THE CONSTITUTIONAL RIGHT TO TRAVEL UNDER QUARANTINE

NOAH SMITH-DRELICH*

ABSTRACT

The constitutional right to travel has long been an enigma for courts and academics alike. Despite being widely recognized and regularly applied, relatively little has been written about the breadth or limits of this constitutional guarantee. This gap is particularly striking in the context of restrictive measures designed to curb the spread of a dangerous disease, like quarantines. Although travel rights are directly implicated by such regulations, the law of quarantines (to the limited extent that one has been developed) has almost entirely disregarded the constitutional right to travel. This Article seeks to close this gap by building a detailed model of the Constitution's protections of movement and travel and then applying this model to quarantines and similar regulations aimed at controlling the spread of a contagious disease. In so doing, this Article makes contributions to the fields of constitutional law and health law, while providing a robust framework of immediate use to policymakers, courts, and litigants responding to the COVID-19 pandemic.

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* Noah Smith-Drelich is an Assistant Professor of Law at Chicago-Kent College of Law and is the lead counsel in *Thunderhawk v. County of Morton*, No. 1:18-cv-00212 (D.N.D. filed Oct. 18, 2018), a lawsuit challenging the closure of the primary road to and from the Standing Rock Reservation at the height of the resistance to the construction of the Dakota Access Pipeline. Thanks to Felice Batlan, Jay S. Bybee, Lawrence O. Gostin, Mark Hall, Harold J. Krent, Wendy E. Parmet, Dorit Rubinstein Reiss, and Christopher W. Schmidt, whose comments have been invaluable in shaping this Article.

INTRODUCTION

As the COVID-19 pandemic swept the United States, state and local governments responded with increasingly severe restrictive measures seeking to limit the spread of the disease. Even former President Trump briefly joined the chorus, weighing a partial "quarantine" of New York, New Jersey, and Connecticut.[1] One of the primary policy interventions favored by legislators, especially early in the pandemic, was to restrict where people could go: Illinois's "shelter in place" order stated that "all individuals currently living within the State of Illinois are ordered to stay at home or at their place of residence,"[2] and former President Trump's contemplated

1. Victoria Bekiempis & Richard Luscombe, *Cuomo and Trump Clash Over Talk of New York 'Quarantine*,*'* GUARDIAN (Mar. 28, 2020, 9:27 PM), https://www.theguardian.com/us-news/2020/mar/28/donald-trump-virginia-usns-comfort-travel [https://perma.cc/XB5D-MZFF]. This Article adopts the broad colloquial use of the word "quarantine," while recognizing that there is a narrower technical definition used in the public health community. *See* Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 WAKE FOREST J.L. & POL'Y 1, 7 (2018).

2. OFF. OF THE GOVERNOR, EXECUTIVE ORDER IN RESPONSE TO COVID-19 (COVID-19 EXECUTIVE ORDER NO. 8) (Mar. 20, 2020) [hereinafter ILL. COVID-19 EXEC. ORDER], https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-10.aspx [https://perma.cc/5QRW-6R55] (outlining, also, a number of exceptions).

federal order would have restricted travel to and from heavily impacted states.[3] As significant restrictions on movement and travel have grown increasingly common, however, the relevant constitutional protection most directly implicated by such measures has remained largely disregarded in both popular and scholarly literature; the constitutional right to travel has long been one of the less explored of the Constitution's widely recognized rights. This Article seeks to remedy this gap, testing the contours of the right to travel through the current crisis while providing a legal roadmap for public health officials considering travel restrictions to ward off both present and future disease.

This discussion is not meant to imply that such public health measures are unjustified or that they should be struck down. State and local governments have far-reaching—but not unlimited—powers to respond to public health emergencies. Rather, this Article seeks to enrich the discussion of rights and liberties in this context by highlighting the overlooked role of the right to travel and, in the process, shift the academic literature's focus from procedural to substantive rights. As this examination indicates, attempts to mitigate the spread of diseases like COVID-19 will implicate, and sometimes violate, the constitutional right, or rights, to travel. Though governments may proceed with restrictive measures—at least when the public health demands it—travel restrictions that are not thoughtfully constructed may give rise to constitutional liability.

I. CURRENT LEGAL FRAMEWORK

There have only been a few occasions over the past century in which quarantines or other similar restrictions have been implemented.[4] And in most such instances, there has been widespread voluntary compliance with public health recommendations, thereby obviating the need for formal coercive measures (or legal challenge).[5] As a result, the case law and academic discussion of quarantines have remained relatively undeveloped, with the dominant approaches being either to defer greatly to the government

3. *Trump Says a Quarantine 'Will Not Be Necessary*,*'* N.Y. TIMES (Mar. 28, 2020), https://www.nytimes.com/2020/03/28/world/coronavirus-live-news-updates.html?action=click&module=Spotlight&pgtype=Homepage [https://perma.cc/TW5Q-29GX].

4. *Cf.* Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 WAKE FOREST J.L. & POL'Y 1, 11 (2018) (noting the absence of cases).

5. *Id.* at 2 (" '[S]tates implemented at least 40 formal quarantines and 233 de facto quarantines, in which formal orders were not issued but individuals nonetheless went into quarantine or had their movements severely restricted due to official pressure.' In addition, at least twenty-three states announced quarantine and movement restrictions that exceeded the guidelines developed by the Centers for Disease Control and Prevention ('CDC').").

or to examine the measures in question through the lens of procedural rights.[6] As this Part will discuss, however, neither approach is well-suited to balancing the constitutional and public health interests at stake in times of a pandemic.

A. PUBLIC HEALTH DEFERENCE

More than anything else, judicial review of public health regulations has been highly deferential. Courts have been quick to bend constitutional rights and liberties in service of controlling the spread of contagious diseases. This approach is generally sourced to a 1905 Supreme Court case, *Jacobson v. Massachusetts*, which involved a mandatory vaccination law targeted at smallpox. *Jacobson* may not, however, require or even recommend such a high degree of deference. Regardless, as legislators have shown time and time again through discriminatory quarantines, public health measures should not be exempted from serious constitutional scrutiny—tempting though it may be in times of crisis.

1. *Jacobson v. Massachusetts*

Smallpox was a highly contagious disease that killed thirty percent of those who became infected.[7] Although a smallpox vaccine has been available since 1796, smallpox outbreaks remained common in the United States throughout the nineteenth century in large part because people were reluctant to get vaccinated except during or immediately after outbreaks.[8] By the turn of the twentieth century, vaccination mandates had become a common public health tool for ensuring vaccination.[9] Children, for example, were often required to be vaccinated in order to attend public school.[10]

Jacobson involved a Massachusetts statute that gave municipalities the power to require smallpox vaccination. One such municipality, Cambridge, Massachusetts, had given its residents a choice: be vaccinated or pay a $5 fine (approximately $150 today).[11] The suit arose when a local minister fearing vaccination, Henning Jacobson, refused the shot and was fined. Jacobson's concern regarding vaccination revolved around his belief that

6. The procedural rights approach focuses on the formal steps that must be taken when rights are enforced. *See, e.g.*, *infra* Section I.B.

7. *Smallpox*, U.S. FOOD & DRUG ADMIN. (Mar. 23, 2018), https://www.fda.gov/vaccines-blood-biologics/vaccines/smallpox [https://perma.cc/2YQV-QHLH].

8. Wendy E. Parmet, *Rediscovering* Jacobson *in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117, 119 (2020).

9. *Id.* at 119–20.

10. *Id.*

11. *Id.* at 121.

prior vaccinations had injured himself and one of his sons.[12] This was not an entirely unreasonable view—compared with modern vaccines, the smallpox vaccine had a much higher rate of complication.[13]

Although Jacobson's challenge to the vaccine mandate spoke primarily in the rights-based constitutional language of "liberty," it revolved around his skepticism regarding the necessity of vaccination: the Constitution, Jacobson argued, guarded his liberty to refuse a vaccine that he believed to be dangerous. This position won little support in the courts. Jacobson lost in the trial court, the Massachusetts Supreme Court, and, ultimately, the U.S. Supreme Court. Across the board, judges showed little sympathy for Jacobson's vaccine skepticism, at least in the face of a public health threat as serious as smallpox. In the words of the Massachusetts Supreme Court, "It is a fact of common knowledge that smallpox is a terrible disease, whose ravages have sometimes swept away thousands of human beings in a few weeks."[14] In such circumstances, the state's police power provides "general legislative authority to make laws for the common good."[15]

The U.S. Supreme Court largely agreed, affirming Jacobson's conviction and fine in a notably "nuanced and Delphic" opinion that has, over the years, been subject to a great deal of interpretation and translation.[16] Contemporary courts have mostly coalesced around the view that *Jacobson* sets forth a highly deferential standard: in order to be "susceptible to constitutional challenge," a public health measure must (a) have "no real or substantial relation to [its public health goals]," or (b) constitute "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[17] Needless to say, this does not present a terribly high bar for policymakers to overcome; most public health measures will bear *some* relation to their public health goals.

Nevertheless, contemporary courts have read this interpretation of *Jacobson* expansively to afford states *even more* deference in times of perceived public health crisis. In *In re Rutledge*, for example, the Eighth Circuit considered the impact a state mandate targeted at preserving scarce personal protective equipment ("PPE") during the COVID-19 pandemic had on abortions. The plaintiffs argued (and the district court concluded), that

12. MICHAEL WILLRICH, POX: AN AMERICAN HISTORY 287–88 (2011).

13. Parmet, *supra* note 8, at 121.

14. Commonwealth v. Pear, 66 N.E. 719, 720 (Mass. 1903), *aff'd sub nom.* Jacobson v. Massachusetts, 197 U.S. 11 (1905).

15. *Id.*

16. Parmet, *supra* note 8, at 119.

17. *In re* Rutledge, 956 F.3d 1018, 1027–28 (8th Cir. 2020) (quoting *Jacobson*, 197 U.S. at 31). *But cf., e.g.*, Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam) (suggesting that Free Exercise claims may require special treatment—and less deference).

"there is no real or substantial relationship between the [government directive as it was applied to surgical abortions] and the State's public health rationale."[18] In fact, the plaintiffs argued that "requiring women to continue their pregnancies will actually utilize more PPE and hospital resources than allowing non-emergency surgical abortions."[19] Thus, this argument concluded that the challenged regulation—banning elective surgical abortions—had no "real or substantial relation to" the State's goal of conserving scarce resources.[20] The Eighth Circuit rejected this framing of the *Jacobson* standard: "[W]e do not read *Jacobson* to require that courts take a piecemeal approach and scrutinize individual surgical procedures or otherwise create an exception for particular providers, such as those performing non-emergency, surgical abortions."[21] Thus, according to the Eighth Circuit's view, a regulation may be significantly overbroad and impose requirements on many procedures, such as abortions that do not further its goals, and yet, under *Jacobson*, withstand constitutional challenge.[22]

This permissive approach to an already-permissive standard is fairly typical; contemporary courts have repeatedly used *Jacobson* as a license to adopt a standard of near-absolute deference toward legislatures responding to a perceived public health emergency.[23] Indeed, even in those circumstances in which courts have shown more willingness to scrutinize public health measures, contemporary examinations of public health through the lens of *Jacobson* have been deferential. In *Maryville Baptist Church, Inc. v. Beshear*, for example, the Sixth Circuit rejected the argument that

18. *Id.* at 1028.
19. *Id.*
20. *Id.*
21. *Id.* at 1029.
22. For a contrasting view, see *Adams & Boyle, P.C. v. Slatery*, in which the Sixth Circuit approved a similar argument—and was subsequently reversed by the Supreme Court. 956 F.3d 913, 927 (6th Cir. 2020), *vacated*, 141 S. Ct. 1262 (2021).
23. *See, e.g.*, *In re* Abbott, 954 F.3d 772, 784 (5th Cir. 2020), *vacated as moot*, 141 S. Ct. 1261 (2021); *In re* Rutledge, 956 F.3d 1018; Geller v. de Blasio, No. 20-cv-03566, 2020 U.S. Dist. LEXIS 87405, at *3 (S.D.N.Y. May 18, 2020), *appeal dismissed*, 2020 U.S. App. LEXIS 41437, at *1 (2d Cir. June 8, 2020); Amato v. Elicker, 460 F. Supp. 3d 202 (D. Conn. 2020); Spell v. Edwards, 460 F. Supp. 3d 671 (M.D. La. 2020), *vacated as moot*, *appeal dismissed*, 962 F.3d 175 (5th Cir. 2020); Givens v. Newsom, 459 F. Supp. 3d 1302 (E.D. Cal. 2020), *appeal dismissed*, 830 F. App'x 560 (9th Cir. 2020), *reh'g denied*, No. 20-15949, 2021 U.S. App. LEXIS 796, at *1 (9th Cir. 2021) (en banc); SH3 Health Consulting, LLC v. Page, 459 F. Supp. 3d 1212 (E.D. Mo. 2020). The exceptions have come almost exclusively in the context of religious exercise. *See, e.g.*, Maryville Baptist Church v. Beshear, 957 F.3d 610, 615 (6th Cir. 2020) (per curiam) (striking down public health measures that burdened religious services, and, in the process, rejecting the argument that *Jacobson* requires the suspension of constitutional rights: "While the law may take periodic naps during a pandemic, we will not let it sleep through one"); *cf.* Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (per curiam) (striking down several public health measures on free exercise grounds while disregarding *Jacobson* altogether).

