *Smith v. Turner*, 48 U.S. 283, 400 (1849) (citing quarantine laws as an example of the states’ legitimate exercise of the power of “self-preservation,” or the power to “guard against the introduction of any thing which may . . . endanger the health or lives of their citizens”).

71 See *Have Lost Their Heads: Parts of the South Under Mob Rule*, N.Y. TIMES, Sept. 25, 1888, at 1 (characterizing certain local legislative acts as mob rule).

72 See, e.g., Act of Dec. 17, 1793, No. 485, para. IX, reprinted in A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 514, 517 (Robert Watkins & George Watkins eds., Philadelphia, R. Aitken 1800) [hereinafter 1793 QUARANTINE ACT] (authorizing “justices of the county or commissioners of the town” next to inlets and rivers to appoint “centinels” and “guard-boats” to enforce quarantine). This division of state and local government is consistent with the findings of William Novak, who has provided other examples of local authority deriving from limited state capacity. See William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1078–79 (1994) (describing the New York State legislation that granted to the city of Albany “ample powers to pass regulations of their own”).

73 1793 QUARANTINE ACT, *supra* note 72, at 516.

enforcing the fines.⁷⁴ Practical limitations on the availability and number of justices of the peace led the Legislature to provide for whistleblowers—any person could collect part of the fine imposed on a ship captain or owner who had failed to report sickness or maintain a quarantine.⁷⁵ Failure to report sickness of crew or passengers, or failure to answer truthfully, meant a fine of £100.⁷⁶

For persons entering the state by land or traveling inland from a port, the governor of the state had the power by proclamation to appoint “centinels” who in turn had authority to turn away or compel the return of anyone suspected of carrying a contagious disease. Should a sentinel fail in this duty, he was subject to the same fine levied on a person who disobeyed or fled a quarantine order.⁷⁷

While the governor possessed executive authority to proclaim a quarantine anywhere in the state, towns and counties had the same authority within their jurisdictions and were expected to use it.⁷⁸ The city of Savannah had its own quarantine power, described in separate provisions of the 1793 Act, reflecting its preeminence in population and the commerce of its port as well as the frequency of its own yellow fever episodes.⁷⁹ Decisions respecting quarantine were invested in the “Corporation of Savannah,” and mention is made of a “health officer” for the port.⁸⁰ Like county justices and town commissioners, the Corporation of Savannah could “use all and every means in their power to enforce this law for the purposes intended.”⁸¹ Justices of the peace could impose fines or seek jail time by petitioning a local court.⁸²

Over the next century, various amendments and permutations of the Quarantine Act characterize legislative attention to quarantine. These changes share two characteristics: (1) local elected officials had unilateral power to determine the need for a quarantine, its duration, and whether the

⁷⁴ *Id.* at 515.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 516.

⁷⁸ 1793 QUARANTINE ACT, *supra* note 72, at 517. Justices of the county or commissioners of any town were “fully authorized to fix such centinels [sic], guard-boats and to use all and every means in their power to enforce this law for the purposes intended.” *Id.*

⁷⁹ *Id.* at 516–17. “Negroes” were automatically quarantined for ten days on land following the arrival of the ship. *Id.* This provision was noted to be “obsolete” in a compilation published in 1822, as slave importation had been outlawed after 1808. A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 191 (Oliver H. Prince ed., Milledgeville, Grantland & Orme 1822), http://digitalcommons.law.uga.edu/ga_code/6. Free persons of color arriving in the city were subject to other administrative burdens, but those were not especially disease-control measures.

⁸⁰ 1793 QUARANTINE ACT, *supra* note 72, at 516–17.

⁸¹ *Id.*

⁸² *Id.* at 515.

local quarantine order had been violated; and (2) judicial involvement was limited to enforcing penalties—either a fine or jail time, at the discretion of the elected official. This basic structure remained the same as improvements in interstate travel (especially by rail) increased the likelihood of contagious disease introduced from other states.

As the number of counties and townships grew, so did the number of independent political subdivisions with independent quarantine power. Today, each Georgia county retains quarantine authority,⁸³ meaning a “legal” quarantine, with or without shotguns, is possible in any one of Georgia’s 159 counties.

The Supreme Court recognized a seemingly unlimited local police power for quarantine as early as *Gibbons v. Ogden*⁸⁴ and again in 1900, noting that “from an early day 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.”⁸⁵

As we shall see, in light of the massive disruption to travel and commerce occasioned by the shotgun quarantine, it is striking that the Dormant Commerce Clause did not play any role in legal debate at the time. The shotgun quarantine would seem an easy target for federal preemption.⁸⁶ The same is true for the later development of a “right to travel” protected by the Privileges or Immunities Clause, a concept closely related to the Dormant Commerce Clause.⁸⁷ Neither of these constitutional doctrines made any appearance in the debates over state and local quarantine.

Why are these constitutional ideas absent from debate? One answer may be the transient nature of the quarantines and the inability of any court to

83 GA. CODE ANN. § 31-12-4 (2016) (“The department [of health] may . . . require quarantine or surveillance of carriers of disease and persons exposed to, or suspected of being infected with, infectious disease until they are found to be free of the infectious agent or disease in question.”).

84 22 U.S. 1, 203 (1824) (describing how inspection laws “form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description . . . are component parts of this mass”).

85 *Compagnie Francaise De Navigation A Vapeur v. La. Bd. of Health*, 186 U.S. 380, 387 (1902).

86 For a general background on the historical development of the “Dormant Commerce Clause” doctrine, see Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (1987); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

87 For historical background on the “right to travel” as a constitutional interest, see Bryan H. Wildenthal, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557 (1989); see also Kathryn E. Wilhelm, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B.U. L. REV. 2461 (2010).

intervene in a timely fashion. But the dominant reason is that immediate health risks were categorically different from commerce and other constitutional relations between states. By the early 1900s the Supreme Court had recognized as much in the *Quarantine Cases*, concerning a state's right to prevent entry of cattle from another state.⁸⁸

In the same period, the Supreme Court also recognized a sweeping local government power (indeed, a responsibility) in times of health emergencies. *Jacobson v. Massachusetts*⁸⁹ upheld the prosecution of a person who refused to be vaccinated during a smallpox outbreak. In doing so, the Court stated that “[u]pon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.”⁹⁰ This privilege for local protectionism trumped the myriad difficulties posed by the shotgun quarantine, as described below. What separates us today from the constitutional status of the shotgun quarantine is the due process revolution of the twentieth century, not the Commerce Clause.

B. *The Refugee Problem*

A gentleman from this city tried to get to Faunsdale, south Alabama, to see his wife, who was visiting there. He was escorted out of three towns by armed guards, after being compelled to leave a quarantine train thirty miles from his destination. . . . He was finally compelled to walk twenty miles under guard to the station, where he could get a train back to this city.⁹¹

At the first appearance of yellow fever, untold numbers attempted to flee the region, especially from the South's commercial cities. In 1878 in Memphis, for example, more than half of the city's population of 47,000 left to escape the disease, most to more northerly regions.⁹² In some years the flood of refugees was so great that relief camps were established for those denied passage.⁹³

88 *Reid v. Colorado*, 187 U.S. 137 (1902) (validating state statute protecting cattle from risk of disease by cattle from another state).

89 *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

90 *Id.* at 27.

91 *The Shotgun in Alabama*, ATLANTA CONST., Sept. 27, 1888, at 2.

92 See Benjamin Evans, *The Yellow Fever Epidemic of 1878 and Public Health Reform in Memphis*, 15 RHODES HIST. REV. 1, 11 (2013).

93 See, e.g., United States Marine-Hospital Service, Annual Report of the Supervising Surgeon-General of the Marine-Hospital Service of the United States for the Fiscal Year 1898 (1899) (discussing detention camps for the prevention of yellow fever). As a relief measure, the federal government established detention camps at several points to receive travelers turned-away by quarantines. Those detained were provided with a certificate

News headlines, once again, illustrated the refugee problem:

“Cities Along the Way Closed, Passengers Not Allowed to Alight Anywhere Short of Alabama Line”⁹⁴

“Railroads Stop All Their Trains”⁹⁵

“Terrified South Ties Up Traffic”⁹⁶

“Atlanta and the Refugees”⁹⁷

“No Quarter in the South: Frightened People Are Refused a Refuge: Some Communities Are Terror-Stricken by the Report that Fever is within a Hundred Miles”⁹⁸

Some cities north of the coast, including Atlanta and Nashville, invited refugees to come, provided they could get through shotgun quarantines along the way.⁹⁹ Travelers at times could board special “refugee trains” to these sanctuaries.¹⁰⁰

The American Medical Association condemned the shotgun quarantine because of “its brutality of administration in so many places.”¹⁰¹

With all its rigors and entailed human suffering, the shotgun quarantine always fails of its object to arrest every incomer. There is ever a loophole—a careless or avaricious or potantious guard, or a byway that escapes watch. The traveler of the better class, going openly, can not miss detention or deportation, but the criminal and the tramp, and at times the local celebrity of powerful connections, can always find an open door. Town after town in the infected area is demonstrating these truths.¹⁰²

To the extent travelers received some kind of individual inspection, they had two possible ways to pass through a shotgun quarantine. One was to prove, somehow, that they had not traveled from or been present in any area where yellow fever was thought to exist.¹⁰³ Another was to demonstrate

upon discharge, to prove length of time away from a yellow-fever zone. For further discussion of federal action, see Part IV *infra*.

94 P.J. Moran, *Greenville and the Yellow Fever*, ATLANTA CONST., Sept. 16, 1897, at 3.

95 *Railroads Stop All Their Trains*, ATLANTA CONST., Oct. 19, 1897, at 6.

96 *Terrified South Ties Up Traffic*, CHI. DAILY TRIB., Aug. 29, 1905, at 3.

97 *Atlanta and the Refugees*, ATLANTA CONST., Aug. 19, 1888, at 12.

98 *No Quarter in the South*, N.Y. TIMES, Sept. 22, 1888, at 1.

99 *See Nashville Invites Refugees*, N.Y. TIMES, Sept. 3, 1905, at 2; *see also Atlanta and the Refugees*, ATLANTA CONST., Aug. 19, 1888, at 12 (“Atlanta is the only city in the gulf and south Atlantic states that has not refused to shelter the yellow fever refugees from Florida.”).

100 *See Decatur, Alabama, Lifts Quarantine*, ATLANTA CONST., Nov. 3, 1897, at 9 (describing refugee trains); *Georgia Towns Ask Protection*, ATLANTA CONST., Oct. 22, 1899, at 24.

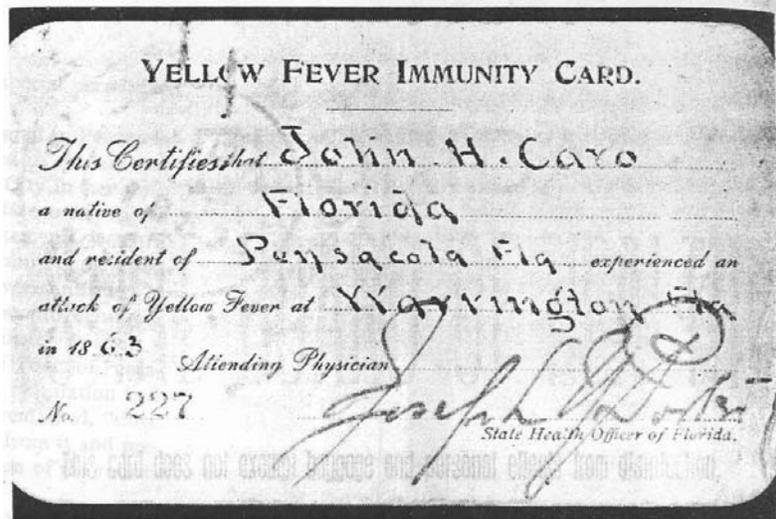
101 *Yellow Fever*, 45 J. AM. MED. ASS’N 722, 722–23 (Sept. 2, 1905).

102 *Id.*

103 *See, e.g., Wilson v. Ala. G.S.R. Co.*, 28 So. 567 (Miss. 1900) (noting one state’s regulation, which prohibited certain people from infected areas from exiting trains at state’s train stations, and providing exceptions for certain people from non-infected areas merely passing through the state); *St. Louis & S.F.R. Co. v. Roane*, 46 So. 711, 711–12 (Miss. 1908) (noting that, in the midst of the yellow fever epidemic in Mississippi and Louisiana, most Southern states required passengers to show health certificates).

immunity from yellow fever by having had the disease in the past.¹⁰⁴ Some residents obtained or forged a physician's note to this effect.¹⁰⁵

Later in the nineteenth century, state boards of health sought to standardize the process by issuing "official" immunity cards in an effort to aid the state's citizens. An example follows:



Florida State Board of Health "Yellow Fever Immunity Card," 1899.

104 *But see* Wendy E. Parmet, *From Slaughter-House to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 *Am. J. Legal Hist.* 476, 493 n.131 (1996) (noting that Louisiana's ordinance went a step further, permitting its Board of Health to block the entry of individuals whether "unacclimated" or "acclimated" to yellow fever).

105 *See infra* note 106 and accompanying text. African Americans, though as a general rule subject to discrimination in travel and accommodation, seem to have been treated more equally to their white counterparts who were subject to a shotgun quarantine. African Americans were perceived to have immunity from yellow fever, based on their African ancestry, and were sometimes even allowed to travel on special "excursion trains" through yellow fever zones. *See* U.S. TREASURY DEP'T, BUREAU OF PUB. HEALTH AND MARINE-HOSP. SERV., *supra* note 48, at 148-49 (noting that a majority of excursionists from Vicksburg during an outbreak of yellow fever were of African descent and that "[i]t is a well-known fact" yellow fever was milder among people of African descent).

PERSONAL DESCRIPTION OF BEARER.

HEIGHT 5 FEET 4 INCHES. WEIGHT 140 POUNDS.

HAIR: NO. STRAIGHT, COARSE, BLACK. ~~WAVEY~~ ~~FRONT~~ ~~COARSE~~.

MOUSTACHE, NO. YES; ~~WAVEY~~ ~~FRONT~~ ~~COARSE~~, BLACK. CHIN-BEARD, YES. ~~FRONT~~ ~~COARSE~~, BLACK. SIDE-WHISKERS, YES; ~~FRONT~~ ~~COARSE~~, WHITE.

