AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 7: The Republican Era – Separation of Powers/Nondelegation of Legislative Powers

**Ex Parte McGee, 105 Kan. 574 (KS 1919)**

*In 1917, the Kansas legislature passed a statute empowering the state board of health to designate diseases that are infectious and “to make and prescribe rules, regulations, and procedures for the isolation and quarantine of such diseases and persons afflicted with or exposed to such diseases as may be necessary to prevent the spread and dissemination of diseases dangerous to the public health.” During World War I, the U.S. army became concerned about the spread of venereal diseases among soldiers being trained in several military bases in Kansas. The state board of health subsequently adopted a rule that directed local officials “to use every available means to ascertain the existence of and immediately investigate all suspected cases of syphilis” and to examine “all persons reasonably suspected of having syphilis” and “to isolate such persons” as necessary to protect the public health. In 1918, the board of commissioners of the city of Topeka authorized the city health officer to immediately inspect every prostitute in the city and to isolate any who might be infected with syphilis. Since the city had no suitable facility for holding such women in quarantine, any carriers of the disease were to be sent to the Kansas State Industrial Farm for Women at Lansing.*

*A group of individuals, including Walter McGee, had been detained in the city jail under an isolation order in preparation for their transportation to the state facility. They filed a habeas corpus petition in the state court seeking their immediate release on the grounds that the state statute was constitutionally defective for delegating legislative power to the state board of health. The state supreme court unanimously rejected the petition, upholding the statute as constitutionally valid.*

Judge [BURCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I215b0bc634f411e9bc5c825c4b9add2e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I215b0bc634f411e9bc5c825c4b9add2e).

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The statute is assailed as delegating legislative power to the state board of health. The statute belongs to the well-known class in which the Legislature enacts a law in general terms, confers on an officer or administrative body power to enforce the law, and, to accomplish that end, to adopt necessary rules and regulations, and prescribes penalties for violations of the regulations so adopted. The necessity for legislation of this character is demonstrated by very recent events. If, when the statute under consideration was before the Legislature, it had designated all the infectious, contagious, and communicable diseases it knew, and had prescribed regulations for their suppression and control, it would have omitted the deadly influenza which soon afterwards made such appalling inroads on the lives and health of the people of the state. To meet emergencies of this character, it is indispensable to preservation of the public health that some administrative officer or board should be clothed with authority to make adequate rules which have the force of law, and generally the public welfare is best promoted by delegating power to make administrative regulations to fulfill the expressed intention of the Legislature. While in this instance the terms of the statute are somewhat meager, it undertakes to protect public health by preventing dissemination of dangerous communicable diseases, through isolation and quarantine measures, nonobservance of which is declared to be a misdemeanor; and the authority given the state board of health to specify such diseases as measure up to the standard of infectious, contagious, and communicable, and to prescribe appropriate control measures, is well sustained. The following cases, chosen from a constantly lengthening list, discuss and apply the principles involved: *Isenhour v. State* (IN 1901) . . . *Carstens v. De Sellem* (WA 1914) . . . *Richards v. Coal Co.* (KS 1918). . . .

The rules of the state board of health and the city ordinance are assailed as unreasonable. In this instance only those provisions of the rules of the state board of health and of the city ordinance are involved which relate to isolation of persons who have been examined and have been found to be diseased. Reasonableness of provisions relating to discovery and to examination of suspects need not be determined. It may be observed, however, that while provisions of the latter class cut deeply into private personal right, the subject is one respecting which a mincing policy is not to be tolerated. It affects the public health so intimately and so insidiously, that considerations of delicacy and privacy may not be permitted to thwart measures necessary to avert the public peril. Only those invasions of personal privacy are unlawful which are unreasonable, and reasonableness is always relative to gravity of the occasion. Opportunity for abuse of power is no greater than in other fields of governmental activity, and misconduct in the execution of official authority is not to be presumed.

It is urged that the regulations in question are unreasonable, in that they authorizes isolation in remote places beyond the limits of the city in which the petitioners reside. The court knows of no law, or rule of public policy or private right, which requires a person who, for the protection of the public, must be isolated and treated for loathsome communicable diseases, to be interned in the locality in which he may reside. It would have been competent for the state board of health to designate a single hospital for the detention of all persons in the state found to be so diseased, and it is entirely reasonable for cities having inadequate facilities, or having no facilities of their own, to take advantage of those provided by state authority. . . .

In the application for the writ it is stated that the petitioners are not diseased. The question is one of fact, determinable by practically infallible scientific methods. The city health officer was authorized to ascertain the fact. He has certified to the existence of disease, and, in the absence of a charge of bad faith, or conduct equivalent to bad faith, on his part, his finding is conclusive.

In the application for the writ it is stated that, if the petitioners be diseased, they are able to provide themselves with proper treatment in an isolated place in the city of Topeka. The answer is: The public health authorities are not obliged to take chances.

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*Denied*.