Jacobson fully requires the suspension of constitutional rights: "While the law may take periodic naps during a pandemic, we will not let it sleep through one."[24] Even while rejecting a more extreme view, the Sixth Circuit therefore maintained its embrace of the notion that *Jacobson* demands an extraordinary amount of deference—that "the law may take periodic naps during a pandemic."[25]

2. *Jacobson* Reconsidered

Putting aside for a moment the question of whether *Jacobson* still is or should be good law, it is far from clear that this hyper-deferential view represents the best reading of the case. The hyper-deferential interpretation of *Jacobson* is constructed largely from dicta taken out of context. It is true that *Jacobson* urges courts to defer to official policy judgments, but it does not command any more deference in times of public health emergency than what is generally owed to state actors performing a legislative function.[26]

In *Jacobson*, one of the plaintiff's central claims was that "his liberty [was] invaded when the state subject[ed] him to fine or imprisonment for neglecting or refusing to submit to vaccination."[27] To this, the Court responded in a much quoted line: "But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint."[28] This line has been repeatedly cited to support the proposition that constitutional liberties must give way to public health considerations during public health emergencies.[29] But what the Court appears to be articulating here is the far less controversial position that "[e]ven liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will"; the plaintiff could not refuse to follow an otherwise proper vaccination law with which he disagreed because of "liberty."[30] This more limited view is now formally ensconced throughout

24. *Maryville Baptist Church*, 957 F.3d at 615.

25. *Id.* In its recent opinions striking down several public health measures on free exercise grounds, the Supreme Court has disregarded *Jacobson* altogether. *See, e.g.*, *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 63 (per curiam).

26. *Cf.* Robinson v. Att'y Gen., 957 F.3d 1171, 1179 (11th Cir. 2020) ("[*Jacobson* is] not an absolute blank check for the exercise of governmental power.").

27. Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

28. *Id.*

29. *See, e.g.*, *In re* Abbott, 954 F.3d 772, 784 (5th Cir. 2020) (quoting this line to support the principle that although "individual rights secured by the Constitution do not disappear during a public health crisis, . . . rights could be reasonably restricted during those times"), *vacated as moot*, 141 S. Ct. 1261 (2021). Although *In re Abbott* was ultimately vacated as moot after Governor Greg Abbott replaced the challenged executive order, the Court's reasoning is nevertheless representative of the deferential approach toward legislatures.

30. *Jacobson*, 197 U.S. at 26–27 ("Real liberty for all could not exist under the operation of a

most of the Court's constitutional jurisprudence (nearly all of which was developed after *Jacobson*)—including, most pertinently, strict scrutiny.[31]

The *Jacobson* plaintiff also centered his argument around "the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox or who think that vaccination causes other diseases of the body."[32] In response, the Court recognized

> that an opposite theory accords with the common belief, and is maintained by high medical authority. . . . It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease.[33]

Lower courts, including most recently the Fifth and Eighth Circuits, have relied on the latter half of this statement to argue that the Supreme Court has "disclaimed *any* judicial power to second-guess the state's policy choices in crafting emergency public health measures."[34] Although there can be little question that *Jacobson* urges courts to defer to legislatures to some extent, the dicta in question does not, in context, appear to announce the sweeping deference that has since been attributed to it. The issue before the Court was whether to force a legislature to reject the dominant scientific consensus—a view with "strong support in the experience of this and other countries."[35] Refusing to overturn the legislature in such circumstances is a far cry from creating a standard of near-absolute legislative deference applicable in circumstances of public health emergencies.

Jacobson largely reflects the constitutional understandings of its time, expressing a range of proto-modern views on constitutional analysis: constitutional rights are not absolute; the legislative branch is entitled to significant deference in its weighing of different expert-supported policies;

principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."). Indeed, *Jacobson* provided an illustration reinforcing that it is not meant to carve out an exception specific to public health: "The liberty secured by the 14th Amendment, this court has said, consists, in part, in the right of a person 'to live and work where he will'; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense." *Id.* at 29 (citation omitted).

31. *See, e.g.*, Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 961–62 (1998) (discussing the "prevalence of 'balancing' in modern constitutional law," including in strict scrutiny).

32. *Jacobson*, 197 U.S. at 30.

33. *Id.*

34. *In re Abbott*, 954 F.3d at 784 (emphasis added). *But cf.* Parmet, *supra* note 8 (criticizing this approach).

35. *Jacobson*, 197 U.S. at 35.

and so forth.[36] As such, *Jacobson* should be read as a pre–New Deal predecessor to modern constitutional jurisprudence—as a very early part of the bedrock on which strict scrutiny and its ilk were built—rather than as an exception to it. *Jacobson* nowhere articulates the view that crises related to public health are somehow of a different *kind* than crises related to, for example, public safety. There are a wide range of circumstances unrelated to public health, including in the context of public safety, that the state may plausibly claim justify just as much need for deference. The dominant contemporary reading of *Jacobson* thus risks creating an exception that swallows the rule, undermining meaningful constitutional review where it is needed the most—in circumstances in which the public itself may be clamoring for rights-restrictive regulations.

3. The Trouble with Deference

Even if *Jacobson* did stand for the principle that courts must use extraordinary deference in considering official responses to perceived public health emergencies, there are strong public policy justifications for declining to adopt such a rule.[37] Far-reaching uses of government power should not be so easily left unexamined. And, although there is good reason to be somewhat more deferential to policymaking in the public health context—namely, courts are particularly poorly equipped to second-guess policy rooted in technical expertise—decisions made in the name of public health have historically not been free of prejudice. "[I]n the past, quarantines have been infused with issues of race, class, and gender, placing the greatest hardships on those who failed to conform to white middle-class norms of behavior."[38] As epidemics have threatened or swept through parts of the United States, quarantines have been repeatedly targeted at racial and ethnic

36. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 163 (2007) ("[S]tate and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty."); *see also Jacobson*, 197 U.S. at 38 ("Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression."); LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 124 (3d ed. 2016) (characterizing *Jacobson* as requiring that state regulations conform to "public health necessity, reasonable means, proportionality, [and] harm avoidance"); *cf.* James G. Hodge, Jr., Daniel Aaron, Haley R. Augur, Ashley Cheff, Joseph Daval & Drew Hensley, *Constitutional Cohesion and the Right to Public Health*, 53 U. MICH. J. L. REFORM 173, 191 (2019).

37. For a vivid illustration of what it looks like to take the deferential view of *Jacobson* to its logical end, see *Buck v. Bell*, 274 U.S. 200, 207 (1927), in which Justice Holmes stated that "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." Needless to say, *Buck v. Bell* has fallen into significant disfavor.

38. Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 60 (2007).

minorities "who were seen as having the capacity to pollute the country and the body politic."[39]

Probably most infamously, in *Jew Ho v. Williamson*, public health authorities imposed a mass quarantine that was enforced only against Chinese and Chinese-American residents of San Francisco, ostensibly to control an outbreak of the bubonic plague.[40] The purported outbreak in question had resulted in, at most, eleven deaths and no known cases of transmission, and there was significant dispute as to whether any outbreak existed to begin with.[41] Nevertheless, San Francisco discriminatorily cordoned off over 10,000 of its residents.[42] *Jew Ho* is well known in part because it represents one of the rare instances in which litigants were successful in challenging a quarantine: the reviewing court held that the quarantine appeared to be the product of "an evil eye and an unequal hand," and struck it down under the Fourteenth Amendment.[43]

Jew Ho, however, is far from the most blatant (or tragic) example of official discrimination made under cover of public health. Another illustration of the discriminatory use of public health measures came in 1899–1900, after a small number of bubonic plague cases appeared in Honolulu's Chinatown.[44] The Hawaiian provisional government imposed a cordon sanitaire of the area,[45] prohibiting Chinese and Japanese residents (but not white residents) from leaving the island. When that did not appear sufficient to contain the outbreak, the government began incinerating, without notice, buildings surrounding the location of plague victims—leading, ultimately, to an uncontrolled blaze that burnt down much of Chinatown.[46] Although nobody was killed in the fire, approximately 4,000 residents of the area (most of whom were Chinese, Japanese, or Native Hawaiian) were left homeless.[47] Ultimately, few of these victims would ever see any remuneration for their injuries; what little restitution was eventually provided required proof of loss that only a small number of victims could provide.[48]

39. *Id.* at 61.
40. Jew Ho v. Williamson, 103 F. 10, 11–14 (C.C.N.D. Cal. 1900).
41. *Id.* at 25.
42. *Id.* at 14.
43. *Id.* at 24 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886)); *see also* Wong Wai v. Williamson, 103 F. 1, 5 (C.C.N.D. Cal. 1900).
44. Batlan, *supra* note 38, at 97–99.
45. A *cordon sanitaire* is an extreme quarantine measure, in which a guarded cordon is established around a region to ensure that nobody enters or exits. *See, e.g.*, Melissa L. Markey, *Planning for Pandemonium: Pandemic Planning for Physicians*, AHLA SEMINAR PAPERS, Feb. 9, 2009, at 1.
46. Batlan, *supra* note 38, at 99.
47. *Id.*
48. *Id.*

These cases are just a small sample of the wide range of discriminatory or constitutionally dubious measures that have been justified by claims of public health necessity.[49] Time after time, such oppressive actions have been challenged in court, and time after time, judges have upheld, under cover of extreme deference, the state's authority to violate rights and liberties during times of a public health emergency.[50] Although courts should be careful to respect the legislative role of officials and to defer to expertise, it is similarly crucial for the judicial branch to continue to provide meaningful review of public health measures.

B. PROCEDURAL RIGHTS APPROACH

The most common alternative to the deferential approach attributed to *Jacobson* has been to view the impact of public health measures through the lens of procedural rights.[51] According to the procedural rights argument, to be upheld against constitutional challenge, quarantines must satisfy the requirements of procedural due process, and include notice, counsel, the right to cross-examination, and so forth. As the COVID-19 crisis illustrates, however, the procedural rights approach presents an awkward analytical lens for all but a few of the regulations that may be imposed in service of controlling the spread of a dangerous contagious disease. Even more concerningly, centering the discussion of quarantines around procedural rights suggests a dangerous false choice: that a court must delay the imposition of a quarantine until the checks required by procedural due process are in place, or constitutional rights must give way in order to protect the public's safety.

1. Procedural Rights

When considering the legality of previous quarantines (and not simply deferring to policymakers), courts have repeatedly turned to the seemingly analogous circumstance of civil confinements for mental illness. This comparison made a great deal of sense for the sort of individualized quarantines that were common prior to the COVID-19 pandemic; an involuntary quarantine targeting a single person potentially exposed to illness looks, in practice, a lot like the involuntary detention of a single person with mental illness.

This trend to procedural rights appears to have started in earnest with

49. *See, e.g.*, *supra* note 23.