~~FRONT~~ ~~COARSE~~, BLACK. SIZE, LARGE ~~FRONT~~ ~~COARSE~~. FOR ~~FRONT~~ ~~COARSE~~, SLENDER. EYES, ~~FRONT~~ ~~COARSE~~, DARK, BLUE, BROWN, BLACK. EARS PIERCED, YES, NO. SPECIAL MARKS, SCARS, ETC.,

(SIGNATURE) John H. Carson

ISSUED May 15 1899

70-68,611

Florida State Board of Health "Yellow Fever Immunity Card," 1899.

The "Yellow Fever Immunity Card" pictured above ostensibly permitted travel on railroads and other conveyances or on foot through quarantined areas. Note that proof of immunity was based on the individual's having "experienced an attack of yellow fever," followed by the location and year. Receipt of the card depended upon the credibility of the individual and the cooperation of a physician. Scams abounded, including "contemptible petty robbery of the ignorant" by way of certificate and notarial fees; dozens of card holders were turned back because of fraudulent papers.¹⁰⁶

Possession of a health certificate did not guarantee the cooperation of local health inspectors, however. In one particularly sad case, two brothers returning home from tuberculosis treatment in the West purchased tickets from Memphis to Oxford, Mississippi, but were required to change trains at Holly Springs, Mississippi.¹⁰⁷ The brothers boarded the train at Memphis, but during the trip they were approached by a man who claimed to be a quarantine officer of the city of Holly Springs and were told to get off the train. Even though the boys possessed certificates showing that they had not been in any yellow fever-infected region, they were forced to leave the train at a rural station, leaving the boys to make their way back to Memphis on foot. Two days later, they traveled by another route to Oxford. One brother

¹⁰⁶ U.S. TREASURY DEP'T, BUREAU OF PUB. HEALTH AND MARINE-HOSP. SERV., *supra* note 48, at 182.

¹⁰⁷ *St. Louis & S.F.R. Co. v. Roane*, 46 So. 711, 711-12 (Miss. 1908).

died from tuberculosis two days after arriving at Oxford. His brother lived only a few weeks more, both deaths allegedly hastened by the ordeal.¹⁰⁸

Railroads did not assume responsibility for passengers reaching the destination for which they had purchased a ticket.¹⁰⁹ Moreover, in this time period, passengers had only a nascent constitutional “right to travel,”¹¹⁰ and certainly no judicially enforceable right to pass through a quarantine imposed under the authority of the state’s police power. Any “right to travel” was not likely enforceable in any meaningful way, as described below.

Travelers had no effective remedy through the judicial system. Courts were unable to intervene—sometimes years passed before tort or contract suits wound their way through trial and appeal. Even if they could petition a court for an injunction or writ of mandamus, judges deferred to medical opinion on the necessity of quarantine and were unwilling to referee disputes about it.¹¹¹

Tort and contract remedies, moreover, were limited. Judges preferred not to revisit governmental choices during an epidemic. One of the few successful claims grew out of the 1897 epidemic. In *Wilson v. Alabama G. S. R. Co.*,¹¹² the railroad was held liable for damages in forcing a passenger to disembark at the Mississippi state line on account of a quarantine by the Mississippi State Board of Health. But in that case, no Mississippi health officers were actually present to compel obedience to the quarantine. The

¹⁰⁸ *Id.*

¹⁰⁹ See *The Railroads in Epidemics*, ATLANTA CONST., April 1, 1898, at 11; R. Scott Huffard, Jr., *Infected Rails: Yellow Fever and Southern Railroads*, 79 J.S. HIST. 79, 80 (2013) (describing the adjustment of residents to the development of railroads in the South as “anything but smooth”).

¹¹⁰ In 1867, the Supreme Court ruled that the right of travel throughout the United States was a right, privilege, or immunity of national citizenship. This right could not be interfered with by a state seeking to impose a capitation tax upon all travelers. *Crandall v. Nevada*, 73 U.S. 35, 49 (1867). For subsequent developments regarding the constitutional right to enter and reside in any U.S. state, see Kevin Maher, *Like A Phoenix from the Ashes: Saenz v. Roe, the Right to Travel, and the Resurrection of the Privileges or Immunities Clause of the Fourteenth Amendment*, 33 TEX. TECH L. REV. 105, 106–07 (2001) (discussing how the right to travel was, ostensibly, protected by the Privileges or Immunities Clause of the Fourteenth Amendment, as recognized in the *Slaughterhouse Cases*); see also Jason Alloy, Note, “158-County Banishment” in Georgia: Constitutional Implications under the State Constitution and the Federal Right to Travel, 36 GA. L. REV. 1083 (2002) (discussing Georgia’s practice of banishment as a punishment for crimes). Interestingly, no federal constitutional arguments appear to have been made in the case of a Maine nurse who sued the state’s health department over the terms of her quarantine order. See Order Pending Hearing, *Mayhew v. Hickox*, No. 2014-36 (D. Me., Oct. 31, 2014) (noting that no mention of the Privileges and Immunities Clause of the Fourteenth Amendment was made in the Plaintiff’s argument in her suit against the state’s quarantine).

¹¹¹ Tort and contract decisions as well as extra-legal norms occasioned by the various yellow fever epidemics in the South are beyond the immediate scope of this Article. A full treatment of this subject will be the subject of a separate article.

¹¹² *Wilson v. Ala. G.S.R. Co.*, 28 So. 567 (Miss. 1900).

railroad company acted, it said, because it had been given prior notice of the order. Absent compulsion by health authorities, the railroad was held liable for wrongful discharge and the resulting damage suffered by the passenger.¹¹³

As the Mississippi Supreme Court explained:

The public health must be vigilantly cared for, but with due caution that no order intended to secure it shall be so sweeping and arbitrary as to interfere unreasonably with the citizen's rights of return to his home, neither he nor it having been exposed to infection. With every disposition to uphold all reasonable regulations of our efficient and faithful board of health, we are constrained by the oft-settled doctrines applicable to declare this order void for unreasonableness. Doubtless this order would not have been given its unconfined sweep, but for the hurry and excitement of the times.¹¹⁴

But obedience to a quarantine order when enforcement was not imminent was a risk the railroad assumed:

The railroad company must take the risk—as all citizens do—as to the validity of such orders, when it yields to the order alone. And when its defense is, not that it yielded obedience because only of the order, but because, also, of vis major,—a shotgun quarantine, for example,—its defense will be maintained, if it shall appear that such vis major, such uncontrollable necessity, was the real cause of its action. It need not go to the extent of actual collision with force marshaled by necessity; but it must show that its action was due to such force, existing and capable of controlling its action.¹¹⁵

The railroad had acted solely on the authority of an order later deemed “void” and thus was liable to its passenger. But the prevailing judicial attitude did not question a local government's right to impose any quarantine it saw fit, frequently citing the maxim, *salus populi suprema lex*—“the health of the people should be the supreme law.”¹¹⁶

If passengers were not generally considered to be engaged in interstate commerce, cargo and mail shipments clearly were. The significant effect of the shotgun quarantine on business interests is surveyed below.

C. Commercial Disruption, Rivalry, and Rumor

The disruption to commerce resulting from the shotgun quarantine, more than the plight of refugees, provoked business leaders and the politicians they lobbied to pursue legislative solutions.

113 *Id.* at 569.

114 *Id.*

115 *Id.*

116 *Id.* at 567–69.

Beyond doubt, the North was aware of the commercial impact occasioned by the shotgun quarantine in the South, as is evident from news articles in the *Washington Post*, the *Chicago Daily Tribune*, and the *New York Times*. As some headlines alerted readers:

More Fever Cases: Situation Not Regarded as Unusually Alarming. Heavy Blow to Business: Texas and Mississippi Quarantines Especially Severe.¹¹⁷
 Yellow Fever Epidemic . . . Business Much Depressed¹¹⁸
 All Trade Stagnant¹¹⁹

The *Wall Street Journal* reported local quarantines as they were imposed in the South, further evidence of the attention to commercial disruption caused by the shotgun quarantine.¹²⁰

Unsurprisingly, local business interests outside the afflicted areas backed efforts to prevent shotgun quarantines. At various points, chambers of commerce, hoteliers, railroad officials, and the League of American Municipalities lobbied state legislatures and Congress for relief.¹²¹ “Railroad men” were especially concerned, with representatives of the various rail lines joining state and regional conferences on quarantine.¹²²

These same groups also had an incentive to suppress reports of yellow fever in their cities, for fear of interference with commerce that would result from shotgun quarantines imposed against them. Accordingly, health officials accused each other of bowing to political pressure by failing to report legitimate cases of yellow fever.¹²³ One of the most prominent disputes arose in the vicinity of Biloxi, Mississippi.¹²⁴ Health officials from New Orleans and Mobile insisted Biloxi physicians were covering up cases of yellow fever, while Biloxi health officials, in turn, accused them of inciting an quarantine without adequate justification:

The people of Biloxi held a mass meeting to-day [sic] and passed resolutions expressing their confidence in the medical intelligence and

¹¹⁷ *More Fever Cases*, WASH. POST, July 30, 1905, at 1.

¹¹⁸ *Yellow Fever Epidemic*, N.Y. TIMES, Sept. 29, 1897, at 5.

¹¹⁹ *All Trade Stagnant*, WASH. POST, Sept. 29, 1897, at 2.

¹²⁰ See, e.g., *Yellow Fever Conditions*, WALL ST. J., Oct. 1, 1897, at 2; *Effect of Yellow Fever*, WALL ST. J., Sept. 2, 1898, at 4; *The Yellow Fever Situation*, WALL ST. J., Aug. 1, 1905, at 2.

¹²¹ See, e.g., *Unify Quarantine Throughout Land: Atlanta Chamber of Commerce Secures Unanimous Action*, ATLANTA CONST., Dec. 17, 1897, at 1; see also *State Quarantine Ineffectual*, WASH. POST, Dec. 14, 1900, at 1 (recounting the urging of Dr. Brunner of the League of American Municipalities for national quarantine laws).

¹²² *For a Uniform Quarantine Law*, ATLANTA CONST., Jan. 30, 1898, at 17; *Yellow Jack Convention Meets and Adopts Code for the South*, ATLANTA CONST., Apr. 17, 1898, at 5; see also *Many Officials Will Be Present*, ATLANTA CONST., Oct. 23, 1905, at 3.

¹²³ *Quarantine in the Gulf States*, N.Y. TIMES, June 3, 1884, at 5 (“The meeting had hardly got to work before Dr. Jerome Cochrane, of Mobile, accused the health officers of Louisiana and Florida of withholding information about yellow fever cases from the Alabama authorities.”).

¹²⁴ *A Shotgun Quarantine*, N.Y. TIMES, Sept. 3, 1886, at 1.

experience of their local physicians, who had declared the cases of sickness to be bilous [sic] remittent fever, denouncing the report of the visiting officials of New-Orleans [sic] and Mobile, which has done the town an irreparable injury in driving away hundreds of visitors, stopping trade, and depriving hundreds of working people of their daily bread.¹²⁵

By the same turn, city officials often accused business interests in other locations of spreading false rumors for commercial gain.¹²⁶ The degree of panic, however, probably led to rumors regardless of motive. As one headline described, for example, “Rome Will Not Quarantine: Rumor that a Case Was Found Caused a Panic Almost.”¹²⁷ The *Atlanta Constitution* blamed journalists for much of the “insane yellow fever panic,” describing how correspondents “in every little hamlet” sent news reports “from every little cross-roads town in the south.”¹²⁸

The most public accusation of a politically-motivated economic embargo involved the states of Louisiana and Texas.¹²⁹ Texas sealed its borders with Louisiana following reports of yellow fever in New Orleans. In a lawsuit brought before the U.S. Supreme Court, Louisiana officials claimed the strict quarantine was unnecessary and was designed to benefit the port of Galveston and other cities in Texas at the expense of the commerce of New Orleans.¹³⁰ The Court declined to hear the case on the ground that it did not have original jurisdiction.¹³¹

Another quarrel between the governors of Mississippi and Louisiana over quarantine jurisdiction seems certain to have been about underlying commercial interests. According to a writer for the *Chicago Daily Tribune*:

Gov. Vardaman of Mississippi equipped a flotilla and, as Gov. Blanchard of Louisiana afterward complained, invaded the waters of the latter state, driving out the fishermen, seizing vast oyster fields, etc., occupying

125 *Id.*

126 *See A Shotgun Quarantine*, N.Y. TIMES., Sept. 3, 1886, at 1 (“The people of Biloxi held a mass meeting to-day . . . denouncing the report of the visiting officials of New-Orleans and Mobile, which has done the town an irreparable injury in driving away hundreds of visitors, stopping trade, [etc.] . . .”); *No Yellow Fever at Biloxi*, N.Y. TIMES, Sept. 7, 1886, at 5 (“The Biloxi yellow fever sensation has fizzled out. . . . [B]ut Cadet point, where the cases of sickness occurred, is quarantined . . . not because the recent diseases were infectious, but for the comfort and solace of other cities.”). The most serious and public accusations arose between Louisiana and Texas during the epidemic of 1905. *See* Part IV.A *infra*.

127 *Rome Will Not Quarantine: Rumor That a Case Was Found Caused a Panic Almost*, ATLANTA CONST., Sept. 21, 1897, at 1.

128 *A Senseless Scare Abating*, ATLANTA CONST., Sept. 27, 1888, at 4.

129 *See Louisiana Against Texas Treatment*, ATLANTA CONST., Oct. 16, 1899, at 1.

130 *Louisiana v. Texas*, 176 U.S. 1, 8 (1900). This case is examined in Part IV.A *infra*.

131 *Id.* at 23.