50. Batlan, *supra* note 38, at 99. Nor is it possible to dismiss this as a concern of the past; these same essential prejudices have emerged once more as the Ebola and COVID-19 outbreaks have been associated with, respectively, a significant rise in anti-African and anti-Chinese sentiments.

51. *Jacobson* was not a procedural due process case.

Greene v. Edwards, a 1980 case involving tuberculosis wards. In *Greene*, the West Virginia Supreme Court noted that "involuntary commitment for having communicable tuberculosis impinges upon the right to 'liberty, full and complete liberty' no less than involuntary commitment for being mentally ill."[52] Thus, the court held, the same "procedural safeguards" attach in both circumstances: notice, counsel, the right to cross-examine and present witnesses, a clear and convincing standard of proof, and a right to a transcript for appeal.[53]

The academic literature on quarantines has largely taken a similar tact, also focusing on the analogy to involuntary confinement and on the procedural rights approach more generally. This is reflected in Lawrence Gostin, Scott Burris, and Zita Lazzarini's seminal public health article, which recognized that "little difference exists between loss of liberty for mental health purposes and loss of liberty for public health purposes," advocating for the application of a procedural due process analysis to quarantines.[54] Wendy Parmet and Michelle Daubert likewise emphasize the importance of providing the full gamut of procedural protections for those who face quarantines.[55] Parmet, for example, calls for a clarification of the procedural rights at stake, so as to (among other things) guard against the "dangers" of "officials imposing quarantine as result of political pressure even when the best scientific evidence points against quarantine's efficacy."[56]

52. Greene v. Edwards, 263 S.E.2d 661, 663 (W. Va. 1980). The Arkansas Supreme Court made the same connection twenty years earlier, albeit without applying procedural due process: "Like an insanity proceeding, this is neither a civil nor a criminal proceeding, but rather is a special proceeding by the State in its character of *parens patriae*, based on the theory that the public has an interest to be protected." State v. Snow, 324 S.W.2d 532, 534 (Ark. 1959).

53. *Greene*, 263 S.E.2d at 663; *see also* City of Newark v. J.S., 652 A.2d 265, 270–73 (N.J. Super. Ct. Law Div. 1993); Best v. St. Vincent's Hosp., No. 03 Cv. 0365, 2003 U.S. Dist. LEXIS 11354 (S.D.N.Y. Jul. 2, 2003); City of New York v. Doe, 614 N.Y.S.2d 8 (N.Y. App. Div. 1994); City of New York v. Antoinette R., 630 N.Y.S.2d 1008 (N.Y. Sup. Ct. 1995). Even when not explicitly drawing this comparison, litigants and courts have regularly emphasized procedural rights in the context of quarantines. *See, e.g.*, *In re* Halko, 54 Cal. Rptr. 661 (Ct. App. 1966). There has also been some limited recognition of the role of fundamental rights in the context of involuntary confinement. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (providing, however, little guidance for how fundamental rights might apply in the context of quarantines, while suggesting that fundamental rights likely have bite).

54. Lawrence O. Gostin, Scott Burris & Zita Lazzarini, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 122 (1999) ("Public health statutes should provide for fair procedures in the exercise of coercive health powers, including written notice of the behavior or conditions said to pose a risk, assistance of counsel, a full and impartial hearing, and an appeal."); *see also* Lawrence O. Gostin, *Public Health Law in a New Century Part II: Public Health Powers and Limits*, 283 JAMA 2979, 2980 (2000).

55. Michelle A. Daubert, Comment, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights*, 54 BUFF. L. REV. 1299, 1318 (2007); Parmet, *supra* note 4, at 6.

56. Parmet, *supra* note 4, at 29. Daubert takes a more pragmatic approach, arguing that by viewing

This is not, of course, to say that substantive rights have been entirely overlooked in this context: each of these respective scholars (and many of these opinions) recognizes the existence of substantive due process, most devoting at least one subsection to the topic. But the primary focus of the discussion of constitutional limitations on quarantines has been on procedural rights.

2. Shortcomings

There are at least three critical problems with relying exclusively on the procedural rights approach. First, the civil commitment analogy is of far less utility than what its frequent mention seems to imply: only a small fraction of the public health tools available to policymakers actually resemble civil commitment for mental illness. To mitigate the spread of COVID-19, for example, officials have mostly implemented regulations directed at large groups that do not differentiate between those who are presumptively infected, exposed, or healthy.[57] These present-day quarantine regulations are intended to influence the behaviors of communities rather than individuals, and the result is a collection of regulations that less completely burdens the liberty of a far greater number of people. This presents a serious problem for would-be plaintiffs. The doctrine of qualified immunity requires the dismissal of damages actions when the constitutional right allegedly violated was not "clearly established" at the time of the violation—and courts have repeatedly held that the civil commitment analogy does not even "clearly establish" the procedural rights in question for individualized quarantines that far more closely resemble civil commitment.[58]

Second, the procedural rights approach presents a poor fit for this type of regulation as a more general matter. A restriction that constrains the behaviors of millions of residents in a given state may well be constitutionally suspect, but its primary fault is not its failure to make attorneys available to each person impacted, to require individual hearings, or to otherwise provide the particularized protections required by procedural due process. We don't generally subject traffic regulations, housing codes, or other such restrictions that burden liberty to the stringent requirements of procedural due process. This is because, as the Supreme Court has made clear,

procedural due process rights on a continuum in the context of quarantines, courts are likely to give more consideration to process in this context. Daubert, *supra* note 55, at 1318.

57. Policymakers have deemed it necessary to cast a broad net, in part because of the lack of adequate testing and in part because of the spread of COVID-19 via asymptomatic individuals.

58. *See, e.g.*, Hickox v. Christie, 205 F. Supp. 3d 579, 590 (D.N.J. 2016*)*; Liberian Cmty. Ass'n of Conn. v. Malloy, No. 3:16-cv-00201, 2017 U.S. Dist. LEXIS 232738, at *10 (D. Conn. Mar. 30, 2017); Parmet, *supra* note 4, at 6.

> [w]here a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. . . . General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.[59]

Thus, even if the analogy to civil commitment presented a sufficiently close fit, the procedural rights approach is appropriate for only a subset of quarantine regulations.

Most concerningly, however, is that viewing quarantine regulations through the analytical lens of procedural due process sets constitutional rights and liberties in tension with public safety measures. This is because in most procedural rights claims, the primary remedy sought is equitable, taking the form of an injunction or some sort of court-instituted process or do-over.[60] In the context of a quarantine, a court considering a procedural rights challenge must therefore decide between providing notice, counsel, hearings, and other rights guaranteed by due process—any of which may seriously jeopardize the containment of the disease—or concluding that due process does not apply.[61] In such circumstance, it is all too often the constitutional rights that give way. In the recent words of a district court judge considering a challenge to a stay-at-home order, "at times such as we face today, all rights are subject to some invasion."[62]

II. THE CONSTITUTIONAL RIGHT TO TRAVEL

Crucially, this tension is far from inevitable. When damage awards rather than injunctive relief represent the primary remedy sought, as is typical in the context of substantive rights claims, a court may allow the challenged policy to proceed, providing relief to plaintiffs ex post rather than ex ante.[63] In this Part, this Article turns to discuss a substantive right, one

59. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915); *see also* Bragg v. Weaver, 251 U.S. 57, 58 (1919); *cf.* Logan v. Zimmerman Brush Co., 445 U.S. 422, 432–33 (1982).

60. Although substantive rights cases also can involve equitable remedies, these cases tend to be more damages-centered than procedural rights claims. *Cf.* Carey v. Piphus, 435 U.S. 247, 248 (1978) (holding that only nominal damages were available for a denial of procedural due process that had no additional accompanying injury).

61. Edward P. Richards, Scott Burris, Richard P. McNelis & Eric Hargan, *Quarantine Laws and Public Health Realities*, 33 J.L. MED. & ETHICS 69, 70 (2005) ("All due process does is increase the cost and delay of the quarantine.").

62. SH3 Health Consulting, LLC v. Page, 459 F. Supp. 3d 1212 (E.D. Mo. 2020); Cassel v. Snyders, 458 F. Supp. 3d 981, 993 (N.D. Ill. 2020) ("During an epidemic, the *Jacobson* court explained, the traditional tiers of constitutional scrutiny do not apply."), *aff'd*, 990 F.3d 539 (7th Cir. 2021).

63. Substantive rights claims can, of course, seek injunctive relief—in which case they may give rise to the same inherent tension. What distinguishes procedural rights from substantive claims is not the

that is key but largely overlooked in this context: the right to travel.

The Supreme Court has struggled to locate the right to travel in any one specific place in the Constitution—while consistently acknowledging its existence.[64] This is because the "right" is more accurately described as a *series* of travel-related rights: the Constitution guarantees, at the very least, a right to free movement, to travel between the states, and to relocate from one state to another.[65] Each of these rights is regularly characterized as a "right to travel," and each of these rights is independently guaranteed by the U.S. Constitution—with somewhat different protections afforded in each instance. By distinguishing between these different constitutional rights, this Part adds not only detail, but also much-needed clarity to the constitutional right to travel.

This clarity is particularly crucial in the context of quarantine law. Inconsistency resulting from Supreme Court confusion or circuit splits is always concerning, but it is especially troubling in circumstances that demand a nationally consistent response, as is true in times of a pandemic. A patchwork of restrictions based not on public health suggestions but on the divergent paths following from different interpretations of the constitutional right to travel jeopardizes not only horizontal equity, but our ability to effectively control the spread of a dangerous disease.

A. RIGHT TO MOVE FREELY

Restrictive measures designed to slow the spread of a dangerous disease will frequently implicate the constitutional right to free movement. This right represents one of the rare fundamental rights that the Court has continuously acknowledged even after the close of the *Lochner* era.[66]

Although the right to free movement has been litigated only

possibility for tension, but the near certainty: most procedural rights claims center around equitable relief, whereas most substantive rights claims include at least a major damage component, providing judges an outlet for ruling in favor of plaintiffs without risking the public health in the process.

64. *See, e.g.*, Edwards v. California, 314 U.S. 160, 161 (1941) (disagreeing whether the right springs from the Commerce Clause, the Fourteenth Amendment's Privileges and Immunities Clause, or national citizenship); Att'y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 902 (1986) ("The textual source of the constitutional right to travel . . . has proved elusive."); *cf.* Zobel v. Williams, 457 U.S. 55, 66–67 (1982).

65. Because the right to relocate from one state to another is rarely implicated by quarantine regulations, this Article leaves discussion of the right for another day. *See, e.g.*, *Soto-Lopez*, 476 U.S. at 903 (noting that "[a] state law implicates th[is] right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses 'any classification which serves to penalize the exercise of that right' " (citations omitted)).

66. The "*Lochner* era" lasted for approximately fifty years, from the 1880s to the 1930s, and is marked by the Supreme Court's aggressive use of substantive due process to strike down (mostly economic) laws. *See, e.g.*, Mila Sohoni, *The Trump Administration and the Law of the* Lochner *Era*, 107 GEO. L.J. 1323, 1330–31 (2019).

infrequently, when presented with the question, the Supreme Court has cast the right in broad terms: a regulation need not close off every avenue or even most avenues of movement to be constitutionally impermissible. For example, in an early but still influential case, *Crandall v. Nevada*, the Supreme Court considered a $1-per-passenger tax (approximately $16 in today's dollars) imposed by the State of Nevada on transportation companies. Though the tax was relatively small and did not directly fall on the travelers themselves, the Court struck it down as unconstitutional:

> [I]f the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other.[67]

The *Crandall* Court did not clarify from what part of the Constitution this right to movement springs, or its exact limits, although the Court's focus on the essential purposes served by free movement largely echoes the language of fundamental rights: a citizen, *Crandall* recognized, has a right to travel "to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it."[68] Interestingly, although the stricken Nevada regulation impacted only *inter*state travel, this key passage would appear to apply to *intra*state travel as well: a purely *intra*state travel restriction may burden travel "to the seat of government" no less than one impacting *inter*state travel.[69]

Somewhat more recently, in *Kent v. Dulles* and *Aptheker v. Secretary of State*, the Supreme Court struck down, respectively, a practice of and a statute denying passports to suspected Communists—restrictions that would have done little to impact the day-to-day mobility of most of those impacted.[70] Nevertheless, in striking down these regulations, the Court made its position clear: "[f]reedom of movement is basic in our scheme of values" and travel "may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads."[71] It should be noted that both *Kent* and *Aptheker* are rooted in the due process clause of the Fifth Amendment, which applies to the federal government and not the

67. Crandall v. Nevada, 73 U.S. 35, 46 (1867).

68. Kent v. Dulles, 357 U.S. 116 (1958); Aptheker v. Sec'y of State 378 U.S. 500 (1964).

69. For example, if Maryland were to completely close, all within the State of Maryland, fifty miles of Highway 70—a key east-west route to Washington D.C.—the impact on travel to the nation's capital would be substantially more severe than the $1 interstate tax imposed by Nevada that was overturned in *Crandall*.