Louisiana territory, and generally committing unwarranted and intolerable deprivations.¹³²

An opinion in the *Atlanta Constitution* favored a national quarantine law precisely to counter such economic embargoes:

The one remedy for such manifestations is a national quarantine law broad enough in its provisions to meet every emergency. . . . We should hear no more of shotgun quarantines, and there would be no basis for irritation or ill feeling between states, or between communities in different states.¹³³

Business losses in each major epidemic were difficult to estimate. During a given fever season, a time-lapse geographic map of locally-imposed shotgun quarantines would show hundreds of towns lighting up as sickness spread.¹³⁴ The effect would be like a disco strobe light. Under such circumstances it was difficult for people to plan even ordinary commercial transactions, with the result that many businesses, large and small, closed their doors permanently.¹³⁵

The yellow fever epidemics of the latter part of the nineteenth century created pressure to restructure the balance between state and local police power. The shotgun quarantine proved that state governments had limited legal authority over independently-minded local communities. As a result, state legislatures undertook to centralize control over quarantine authority. These measures would fail to achieve their purpose, leading to the conclusion that only the federal government could provide an effective solution.

D. Regional Solutions?

Similar disputes took place throughout the South, as governors and legislatures attempted to quell the local shotgun quarantine. The failure of these efforts led southern health officials to attempt region-wide responses to yellow fever epidemics. Ultimately, the attempt to attain uniform regional standards would fail, leading southern politicians to ask for federal intervention.

132 Richard Weightman, *Edible Enlightenment in South's Quarantine War*, CHI. DAILY TRIB., Oct. 14, 1905, at 8.

133 *Wanted: A National Quarantine Law*, ATLANTA CONST., Oct. 17, 1899, at 6.

134 For example, *The Atlanta Constitution* reported, "Brunswick's city council held a called meeting tonight and passed a resolution authorizing Mayor Atkinson to quarantine against any places he believed to have yellow fever and at any time he deemed proper." *Brunswick Ready for Quarantine*, ATLANTA CONST., Sept. 12, 1899, at 1.

135 *Appalling Affliction*, DAILY AM., Sept. 6, 1878 at 1 (describing the "gloomy" effect of having "all the business houses except two drug stores" closed in Brownsville, Tennessee); *In a Panic!*, DETROIT FREE PRESS, Sept. 16, 1897, at 1 ("The state capital [of Mississippi] depopulated, its business houses closed, its newspapers suspended . . .").

Following the far-reaching epidemics of 1897 and 1905, delegates from southern states attended regional conferences aimed at a coordinated response to yellow fever.

1. *Mobile Convention, 1898*

At the request of Governor Johnston of Alabama, representatives of southern states met in Mobile to plan a quarantine convention of the South Atlantic and Gulf states. Representation was to be “fixed at five members, appointed by the governor of each state, one delegate from each municipality and one from each commercial organization, railroad system and river transportation company, [and] all chiefs of quarantine service in the states”¹³⁶ The program, the invitation stated, would cover “the whole subject of quarantine in relation to state and national government”¹³⁷ In anticipation of the convention, the organizing committee adopted a resolution “appealing to [C]ongress to withhold action on the public health and quarantine matters until the subject can receive the attention its importance demands.”¹³⁸

The convention assembled in February 1898 in Mobile, and included a broad spectrum of southern society: “members of the medical profession, members of the legal fraternity, members of the cloth; the laity being represented by men from great corporations—the railroads, boards of trade and commerce, and cities interested in the vital interests to be discussed.”¹³⁹

Optimism at the outset of the convention was great:

The high importance of the quarantine convention now in session here was today established for the first time and tonight it may safely be predicted that the result of their deliberation will go much further toward shaping future quarantine legislation of national, state and local character than the most sanguine of its promoters hoped for.¹⁴⁰

It was also clear to the delegates that their action could have national importance. As an observer reported, “The fact that [C]ongress will recognize the final action of the convention has been telegraphed here in many different ways from Washington, and it is even apparent that Washington is trying to influence some of the delegates.”¹⁴¹

¹³⁶ *Quarantine Laws Debated in Mobile*, ATLANTA CONST., Dec. 19, 1897, at 21.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Hearing Before the Comm. on Interstate and Foreign Commerce of the H.R. on Bills (H.R. 4363 and S. 2680) to Amend an Act Entitled “An Act Granting Additional Quarantine Powers and Imposing Additional Duties upon the Marine Hospital Service”*, 55th Cong. 20 (1898) [hereinafter *1898 Quarantine Powers Hearing*] (statement of H.B. Horlbeck, Health Officer, Charleston, S.C.).

¹⁴⁰ *Quarantine Laws Are Discussed*, ATLANTA CONST., Feb. 11, 1898, at 1.

¹⁴¹ *Id.*

The final result of the convention reflected divided opinion on many questions, but at the end delegates strongly favored national legislation of some sort. The *Atlanta Constitution* trumpeted the headline “Home Quarantine Loses the Fight: Mobile Convention Declares in Favor of National System,” though it noted, “Details Not Yet Perfected.”¹⁴² Those details, in fact, would be a matter of some dispute at a congressional hearing later that spring.¹⁴³

2. *Memphis Convention, 1898*

A self-styled “National Quarantine Convention” took place in Memphis ten months later. At the invitation of Memphis merchants to “all interested,” the convention delegates included “many prominent scientists,” representatives from the Marine Service Hospital, and state and local health boards.¹⁴⁴ Of the 125 delegates, most were from southern states.¹⁴⁵

At the outset of the convention, the delegates received a telegraph communicating the views of President William McKinley:

The [P]resident has received your communication inclosing [sic] a copy of the resolutions recently adopted by the Memphis merchants’ exchange, in accordance with which a convention has been called to meet in your city It affords me pleasure to assure you of the [P]resident’s deep interest in this and other movements looking to the prevention of the unhealthful and distressing condition referred to, and to convey his best wishes for a most successful result of the deliberations of the convention.¹⁴⁶

The Memphis group passed resolutions stating the need for national control of quarantine, but they were unable to agree as a group with respect to the specific legislation needed. Senator George Vest of Missouri, who was unable to attend, wrote to the delegates that he did not believe that “any legislation can be had doing away with the present complex and conflicting conditions as to quarantine.”¹⁴⁷ The primary impediment, according to Senator Vest, was state boards of health. They “are determined to retain their jurisdiction as it now exists, and this is absolutely inconsistent with the idea of such a national quarantine as will secure rapid and efficient opposition to yellow fever.”¹⁴⁸

142 *Home Quarantine Loses the Fight*, ATLANTA CONST., Feb. 12, 1898, at 1.

143 *1898 Quarantine Powers Hearing*, *supra* note 139, at 20–23, 29–30, 54, 86.

144 *Quarantine Folk Will Meet Today*, ATLANTA CONST., Nov. 16, 1898, at 2.

145 *Quarantine Convention Holds Three Sessions and Organizes*, ATLANTA CONST., Nov. 18, 1898, at 1.

146 *Id.*

147 *Quarantine Folk Will Meet Today*, *supra* note 144.

148 *Id.*

3. *Chattanooga Convention, 1905*

The most ambitious regional conference took place in Chattanooga in November 1905, just as the epidemic of 1905 wound down. Nine governors, two senators and eighteen congressmen from southern states attended the “Southern Quarantine and Immigration Congress,” which sought regional authority for interstate quarantine control together with their state boards of health.¹⁴⁹

In the opening address, Governor John Cox of Tennessee reportedly said the Convention should “provide for uniform quarantine legislation by the Southern States, which should have the approval of the National Congress and thus have the force of constitutional law, so that a citizen going to any part of the South in times of epidemic should know exactly what conditions he would meet.”¹⁵⁰

Over some objection on grounds of states’ rights—including by Governor Vardaman of Mississippi, who warned the convention “against taking any steps which will trample upon the autonomy of our States”¹⁵¹—the delegates attained remarkable unanimity on the need for congressional action, as indicated by the headline below:

WANT FEDERAL CONTROL OVER FEVER SITUATION

Fourteen Southern States Adopt-
ed Resolutions Asking
Government Quarantine.

Atlanta Constitution, November 11, 1905

Unable to agree on an effective regional approach, delegates to the convention concluded that Congress alone could solve the problems posed by the shotgun quarantine. They hoped Congress would approve a “national quarantine” law that would, in the words of the *Atlanta Constitution*, “wipe[] out the state line foolishness with its inevitable display of opera

149 *Governors Disagree*, WASH. POST, Nov. 10, 1905, at 11.

150 *Id.*

151 *Id.*

bouffe officialism in the contingency of a dangerous epidemic, placing the responsibility for quarantining and the care of the pestilence victims upon the broad shoulders of Uncle Sam."¹⁵² At least some delegates, however, believed the convention's resolution would not remove any power of municipal quarantine.¹⁵³

Congress took note of these three regional conventions when it considered the extent of the federal government's authority to preempt state and local quarantine.

III. LAW IN THE TIME OF QUARANTINE: DEBATING FEDERAL AUTHORITY

If the gentleman will read all the decisions, and then undertake to write down in words exactly where the national power ends and where the State power begins on this subject of quarantine he will accomplish what in my judgment nobody else has yet accomplished.¹⁵⁴

As we have seen, the shotgun quarantine made its first widespread appearance during the 1878 epidemic. The shotgun quarantine also featured prominently in the epidemics of 1897 and 1905, followed in each instance by congressional efforts to address it. Proposed legislation would have provided the federal government with explicit power to single out any local quarantine and dismantle it. At no other time has such an extension of federal quarantine power been considered or more fully vetted.

Two sessions of Congress—in 1898 and 1906—tackled head-on the question whether the federal government could force a municipality to end its shotgun quarantine. These sessions featured intense advocacy for Congress to assume the power to override the local shotgun quarantine, invitations which Congress ultimately declined. This Part examines these legislative moments for a clearer view of the constitutional issues at stake.

¹⁵² *The National Quarantine Law*, ATLANTA CONST., April 7, 1906, at 8.

¹⁵³ As the *Atlanta Constitution* summarized:

The exercise by the federal government of a supervisory control over state quarantines will not take from the states or from the municipalities their inherent rights to protect themselves. In the case of a municipality, for instance, the fact that the federal government permits a train from an infected district to pass through—proper precautions, of course, being taken—does not take away from the municipality its right to protect itself by prohibiting the landing in its midst of people from infected districts. And the same right would still remain with the states, even with the federal government exercising the general supervision which seems to be contemplated in the Chattanooga resolution.

Federal and State Cooperation, ATLANTA CONST., Nov. 12, 1905, at D4.

¹⁵⁴ William Hamilton Cowles, *State Quarantine Laws and the Federal Constitution*, 25 AM. L. REV. 45 (1891) (quoting an unnamed member of the House of Representatives).

The key was to separate two questions: coastal quarantine, historically under state control, and geographic quarantines imposed by inland towns. The question of national control over seaport inspection dominated congressional debate, but local quarantines in the interior were also of significant concern. To be sure, much of the dissatisfaction with current law was the lack of uniform methods to prevent the introduction of yellow fever through importation of cargo and persons, and the worry that port cities had incentives to promote their own commercial interests above all other considerations. When a “uniform quarantine system” was urged, often the advocate meant federal control over all state seaport inspections, to interdict and disinfect incoming ships by application of uniform standards and federal resources.

But an important component of the debate was how to stop the shotgun quarantine—federal ability to lift inland quarantines imposed by cities and towns. As I point out below, it is one thing to have the authority to impose quarantine measures where states fail to act; it is quite another to prevent a state or local government from imposing a quarantine that it believes necessary for itself. Could the federal government deprive a state or local government of this right?

A. *The U.S. Supreme Court, Quarantine, and Interstate Commerce*

The U.S. Supreme Court never explicitly addressed the shotgun quarantine, nor has the Court ever set limits on the extent to which the federal government might preempt any local quarantine. But in the midst of yellow fever epidemics, it twice sent clear signals that Congress might assert such power if it chose. This constitutional backdrop was significant for debates over the reach of federal authority.

Exclusive state authority for quarantine and inspection stemmed from earlier pronouncements by the Supreme Court, including *Gibbons v. Ogden*.¹⁵⁵ Health laws internal to a state could not be preempted in the name of interstate commerce:

They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries[, etc.], are component parts of this mass.¹⁵⁶

¹⁵⁵ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

¹⁵⁶ *Id.* at 203.

In 1891, an article in the *American Law Review* explained the established understanding of a state's police power to protect the health of its residents:

It is well settled, upon the authorities, that the power to establish quarantine regulations rests with the States and has not been surrendered to the Federal government. The source of this power lies in the general right of a State to provide for the health of its people, and although the power when exercised may, in a greater or less degree, affect commerce, yet quarantine laws are not enacted for that purpose, but solely for preserving the public health.¹⁵⁷

The first case in which the Supreme Court invited Congress to act in favor of national quarantine was *Morgan's Steamship Co. v. Louisiana Board of Health*,¹⁵⁸ decided in 1886. In that case, the Court upheld quarantine rules imposed by Louisiana. But the Court also advised Congress that it might preempt state and local quarantines:

[I]t may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all State laws on the subject will be abrogated, at least so far as the two are inconsistent. But, until this is done, the laws of the State on the subject are valid.¹⁵⁹

That pronouncement created a stir in legal circles, with a number of writers hypothesizing how far-reaching that federal power might be.¹⁶⁰ Much of the analysis centered on Congress's power under the Commerce Clause. In 1877, the Court had established:

While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, [etc.], from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or inter-state commerce.¹⁶¹

“[U]nder the cover of exerting its police powers” suggests a quarantine may not be motivated by any factor other than the protection of public health.¹⁶²

¹⁵⁷ H. Campbell Black, *The Police Power and the Public Health*, 25 AM. L. REV. 170, 181 (1891).

¹⁵⁸ *Morgan's Steamship Co. v. Louisiana Bd. of Health*, 118 U.S. 455 (1886).

¹⁵⁹ *Id.* at 464.

¹⁶⁰ See Cowles, *supra* note 154, at 45, 48; John H. Girdner, Alvah H. Doty & C.M. Drake, *The National Government and the Public Health*, 165 N. AM. REV. 733 (1897); James H. McCall, *supra* note 64; Charles Merz, *Growth of Federalism*, 10 NEW REPUBLIC 256 (1917); D.H. Pingrey, *Valid State Laws Incidentally Affecting Foreign and Interstate Commerce*, 28 CENT. L.J. 336 (1889); U.O.B. Wingate, *National Public Health Legislation*, 504 N. AM. REV. 527 (1898).

¹⁶¹ *R.R. Co. v. Husen*, 95 U.S. 465, 472 (1877).