68. Kent v. Dulles, 357 U.S. 116 (1958); Aptheker v. Sec'y of State 378 U.S. 500 (1964).

71. *Kent*, 357 U.S. at 126 (1958).

states, prompting one leading scholar to question whether the substantive due process-related right to free movement might only apply to the federal government.[72] *Crandall* is no help in this regard. Although *Crandall* recognized a right to free movement applicable to the states, the opinion predates the Fourteenth Amendment. It therefore did not locate the right in question in the Fourteenth Amendment's Due Process clause.

Regardless, the Supreme Court has more recently recognized a right to free movement applicable to the states (albeit again without clarifying from where in the Constitution that right precisely springs). In *Papachristou v. City of Jacksonville*, the Court invalidated a Jacksonville vagrancy ordinance that made criminal "persons wandering or strolling around from place to place without any lawful purpose or object."[73] This, the Court held, violated the constitutional right to free movement: wandering and strolling are "historically part of the amenities of life as we have known them."[74]

> These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.[75]

As in *Crandall*, this language reflects that used in the Court's fundamental rights jurisprudence, albeit without any explicit identification of the recognized right as fundamental.[76]

Together, these cases point to a consistently recognized right to free movement, one that is probably best characterized as a fundamental right.

72. Jay S. Bybee, The Congruent Constitution 71–72 (2021) (unpublished manuscript) (working copy on file with author). It would make little sense, however, for the fundamental right to free movement to be incorporated through the Fifth Amendment's Due Process Clause against the federal government but not through the Fourteenth Amendment's identical Due Process Clause against the states. *See id.* (recognizing the incoherence of such a proposition, while arguing that it nevertheless may best describe the current state of the law).

73. Papachristou v. City of Jacksonville, 405 U.S. 156, 157 n.1, 171 (1972).

74. *Id.* at 164; *see also* City of Chicago v. Morales, 527 U.S. 41, 53 (1999) ("[T]he freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."); Kolender v. Lawson, 461 U.S. 352, 358 (1983) (recognizing "the constitutional right to freedom of movement"); United States v. Wheeler, 254 U.S. 281, 293 (1920) ("In all the states, from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the fundamental right, inherent in citizens of all free governments . . . to move at will from place to place therein, and to have free ingress thereto and egress therefrom . . . .").

75. *Papachristou*, 405 U.S. at 164. Although *Papachristou* is also a Due Process decision—based on the vagueness doctrine—the Court declined to locate the underlying right to free movement in the Due Process clause of the Fifth or Fourteenth Amendment. The Court recognized the applicability of the right, while remarking that it is "not mentioned in the Constitution or in the Bill of Rights." *Id.*

76. *See, e.g.*, Nunez by Nunez v. City of San Diego, 114 F.3d 935, 944 (9th Cir. 1997) (citing *Papachristou* for the principle that "[c]itizens have a fundamental right of free movement").

As such, regulations that burden free movement are subject to strict scrutiny, and "may be sustained only if 'narrowly tailored to serve a compelling state interest.' "[77] In *Aptheker*, for instance, the Court held that the passport regulation in question was broader than necessary to further the government's stated interest of promoting national security: "Even '[a]ssuming that some members of the Communist Party had illegal aims and engaged in illegal activities, it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct.' "[78] Similarly, in *Papachristou*, the Court held that Jacksonville's vagrancy ordinance was unconstitutionally vague because it appeared to criminalize innocuous and suspicious conduct alike.[79]

Although the circuit courts have by and large embraced this right to free movement, there remains some confusion about the appropriate level of scrutiny. The Sixth and Ninth Circuit each have applied strict scrutiny to such laws, although the Sixth Circuit has not "foreclose[d] the possibility of applying intermediate scrutiny to a less severe regulation of localized travel."[80] The Second Circuit applies strict scrutiny to state actions that burden the free movement of adults, but applies only intermediate scrutiny when it is a juvenile's right that is implicated.[81] On the other hand, the Third Circuit applies intermediate scrutiny to all laws that burden free movement,[82] and the Seventh Circuit has simply held that the right "cannot be abridged without due process of law," implicitly confusing the *substantive* due process right to free movement for a *procedural* due process right.[83] This

77. Washington v. Glucksberg, 521 U.S. 702, 772 n.12 (1997) (Souter, J., concurring).

78. Aptheker v. Sec'y of State, 378 U.S. 500, 510–12 (1964) (recognizing, also, the availability of "less drastic" means of accomplishing the government's objectives). It is probably worth noting that although the *Aptheker* Court probably could have rooted its decision in the First Amendment, it did not.

79. *Papachristou*, 405 U.S. at 162. *See generally id.* at 166 n.8 (providing more background regarding the void-for-vagueness doctrine in the context of fundamental rights); *Wheeler*, 254 U.S. at 293.

80. Johnson v. City of Cincinnati, 310 F.3d 484, 502 (6th Cir. 2002); *Nunez by Nunez*, 114 F.3d at 944.

81. Ramos v. Town of Vernon, 353 F.3d 171, 176 (2d Cir. 2003).

82. Lutz v. City of York, 899 F.2d 255, 269–70 (3d Cir. 1990) (nevertheless describing this as a substantive due process right).

83. United States v. Shaheen, 445 F.2d 6, 10 (7th Cir. 1971) ("When the relief impinges upon a constitutionally protected personal liberty, that burden must certainly be at least as great as that required to obtain more familiar forms of injunctive relief."). Since *Shaheen*, the Seventh Circuit has taken a more skeptical approach, refusing, for example, to extend the right to protect loitering or to travel to public parks. *See, e.g.*, Doe v. City of Lafayette, 377 F.3d 757, 771 (7th Cir. 2004) (implying, nevertheless, that there is a fundamental right to "mov[e] from place to place within [one's] locality to socialize with friends and family, to participate in gainful employment or to go to the market to buy food and clothing"). The D.C., Eighth, and Eleventh circuits have only acknowledged this right in dicta. *See, e.g.*, Gomez v. Turner, 672 F.2d 134, 143–44, 143 n.18 (D.C. Cir. 1982) ("That citizens can walk the streets, without explanations or formal papers, is surely among the cherished liberties that distinguish this nation from so many others."); Smith v. Avino, 91 F.3d 105, 109 (11th Cir. 1996) ("In an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended.");

inconsistency is unfortunate—and unnecessary: restrictions that burden fundamental rights are subject to strict scrutiny.[84]

Not every state action that touches on movement, however, necessarily triggers the protections afforded by the right. "[J]ust as the right to speak cannot conceivably imply the right to speak whenever, wherever and however one pleases . . . so too the right to travel cannot conceivably imply the right to travel whenever, wherever and however one pleases."[85] Thus, courts have generally held that brief or narrow restrictions on movement do not implicate the right. For example, both the Second and Seventh circuits have held that a municipality's decision to limit access to some of its facilities—such as a school and its grounds—did not interfere with the right to free movement.[86] And numerous other courts have held that gasoline taxes, toll roads, speed limits, and other such minor burdens do not implicate the right.[87] Nevertheless, courts have consistently struck down laws that more substantially burden movement; a restriction need not be absolute to implicate the constitutional right.[88]

B. RIGHT TO INTERSTATE TRAVEL

When states act to slow the spread of contagious diseases like COVID-19, they will often do so through burdens on *inter*state travel. Such regulations, too, impact a long and consistently recognized constitutional right: the right to travel freely between the states. The constitutional right to interstate travel is protected by at least three different provisions of the U.S. Constitution.

First, as is the case with free movement, interstate travel is a

Doe v. Miller, 405 F.3d 700, 713 (8th Cir. 2005); Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1017 (8th Cir. 2006); Bissonette v. Haig, 776 F.2d 1384, 1391 n.10 (8th Cir. 1985).

84. *See* Washington v. Glucksberg, 521 U.S. 702, 773 (1997) (Souter, J., concurring). In all fairness to the circuit courts, this issue is rarely litigated, and the fundamental rights test has been muddled by the Court's jurisprudence around abortion. *See, e.g.*, Michael Dorf, *Symposium: Abortion Is Still a Fundamental Right*, SCOTUSBLOG (Jan. 4, 2016), https://www.scotusblog.com/2016/01/symposium-abortion-is-still-a-fundamental-right [https://perma.cc/Z4BB-77W8].

85. *Lutz*, 899 F.2d at 269.

86. *See, e.g.*, Williams v. Town of Greenburgh, 535 F.3d 71, 75 (2d Cir. 2008) (holding that a municipality's decision to limit access to its facilities did not interfere with the constitutional right to travel); Hannemann v. S. Door Cnty. Sch. Dist., 673 F.3d 746, 757 (7th Cir. 2012) (holding that banning a former student from school grounds did not interfere with his right to travel).

87. *See, e.g.*, Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999); Hughes v. City of Cedar Rapids, 840 F.3d 987, 995 (8th Cir. 2016); *cf.* Maxwell v. City of New York, No. 93 Civ. 5834, 1995 U.S. Dist. LEXIS 5467, at *9, 24 (S.D.N.Y. Apr. 27, 1995) (contrasting a permissible series of checkpoints that stopped drivers "no more than a few minutes" and caused no traffic congestion with a checkpoint set up on the George Washington Bridge that was struck down because it "tied up one million vehicles for four hours"); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) (upholding immigration-related checkpoints that only momentarily interrupted the travelers' passage).

88. *See generally Williams*, 535 F.3d at 75 (collecting cases).

fundamental right. In the words of the Court, the "right of 'free ingress and regress to and from' neighboring States," is deeply rooted in the history and tradition of the United States.[89] The right to travel "across frontiers in either direction, and inside frontiers as well, was a part of our heritage," dating to the Magna Carta.[90] Although the fundamental rights side of interstate travel has been given relatively little attention by litigants—in part because burdens on interstate travel will regularly also violate other constitutional provisions—the Court has nevertheless continued in the modern constitutional era to recognize interstate travel as a fundamental right: "[T]he constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union."[91] As a fundamental right, any regulation impacting "travel from one state to another" should be evaluated under strict scrutiny.[92]

Second, interstate travel is also protected by the Privileges and Immunities Clause of Article IV[93]: "[A] citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits."[94] The Supreme Court has construed this right to travel broadly: "[A] purely intrastate restriction [can] . . . implicate the right of interstate travel" that arises under the Privileges and Immunities Clause if "it is applied discriminatorily against [travelers from other states]."[95] This makes a great

89. Saenz v. Roe, 526 U.S. 489, 501 (1999) (quoting 3 Records of the Federal Convention of 1787, p. 112 (M. Farrand ed. 1966)) (examining this question through the lens of the Fourteenth Amendment's Privileges and Immunities Clause). Indeed, the Articles of Confederation explicitly recognize this right. *See id.*

90. Kent v. Dulles, 357 U.S. 116, 125–26 (1958) (examining this question through the lens of the Fifth Amendment's Due Process Clause). *Kent* did not, however, actually hold that any such right was violated by the passport denial in question: because Congress hadn't actually conferred any authority to the Secretary of State to deny passport applications for such a reason, the Court declined to examine the "extent to which [the right to free movement] can be curtailed." *Id.* at 27.

91. United States v. Guest, 383 U.S. 745, 757 (1966); *see also* Shapiro v. Thompson, 394 U.S. 618, 630 (1969), *overruled in part on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974).

92. *Guest*, 383 U.S. at 757 (recognizing, while declining to apply, such a right). This is likely true irrespective of whether the regulation in question is promulgated via state or federal authority. *See supra* note 72 and accompanying text (recognizing that the Supreme Court has not explicitly located this right in the Fourteenth Amendment's Due Process Clause).

93. There is also a Privileges or Immunities Clause to the Fourteenth Amendment—which, importantly, does not require any sort of out-of-state discrimination. Although its reach remains murky, it protects, at the very least, the right to relocate one's residence from one place to another. *See, e.g.*, *Saenz*, 526 U.S. at 503; Slaughter-House Cases, 83 U.S. 36, 80 (1872). Both Privileges and Immunities clauses bind only the states.

94. *Saenz*, 526 U.S. at 500 (describing this as "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State"). Included among these privileges and immunities is "the right of a citizen of one state to pass through, or to reside in any other state." *Id.* at 501 n.14. Article IV's Privileges and Immunities Clause only applies to citizens.

95. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993) (holding that

deal of sense: the touchstone of Article IV's Privileges and Immunities Clause is that it bars states from treating citizens of other states in a discriminatory manner.[96] Thus, although the Court has typically construed travel restrictions of this nature as *inter*state restrictions, whether the discrimination takes the form of an interstate or intrastate burden on travel is not critical.

Under Article IV's Privileges and Immunities Clause, any regulation that discriminatorily burdens such travel must be "closely related to the advancement of a substantial state interest."[97] This test is meant to be stringent: "[T]he purpose of [the Privileges and Immunities Clause] . . . is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed."[98] As a result, "[i]n deciding whether the degree of discrimination bears a sufficiently close relation to the reasons proffered by the State," the Court asks "whether, within the full panoply of legislative choices otherwise available to the State, there exist alternative means of furthering the State's purpose without implicating constitutional concerns."[99]

Third and finally, burdens on interstate travel will regularly implicate the Commerce Clause. One of the limitations implied by the Commerce Clause, known as the "Negative" or "Dormant" Commerce Clause, provides that states cannot take action that improperly discriminates against interstate commerce.[100] Given the central role of travel in commerce, burdens on interstate travel will regularly also encumber interstate commerce. Closing a key arterial route between two states, for example, will not only impact commercial shipping, but also businesses on either side of the closure. And as the Court has made clear, "[e]ven when business activities are purely local, if 'it is interstate commerce that feels the pinch, it does not matter how

demonstrations that impeded, at most, *intra*state travel did not violate the right to *inter*state travel protected by the Privileges and Immunities Clause); *see also* Patrick Sullivan, *In Defense of Resident Hiring Preferences: A Public Spending Exception to the Privileges and Immunities Clause*, 86 CALIF. L. REV. 1335, 1348 (1998).

96. It may not, however, similarly burden *federal* regulation. *See, e.g.*, Pollack v. Duff, 793 F.3d 34, 41 (D.C. Cir. 2015) (concluding that "the Privileges and Immunities Clause of Article IV does not constrain the powers of the federal government at all").

97. Sup. Ct. of Va. v. Friedman, 487 U.S. 59, 65 (1988); *see also* Toomer v. Witsell, 334 U.S. 385, 396 (1948).

98. *Toomer*, 334 U.S. at 398.

99. *Friedman*, 487 U.S. at 67; *see also Toomer*, 334 U.S. at 398; Mullaney v. Anderson, 342 U.S. 415, 417 (1952) (striking down, as a privileges and immunities violation, a licensing scheme imposing a $45 burden on nonresidents).

100. The Dormant Commerce Clause, too, restricts only the states. *See* Dep't of Revenue v. Davis, 553 U.S. 328, 337–40 (2008) (providing history of the Dormant Commerce Clause).

local the operation which applies the squeeze.' "[101]

Indeed, the Supreme Court has taken a particularly expansive approach when it comes to viewing the interrelated nature of travel and commerce, repeatedly recognizing "the transportation of persons across state lines" itself to be "a form of 'commerce' " protected by the Commerce Clause.[102] The Court has applied this logic even when the burden on interstate commerce was neither direct nor immediate. In *Camps Newfound/Owatonna v. Town of Harrison*, an operator of a nonprofit camp challenged a Maine property tax exemption that favored camps serving primarily in-state residents. The Court held that by discriminating against the camp, the regulation discouraged camp attendance, thereby discouraging interstate travel—and thus interstate commerce.[103]

When a state burdens interstate travel, and therefore commerce, the question a reviewing court must then ask is whether the burden is discriminatory against interstate commerce on its face. If so, it is "virtually per se invalid."[104] Such laws will only be upheld when they "advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[105] "This is an extremely difficult burden, 'so heavy that facial discrimination by itself may be a fatal defect.' "[106] On the other hand, if the law in question is nondiscriminatory and "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," the Court applies a balancing test, weighing the benefits and costs of the regulation: "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," the law will be upheld.[107]

101. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 573 (1997).

102. *Id.* (citing Edwards v. California, 314 U.S. 160, 172 (1941) ("It is settled beyond question that the transportation of persons is 'commerce,' within the meaning of that provision.")); *see also* Caminetti v. United States, 242 U.S. 470, 491 (1917); Hoke v. United States, 227 U.S. 308, 320 (1913). Ironically, these decisions likely overrule the most recent Supreme Court decision preceding the COVID-19 pandemic to consider the legality of a quarantine, which adopted a far narrower conception of the Commerce Clause. *See, e.g.*, Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380, 391 (1902) (holding that "criminals, diseased persons and things, and paupers, *are not legitimate subjects of commerce*").

103. *Camps Newfound/Owatonna*, 520 U.S. at 573; *see also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 243 (1964) (holding that private race discrimination limiting access to a hotel impeded interstate commerce in the form of travel, because the hotel "solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation").

104. Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996).

105. Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93, 94 (1994).

106. *Camps Newfound/Owatonna*, 520 U.S. at 582 (quoting *Or. Waste*, 511 U.S. at 101).

107. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

III. QUARANTINES AND THE CONSTITUTION

So far, this Article has focused on quarantine regulations in history or in the abstract. This Part of this Article looks to the present and the future, illustrating the advantages of a substantive right-to-travel framework for quarantines and quarantine-like regulations by examining several specific regulations used to control the spread of the COVID-19 pandemic.

These public health regulations have taken a number of different forms, ranging from "stay at home orders" of various degrees of strictness, to restrictions on out-of-state visitors, to requirements that travelers complete health-and-contact questionnaires. Each of these types of restriction burdens travel in different ways, implicating different constitutional protections in the process. Each *can* be constitutionally permissible,[108] but, as this Part's discussion will show, policymakers must be careful in shaping these regulations.

A. STAY-AT-HOME ORDERS

The majority of U.S. residents in 2020 lived, at least for a period, within the reach of a "stay-at-home" order related to the COVID-19 pandemic that was issued by a state, tribal government, county, or municipality.[109] Although the nature of these orders varied from jurisdiction to jurisdiction, they largely followed a similar framework: residents were prohibited from leaving their houses except to participate in a specific set of designated "essential" activities and jobs.[110] These orders mostly cast a broad net, applying—for weeks if not months in duration—to sick, exposed, and apparently healthy individuals alike.[111]

By way of illustration, Illinois's order mandated that "all individuals currently living within the State of Illinois [must] stay at home or at their place of residence."[112] The order exempted homeless persons and "[i]ndividuals whose residences are unsafe or become unsafe" from its reach, but otherwise made clear that "[a]ll persons may leave their homes or place

108. This is not surprising given that these doctrines developed alongside quarantine law; indeed, quarantines were, at a point, a recognized exception to the Dormant Commerce Clause. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978) (recognizing this historical exception, while limiting its reach).

109. Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html [https://perma.cc/7NX9-XKAJ].

110. Thomas Johnson & Angela Fritz, *So You're Under a Stay-at-Home Order? Here's What That Means in Your State.*, WASH. POST (May 5, 2020), https://www.washingtonpost.com/health/2020/04/06/coronavirus-stay-at-home-by-state [https://perma.cc/VRL9-4RPB].

111. *Id.*

112. ILL. COVID-19 EXEC. ORDER, *supra* note 2.

of residence only for Essential Activities, Essential Governmental Functions, or to operate Essential Businesses and Operations."[113] The order also explicitly (and potentially redundantly) banned "[a]ll travel, including, but not limited to, travel by automobile, motorcycle, scooter, bicycle, train, plane, or public transit, except Essential Travel and Essential Activities as defined herein."[114] The "Essential Activities" listed by the order, for which residents *may* leave their homes, were: "[f]or health and safety," "[f]or necessary supplies and services," "[f]or outdoor activity," for specifically designated essential work, and "[t]o take care of others."[115] Similarly, the order permitted Illinois residents to continue to undertake essential "travel related to the provision of or access to" an explicitly permitted activity or job; "to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons"; "to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services"; "to return to a place of residence from outside the jurisdiction"; "required by law enforcement or court order"; and "required for non-residents to return to their place of residence outside the State."[116] In all other circumstances, any travel or movement whatsoever was prohibited.

1. Fundamental Right to Free Movement

Stay-at-home orders like Illinois's significantly impinge on the fundamental right to free movement. They explicitly ban movement "necessary for a livelihood" (at least for livelihoods not deemed "essential") and have, as a result, contributed to widespread unemployment.[117] And although wandering or strolling around from place to place may not be *fully* barred under most such orders—Illinois, for example, permits "outdoor activity" and activity related to "health and safety"—they nevertheless prohibit a vast amount of movement, recreational and otherwise, intrastate and interstate. Joy rides, for example, did not appear to be allowed under the terms of Illinois's order, and trips to the playground were explicitly prohibited.[118] Despite the many exemptions contained within these stay-at-home orders, the end result was nevertheless to burden a wide range of

113. *Id.* The order also banned all public gatherings while commanding that when "individuals are using shared or outdoor spaces when outside their residence, they must at all times and as much as reasonably possible maintain social distancing of at least six feet from any other person." *Id.*

114. *Id.*

115. *Id.* (listing, also, specific "essential businesses").

116. *Id.*

117. *See generally* ChaeWon Baek, Peter B. McCrory, Todd Messer & Preston Mui, *Unemployment Effects of Stay-at-Home Orders: Evidence from High Frequency Claims Data* (Inst. for Rsch. on Lab. & Emp., Working Paper No. 101-20, 2020) (observing that a substantial, but minority share, of unemployment claims made between March 14 and April 4 were attributable to stay-at-home orders).

118. It is unclear whether taking a ride merely for pleasure in a fully enclosed vehicle is a permitted "outdoor activity."

activities that have been "historically part of the amenities of life as we have known them."[119] Strict scrutiny should therefore apply, meaning that such orders "may be sustained only if [they are] narrowly tailored to serve a compelling state interest."[120]

Although this presents a significant hurdle, strict scrutiny should be far from a fatal pronouncement for such regulations. This is because strict scrutiny does not actually require a court to trade rights against the public's health or vice versa; it is precisely regulations that match the demands of public health that should be upheld as constitutional. The crisis associated with the COVID-19 pandemic presents a good illustration of this: stay-at-home orders that closely track public health recommendations should survive strict scrutiny.

The first question in strict scrutiny, whether the state has a compelling interest, is answered by looking to the seriousness of the purported crisis at hand.[121] Although the public's health presents a compelling justification for policymaking in the abstract, not every malady threatens public health to the same extent. To satisfy the compelling interest prong of strict scrutiny, officials must therefore do more than show that the policy or action in question serves *some* public health goal. A campaign to curtail hay fever might be widely appreciated within the population, but sneezing and itchy eyes likely do not represent the sort of "public health" exigency that gives rise to a *constitutionally* compelling interest. Although courts tend to be deferential to the state in this review, it must ultimately be the background reality against which the actions in question are made that determines whether the state's action serves a compelling interest; an interest cannot be made compelling solely by popular desire or official decree. This, importantly, should place experts at the center of any determination of which exigencies are significant. In relation to the present crisis, scientists have largely coalesced around the view that COVID-19 presents a grave threat to, at the very least, older individuals, persons with various comorbidities such as diabetes and obesity, and the healthcare system as a whole—which should be more than sufficient to make the government's interest in combatting COVID-19 compelling.