¹⁶² *Id.*

Did the dicta in *Morgan's Steamship* mean that only duplicitous or dishonest local quarantines might be preempted by the federal government? At least one legal scholar thought so: "Of course if it can be said of any law of this sort that it is clearly not a *bona fide* quarantine regulation, it would interfere with commerce more than is necessary."¹⁶³ But who would decide if a shotgun quarantine was *bona fide*, and with what criteria?¹⁶⁴ In 1900, a federal circuit court struck down a geographic quarantine of San Francisco's Chinatown, primarily on the authority of *Yick Wo v. Hopkins*,¹⁶⁵ but also because the twelve block cordon was an unreasonable restriction based merely on unfounded rumors of bubonic plague.¹⁶⁶

The second case, *Louisiana v. Texas*,¹⁶⁷ arose from alleged economic embargoes against New Orleans. The state of Louisiana claimed that Texas quarantines "place[d] an embargo on all interstate commerce between the city of New Orleans and the state of Texas," and that the quarantine was a pretext for economic gain.¹⁶⁸ Texas closed its borders as soon as the first case of yellow fever appeared in New Orleans, "the effect being to benefit the commerce of Galveston and of other Texas cities at the expense of the commerce of New Orleans."¹⁶⁹ Louisiana claimed such actions violated the federal Constitution and especially the clause regulating interstate commerce.

Contemporaries understood what was at stake in the litigation. As the case was pending, the *Atlanta Constitution* wrote:

The suit now pending, on a petition from Louisiana, to prevent the state of Texas from placing an embargo upon interstate commerce from Louisiana, seems to us a somewhat futile remedy for the troublesome situation which has existed in the southwest during the summer as a result of the existence of yellow fever in New Orleans and in Mississippi . . . Should the suit be decided in favor of Louisiana, how will the decision be put in force without the active employment of federal troops; and what will this result in but a total suspension of trade and business relations between the wholesale and retail merchants of Louisiana and the people of Texas?¹⁷⁰

The Supreme Court dismissed the suit on the ground that there was no direct issue between the states. In order to constitute a controversy between states, as is required for original jurisdiction, "something more must be put

163 Cowles, *supra* note 154, at 66.

164 *Id.* (questioning whether state quarantine laws "interfere with commerce more than is necessary").

165 118 U.S. 356 (1886).

166 *Jew Ho v. Williamson*, 103 F. 10 (C.C.N.D. Cal. 1900).

167 *Louisiana v. Texas*, 176 U.S. 1 (1900).

168 *Texas' Quarantine Rights*, WASH. POST, Jan. 16, 1900, at 10.

169 *Id.*

170 *A National Quarantine Law*, ATLANTA CONST., Nov. 10, 1899, at 4.

forward than that the citizens of one state are injured by the maladministration of the laws of another.”¹⁷¹

Nonetheless, a concurring opinion suggested, once again, that Congress might intervene in these circumstances. Justice John Harlan wrote:

[I]f the allegations of the bill be true, the Texas authorities have gone beyond the necessities of the situation and established a quarantine system that is absolutely subversive of all commerce between Texas and Louisiana, particularly commerce between Texas and New Orleans. This court has often declared that the States have the power to protect the health of their people by police regulations directed to that end, and that regulations of that character are not to be disregarded because they may indirectly or incidentally affect interstate commerce. But when that principle has been announced it has always been said that the police power of a State cannot be so exerted as to obstruct foreign or interstate commerce beyond the necessity for its exercise, and that the courts must guard vigilantly against needless intrusion upon the field committed to Congress.¹⁷²

The Supreme Court’s invitations for Congress to act became a game of capture the flag in the pivotal debates of 1898 and 1906. Presidents William McKinley, Teddy Roosevelt, and William Howard Taft believed the federal government had the authority to override a state or local quarantine and that it should use it.¹⁷³ Congressional debates over a federal quarantine power that would preempt state and local quarantine orders are considered below.

B. 1878–1893: First Reactions to the Shotgun Quarantine

The first efforts to counteract the southern shotgun quarantine were indirect. Coastal quarantine dominated congressional debate; inland quarantine received little attention. Containing shotgun quarantines would be prominent aims of Congress in 1889 and 1906. For this reason, this Part provides merely a brief overview of national legislation in preceding years.

The National Board of Health (1879–1883) receives cursory treatment here because it had only advisory power and did not address the problems of the local shotgun quarantine.¹⁷⁴ Congressional attention following the devastating yellow fever epidemic of 1878 did not yet focus on the shotgun quarantine problem, perhaps because it was not evident that this type of

171 *Louisiana v. Texas*, 176 U.S. at 22.

172 *Id.* at 23–24 (Harlan, J., concurring).

173 *See Maxey*, *supra* note 7, at 394–95.

174 Accounts of the establishment and function of the National Board of Health describe its jurisdictional limitations and the compromise necessary for its creation. *See BLOOM*, *supra* note 15, at 206–07, 235, 245–46; ELLIS, *supra* note 15, at 60–82; HUMPHREYS, *supra* note 15, at 62–76; Cowles, *supra* note 154, at 70–71; Jerrold M. Michael, *The National Board of Health: 1879–1883*, 126 PUB. HEALTH REP. 123, 127 (2011).

quarantine would become an enduring practice. As a contemporary summarized, “This law expired at the end of four years, a reenactment was prevented, and Congress placed an epidemic fund in the hands of the President to be used at his discretion in preventing and suppressing epidemics and maintaining quarantines at exposed points.”¹⁷⁵ Instead, members of Congress directed their efforts toward improving coastal quarantine to prevent introduction of yellow fever from abroad.

Proponents of a national quarantine measure, known as the “yellow fever bill,” justified the federal government’s intervention under its constitutional right to regulate commerce and to protect the country from foreign “invasions.”¹⁷⁶ Opponents of the bill argued that it was unconstitutional and a violation of state rights.¹⁷⁷ Southerners, it seemed, preferred federal power over local quarantine. Members of the National Board of Health, meeting in Atlanta in 1879, reported:

[There is] very great indignation and dissatisfaction in the Southern States at the fact that the Senate has refused to approve the National Quarantine Bill. In case nothing is done by Congress they say that it will be impossible to restrain the people, and that at the first intimations of the approach of yellow fever from the South a rigid, destructive shotgun quarantine system will be established by the people, who will take all law into their own hands.¹⁷⁸

Ultimately, a much weaker bill created the National Board of Health, one that satisfied opponents of federal power. The Board’s functions were limited to advising state and local boards of health, publishing health information, and investigating public health questions.¹⁷⁹ Even with the weakened version, some health officials in Louisiana, Georgia, and Alabama objected to the National Board’s potential “interference” in local affairs.¹⁸⁰ A memorial to Congress from Alabama stated that it was “neither wise nor prudent for us to entrust the administration of quarantine to the hands of any other health authorities than those who are of our own appointment and directly responsible to our own people.”¹⁸¹ Further, “the State can not afford to allow this large grant of power, so nearly affecting the welfare of our people, to be placed in the hands of the National Board of Health, or of

175 McCall, *supra* note 64, at 483.

176 *Necessity for a National Quarantine*, 14 FORUM 579 (1893); McCall, *supra* note 64, at 483.

177 McCall, *supra* note 64, at 483.

178 *Yellow Fever: Southern Dissatisfaction at the Action of Congress: A Shot-Gun Quarantine to Be Established*, BOS. EVENING J., May 12, 1879.

179 McCall, *supra* note 64, at 483.

180 *See* Warner, *supra* note 46, at 426.

181 *Id.* (quoting Jerome Cochran et al., *The Memorial of the Board of Health of the State of Alabama*, TRANSACTIONS OF THE MED. ASS’N OF ALABAMA: REP. OF THE STATE BD. OF HEALTH (Apr. 1880), at 123–25).

any other agent of the federal government.”¹⁸² Congress permitted the Board to expire in 1883 at the conclusion of its initial appropriations.¹⁸³

The National Health Board did, at least, set a precedent for future public health efforts by the federal government. Congress had given the Board authority to provide money to state and local health boards “and to assume quarantine powers when states did not appear competent or willing to do so.”¹⁸⁴ One historian concluded that “[t]here was considerable confusion among state and local boards over the limitations of the National Board’s powers,” providing as an example that the “National Board could not intervene until local boards had submitted itemized requests for funds.”¹⁸⁵

By 1893, the Marine Hospital Service (later renamed the U.S. Public Health Service) was given explicit statutory authorization to use interstate quarantine powers to prevent the introduction and spread of cholera, yellow fever, smallpox, and plague, with jurisdiction soon extended to include quarantine for all infectious and contagious diseases.¹⁸⁶ These powers were to be exercised “in cooperation” with state and local health agencies.¹⁸⁷

1890 saw the first federal legislation specific to interstate, as opposed to coastal, quarantine.¹⁸⁸ Popularly known as the “Interstate Quarantine Law” and titled “An act to prevent the introduction of contagious diseases from one State to another,” the statute provided:

That whenever it shall be made to appear to the satisfaction of the President that cholera, yellow-fever, small-pox, or plague exists in any State or Territory, or in the District of Columbia, and that there is danger of the spread of such disease into other States . . . he is hereby authorized to cause the Secretary of the Treasury to promulgate such rules and regulations as in his judgment may be necessary to prevent the spread of such disease from one State or Territory into another . . . and to employ such inspectors and other persons as may be necessary to execute such regulations to prevent the spread of such disease.¹⁸⁹

The statute directed the Supervising Surgeon General of the Marine Hospital to prepare regulations “under the direction of the Secretary of the Treasury.”¹⁹⁰ It further provided a penalty for “any person who shall willfully

182 *Id.*

183 *Id.* at 413.

184 *Id.*

185 *Id.* at 414.

186 Act of Feb. 15, 1893, ch. 114, 27 Stat. 449.

187 *Id.*

188 It would be very interesting, though beyond the scope of this Article, to compare the support and opposition to federal quarantine actions (either coastal or interstate measures) with support and opposition to the Interstate Commerce Act of 1887, to see how the focus on federal authority in public health played out compared with federal authority in regulating private business.

189 Act of Mar. 27, 1890, ch. 51, 26 Stat. 31.

190 *Id.*

violate any rule or regulation so made and promulgated,” designating such acts as a misdemeanor punished by a fine of up to \$500 or imprisonment for up to two years.¹⁹¹ But the federal government had no explicit authority under the statute to override local regulations. “To prevent the spread” of disease could not open channels of travel and commerce against the wishes of local health officials.¹⁹² In any event, there is no record that this statute was ever enforced.

There was surprisingly little debate on this bill. Competing bills, both of which failed, sought to create a national bureau and board of health, and to assume federal control of port inspection and quarantine. These garnered the lion’s share of attention, while the interstate bill passed with little comment. One reason may have been the relative absence of yellow fever the previous year.¹⁹³

In remarks before the American Medical Association, John B. Hamilton, Supervising Surgeon General of the Marine-Hospital Service, explained that Treasury regulations to implement the interstate quarantine power would be formulated when yellow fever was known to exist in any state, “then regulations for the prevention of its extension shall be framed by the Supervising Surgeon-General. When these regulations are approved by the Secretary of the Treasury and the President, they are binding upon the general public, and specifically upon officers of the Government, common carriers’ agents, officers, and employ[ee]s.”¹⁹⁴

As we shall see, the Treasury Department did not promulgate effective regulations. One reason may have been doubts about the constitutional limits of this authority. Another reason proved to be the impracticability of any such federal intervention within a state—the absence of any funding or entity empowered to carry out any such intervention. Congress would consider legislation directing the Secretary of the Treasury to take steps to counteract shotgun quarantines in 1898 and 1906.

C. The 1897 Epidemic: Toward a National Quarantine Law

The return of yellow fever in serious form in 1897 brought with it the recurrence of local shotgun quarantines throughout the South. This, in turn, pressured Congress once again to address the issue of interstate

191 *Id.*

192 *Id.*

193 U.S. TREASURY DEP’T, MARINE-HOSP. BUREAU, Doc. No. 1373, ANNUAL REPORT OF THE SUPERVISING SURGEON-GENERAL OF THE MARINE-HOSPITAL SERVICE OF THE UNITED STATES FOR THE FISCAL YEAR 1890 (1890), at 7 (“The country may congratulate itself on the fact that no epidemic of yellow-fever, small-pox, or cholera has prevailed in any portion of our country.”).

194 *Id.* at 28.

quarantine. Reflecting the common view that yellow fever could not be interdicted through port quarantine, in 1898 the *Washington Post* emphasized that the shotgun quarantine would be an enduring problem, absent national legislation:

The fact is that the South is suffering less from yellow fever than from the curse of the barbarous shotgun quarantine—a system which is notoriously inefficient as regards the protection of human life, and which is potent only to the destruction of commerce and the paralysis of civilization. . . . It is more than probable that, so long as the States retain control of quarantine, the hideous performances of 1897 and 1898 will be repeated with each fresh visitation of the disease.¹⁹⁵

In an article entitled “Business and Quarantine,” the *Washington Post* in 1898 considered a “national quarantine system” essential for the commercial interests of the South:

The moral of the situation is that a national quarantine law is wanted, so that a repetition of such conditions may be avoided. It is safe to assume that with an effective national quarantine law in operation there would be an end to the senseless shotgun quarantines and non-intercourse regulations.¹⁹⁶

The *Atlanta Constitution* reported a “strong movement” toward a national quarantine law: “The movement to secure legislation at the hands of the United States [C]ongress to abolish the present system of state and local quarantine and put into effect a national quarantine is taking definite shape.”¹⁹⁷ It noted that the absence of uniform quarantine practices caused “great harm” by “putting it within the power of every little fever scared community to stop the wheels of commerce and bring suffering and misery to the homes of thousands”¹⁹⁸

Again, from the *Washington Post*:

Seriously, this shotgun quarantine system has reached such a stage in some Southern States that it will surely ruin them unless it is reformed. In some places it is no longer a justifiable precaution against possible infection, but a matter of retaliation between county and parish, city and town. It is a case of “you quarantine us, we’ll quarantine you,” and some bumptious Board of Health or self-constituted authority on contagious diseases may be relied upon to carry out the threat to the letter.¹⁹⁹

195 *A Southern View of the Case*, WASH. POST, Oct. 24, 1898, at 6.

196 *Business and Quarantine*, WASH. POST, Jan. 29, 1898, at 6.

197 *A New Quarantine Law*, ATLANTA CONST., Nov. 4, 1897, at 4.

198 *Id.*

199 *Southern Shotgun Quarantine*, WASH. POST, Sept. 30, 1898, at 6.

1. *Public and Private Advocacy*

Urban business interests in the South wanted authority in the national government to stop local shotgun quarantines. The Birmingham Commercial Club, for instance, called for a “concerted movement in the South” to advocate federal control of quarantine, denouncing “in unmeasured terms the shotgun method of quarantine.”²⁰⁰ The Club initiated correspondence with the chambers of commerce, municipalities, and state officials in all Southern states “with a view to inducing them to bring pressure upon their United States Senators and Congressmen to secure aid in enacting a law, empowering the Federal government . . . to take charge of the quarantine regulations of the country”²⁰¹

That call was answered by local business organizations as well as political leaders of the larger cities throughout the South.²⁰² Both the Atlanta Chamber of Commerce and the city’s mayor advocated for national quarantine, the latter noting that shotgun quarantines “are a disgrace to the country and the states affected have been held up to scorn and ridicule.”²⁰³ The mayor and leading businessmen of Atlanta traveled to Washington, D.C. to urge Congress to enact a national quarantine law, reportedly receiving “assurance of hearty co-operation from President McKinley,” who promised to “send a special message urging its passage.”²⁰⁴

Lobbyists representing business interests beset state legislatures as well as Congress. In December 1897, the Georgia legislature overwhelmingly passed a resolution asking its congressional delegation to push for a uniform system of quarantine under federal control.²⁰⁵ Governor William Atkinson maintained that the resolution “proposed to surrender to the national government an important power which is now vested in the state.”²⁰⁶ Governor Atkinson explained:

The bill under consideration proposes to turn over to the national government, whenever it sees fit to enact the necessary legislation, all quarantine matters in this state, in case of an outbreak of yellow fever, smallpox, cholera or plague. When this is done the liberty of the citizen and the right of travel of our people are taken out of the hands of the

200 *Shotgun Quarantine Denounced*, WASH. POST, Nov. 7, 1897, at 1.

201 *Id.*

202 *See, e.g., Macon Thinks Well of the Plan*, ATLANTA CONST., Nov. 9, 1897, at 2 (reporting a Macon Chamber of Commerce resolution in favor of national quarantine).

203 *Collier Roasts Quarantine Law*, ATLANTA CONST., Nov. 5, 1897, at 6; *see also Chamber Favors National System*, ATLANTA CONST., Nov. 6, 1897, at 8 (describing resolution passed by the Atlanta Chamber of Commerce).

204 *National Quarantine Law*, ATLANTA CONST., Dec. 24, 1897, at 3.

205 *See A National Quarantine Law Favored by the Legislature*, ATLANTA CONST., Nov. 7, 1897, at 5 (describing the contents of the resolution).

206 *All Bills Are Now Passed On*, ATLANTA CONST., Dec. 23, 1897, at 5.

state government—in fact, the life and liberty of our people is placed in the hands of officers appointed by the federal government.²⁰⁷

The Governor nonetheless forwarded copies of the resolution to the members of the Georgia Congressional delegation, along with his veto.²⁰⁸

2. *Deficiency of Existing Law: Hearings Before Congress*

In February 1898, the House Committee on Interstate and Foreign Commerce held hearings on the question of interstate quarantine—the first time the shotgun quarantine featured in a Congressional debate.²⁰⁹ Of five separate bills in all, two of them—the “Caffery Bill” and the “Spooner Bill”—received the most attention.²¹⁰

The Caffery Bill, introduced in the Senate by Donelson Caffery of Louisiana, placed quarantine regulations “exclusively in the hands of the national authorities,” and further provided that when yellow fever eluded port quarantine and appeared within any state or territory, “the quarantine regulations of the Secretary of the Treasury shall be supreme and have precedence over state or municipal quarantine laws,” authorizing the President to enforce them.²¹¹

William P. Hepburn of Iowa, an eleven-term Republican congressman, sponsored the Senate Caffery Bill in the House.²¹² Importantly, he also chaired the House Committee on Interstate and Foreign Commerce for twelve years, from 1895 to 1909,²¹³ and in that period was a champion of increased federal interstate quarantine power. At the hearings, Hepburn zeroed in on the problem of inland interstate quarantine. Guiding the witnesses away from coastal seaport issues, Hepburn repeatedly questioned witnesses about, as he termed it, “what some people have irreverently spoken of as a ‘shotgun quarantine’.”²¹⁴

In Hepburn’s view, the current statutory scheme permitted the federal government to impose quarantines to prevent the spread of disease from one state into another, but not to lift quarantines imposed by state or local authorities. The existing statutes were commonly interpreted to mean that

207 *Id.*

208 *National Quarantine Law: Gov. Atkinson Vetoes the Resolution of the Georgia Legislature, on the Issue of State Rights*, ATLANTA CONST., Dec. 24, 1897, at 3.

209 *1898 Quarantine Powers Hearing*, *supra* note 139.

210 *See Forward or Backward?* N.Y. TIMES, Feb. 17, 1898, at 6 (describing the Spooner and Caffery bills).

211 *For A Stricter Quarantine*, CHI. DAILY TRIB., Dec. 10, 1897, at 7 (quoting the Caffery Bill).

212 Walter Wyman, *National Quarantine and Sanitation*, 26 FORUM 684, 688 (1899).

213 U.S. HOUSE OF REPRESENTATIVES: OFFICE OF THE HISTORIAN, HEPBURN, WILLIAM PETERS, <http://history.house.gov/People/Detail/14931>.

214 *1898 Quarantine Powers Hearing*, *supra* note 139, at 91 (testimony of Sen. William P. Hepburn). *See also id.* at 7, 12–14, 17, 92, 104.

federal authorities were unable to act until requested to do so by a state or municipal health board. But Hepburn believed greater federal authority was necessary to prevent the local shotgun quarantine, which the Caffery Bill would provide.

The Spooner Bill, by contrast, placed no absolute control over local quarantines in federal hands, preferring instead a collaborative advisory board consisting of state and local health officials. Supporters of this measure criticized the Caffery Bill on the ground that it lacked such representatives. As one witness characterized the Caffery Bill, “[I]t seeks to make the Supervising Surgeon General the health dictator of the United States, against whose mandates there is provided no right of appeal, and who is controlled in his acts by no provision of law and is as unfettered in the exercise of his power as is his ambition to rule.”²¹⁵ The Spooner proposal, by contrast, would provide for local input and would operate as a national health association “where the majority rules.”²¹⁶

Another Committee member, Representative Hawley, posed the issue this way:

[W]ithout regard to the facts as to whether fever exists or does not exist, at the slightest rumor there will be established near towns and villages what is properly known as the shotgun quarantine. The quarantine is sometimes justified under conditions existing there, but frequently it is not justified by any facts that exist or any disease which exists. That is a case within the limits of a State, but in order to pass from one village to another in the State it is important that interstate commerce should pass in order to maintain commerce between those two villages.”²¹⁷

The Committee heard testimony from prominent physicians and public health officials. Dr. Alvah H. Doty, director of quarantine for the port of New York and a supporter of the Spooner bill,²¹⁸ sought to distance state health boards from the recent “shotgun quarantines in the south,” causing “the trouble that interfered with the transportation of goods, commerce, or anything of that character.”²¹⁹

Dr. Doty attributed the local shotgun quarantine to a difference in opinion among local health officers:

²¹⁵ *Id.* at 49 (statement of Joseph Y. Porter, State Health Officer of Florida).

²¹⁶ *Id.* at 6 (statement of Dr. Alvah H. Doty of New York) (“I only desire to dwell on one thing particularly, and that is the fact that this power is given to one man to decide; that there is absolutely no deliberation in this matter at all. You will notice throughout the bill teams with penalties and threats. There is not a thing in that bill which tends to cooperate with the State or municipal authorities. There is not a State or municipal authority throughout the country that is not discouraged after reading the bill.”).

²¹⁷ *Id.* at 17.

²¹⁸ Alvah H. Doty, *The Federal Government and the Public Health*, N. AM. REV. 498, 543 (May 1898).

²¹⁹ *1898 Quarantine Powers Hearing, supra* note 139, at 5–6.

It is the fact that in Texas and other places where they had shotgun quarantines that health officers differed in their opinion. They might be all good, but the result was a popular clamor and things of that character. They formulated rules which were unjust. We all believe there should be some Government supervision and regulations to harmonize these things, but we do not believe the Federal Government should interfere with the details of these local health matters.²²⁰

Chairman Hepburn pressed witnesses on the interstate commerce issue, but he could not get a direct answer. Dr. H. B. Horlbeck, a health officer from Charleston, South Carolina, defended the right of his city to impose a quarantine against passengers and traffic.²²¹ Hepburn asked whether “[t]he same right you would assume to yourself in Charleston every other city on the road from New Orleans to the city of Washington on the Coast Line would exercise, would they not?”²²²

THE CHAIRMAN: In that way you would destroy all travel and all commerce between the city of Washington and the city of Charleston? . . . If you can exercise this authority and because of your force hold a man or hold his property there four or five days until you subjected to quarantine?

DR. HORLBECK: We want a little quarantine; we only want to be satisfied it is all right.

THE CHAIRMAN: Suppose you would have this; then if every other city would have the same and every other village had a quarantine, would you not entirely destroy by the exercise of that kind of power all communication between the different cities in the United States because of the fear you may have?

DR. HORLBECK: I do not think practically we would exercise it. . . .

THE CHAIRMAN: You are insisting, however, upon the power to do it?

DR. HORLBECK: I think we ought to have that because there may be some person, even if the Marine-Hospital Service employed the best talent to assist them, they may be wrong; all human agency is liable to that. . . . I do not think they ought to have the final power to permit those things to come into our borders without our being permitted to say anything about it.²²³

In addition to highlighting the distrust of the federal government’s expertise, Horlbeck also pointed out the impracticality of federal

²²⁰ *Id.* at 6.

²²¹ *Id.* at 26 (“Now, last summer we had in our town quite a great deal of apprehension, which was natural, on account of the experience of the past with this dread disease. On 14th September we got an official notice from Mobile and New Orleans of the presence of yellow fever. We had known of its previously being on the coast. At once the mayor of the city, the chairman of the board of health, and myself got together and got the best police for detectives we could get, and every train of people coming to our town was examined, and if they had a proper certificate we allow them in. There were no barriers other than showing they were not from an infected district.”).

²²² *Id.* at 27.

²²³ *Id.* at 27–28.

intervention at the local level. “I do not think it might be wise at any time to have the Government undertake [quarantine] locally, and I do not think . . . that in the local boards of health in 10,000 towns and villages and townships you should have Federal officers; you would break the nation almost.”²²⁴

Representative T. M. Mahon of Pennsylvania appeared as one of the few witnesses in favor of the Caffery Bill. Often, he interrogated members of the Committee, rather than the other way around:

During the last trouble with yellow fever, a man traveling there, perfectly well, was pulled off at the State line, at the mouth of the shotgun, and not allowed to go into another State, and not allowed to go back. Will you tell me the action of the United States, under the powers of the Constitution regulating interstate commerce, does not have power to interfere in behalf of that citizen and say that no such treatment shall be accorded him?²²⁵

When questioned by Representative James Mann (R-Ill.), however, Mahon posited that the federal government’s authority could only function at state borders:

MR. MANN: All of the transportation lines which run from Cincinnati or Chicago, or those cities and that territory, run through Tennessee going south to New Orleans. Suppose the State board of health simply says that they have yellow fever in the South, and they will not permit transportation to go through Tennessee?

MR. MAHON: Under the interstate commerce law, what is the right due your State, then? It is as clear as the sun under the heavens that one State has no right to interfere—

MR. MANN: But suppose they do?

MR. MAHON: Then [the Caffery Bill] provides that this bureau shall establish on the State line, to protect your people, quarantine stations, and that all passengers shall be examined there, all freight and passengers shall be stopped, and freight disinfected, and then sent on its way.

. . . .

MR. MANN: To that extent, then, it would override the State authority?

²²⁴ *Id.* at 31. The point was emphasized in an exchange with Rep. Robert Davey (D-La.):

MR. DAVEY: Is it not a fact during the late epidemic always the board of health was entirely powerless outside of such municipalities?

DR. HORLBECK: I have heard they allowed nothing to go through and stopped everything in the most senseless fashion, possibly through terror.

MR. DAVEY: Is it not a fact the State boards of health of Louisiana and the State board of Texas—the health officers—were not allowed to meet; that the people stopped the trains in between?

DR. HORLBECK: I am afraid you will have the same thing if any department had control.

1898 Quarantine Powers Hearing, supra note 139, at 30–31.

²²⁵ *Id.* at 39.

MR. MAHON: Yes, sir; and should override it. You see, in that panic down there people lost their heads.²²⁶

Finally, Mahon insisted that passengers, as well as freight, were protected by the federal Constitution's Commerce Clause:

MR. MAHON: Am I not a subject of commerce?

THE CHAIRMAN: No.

MR. MAHON (continuing): Going from State to State, I am as fully protected under that interstate-commerce clause of the Constitution as a barrel of flour.²²⁷

Representative Mahon centered Congress's power over interstate travel in the Commerce Clause. That transportation of persons was "commerce" first appears in *Gibbons v. Ogden*.²²⁸ Mahon's idea is similar to the nascent "right to travel," dating back to the *Passenger Cases* of 1849, in which Justice Taney wrote that "[w]e 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."²²⁹ An important difference, however, is that the shotgun quarantine excluded *all* travelers, including residents of a state attempting to return home.²³⁰

As Hepburn and the Committee viewed it, only the Caffery Bill provided room for the federal government to intervene directly in a local quarantine. It would "prevent unnecessary restrictions upon interstate commerce" by, among other means, authorizing the Marine Service Hospital to issue federal travel permits for both passengers and freight.²³¹ Any person interfering with the permit from the federal authorities would be deemed guilty of a misdemeanor. As one critic of the bill characterized, "[t]herefore, any health officer who shall disregard a permit which he

²²⁶ *Id.* at 44.