The second question in strict scrutiny—narrow tailoring—may

119. Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972); *see also* City of Chicago v. Morales, 527 U.S. 41, 53 (1999) ("[T]he freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."); Kolender v. Lawson, 461 U.S. 352, 358 (1983) (recognizing "the constitutional right to freedom of movement").

120. Washington v. Glucksberg, 521 U.S. 702, 772 n.12 (1997) (Souter, J., concurring).

121. *Id.* ("How compelling the interest and how narrow the tailoring must be will depend, of course, not only on the substantiality of the individual's own liberty interest, but also on the extent of the burden placed upon it.").

similarly be answered by looking to the experts. A narrowly tailored regulation is one that uses the least restrictive means available of accomplishing its purposes, sweeping no more broadly than is necessary.[122] In the context of quarantines and similar regulations, narrow tailoring is best measured by examining how closely a policy hews to expert recommendations. State action that precisely implements expert recommendations sweeps exactly as broadly as is necessary (and is therefore narrowly tailored). This means that even far-reaching or indiscriminate aspects of regulations could be constitutional if they are largely consistent with the policies suggested by the relevant experts. Take, for example, the application of stay-at-home orders to apparently healthy individuals with no known exposure to COVID-19. Because this particular coronavirus can be spread widely by individuals without symptoms[123] and because quick accurate testing remained mostly unavailable at the time in question,[124] it was impossible to determine which individuals living in a region with community spread had been exposed and were asymptomatic or presymptomatic spreaders. As a consequence, public health experts urged policymakers to treat everyone as a potential disease vector, which is exactly what these broad provisions do. At the point that it becomes possible to determine who cannot spread a disease—through, potentially, advances in antibody testing or vaccines—and the expert recommendations change accordingly, such blanket attempts to minimize the spread of a virus like the one causing COVID-19 may no longer be narrowly tailored. Likewise, as the spread of disease becomes more controlled and contact tracing therefore becomes once again practicable, broad-based strategies will become less necessary from a public health standpoint—and therefore more constitutionally suspect.[125]

2. Other Constitutional Provisions

The fundamental right to free movement is not the only constitutional protection of travel or movement relevant to stay-at-home orders. Article

122. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (noting that the state "would have to prove that the statute is supported by a compelling interest and is the most narrowly drawn means of achieving that end" to meet the requirements of strict scrutiny).

123. *See generally* Michael A. Johansson, Talia M. Quandelacy, Sarah Kada, Pragati Venkata Prasad, Molly Steele, John T. Brooks, Rachel B. Slayton, Matthew Biggerstaff & Jay C. Butler, *SARS-CoV-2 Transmission from People Without COVID-19 Symptoms*, JAMA NETWORK, Jan. 7, 2021, at 1.

124. Olga Khazan, *The 4 Key Reasons the U.S. Is So Behind on Coronavirus Testing*, ATLANTIC (Mar. 13, 2020), https://www.theatlantic.com/health/archive/2020/03/why-coronavirus-testing-us-so-delayed/607954 [https://perma.cc/TD5J-QJUY].

125. One could imagine how challenging political realities, such as the unpopularity of vaccine "passports," might lead to the institution of broad-based strategies even while a significant subset of the population has developed immunity through vaccination or natural infection. Political expediency does not, however, enter into a strict scrutiny analysis—the government may not restrict constitutional rights because the majority demands it—and such measures may therefore be vulnerable to challenge.

IV's Privileges and Immunities Clause and the Commerce Clause also offer potential avenues of protection, albeit to very different degrees.

First, Article IV's Privileges and Immunities Clause applies only to state regulations that *discriminatorily* burden travel. Most stay-at-home orders, including Illinois's, are nondiscriminatory, prohibiting travel and movement for everyone in the state without regard to residency status.[126] Moreover, when these orders make exemptions to their general bars on travel, as they all did, the exemptions were largely based on the *reason* for the travel in question rather than its direction or destination.[127] Under Illinois's order, for example, travel to get groceries was permitted, in-state or out, by a resident or a nonresident—whereas travel to socialize at a bar was not.[128] This is undeniably burdensome, but because it is not discriminatorily so, it does not run afoul of Article IV's Privileges and Immunities Clause.[129]

The Dormant Commerce Clause, on the other hand, presents a greater obstacle for state or local stay-at-home orders.[130] Although these orders may not facially discriminate against interstate commerce (for the same essential reasons that they do not discriminate against out-of-state residents),[131] they may nevertheless greatly tax interstate commerce through their significant burdening of business and recreation of all stripes: closing an office building, state park, or restaurant will limit the travel and commerce of out-of-state visitors who otherwise would have come for work or recreation. As such, the *Pike* balancing test applies.

Pike generally is not viewed as a particularly stringent test. Under *Pike*, stay-at-home orders should be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[132] Nevertheless, *Pike* could prove more challenging of a hurdle for stay-at-

126. ILL. COVID-19 EXEC. ORDER, *supra* note 2. The order references only nonresidents to expressly *permit* travel to return to a place of residence to or from another jurisdiction. *Id.*

127. One important exception to this was the Kentucky Governor's March 30, 2020, Executive Order, which banned Kentucky residents from traveling out of state except for several limited exceptions. *See* Roberts v. Neace, 457 F. Supp. 3d 595, 598 (E.D. Ky. 2020) (describing, then striking down the order on right-to-travel grounds, albeit without many discussions or analysis other than a bare conclusion that the Order was overbroad), *aff'd*, 958 F.3d 409 (6th Cir. 2020).

128. *See supra* notes 107–11 and accompanying text.

129. Saenz v. Roe, 526 U.S. 489, 500 (1999) (describing this as "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State"). Included among these privileges and immunities is "the right of a citizen of one state to pass through, or to reside in any other state." *Id.* at 501 n.14.

130. The Dormant Commerce Clause does not bind federal regulations. *See supra* note 100.

131. To the contrary, these orders commonly take affirmative steps in service of mitigating their impacts on interstate commerce. Illinois's stay-at-home order, for example, exempted all travel related to shipping or delivery from its constraints. ILL. COVID-19 EXEC. ORDER, *supra* note 2.

132. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

home orders than even strict scrutiny. This is because regulations that hew closely to expert recommendations may *not* survive *Pike*, even if they will typically survive strict scrutiny. Although the high economic burden of illness and death means that promoting public health will generally facilitate interstate commerce, there may be some instances in which the economic costs of policies serving the public health are so ruinous as to outweigh the substantial economic and non-economic benefits that flow from public health. This is, in fact, one of the primary popular critiques of stay-at-home orders; COVID-19 may present a real threat to the public health, and yet the economic costs of stay-at-home orders may be greater. As a result, a state cannot safeguard its stay-at-home order from a Dormant Commerce Clause challenge solely by modeling it after expert regulations. This is not to say that state and local stay-at-home orders are doomed. Far from it. The uncertainty surrounding measures intended to mitigate the spread of a dangerous disease, like COVID-19, works in the government's favor, as it will be especially challenging to prove that the economic costs of such a regulation *clearly* exceed its putative local benefits.

B. BORDER CONTROL

Another legal strategy widely adopted by states, counties, municipalities, tribal governments, and even the federal government has been to control the arrival of new visitors into the jurisdiction. This strategy aimed to limit the introduction of COVID-19 into the community—and, by so doing, obviate the need for more drastic measures. In practice, this has taken a range of forms. For example, the Florida Keys effectively shut itself off to most outsiders for several months by erecting checkpoints on each of the two roads into the Keys, allowing only "residents, property owners and those actively involved in work in the Florida Keys" to pass through.[133] Throughout the same period, the state of Florida, as a whole, also implemented a more targeted form of border control, imposing a fourteen-day "quarantine restriction[] on travelers from New York State," going so

133. David Goodhue & Gwen Filosa, *Monroe County to Close U.S. 1 to Tourists into the Florida Keys Due to COVID-19 Concerns*, MIA. HERALD (Mar. 24, 2020, 2:32 PM), https://www.miamiherald.com/news/local/community/florida-keys/article241462451.html [https://perma.cc/YG4V-KYNZ] (noting that fuel tankers, delivery and grocery trucks, first responders, and healthcare workers would be allowed when they were involved in work in the Keys). Hotels and short-term rentals had already been closed at the point that this restriction was implemented. *Id.* At the time that the checkpoints were established, there had been three cases of COVID-19 detected in the Keys. *Id.* The checkpoints remained up for approximately two months. *Checkpoints Keeping Visitors Out of Florida Keys Are Coming Down Monday*, WINK NEWS (May 31, 2020, 3:43 PM), https://www.winknews.com/2020/05/31/checkpoints-keeping-out-visitors-come-down-in-florida-keys [https://perma.cc/KAT9-7355]. At the time the checkpoints were removed, the Keys had approximately 110 cases of COVID-19, or about 850 per 100,000. *Id.* Miami-Dade County had, at that time, 18,000 cases of COVID-19, or about 660 per 100,000. "More than 18,750 cars coming from the mainland were turned away" by these checkpoints. *Id.*

far as to stop motorists with New York plates to remind them of their self-quarantine obligation.[134] On the other hand, New York state created a "containment area" around the community of New Rochelle at a point when the city served as an epicenter of New York's outbreak.[135] Even relatively laissez-faire states implemented some border-control measures. Utah, for example, briefly required all travelers entering the state to fill out a questionnaire with personal information about their travel plans, COVID-19 exposure and testing, and their present health.[136] Broadly speaking, these respective policies incapsulate the different categories of border control that states have adopted in response to COVID-19. Although such regulations tend to have a less draconian impact on the region as a whole than stay-at-home orders, they implicate the Constitution in fundamentally different ways—and may actually be *less* constitutionally sustainable as a result.

1. Fundamental Right to Movement

First, regulations that exclude people from a jurisdiction entirely (as the Florida Keys did), require self-isolation on arrival (as Alaska, Connecticut, Florida, Hawaii, Illinois, New Jersey, New York, and Rhode Island have all done), or restrict people from leaving their own community (as was true for New Rochelle, New York) implicate the fundamental right to free movement.[137] It is impossible to "wander[] or stroll[] around from place to

134. *Travelers*, FLA. COVID-19 RESPONSE, https://web.archive.org/web/20200721180532/https://floridahealthcovid19.gov/travelers (noting exceptions for students and commercial travel). Rhode Island implemented a similar policy, which it quickly extended to include *all* states. Scott Souza, *RI Reopening: Travel Restrictions Set for Those Coming to State*, PATCH (June 29, 2020, 4:07 PM), https://patch.com/rhode-island/middletown/ri-reopening-travel-restrictions-set-those-coming-state [https://perma.cc/RJJ5-5KMJ]. Several months later, in response to a second surge of infections in different states, New York, Connecticut, and New Jersey together instituted similar policies. *See Travel Restrictions Issued by States in Response to the Coronavirus (COVID-19) Pandemic, 2020–2021*, BALLOTPEDIA, https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021 [https://perma.cc/JV94-8MMW].

135. Bill Chappell, *Coronavirus: New York Creates 'Containment Area' Around Cluster in New Rochelle*, NPR (Mar. 10, 2020, 2:17 PM), https://www.npr.org/sections/health-shots/2020/03/10/814099444/new-york-creates-containment-area-around-cluster-in-new-rochelle [https://perma.cc/9U3D-CKY2]. This policy resembled a *cordon sanitaire*, a disease-control measure in which an entire community is walled off (often literally) to prevent the spread of a disease outside of that community. *See supra* note 45. But because residents were still permitted to leave New Rochelle under the containment area rules, this was not a true *cordon sanitaire*. Chappell, *supra*.

136. *Governor Issues Executive Order on Inbound Travel*, UTAH.GOV (Apr. 9, 2020), https://coronavirus.utah.gov/governor-issues-executive-order-on-inbound-travel [https://perma.cc/7T4B-RB52]; *see also* Sonja Hutson, *Utah to Require Travelers Entering the State to Answer COVID-19 Travel Questionnaire*, KUER 90.1 (Apr. 8, 2020), https://www.kuer.org/post/utah-require-travelers-entering-state-answer-covid-19-travel-questionnaire#stream/0 [https://perma.cc/5QN2-227S]. The order was repealed soon thereafter because of problems with execution. *See Travel Restrictions Issued by States in Response to the Coronavirus (COVID-19) Pandemic, 2020–2021*, *supra* note 129.