²²⁷ *Id.* at 46. The uncertain reach of the Interstate Commerce Clause in this period received substantial attention from legal scholars. *See, e.g.*, H. Campbell Black, *The Police Power and the Public Health*, 25 AM. L. REV. 170, 175 (1891) (highlighting the limitations of police power in inspecting the purity of food products due to the constraints of interstate commerce); Charles A. Culberson, *The Supreme Court and Interstate Commerce*, 24 AM. L. REV. 25, 25 (1890) (observing that the "difficult and perplexing subject" of interstate commerce is hotly disputed in courts across the nation); D.H. Pingrey, *Valid State Laws Incidentally Affecting Foreign and Interstate Commerce*, 28 CENT. L.J. 336, 336 (1889) (noting that the questions surrounding the interstate commerce clause are complex and difficult).

²²⁸ *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–90 (1824) (explaining that the word "commerce" should not be interpreted so narrowly that it excludes the idea of navigation).

²²⁹ *Smith v. Turner*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, J., dissenting).

²³⁰ *Id.*

²³¹ *1898 Quarantine Powers Hearing*, *supra* note 139, at 22–24 (1898) (statement of Dr. H. Horlbeck, Health Officer of Charleston, S.C.). There was apparently no provision for individuals who obtained a permit fraudulently or who subsequently developed yellow fever.

regards dangerous to his community shall wear stripes in a common prison or penitentiary and pay a fine which may beggar him.”²³²

Hepburn was unmoved: “Why is it not a better plan to say that the General Government will carry on a quarantine system, and that nobody else shall interfere with it?”²³³

As an anti-climax to the first sustained congressional investigation of the shotgun quarantine, all of the bills presented that session were destined to fail. The declaration of war against Spain and the contemplated invasion of Cuba put aside any further consideration of the shotgun quarantine.²³⁴ Legislation addressing it would not be taken up until the next (and last) epidemic of yellow fever ravaged the South, and after U.S. troops in Cuba had been decimated by the disease.²³⁵ In the interim, advocates continued to press the need for interstate intervention by the federal government:

When the comfort and commerce of millions of people are at stake it should not be left with the power of isolated communities to set all in confusion and to institute a reign of terror. The day of the local shotgun quarantine has gone by, and the time has come for our people to act upon common sense principles.²³⁶

As would be the case in the fifty-ninth Congress, however, such dire pronouncements failed to secure the needed legislation.

D. The 1905 Epidemic: A Narrow Defeat for Federal Intervention

The epidemic of 1905 proved once again that state governments in the South could not control local shotgun quarantines. Louisiana threatened to use troops to lift local quarantines after the State Board of Health ordered restrictions on travel and traffic removed, denouncing those quarantines as “illegal . . . and inhuman.”²³⁷ In the opinion of the *Washington Post*, “[t]he

²³² *Id.* at 22.

²³³ *Id.* at 45 (statement of W.P. Hepburn, Chairman, Comm. on Interstate and Foreign Commerce).

²³⁴ *See id.* at 108. The last action in the Senate was a committee’s proposed amendment, as follows: “Nothing in this act shall be construed to interfere with the right of any State to protect its citizens from infectious or contagious diseases by such rules and regulations as the authorities of said State may deem necessary and which do not conflict with the rules and regulations made by the Secretary of the Treasury, as hereinbefore provided, to prevent the introduction of infectious or contagious diseases into the United States from foreign countries or the spread of such diseases.” *National Quarantine Bill—Mr. Vest Makes an Earnest Speech in Behalf of National Control of Health Laws*, CHI. DAILY TRIB., Mar. 16, 1898, at 7.

²³⁵ The specific legislation referenced here is discussed below. For background on the effects of the yellow fever during the Spanish-American war, see Alfred Jay Bollet, *Military Medicine in the Spanish-American War*, 48 PERSP. BIOLOGY & MED. 293.

²³⁶ *Extending the National Quarantine*, ATLANTA CONST., Mar. 22, 1899, at 4.

²³⁷ *Fight on Quarantine: Louisiana May Use Troops to Lift Local Embargoes*, WASH. POST, Aug. 9, 1905, at 1.

indications are that unless an early break occurs in the shotgun quarantine in Louisiana, something very like war will break out in this State.”²³⁸

The important question of control of interstate commerce, left hanging in 1898, now could not be avoided. The denouement of the interstate quarantine question arrived in 1906, when a conference committee of Congress rejected a provision that would have imposed federal control over rail travel within states.

The 1906 congressional session occurred against the backdrop of the Chattanooga regional conference, with its call for national quarantine authority, and the U.S. Supreme Court’s decision in *Louisiana v. Texas* in 1900. With the exception of Texas and a divided congressional delegation from Georgia, the South was united in support of federal intervention.²³⁹ The *Chicago Record-Herald* concluded it proved “the old State’s rights doctrine is a creed outworn.”²⁴⁰

For national control of border and seaport entry, the crowning achievement of the 1906 Congress was “The National Quarantine Law of 1906.”²⁴¹ Over the strenuous objection of New York public health officers, the Act at last provided for full national control over port and international border quarantine stations, with authorization to purchase any facilities still operated by states. But the measure was nearly derailed by a last-minute attempt to provide for federal quarantine authority *within* states. As the *Atlanta Constitution* reported:

For some weeks the passage of the bill was jeopardized by an effort to incorporate a clause which would have given the government control of interstate quarantines, the idea being to eliminate the possibility of the old drastic regulations enforced by the shotgun. In the end this provision was stricken, the majority being of the opinion that if the marine hospital service were given full control of port stations the entrance of disease would be rendered next to impossible, and that there would be no development of complications giving rise to interstate and local squabbles.²⁴²

The dispute centered on the insertion of an additional provision, known as the new “Section 7,” by the House Committee on Interstate and Foreign

²³⁸ *Id.* The shotgun quarantine also extended outside of the deep South. See also *Officers Clash over Fever Law*, CHI. DAILY TRIB., Aug. 24, 1905, at 2 (reporting that Illinois state health officials ordered federal quarantine officers not to enter Cairo, Illinois).

²³⁹ See e.g., 40 CONG. REC. 5387, 5389 (1906) (statement of Rep. Jack Beall); *National Quarantine Favored by the House*, ATLANTA CONST., Apr. 4, 1906, at 5.

²⁴⁰ *Not a Decadent Doctrine*, WASH. POST, Apr. 7, 1906, at 6 (quoting the *Chicago Record-Herald* (1906)). On the other hand, resistance to federal authority over quarantine extended to the Illinois Board of Health. See *Officers Clash Over Fever Law*, CHI. DAILY TRIB., Aug. 24, 1905, at 2.

²⁴¹ Act of June 19, 1906, ch. 3433, 34 Stat. 299 (1906) (“An Act to further protect the public health and make more effective the national quarantine.”).

²⁴² *Federal Quarantine Control*, ATLANTA CONST., June 26, 1906, at 6.

Commerce. This section empowered federal authorities to prevent the interruption of rail traffic within a state.²⁴³ If federal authorities certified that a train's passengers and cargo were free from infection, no state or local government could prevent passage through the state without risking criminal prosecution. The measure provided only for "pass through" jurisdiction; it would not override a wholly local shotgun quarantine.²⁴⁴ But even this limited "pass through" clause was too much for opponents.

William P. Hepburn, still chairman of the House Interstate and Foreign Commerce Committee (his tenure would span from 1892 to 1908), had made it clear that he would not report any bill that did not provide for an effective federal interstate quarantine.²⁴⁵ As the *Washington Post* reported, "the majority of the committee insisted that if the Federal government appropriates a large sum of money for quarantine there must also be given enough power to prevent shotgun quarantines similar to that Mississippi enforced recently"²⁴⁶

In the House of Representatives, only twenty-six votes were cast against the Committee bill, but spirited debate by dissenters featured "sharp exchanges" and lengthy discourses on constitutional law.²⁴⁷ The additional feature of the bill, some argued, would jeopardize the original purpose to mandate federal control of seaport and land border quarantine.²⁴⁸ While apparently an accurate observation on the political alignments at issue, that alignment had nothing to do with the merits of whether federal action in inland areas was a good idea.

243 40 CONG. REC. 5387, 5389 (1906) (statement of Rep. Jack Beall). The amended text provided:

SEC 7. That every common carrier, engaged in interstate commerce, shall, under such regulations, restrictions, and safeguards as may be promulgated by the Secretary of the Treasury, receive, carry, and transport through any State or Territory necessary to complete the journey or carriage into a State wherein delivery or debarkation may be lawful, all passengers, freight, or baggage which may have been discharged and properly certified in accordance with the regulations of the Public Health and Marine-Hospital Service; and every person interfering with or obstructing such carrier or any passenger or any instrumentality of commerce in any such carriage or journey shall be guilty of a misdemeanor and on conviction thereof be punished by a fine not exceeding \$300 or be imprisoned for a period not exceeding one year, or both, in the discretion of the court: Provided, That this section shall not be construed as giving authority to any person to debark or unloaded freight in any locality contrary to the lawful regulations thereof.

244 S. 4250, April 10, 1906.

245 *National Quarantine Bill Discussed by Committee*, WASH. POST, Mar. 7, 1906, at 4.

246 *Id.*

247 *National Quarantine Favored by the House*, ATLANTA CONST., Apr. 4, 1906, at 5.

248 *Id.*

As Representative Jack Beall of Texas stated, “[w]e protest against this section as a vicious, unwarranted [sic], and unnecessary interference with the right of a State to protect its people:”²⁴⁹

Section 7 is in contradiction to all the other sections. It is not a quarantine section; it is a commercial section. It places no embargo upon the movement of persons and property from the infected to noninfected points, but facilitates such movement. It does not lessen the opportunities for the transmission of disease; it increases them. It will not check yellow fever; it will spread it. It does not look to the protection of life and health of the people; it protects the railroads. It is not responsive to the demands of the people; it is in obedience to the behests of the transportation companies. It subordinates the rights of the States and the lives of human beings to the right of railroad companies to pile up earnings to satisfy the greed of stockholders.²⁵⁰

Supporters, by contrast, pointed to a recent incident highlighting the need for national intervention. The governor of Arkansas prevented a train carrying refugees from Louisiana to pass through the state.²⁵¹ In response, Representative Beall decried the combined efforts of Louisiana, Mississippi, and Alabama to upset the constitutional scheme:

Our regret over this lamentable result is increased by the reflection that in other days the people of the South have stood steadfastly as the defenders of the faith of the fathers, while to-day [sic] this crusade for the dishonor of the States is led by those coming from what has heretofore been the very citadel of State sovereignty.²⁵²

The House voted to approve the bill by a comfortable margin (172–22), but the Senate bill, previously passed unanimously, had not included any interstate quarantine measure, and indeed the Senate appears not to have considered it, as Section 7 was a late addition to the House measure.²⁵³ The Senate had approved the original bill on April 2. Because the House measure included Section 7 while the Senate bill did not, the two bills were sent to a reconciliation committee.

The showdown over interstate quarantine thus moved to the House-Senate conference committee. That committee agreed to strike Section 7.²⁵⁴ Although the conference report did not explain the committee’s reasoning, apparently the committee’s members were deadlocked for some time.²⁵⁵

249 40 CONG. REC. 5387, 5389 (1906) (statement of Rep. Jack Beall).

250 *Id.*

251 *Id.*

252 *Id.*

253 *Id.* at 5392.

254 H.R. REP. NO. 59-4920, at 1 (1906) (Conf. Rep.).

255 *Quarantine Bill in Peril*, ATLANTA CONST., June 7, 1906, at 7 (“There is decided danger that the quarantine bill intended to give federal aid in yellow fever quarantines and which has passed the [S]enate and [H]ouse, will fail, because of a deadlock among the conferees on

Against this opposition to Section 7, the conference committee preferred to preserve the Act's primary purpose to assume national control over port quarantine.²⁵⁶

Debates in the House on both April 3 and April 17 featured lengthy analysis of the conflict between the federal government's authority over interstate commerce and traditional state police power over local public health.²⁵⁷ In Congress, W.C. Adamson, Representative from Columbus, Georgia, and a member of the House Interstate and Foreign Commerce Committee, defended the local quarantine:

There is no reason for conflict of authority. It is the right and duty of the federal government to exclude infection from the entire country and to regulate its transmission among the states, territories and Indian tribes, provided, as the [S]upreme [C]ourt says, it is really a precaution to protect health and not a sham or pretense to promote commerce at the expense of health.

If the federal government neglects its duty and a state fears danger, the state may prevent the entrance of anything or anybody into its borders, except for rapid transit through the state, and the more rapid the better. No power in earth can override the state in the exercise of such authority. If the state sees no danger, a town or a county may exercise the same authority under the same regulations, the difference in the three being in the extent of territory covered and not inefficiency, and impotency of authority.²⁵⁸

The Marine Hospital Service, meanwhile, operated under Treasury Department regulations that were issued piecemeal as yellow fever spread.²⁵⁹ Compiled from telegrams and circulars, the regulations were limited to localities where federal health officers had been invited to help, and consisted of directions for the establishment of refugee camps, dissemination of reports of yellow fever cases, and inspection of trains at state lines.²⁶⁰

the seventh section of the bill. . . . A movement has been inaugurated lately, however, to get the section mentioned withdrawn rather than defeat the bill.”).

256 *Federal Quarantine Control*, ATLANTA CONST., June 26, 1906, at 6 (“For some weeks the passage of the bill was jeopardized by an effort to incorporate a clause which would have given the government control of interstate quarantines, the idea being to eliminate the possibility of the old drastic regulations enforced by the shotgun. In the end this provision was stricken, the majority being of the opinion that if the marine hospital service were given full control of port stations the entrance of disease would be rendered next to impossible, and that there would be no development of complications giving rise to interstate and local squabbles.”).

257 40 CONG. REC. 4661–4685 (1906); 40 CONG. REC. 5388 (1906).

258 *Adamson Talks on Quarantines*, ATLANTA CONST., Nov. 11, 1905, at 3.

259 *See, e.g.*, sources cited *supra* notes 48, 193 (referencing various Treasury Department regulations).