137. Self-questionnaire requirements, on the other hand, are more akin to a road toll or speed limit, insofar as they are minor restrictions, and likely do not trigger the right's protections. *See, e.g.*, Miller v.

place"[138] in a jurisdiction from which you have been excluded or required to self-isolate. Visitors cannot patronize restaurants in these communities, shop for groceries, swim at lakes or beaches, socialize with friends or family, or partake in any number of other activities that have been "historically part of the amenities of life as we have known them."[139] Although courts have, on occasion, declined to extend the right to geographically limited bans on travel, like a single school's grounds, the Florida Keys (and, of course, an entire state like Illinois) are easily large enough to trigger the protections afforded to violations of fundamental rights.[140]

As a result, such border-control regulations should be subject to strict scrutiny. But, as is true for stay-at-home orders, strict scrutiny need not be fatal.[141] Here, too, the question should turn on what experts have recommended. For example, when there is an outbreak of a sufficiently contagious disease in a community that has not spread elsewhere, *cordon sanitaire*-like measures, such as those used in New Rochelle, could be scientifically justified and therefore legally sustainable.[142] Likewise, where a region has been able to control the spread of COVID-19 internally, and where outside visitors represent a significant threat for introducing new infections, border-control policies may well be in accordance with expert recommendations—in which case they should survive strict scrutiny. This likely was at least initially true for the Florida Keys, which had only three reported cases of COVID-19 infection when the roads were first closed to visitors, and which expected a large number of would-be-visitors to come from areas with significant community spread of COVID-19, such as Miami-Dade County.[143] Similarly, at the time that Florida imposed self-quarantine obligations on travelers arriving from New York, nearly half of all cases in the United States were associated with New York (whereas Florida still had relatively few cases).[144] On the other hand, Rhode Island imposed a similar

Reed, 176 F.3d 1202, 1205 (9th Cir. 1999).

138. Papachristou v. City of Jacksonville, 405 U.S. 156, 156 n.1 (1972).

139. *Papachristou*, 405 U.S. at 164; *see also* City of Chicago v. Morales, 527 U.S. 41, 53–54 (1999); Kolender v. Lawson, 461 U.S. 352, 358 (1983).

140. *See, e.g.*, Hannemann v. S. Door Cnty. Sch. Dist., 673 F.3d 746, 757 (7th Cir. 2012).

141. In one of the only serious challenges to such a COVID-19 regulation on right-to-travel grounds, the court effectively concluded as much, holding that although the self-quarantine requirement burdened the plaintiffs' fundamental right to interstate travel, it appeared narrowly tailored to compelling government interests. Bayley's Campground Inc. v. Mills, 463 F. Supp. 3d 22, 33–34 (D. Me. 2020) (expressing openness to future such challenges), *aff'd*, 985 F.3d 153 (1st Cir. 2021).

142. For more on *cordon sanitaires*, see *supra* notes 45, 130.

143. At the point that the Florida Keys reopened, however, there were more cases in the Keys per capita than in Miami-Dade County—which, at the very least, raises questions about the order's constitutionality.

144. *See Tracking Coronavirus in New York: Latest Map and Case Count*, N.Y. TIMES, https://www.nytimes.com/interactive/2021/us/new-york-covid-cases.html [https://perma.cc/6W35-Y2PC]; *Tracking Coronavirus in Florida: Latest Map and Case Count*, N.Y. TIMES,

self-quarantine requirement on travelers from New York, but quickly extended the rule to apply to all travelers outside of Rhode Island.[145] Treating visitors from South Dakota—where there had been few detected cases at that time—indistinguishably from New Yorkers is not a particularly narrowly tailored approach. Crucially, though, the crux of this analysis must be the relevant public health expert recommendations. Armchair epidemiology is no substitute for expert evaluations, and simply looking at metrics like per capita infection rates potentially misses more sophisticated indicators of the probability that infections will be imported from elsewhere.

2. Privileges and Immunities

Many state and local border-control regulations will also implicate Article IV's Privileges and Immunities Clause by discriminating against out-of-state travelers either facially or in effect.[146] First, "hard" border restrictions, like that used by the Florida Keys, tend to favor at least some subset of in-state residents over out-of-state residents. Through its checkpoints, the Florida Keys ensured that only one group of people (besides property owners and those who worked in the Florida Keys) could travel to the relevant area: Florida Keys residents. Residents of Texas, Louisiana, Massachusetts, or any other state who wished to travel to the Florida Keys during this period (and who did not own property or work in the Keys) were not permitted.[147]

Similarly, regulations requiring incoming visitors to self-quarantine for a period or to answer a detailed questionnaire will typically have a discriminatory impact on interstate travel. Most such orders apply based on the location from which the visitor *travels*, rather than the visitor's place of residence. In practice, though, the burden of such regulations will not fall equally on in-state and out-of-state residents. Florida's order, for example, imposed requirements on visitors traveling to Florida from the New York tristate area. Although some such travelers undoubtedly were Florida residents, this was a population disproportionately consisting of out-of-state residents. Likewise, Alaska's testing obligation placed a discriminatory

https://www.nytimes.com/interactive/2021/us/florida-covid-cases.html [https://perma.cc/FCD4-9CVS].

145. *See supra* note 129.

146. Similar federal regulations may not. *See, e.g.*, Pollack v. Duff, 793 F.3d 34, 41 (D.C. Cir. 2015) (noting that "neither the Supreme Court nor this court has ever held an action taken by any branch of the federal government is subject to scrutiny under the Privileges and Immunities Clause of Article IV").

147. Conversely, measures that restrict those in a given community from leaving, like those used in New Rochelle (and other *cordon sanitaire*-like policies), favor a subset of out-of-state residents over at least some in-state residents—those in the impacted community. Unlike regulations that disfavor out-of-state residents, policies that treat out-of-state residents more favorably likely do not violate Article IV's Privileges and Immunities Clause; the Clause is not merely aimed at differential treatment, but at discrimination against out-of-state residents.

burden on travel to Alaska, effectively taxing the travel of nonresidents (who had to pay $250 for a coronavirus test before entering the state) far more significantly than residents (who were still required to take the test, but were charged $0).[148]

This is not, of course, the end of a Privileges and Immunities Clause analysis. Regulations that discriminatorily burden interstate travel may still be upheld when they are "closely related to the advancement of a substantial state interest."[149] This inquiry is similar to that applied under strict scrutiny—and the likelihood of its satisfaction, similarly, should be greatly increased when the regulation in question coheres closely with public health recommendations. Public health crises of sufficient seriousness presumably generate a "substantial state interest" in the same essential manner that they generate a "compelling interest" for purposes of strict scrutiny. And likewise, a regulation's enactment of expert recommendations should be more than sufficient for that regulation to "closely relate[] to the advancement" of the state's interest in combatting the crisis. To the extent there is any difference between this part of the Privileges and Immunities test and strict scrutiny, it's that the "closely relates" language appears to be more permissive than "narrow tailoring." Officials may therefore have more leeway in deviating from expert recommendations in the context of Article IV's Privileges and Immunities Clause.

There are, nevertheless, important differences between these respective tests that will lead to the Privileges and Immunities Clause presenting the more challenging bar for border-control policies. The Supreme Court has made clear that, to justify a discriminatory regulation, there must be "something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed."[150] Whether this is conceived as an additional step required by the Privileges and Immunities Clause or a consideration for courts to use in determining whether the regulation "closely relates" to the state's interest, the "peculiar source of evil" language is a reminder that a Privileges and Immunities Clause inquiry must center on the *discrimination* at issue.[151] It is easy to imagine, for example, a

148. *Safe Travels*, STATE OF ALASKA, https://covid19.alaska.gov/travelers [https://perma.cc/HK5V-7SJW]; Elizabeth C. Ohlsen, Kimberly A. Porter, Eric Mooring, Coleman Cutchins, Anne Zink & Joseph McLaughlin, *Airport Traveler Testing Program for SARS-CoV-2—Alaska, June–November 2020*, 70 CDC: MORBIDITY & MORTALITY WKLY. REP. 583, 584 (2021); *cf.* CNTY. OF KAUA'I, HOW DO I AVOID A 10-DAY QUARANTINE ON KAUA'I?, https://hawaiicovid19.com/wp-content/uploads/2021/02/Kauai-Travel-Flow-Chart.pdf [https://perma.cc/K4GQ-UAJ7] (detailing harsher restrictions on travel originating from out of the state than travel originating from in the state).

149. Sup. Ct. of Va. v. Friedman, 487 U.S. 59, 65 (1988); Toomer v. Witsell, 334 U.S. 385, 396 (1948).

150. *Toomer*, 334 U.S. at 398.

151. Sup. Ct. of New Hampshire v. Piper, 470 U.S. 274, 284 (1985) (holding that there must be "a

circumstance in which disease transmission in a given state is rampant and yet experts recommend halting the influx of outsiders so as to limit the opportunity for *new* clusters of the disease to form. A regulation that adopts such a proposal would likely survive strict scrutiny. Such a policy would be narrowly tailored (through its adherence to expert recommendations) to a compelling state interest (the limitation of new disease clusters). It is less clear, however, that such a regulation would survive an Article IV Privileges and Immunities Clause inquiry. The out-of-state visitors targeted by the regulation might well constitute an *additional* source of clusters of infection in the state, but they do not "constitute a *peculiar* source of [that] evil."[152]

3. Dormant Commerce Clause

Finally, as is the case for stay-at-home orders, it is the Dormant Commerce Clause that may present the greatest obstacle for state and local border-control regulations aimed at curbing the spread of a contagious disease. This is because, by their very nature, border-control regulations burden interstate travel and therefore interstate commerce. Indeed, a large number of the border-control regulations imposed in response to COVID-19 have been *facially* discriminatory against interstate travel.

First, "hard" border regulations—policies that literally place a physical barrier impeding travel and therefore commerce—present the most direct obstacle to interstate commerce. Even when the "hard" border in question is located purely intrastate, as it was in the Florida Keys, these regulations can still discriminate against interstate travel by employing criteria for passage that treat in-state and out-of-state travelers differently, as the Florida Keys' regulation did.[153] This is true regardless of the direction of travel limited. *Cordon sanitaire*-like policies that restrict people from leaving a particular area burden interstate travel and therefore commerce by constraining those within the impacted community from outside that community. Self-isolation and questionnaire requirements targeted at travel from other states likewise discriminate against interstate travel and therefore commerce. This is particularly true when such requirements apply based on the origin of the travel in question as opposed to the residence of the traveler, which is the approach that most states have taken in response to COVID-19. Such regulations facially impose a burden on travel *between* the states that they do

substantial reason for the difference in treatment," and "the discrimination practiced against nonresidents [must] bear[] a substantial relationship to the State's objective").

152. *Toomer*, 334 U.S. at 398 (emphasis added).

153. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 573 (1997) ("Even when business activities are purely local, if 'it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' " (quoting Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964))).

not impose on travel *within* the state. Under Rhode Island's self-quarantine regulation, for example, the onerous requirement to self-isolate for fourteen days attached to all incoming travel from other states, but not to any travel within the state.[154]

When border-control regulations facially discriminate against interstate travel—as each of the above-described border-control regulations did—they may only be upheld if they "advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[155] This stringent test, which Justice Scalia has described as a "virtually per se rule of invalidity,"[156] presents a serious obstacle for such regulations. This is because there often will be nondiscriminatory alternatives available for controlling the spread of an infectious disease, including, possibly, stay-at-home orders and test, track, or trace programs. Moreover, closely tailoring these policies to expert recommendations will not necessarily ensure their constitutionality (as it should for strict scrutiny). A regulation that implements expert recommendations will be narrowly tailored, but it will not necessarily be free of nondiscriminatory alternatives, including those that were discarded by experts as being too costly without also being more effective.