260 See J. H. White, *Synopsis of the Interstate Quarantine Regulations of the Treasury Department*, in U.S. TREASURY DEP'T, MARINE-HOSP. SERVICE, ANNUAL REPORT OF THE SUPERVISING

Constitutional doubts about the federal government's interstate quarantine authority seem to have receded, but members of Congress recognized that effective implementation was not possible. As a practical matter, congressional leaders concluded there was very little the federal government could do to suppress the shotgun quarantine.

Symbolically, some viewed the bill to have redeemed the South with respect to its reintegration into the union, despite the failure of the interstate quarantine provision. The *Louisville Times* reported:

It is in a double sense a victory for the south, first in the establishment of the fact that the south has come to recognize that it is a part of the national government, and as such, is entitled to her share in the benefits of the national government If the law goes into effect it will save the south thousands in commerce, and scores of lives. It will put an end to the disgrace brought by demagogues who seek the critical occasion of epidemic peril to exploit themselves at the threatened peril of their own and their sister states.²⁶¹

This sustained national debate centered on where state police power ended in matters of public health. The legislative failure in Congress did not necessarily reflect an understanding of constitutional limitation, but instead was a political compromise. The failure also reflected the federal government's limited agency resources—the proponents of greater federal authority simply could not imagine how the goals of federal intervention might be accomplished.

Because the United States would experience no further epidemics of yellow fever after 1905, the issue of interstate quarantine had no urgency and never again received the sustained attention of Congress. Discovery of the mosquito vector would eventually lessen the need for federal intervention in local quarantine matters. As the *Washington Post* noted in 1916, “[w]hen yellow fever was traced directly to the responsible mosquito the shotgun was laid aside, and with it departed a chill of fear fully as prevalent and almost as much to be feared as the disease itself.”²⁶²

SURGEON-GENERAL OF THE MARINE-HOSPITAL SERVICE OF THE UNITED STATES FOR THE FISCAL YEAR 1898, at 412–14 (1899) and P. H. Bailhache, *A Précis of the United States Quarantine Regulations for Domestic Ports with Reference to Preventing the Introduction of Yellow Fever into the United States*, in U.S. TREASURY DEP'T, MARINE-HOSP. SERVICE, ANNUAL REPORT OF THE SUPERVISING SURGEON-GENERAL OF THE MARINE-HOSPITAL SERVICE OF THE UNITED STATES FOR THE FISCAL YEAR 1898, at 414–24 (1899) for a summary of regulations during the 1897 epidemic. See also U.S. TREASURY DEP'T, BUREAU OF PUB. HEALTH AND MARINE-HOSP. SERV., *supra* note 48, for a summary of regulations issued during the 1905 epidemic.

261 *The National Quarantine Law*, ATLANTA CONST., Apr. 7, 1906, at 8 (quoting *The Louisville Times*'s discussion “of the passage of the bill by the lower house”).

262 *Value of Quarantine*, WASH. POST, Aug. 20, 1916, at 4.

IV. MODERN ECHOES: FROM QUARANTINE TO SYRIAN REFUGEES

Where matters stood in 1906 is essentially where they stand today. If a state fails to act in the face of a threatened epidemic or requests assistance, the federal government can intervene. But if a state or local government acts in a way that is unnecessary or excessive, we are just as bewildered about federal authority as in the days of the shotgun quarantine.

There is little reason to think the modern Supreme Court would view the matter differently than it did in both 1886 and 1900. The federal government's power to override state-imposed quarantine regulations is not restricted by the federal constitution. The seminal difference, of course, is the intervention of the due process revolution of the mid-twentieth century. Courts can and will review individual quarantine orders on due process grounds, requiring state and local governments to respect the civil liberties of persons it segregates from the community.²⁶³ Such review, however, occurs only after a quarantine or isolation order is in place or has ended.²⁶⁴ Local health officials are not required to seek court approval in advance.²⁶⁵

Viewed in this light, Ebola (and perhaps, now, the Zika virus) might be seen to pose the same problem as the yellow fever shotgun quarantine: Uninformed or self-interested populations allow political or commercial interests to overcome expert medical opinion, in a manner highly disruptive to national interests. Some states imposed arguably more expansive Ebola quarantine policies than were necessary to protect public health, disrupting interstate commerce and travel as well as violating civil liberties.²⁶⁶

Public health law in the United States is still largely a matter of state authority. If anything, local quarantine is infinitely more complicated today by new means of travel, particularly airplanes and the automobile. It is one thing to concede federal quarantine authority at national borders; it is quite another to prevent or preempt state and local quarantines or other

263 Polly Price, *Quarantine and Liability in the Context of Ebola*, 131 PUB. HEALTH REP. 500, 501 (2016).

264 *Id.*

265 A recent comparison is the Model State Emergency Health Powers Act, which grants public health powers to state and local public health authorities. THE CTRS. FOR LAW & THE PUBLIC'S HEALTH, *The Model State Emergency Health Powers Act (MSEHPA)*, <http://www.publichealthlaw.net/ModelLaws/MSEHPA.php> (“[T]o ensure a strong, effective . . . response mechanism[] to public health emergencies . . . while also respecting individual rights.”).

266 See Matt Flegenheimer et al., *Under Pressure, Cuomo Says Ebola Quarantines Can Be Spent at Home*, N.Y. TIMES, Oct. 27, 2014, at A24 (highlighting criticisms and opposition to New Jersey's Ebola quarantine initiative); see also CTRS. FOR DISEASE CONTROL AND PREVENTION, *Interim Table of State Ebola Screening and Monitoring Policies for Asymptomatic Individuals*, www.cdc.gov/phlp/publications/topic/ebola.html (enumerating state Ebola quarantine rules).

protective barriers that are unnecessary and beyond a legitimate need, even if those actions might be motivated solely by panic and fear.

A. *Federal Quarantine Authority Today*

It is understood today that the federal government derives its quarantine and isolation authority from the Commerce Clause. The modern statute provides:

The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.²⁶⁷

The statute limits federal quarantine power to U.S. entry points and to persons believed “to be moving or about to move from a State to another State”²⁶⁸ The CDC is tasked with federal quarantine orders; to date it has exercised that authority only rarely, and only for individuals rather than groups or populations.²⁶⁹ For example, the CDC maintains a “Do Not Board” list preventing air travel for patients with any infectious disease that is a potential public health threat to passengers, including infectious tuberculosis.²⁷⁰ Persons are added to the Do Not Board list only with reliable medical information provided by a state public health official and following a reviewed approval process by the U.S. Department of Health and Human Services.²⁷¹

²⁶⁷ 42 U.S.C. § 264(a) (2012).

²⁶⁸ 42 U.S.C. § 264(d)(1) (2012) (“Regulations prescribed under this section may provide for the apprehension and examination of any individual reasonably believed to be infected with a communicable disease in a qualifying stage and (A) to be moving or about to move from a State to another State; or (B) to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State.”).

²⁶⁹ See Criteria for Requesting Federal Travel Restrictions for Public Health Purposes, Including for Viral Hemorrhagic Fevers, 80 Fed. Reg. 16,400, 16,400–02 (Mar. 27, 2015) (listing procedures and criteria for restricting individuals with communicable diseases from traveling). This Notice describes the tools the federal government has to ensure that people with serious contagious diseases that pose a public health threat do not board commercial flights or enter into the United States without a public health evaluation.

²⁷⁰ *Id.*

²⁷¹ See CTRS. FOR DISEASE CONTROL AND PREVENTION, *About Quarantine and Isolation* (Aug. 28, 2014), <http://www.cdc.gov/quarantine/QuarantineIsolation.html> (describing specific travel restriction requirements for those who have a communicable disease); see also *Federal Air Travel Restrictions for Public Health Purposes*, CTRS. FOR DISEASE CONTROL AND PREVENTION: MMWR WEEKLY (Sept. 19, 2008), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5737a1.htm> (reviewing a variety of statistical figures relating to CDC requests to place people on the Do Not Board list between 2007 and 2008).

There is no explicit authorization to impose a quarantine that operates wholly within a state, and the statutory scheme appears to prohibit the abrogation of a state or locally-imposed quarantine.²⁷² Instead, Congress has emphasized cooperation with states:

The Secretary is authorized to accept from State and local authorities any assistance in the enforcement of quarantine regulations made pursuant to this chapter which such authorities may be able and willing to provide. The Secretary shall also assist States and their political subdivisions in the prevention and suppression of communicable diseases and with respect to other public health matters, shall cooperate with and aid State and local authorities in the enforcement of their quarantine and other health regulations, and shall advise the several States on matters relating to the preservation and improvement of the public health.²⁷³

The Code of Federal Regulations permits unspecified intervention in the event that measures by state or local health authorities “are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession,” although the context of the provision emphasizes control of livestock and other animals, not persons.²⁷⁴ Moreover, that provision addresses measures deemed “insufficient” but not measures deemed excessive—the shotgun quarantine problem.²⁷⁵

272 See 42 U.S.C. § 264(e) (2012) (“Nothing in this section or section 266 of this title, or the regulations promulgated under such sections, may be construed as superseding any provision under State law (including regulations and including provisions established by political subdivisions of States), except to the extent that such a provision conflicts with an exercise of Federal authority under this section or section 266 of this title.”).

273 42 U.S.C. § 243(a) (2012) (appearing under the subchapter heading entitled, “General grant of authority for cooperation”).

274 42 C.F.R. § 70.2 (2000) (“Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.”).

275 See 42 C.F.R. § 70.3 (2003) (“A person who has a communicable disease in the communicable period shall not travel from one State or possession to another without a permit from the health officer of the State, possession, or locality of destination, if such permit is required under the law applicable to the place of destination. Stop-overs other than those necessary for transportation connections shall be considered as places of destination.”); see also 42 C.F.R. § 70.6 (2003) (“Regulations prescribed in this part authorize the detention, isolation, quarantine, or conditional release of individuals, for the purpose of preventing the introduction, transmission, and spread of the communicable diseases listed in an Executive Order setting out a list of quarantinable communicable diseases . . .”) (applying to persons entering the United States). None of these provisions explicitly authorize a “Do Not Board” list, and, in fact, CDC relies on Transportation Safety Administration (“TSA”) authority for purposes of “requesting” that TSA place individuals on the public health “Do Bot board” list. See Criteria for

We have today the same balance of power by statute: an affirmative power to intervene to prevent the spread of disease does not imply a negative power to preempt a local quarantine. Under the Commerce Clause, Congress could authorize such intervention within states, but it has not done so.²⁷⁶ The federal government has been hesitant to exercise this authority without statutory authorization. One difference, however, is that in the nineteenth century the administration of quarantine would not have been considered a regulatory power of the federal government, whereas today this authority is rarely questioned.²⁷⁷ The federal government's power to intervene in state public health measures is unnecessarily limited by Congress. Inherent authority resides in the Dormant Commerce Clause.

B. Ebola Controversies, and a Preview of the Zika Virus?

In late 2014, Governor Chris Christie of New Jersey led a group of four states to publicly declare stricter quarantines in their states than either the CDC or the World Health Organization recommended.²⁷⁸ Two lawsuits seek damages for Ebola quarantines imposed in these states. To be sure, these quarantines were not remotely equivalent to the exclusion cordons of the shotgun quarantine. State governments did not turn away persons at political boundaries or otherwise prevent entry (despite calls to do so), but the number of persons potentially exposed to Ebola were low and easy to capture through airport screening of those returning from Ebola-infected areas in western Africa. Nonetheless, the actions of these State governors engendered substantial debate about the desirability of a federal role.

Requesting Federal Travel Restrictions for Public Health Purposes, Including for Viral Hemorrhagic Fevers, 80 Fed. Reg. 16,400, 16,4001 (Mar. 27, 2015) (explaining the legal authorities supporting this program). The Centers for Disease Control proposed new federal quarantine regulations through notice and comment rulemaking. The final rule was published January 19, 2017, Control of Communicable Diseases, 82 FR 6890 (to be codified at 42 C.F.R. pts. 70, 71), but at time of publication the fate of the rules were uncertain due to pending Congressional review. See Rob Stein, *CDC Seeks Controversial New Quarantine Powers to Stop Outbreaks*, NPR (Feb. 2, 2017, 4:47 AM), <http://www.npr.org/sections/health-shots/2017/02/02/512678115/cdc-seeks-controversial-new-quarantine-powers-to-stop-outbreaks>.

276 Arjun K. Jaikumar, Note, *Red Flags in Federal Quarantine: The Questionable Constitutionality of Federal Quarantine After NFIB v. Sebelius*, 114 COLUM. L. REV. 677, 689–90 (2014) (“The Court maintained, however, that state quarantine laws . . . could indeed be preempted by Congress if it so desired.”).

277 *Id.* at 686, 714 (analyzing the legal history of how the federal government has implemented quarantines).

278 Jess Bidgood & Dave Philipps, *Judge in Maine Eases Restrictions on Nurse*, N.Y. TIMES (Oct. 31, 2014), <http://www.nytimes.com/2014/11/01/us/ebola-maine-nurse-kaci-hickox.html>.

In the first lawsuit, Kaci Hickox returned to the United States from Sierra Leone, where she had worked for Médecins Sans Frontières at an Ebola treatment unit.²⁷⁹ In a widely publicized series of events, Hickox spent nearly four days in isolation by order of the New Jersey Department of Health, initially at Newark Liberty International Airport.²⁸⁰ News reports followed her subsequent removal to Maine where she remained confined to her residence under an isolation order.²⁸¹ Hickox exhibited no symptoms throughout her isolation and never developed Ebola.²⁸²

While she was under a quarantine order in Maine, attorneys for Hickox successfully sued the Maine Department of Health to modify the strict home confinement. The quarantine order in Maine became the first, and so far only, judicial modification of a public health order related to Ebola. A state judge ruled that public health officials had not proved “by clear and convincing evidence that limiting respondent’s movements to the degree requested” was needed to protect the public.²⁸³ The modification eased the most stringent aspect of the order—home seclusion for three weeks—while retaining monitoring and social distancing aspects of the quarantine order consistent with CDC recommendations.²⁸⁴ Medical groups argued that automatic quarantines of three weeks for persons displaying no symptoms discouraged health care workers from traveling to Ebola-stricken countries,²⁸⁵ while Maine and other states contended that such restrictions were necessary to protect public health.²⁸⁶

With the support of the American Civil Liberties Union (ACLU), in late 2015 Hickox filed a lawsuit over her treatment in New Jersey, naming as defendants Governor Chris Christie and the Commissioner of the New Jersey Department of Health.²⁸⁷ The lawsuit alleges that upon arriving at

279 Justin Wm. Moyer, *Kaci Hickox, Rebel Ebola Nurse Loathed by Conservatives, Sues Chris Christie over Quarantine*, WASH. POST: MORNING MIX (Oct. 23, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/10/23/kaci-hickox-rebel-ebola-nurse-loathed-by-conservatives-sues-chris-christie-over-quarantine/?utm_term=.2f7660fab7f1.