Nevertheless, even this "strictest scrutiny" has not proven impossible for litigants to overcome,[157] and it needn't prove fatal for border-control regulations aimed at the spread of a dangerous disease. "Not all intentional barriers to interstate trade are protectionist, . . . and the Commerce Clause 'is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community.' "[158] Rather, as the Supreme Court has made clear, "[e]ven overt discrimination against interstate trade may be justified where . . . out-of-state goods or services are particularly likely for some reason to threaten the health and safety of a State's citizens, . . . and where 'outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecti[on].' "[159] In *Maine v. Taylor*, for example, the Court upheld Maine's ban on importing baitfish into the state, given that the introduction of parasites and non-native species represented a threat that was "unique" to baitfish from other states.[160] This

154. *See supra* note 129.
155. New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988).
156. *Id.* at 596.
157. *Id.* at 597 (quoting Hughes v. Oklahoma, 441 U.S. 322, 337 (1979)).
158. Maine v. Taylor, 477 U.S. 131, 148 n.19 (1986) (quoting Robertson v. California, 328 U.S. 440, 458 (1946)).
159. *Id.* (quoting Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 43 (1980)).
160. Maine v. Taylor, 477 U.S. 131, 141, 151–52 (1986); Or. Waste Sys., Inc. v. Dep't of Env't

presents a fairly good, if somewhat odd, parallel to controlling the spread of human disease. For regions without community spread of the disease, interstate travelers *may* present a "unique" risk of uncontrolled infection for the region. In such circumstances, it is possible that the state's goal of preventing the emergence of disease clusters that elude tracking "could not be served as well by available nondiscriminatory means."[161] Ordering a population without community spread to stay at home, for example, may do less to quell the spread of a contagious disease than barring the entry of potential carriers of that disease. The same logic could apply to measures that cordon off entire communities, like those used in New Rochelle: the interstate travel burdened by such measures poses a unique threat of spreading an infection contained within a distinct community to the country more generally.

Even when these border-control regulations do not facially discriminate against interstate commerce, they will often nevertheless implicate the Dormant Commerce Clause through their discriminatory effects—in which case the *Pike* balancing test will apply.[162] For "hard" border and self-isolation regulations in particular, *Pike* could present a problem: excluding some subset of visitors entirely or requiring them to self-isolate on arrival can impose a substantial burden on commerce.[163] Depending on who is impacted, such a regulation might, as a practical matter, put an effective halt to a range of travel integral to interstate commerce, including commercial shipping and tourism. To survive *Pike* in such circumstances, a state or locality must show that the putative local benefits of the policy are similarly substantial, which may be no small feat.[164] Additionally, as is the case for stay-at-home orders examined under the Dormant Commerce Clause, closely adhering to the border-control regulation to expert recommendations will not be sufficient to ensure that regulation's constitutionality, which adds a degree of uncertainty for policymakers. Nevertheless, because it will be

Quality, 511 U.S. 93, 101 (1994) (subtly recharacterizing *Maine v. Taylor*, which rested its holding more significantly on the fact that the state's goal of protecting native fisheries from parasites and nonnative species could not be served as well by available nondiscriminatory means).

161. *Maine*, 477 U.S. at 138.

162. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (requiring such a regulation be upheld unless the burden imposed on commerce clearly exceeds the putative local benefits of the policy).

163. Self-questionnaire requirements tend to impose such a slight burden on interstate commerce that they should withstand scrutiny under *Pike* so long as they give rise to *some* benefits. Given the significant value of the sort of information collected through these questionnaires to test, track, and trace programs, only the most thoughtlessly designed questionnaires should face the possibility of failing the *Pike* balancing test.

164. *Cordon sanitaire*-like policies may run into this issue when the community burdened is sufficiently sizable or important to interstate commerce. A *cordon sanitaire* of Kansas City—a large city on Kansas-Missouri border—will have a far greater effect on interstate commerce than one of Great Bend, Kansas, a small city in the center of the state.

difficult to define the (likely significant) putative local benefits of these regulations, litigants will struggle to show that even large commercial burdens are "clearly" excessive in comparison. The result will likely be to sustain all expert-supported public health regulations except those that impose commercial burdens that so outrageously outweigh their benefits as to render the policy choice manifestly unreasonable.

As this discussion illustrates, one federalism-related consequence of these imperfectly overlapping constitutional protections is that states may have less leeway regulating in service of the public health than the federal government. State regulations are subject to examination under Article IV's Privileges and Immunities Clause, the Commerce Clause, and, likely, a fundamental rights analysis. Federal regulations, on the other hand, are only subject to a fundamental rights analysis. Because the fundamental rights approach does not always present the highest bar in this context, the Constitution's federalist bent will more robustly check state rather than federal action. In the context of the COVID-19 pandemic, the federal government has taken a relatively laissez-faire approach, so there have been few opportunities for this distinction to emerge—but that will not necessarily hold true for future pandemics.

C. CONTRASTING APPROACHES

This Article comes full circle by contrasting its right-to-travel framework with the two respective approaches that currently dominate consideration of these issues. As this comparison indicates, the substantive right to travel provides a richer and more robust framework for evaluating quarantines than do approaches rooted in either deference or procedural rights.

1. Deference

First, as numerous courts have recognized, the deferential approach demands that courts must uphold against constitutional challenge most, if not all, public health measures—including, almost certainly, the stay-at-home orders and border-control regulations described previously. No matter how heavy-handed, essentially any version of any such regulation will have *some* "real or substantial relation to [its public health goals]."[165] This is particularly true if, as numerous lower courts have held, the deferential *Jacobson* approach is effectively indifferent to issues of overbreadth.[166] So,

165. *In re* Rutledge, 956 F.3d 1018, 1027–28 (8th Cir. 2020) (quoting Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905)).

166. *See, e.g.*, *id.*; *In re* Abbott, 954 F.3d 772, 784 (5th Cir. 2020), *vacated as moot*, 141 S. Ct. 1261 (2021).

for example, if, in the earliest days of the pandemic, South Dakota had closed its borders completely to all outsiders in response to the first cases of COVID-19 in Wuhan, China, even that might meet this standard (irrespective of whether it went against the recommendations of public health experts). Such a policy of extreme isolationism, misinformed though it may be, has *some* "real or substantial relation to" South Dakota's public health goal of keeping the state free of COVID-19. Nor would it likely matter if the order was little more than pretext for South Dakota to accomplish some other goal, such as to chill protest against the Keystone XL Pipeline. So long as a public health regulation cannot be said to be "arbitrary or oppressive," courts have interpreted *Jacobson* to require that it be upheld;[167] after all, under the deferential view, "all rights are subject to some invasion" in times of perceived public health crisis.[168]

The second prong of the *Jacobson* standard does not provide significant additional protection against state overreach. That is because few actions are "beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[169] Although this murky proclamation has remained largely undeveloped by the lower courts, it appears to go significantly beyond qualified immunity's protection of officers who violate rights that are not "clearly established."[170] Yet even qualified immunity has been deemed so onerous an obstacle as to "undermine[] Congress's intent to provide remedies to those whose rights have been violated."[171] If courts must identify a factually parallel case establishing the right in question in order for its invasion to be "beyond all question" (which courts must to satisfy qualified immunity's standard),[172] there is little reason to believe that *any* half-plausible regulation made in the name of public health will run afoul of this generous standard (and the regulations described above almost certainly do not). The historical lack of litigation of these issues means that there are close to no analogous cases on which courts can rely to adjudge an action to be "beyond all question, a plain, palpable invasion of [a constitutional right

167. *In re Rutledge*, 956 F.3d at 1028.

168. SH3 Health Consulting v. Page, 459 F. Supp. 3d 1212, 1227 (E.D. Mo. 2020). Such a regulation would not survive the strict scrutiny test applicable to fundamental rights (due, among other things, to its inconsistency with expert recommendations), nor would it pass muster under the Article IV Privileges and Immunities Clause (due to its unjustified discrimination against residents of other states) or the Dormant Commerce Clause (due to the disproportionately enormous burden it would place on interstate commerce compared with its minimal local benefits).

169. *In re Rutledge*, 956 F.3d at 1028 (quoting *Jacobson*, 197 U.S. at 31).

170. *See supra* note 57.

171. James A. Wynn Jr., *Opinion: As a Judge I have to Follow Supreme Court. It Should Fix This Mistake.*, WASH. POST (June 12, 2020), https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake [https://perma.cc/4CSG-8CF6?type=image].

172. *See supra* note 57; *supra* note 164.

or liberty]."[173] South Dakota's hypothetical actions, for example, would be entirely without precedent. Even the most recent comparable pandemic that the United States has faced, the Spanish Flu, took place during an earlier stage of constitutional understanding, before the various tests that courts use today came into being. As such, even if a state had taken a similar action then, and even if that action had resulted in a clear judicial holding of unconstitutionality, it may not establish South Dakota's action to be "plain and palpabl[y]" unconstitutional "beyond all question."

2. Procedural Rights

The procedural rights approach provides a more robust set of protections—but they are protections better suited for a fundamentally different *kind* of regulation. Procedural rights do not have much to offer would-be plaintiffs seeking to challenge "general statutes" establishing "a rule of conduct [that] applies to more than a few people."[174] The stay-at-home orders and border-control regulations that have been adopted or even considered in response to the COVID-19 pandemic are exactly such "general statutes." Illinois's stay-at-home order impacted millions of Illinois residents;[175] the Florida Keys checkpoints excluded millions of would-be visitors;[176] and Utah's questionnaire requirement would have burdened millions of travelers in the region had it been implemented for longer than a brief period.[177] Once a pandemic has escaped containment, it will likely require such a "[g]eneral statute" that impacts all or most people who reside in, enter, or wish to enter a jurisdiction. Indeed, as the fictionalized South Dakota border closure illustrates, a pandemic may prompt such a regulation even before officials understand it to have escaped containment. In such circumstances, procedural rights must be "protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."[178] This is all to say that the procedural rights approach will not serve as a check against even the most egregious of "[g]eneral statute[s]" made in service of the public health (or for any other reason).

173. *In re Rutledge*, 956 F.3d at 1028.

174. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915).

175. *Quick Facts: Illinois*, U.S. CENSUS (July 1, 2019), https://www.census.gov/quickfacts/IL [https://perma.cc/MMN9-FZ7Q].

176. *See* 2018 TOURISM IN THE FLORIDA KEYS & KEY WEST: STABLE GROWTH DESPITE CHALLENGING TIMES, ROCKPORT ANALYTICS 9 (2019).

177. *See* Amy Joi O'Donoghue, *Visitors Poured Record $9.75 Billion into Utah Last Year*, KSL.COM (Nov. 16, 2019), https://www.ksl.com/article/46675226/visitors-poured-record-975-billion-into-utah-last-year [https://perma.cc/QCM7-5JUP] (noting more than ten million people visited Utah's national parks in 2018).

178. *Bi-Metallic Inv.*, 239 U.S. at 445; *see also* Bragg v. Weaver, 251 U.S. 57, 58 (1919); *cf.* Logan v. Zimmerman Brush Co., 445 U.S. 422, 432–33 (1982).

CONCLUSION

After over a century of relative inattention, the law of quarantines remains undeveloped. By fleshing out the constitutional right to travel—which has also been overlooked—this Article introduced an alternative legal framework for quarantines, one that will be robust in times of emergency and yet sufficiently pliable to successfully mediate the full range of governmental policies and actions that may be implemented in times of pandemic. There are, of course, other possibilities. Indeed, this exploration suggests that substantive rights more generally present a promising lens for viewing these sorts of quarantine and public health-related questions.

More broadly, this discussion also suggests the need for courts, litigants, and academics alike to embrace the sort of ex post relief that commonly accompanies substantive rights claims, rather than the ex ante equitable relief that is favored in the context of procedural rights claims (and in quarantine law currently). Courts considering challenges to quarantines have plainly been troubled by the prospect of enjoining the state from taking measures that may prove crucial to stemming the tide of a pandemic—as they should be. Shifting quarantine law not only in the direction of substantive rights, but also toward actions for damages rather than injunctions will help relieve this pressure. The result will be more state action protective of the public health, but also more instances in which victims of state overreach are made whole through ex post damage awards. In short, embracing a substantive rights approach like the right-to-travel framework described in this Article should allow states to respond to public health crises less encumbered by injunctions, while ultimately providing more relief for victims of unconstitutional policies.