280 Hickox v. Christie, No. 15-7647 (KM), 2016 WL 4744181, at *1–2 (D. N.J. Sept. 9, 2016).

281 Price, *supra* note 263, at 500

282 Editorial, *The Unfair Treatment of Ebola Workers*, N.Y. TIMES (Dec. 5, 2015), http://www.nytimes.com/2015/12/06/opinion/the-unfair-treatment-of-ebola-workers.html?_r=0 (reporting that even though more than 200 Ebola workers entered voluntary quarantine, none of them developed Ebola).

283 Order Pending Hearing at 3, *Mayhew v. Hickox*, No. 2014-36 (D. Me., Oct. 31, 2014).

284 See Bidgood & Philipps, *supra* note 278 (noting that while the judge ordered Hickox to “submit to daily monitoring for symptoms, to coordinate her travel with public health officials and to notify them immediately if symptoms appear,” he also dismissed the most restrictive impositions).

285 *The Unfair Treatment of Ebola Workers*, *supra* note 282.

286 Bidgood & Philipps, *supra* note 278.

287 Hickox v. Christie, No. 15-7647 (KM), 2016 WL 4744181, at *1 (D. N.J. Sept. 9, 2016).

Newark Liberty International Airport, Hickox was taken into custody and detained without medical grounds or legal justification for approximately 80 hours.²⁸⁸ Hickox also claims that Governor Christie made false statements to news media implying that she showed symptoms of the disease.²⁸⁹ Among other comments, Governor Christie told news media that Hickox was “obviously ill” and “I’m sorry if in any way she was inconvenienced but inconvenience that could occur from having folks that are symptomatic and ill out amongst the public is a much, much greater concern of mine.”²⁹⁰ Unlike the Maine lawsuit, which sought modification of an existing public health order, in this lawsuit Hickox seeks \$250,000 in compensatory and punitive damages.²⁹¹

In a second lawsuit, students working with Yale’s legal services organization and the ACLU filed a class action against the governor of Connecticut and state public health officials over the state’s treatment of residents affected by Connecticut’s Ebola quarantine policies.²⁹² The complaint seeks damages on behalf of Connecticut residents who were quarantined for up to three weeks in fall 2014, with police officers posted outside their residences.²⁹³ The complaint also argues that the court should enjoin future such quarantines that might be imposed in an outbreak of the Zika virus or other potential epidemics.²⁹⁴ In response to medical experts who had questioned the quarantine policy as unnecessary and politically driven, the state’s infectious disease director wrote: “The quarantine definition is very 19th century, making 21st-century quarantine options difficult to implement.”²⁹⁵

Both lawsuits claim violation of individual civil rights. While they do not make structural preemption arguments on state versus federal authority, echoes of the shotgun quarantine debates are clearly evident. Local protectionism, allegedly tinged with some political grandstanding, motivated the stricter and disproportionate quarantines of a class of travelers. Medical necessity and the use of least restrictive settings for isolation, the standard for due process, yielded to other interests. Similar to the nineteenth-century response to yellow fever, the immediacy of a local health threat trumped consideration of wider consequences. In our federal system, state and local

288 *Id.* at *1.

289 *Id.* at *19.

290 Verified Complaint at 19, *Hickox v. Christie*, No. 15-7647 (KM), 2016 WL 4744181, (D. N.J. Sept. 9, 2016) (No. 2:15-cv07647-KM-JBC).

291 *Id.* at 33.

292 See Sheri Fink, *Connecticut Faces Lawsuit over Ebola Quarantines*, N.Y. TIMES, Feb. 8, 2016, at A20.

293 *Id.*

294 *Id.*

295 *Id.*

governments alone determine exigency of protective action, inevitably exhibiting a “safety first” bias in favor of their own residents. Governor Christie has already suggested the potential use of quarantine for the Zika virus in New Jersey, a move some experts characterize as “pointless.”²⁹⁶

C. Syrian Refugees, Toxic Waste, and Other Perceived Threats to Local Communities

This local protectionist bias in public health federalism, as exemplified by the shotgun quarantine, is not unrelated to modern “home rule” and “not in my backyard” ideology. Other historical examples abound, including laws against vagrancy, fugitive slaves and the exclusion of free persons of color in the antebellum South, the reaction to Chinese immigrants in the late nineteenth century and the Chinese Exclusion Acts. Modern manifestations include local objection to resettlement of Syrian refugees (from a fear of terrorist infiltration) as well as to toxic waste introduced from another state. The exclusion of perceived threats as a local prerogative shares deep roots with the nineteenth-century shotgun quarantine. Although it is beyond the scope of this Article to examine these issues in detail, I offer some brief observations. The lesson is not that the Commerce Clause alone provides inherent federal supremacy in health emergencies, as I argue is the case for quarantine. But local protectionism in defiance of a national interest has deep roots with modern resonance.

Take the controversy over the resettlement of Syrian refugees. As the Syrian refugee crisis unfolded across Europe and the Middle East, a number of state governors announced their intention to deny resettlement of Syrians in their communities, contrary to a U.S. government plan to receive 10,000 refugees over the next year. They cited threats to public safety as justification for this extraordinary invocation of the state’s traditional police power.²⁹⁷

Indeed, the State of Texas filed suit in federal court to keep Syrian refugees out of the state. The state claims that federal officials violated the Refugee Act of 1980, which requires the federal government to “consult regularly” with states prior to resettlement.²⁹⁸ As a state official

296 See Tim McDonnell, *Here’s Why Chris Christie’s Zika Quarantines Would Be Pointless*, MOTHER JONES (Feb. 8, 2016), <http://www.motherjones.com/environment/2016/02/christie-ben-carson-zika-quarantine>.

297 Byron Tau & Kristina Peterson, *Republican Governors Object to White House Syrian Migrant Policy*, WALL ST. J. (Nov. 16, 2015), <http://www.wsj.com/articles/u-s-governors-object-to-white-house-syrian-migrant-policy-1447699052>.

298 8 U.S.C. § 1522 (2012).

characterized, “it is about protecting Texans.”²⁹⁹ Along with some other states, Texas prefers to seal its borders to refugees, who are lawful U.S. residents once resettled in any state. This refusal of initial resettlement within the state ignores the fact that the Privileges and Immunities Clause implies a right to travel or relocate from another state.

Then there is the dispute over trash and toxic waste disposal from out-of-state sources. Local governments understandably are concerned with becoming a dumping ground for waste generated elsewhere. Here the Supreme Court has had much to say, even if the doctrinal underpinnings of the Dormant Commerce Clause have been especially troubling.³⁰⁰ Bans on out-of-state waste disposal have been generally struck down in the name of the Commerce Clause. In *Philadelphia v. New Jersey*,³⁰¹ for example, a state statute prohibited the importation of waste from outside the state. Although the stated purpose of the statute was to protect “public health, safety, and welfare,” the Supreme Court invalidated the statute because it discriminated against out-of-state commercial interests, stating: “What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.”³⁰² Justice Rehnquist, in dissent, pointed to the *Quarantine Cases* in justification of such state action.³⁰³

What these issues have in common is the urge to defend against outside threats through “home rule,” whether it be contagious disease, toxic waste, or terrorist infiltration. These are not inherently bad impulses, of course. I do not suggest we risk a return of the local shotgun quarantine to keep these threats out. Instead, I note them to highlight the ambiguity embedded in a state’s right to protect the health, safety, morals, and general welfare of its inhabitants, set against a constitutional structure that historically has privileged local boundaries in matters of quarantine. The shotgun

299 Alexa Ura, *Texas Sues to Block Syrian Refugees*, TEX. TRIB. (Dec. 2, 2015), <https://www.texastribune.org/2015/12/02/texas-sues-feds-over-syrian-refugees> (quoting Texas Attorney General Ken Paxton).

300 See generally, Blair P. Bremberg & David C. Short, *The Quarantine Exception to the Dormant Commerce Power Doctrine Revisited: The Importance of Proofs in Solid Waste Management Cases*, 21 N.M. L. REV. 63 (1990); Janet Cornwall Pancoast & Leonidas W. Payne, *Hazardous Waste in Interstate Commerce: The Triumph of Law over Logic*, 20 ECOLOGY L.Q. 817 (1993); Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL’Y 395 (1998); Anthony L. Moffa & Stephanie L. Safdi, *Freedom from the Costs of Trade: A Principled Argument Against Dormant Commerce Clause Scrutiny of Goods Movement Policies*, 21 N.Y.U. ENVTL. L.J. 344 (2014); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

301 *Philadelphia v. New Jersey*, 437 U.S. 617, 618–19 (1978).

302 *Id.* at 628.

303 *Id.* at 631–33 (Rehnquist, J., dissenting).

quarantine evidenced a much larger but equally complicated issue. But, as Justice Benjamin Cardozo noted in another context, the federal 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.”³⁰⁴

CONCLUSION

Can the federal government preempt state or local quarantines? The question remains open today. This Article has examined the legislative history of the shotgun quarantine to shed light on an enduring issue with modern interest—local protectionism at the expense of national interest.

Human fear and human reactions affect how law is made and how it is enforced. A “fear factor” played a prominent role in public response to Ebola in the United States, as it certainly did with the widespread use of geographic quarantine and martial law in Liberia and Sierra Leone. While undeniably catastrophic in parts of western Africa, an Ebola epidemic in the U.S. was extremely unlikely. Scientists worry more about new viruses that easily spread through the air, unlike the transmission of Ebola.³⁰⁵ Such new viruses, or mutations of old ones, could have the global reach and devastation of the Spanish influenza in 1918.³⁰⁶ In this light, state and local demand for independent quarantine authority is easily understood.

Historically, the shotgun quarantine pressed Congress to provide for greater federal control of state and local quarantine. Although proponents did not get all that they wanted from Congress, the advocacy of Southern politicians, chambers of commerce, railroads and other business interests nearly effected a much greater enlargement of federal government authority. The U.S. Supreme Court invited Congress to extend intrastate federal quarantine power by statute, but it has yet to do so.

Why did legislation authorizing federal intervention in local quarantines fail when the need was clearly demonstrated and southern states dropped objections to it, and even advocated in its favor? I have suggested that one answer to this question lies in a failure of the political process in a nascent era of agency development. But the shotgun quarantine posed a complicated problem because of a long history of exclusive state police

³⁰⁴ Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

³⁰⁵ Polly J. Price, *Ebola and the Law in the United States: A Short Guide to Public Health Authority and Practical Limits* (Emory Legal Studies Research Paper No. 14-299, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2538187.

³⁰⁶ These themes are discussed in greater detail in Polly J. Price, *Ebola and the Law in the United States: A Short Guide to Public Health Authority and Practical Limits*, EMORY LAW LEGAL STUDIES RESEARCH PAPER SERIES, <http://ssrn.com/abstract=2538187>.

power in matters of health, along with a Dormant Commerce Clause doctrine that was in great disarray.

The term “shotgun quarantine,” incidentally, continued to be used in other contexts in the early decades of the twentieth century. In 1908, for example, the *Washington Post* applied the term in an article titled “Color Line Drawn.”³⁰⁷ In a congressional debate over integration of train cars in the District of Columbia, one member described discrimination in the South as “a shotgun quarantine established . . . against negroes.”³⁰⁸ The *Chicago Daily Tribune*, tongue in cheek, applied the term to southern politics:

People must not be misled by the news that all shotgun quarantines in the State of Mississippi have been withdrawn. This applies only so far as yellow-fever is concerned. The old shotgun quarantine against Republican voters will be rigidly maintained.³⁰⁹

The term “shotgun quarantine” is also still defined in some medical dictionaries as “[t]he enforcing of a land quarantine by means of soldiers or an armed guard.”³¹⁰

As I have written elsewhere, the unique brand of public health federalism in the United States is an historical relic, surviving various moments of strong centralizing forces.³¹¹ This Article has considered one of the most significant of those moments. Primary authority in the realm of public health still resides in state and local governments, with no significant federal presence displacing that authority. The federal government is still limited to a supporting role with respect to public health authority over matters such as quarantine.³¹²

Because Congress never acted to quell the shotgun quarantine, we have largely forgotten these legal debates over federal interstate authority. In recovering that history, this Article offers a new perspective on how to manage public health crises in our federal system, highlighting the need for regulatory standards that could preempt an unnecessary and ill-advised local quarantine. The particulars of any federal oversight of a public health

307 *Color Line Drawn*, WASH. POST, Feb. 23, 1908, at 6.

308 “*Jim Crow*” Cars Denied by Congress, N.Y. TIMES, Feb. 23, 1908, at C3.

309 *In the Same Old Style*, CHI. DAILY TRIB., Oct. 6, 1888, at 10.

310 See, e.g., *Shotgun Quarantine*, MEDICAL-DICTIONARY.CC, <http://www.medical-dictionary.cc/what-does/shotgun-quarantine-mean>.

311 See Polly J. Price, *Federalization of the Mosquito: Structural Innovation in the New Deal Administrative State*, 60 EMORY L.J. 325 (2010) (including federal intervention to control malaria in southern states during World War II).

312 Public health federalism is a broad topic of scholarly interest. See, e.g., James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & HEALTH 309 (1998) (reviewing the historical federal role in public health law); Wendy E. Parmet, *After September 11: Rethinking Public Health Federalism*, 30 J.L. MED. & ETHICS 201 (2002) (exploring public health federalism, including doctrinal developments that may restrict the federal government’s ability to regulate).

emergency will still pose significant problems. As a Mississippi judge noted more than a century ago, “Pestilence, like war, disrupts society, and silences the law.”³¹³ The yellow fever “shotgun quarantine” tested our constitutional structure for response to public health emergencies, and found it lacking. This “federalism theater” is still evident today.

313 *Sims v. State*, 72 Tenn. 357, 360 (1880).