A Constitutional Framework for Enforcing Statewide Quarantine Orders: Banning Out-of-State Residents from In-Person Transactions

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In March 2020, when news of the first case of COVID-19 to reach Austin, Texas, hit, I was living 1,600 miles away from home. My family, residing in Connecticut, was located just twenty miles east of the first coronavirus "cluster," a pocket of infections so bad that New York Governor Andrew Cuomo established a perimeter around the city of New Rochelle. Two months later, I made the decision to return home to my family by way of a three-day road trip, an experience that would underscore the cultural divide of the pandemic. A stop at the Buc-ee's convenience store in rural Royce City revealed Texans jokingly sneezing on poor employees, as if to mock the virus. I woke up in Arkansas to a local car dealership's commercial praising the month of May as "freedom month" and boasting how many people they could fit in their building at once. A Tennessee family walked into a rest stop bathroom wearing masks as necklaces. It took me until Virginia to see someone wearing a face mask correctly and consistently.

It was in New York where I first saw a face shield.

In contemporary usage, "quarantine" differs from "isolation" in that the former involves "the separation of individuals . . . who are not ill but are thought to be at risk of becoming infectious," while the latter refers to the separation of those who are already sick.[1] My home state of Connecticut is no stranger to these types of quarantines.[2] But much of the recent literature on quarantining potentially infectious citizens revolves around claims of procedural and substantive due process.[3] In such a widespread pandemic as the one this country currently faces, the question of individualized quarantine becomes moot as millions of Americans face a risk of infection

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[1] 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] For the details surrounding some of these cases, including Connecticut residents Louise Mensah-Sieh and Laura Skrip, see *id.* at 2–3.

[3] *E.g.*, Parmet, *supra* note 1, at 1; Michael R. Ulrich & Wendy K. Mariner, *Quarantine and the Federal Role in Epidemics*, 71 SMU L. REV. 391 (2018); Polly J. Price, *Do State Lines Make Public Health Emergencies Worse? Federal Versus State Control of Quarantine*, 67 EMORY L.J. 491 (2018); Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53 (2007).

so great that quarantine is no longer thought of as an individual or group measure, but rather a *statewide* measure. The responsibility of containing the virus has thus shifted from the federal level to the state and local level. The stark differences in these approaches is best illustrated by comparing the responses of Northeastern states and the rest of the country.

Once the epicenter of the COVID-19 pandemic, the Northeastern United States has shown immense progress on its way to becoming one of the safest places in America to live during the pandemic. The road has not been easy. After the first wave of COVID-19 had waned in May 2020, infections in the region were lower than when the pandemic had begun earlier that year. Through strict compliance with mandatory mask orders, discipline with social distancing, and cultural shifts toward collectivism, the Northeast experienced one of the lowest regional infection rates in the country, all with the prospect of safe and effective vaccines seemingly months, if not years, away.[4] This was due to the collective leadership of state governors recognizing the immediate need to prioritize public health over reopening economies. The combined statewide efforts, led by Governor Andrew Cuomo of New York, and joined most visibly by Governors Ned Lamont of Connecticut and Phil Murphy of New Jersey, paid dividends, with New York experiencing lower levels of coronavirus-related hospitalizations in July 2020 than it had when the pandemic had started.

Of course, as the rest of the country prematurely dropped mask mandates and capacity restrictions, a "second wave" of COVID-19 would spread across the country. While three safe and effective vaccines were approved on an emergency basis, new, more transmissible variants of the coronavirus infected hundreds of thousands of Americans every day. While no part of the country was spared from the spike in cases, the Northeast fared better than nearly everywhere else. Eventually, as more Americans gained access to the vaccines, the Northeast consistently led the country in the proportions of their populations receiving the vaccine; as of this writing, every state in New England has vaccinated at least 60% of its population, with New York not far behind.[5]

However, it is entirely possible that the state will once again see rising infection rates by the time this Note reaches an audience. If it does, a primary cause will undoubtedly be increased interstate movement. In July 2020, a prescient Governor Cuomo made clear his fear of a "second wave" of cases

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[4] This Note does not seek to offer an evaluation of how effective other states' responses to the pandemic have been. I wholly expect that by the time an audience reads this Note, such differences will have been thoroughly documented, debated, and evaluated by far more qualified entities than I.

[5] Centers for Disease Control, *Covid-19 Vaccinations in the United States*, https://covid.cdc.gov/covid-data-tracker/#vaccinations (last visited June 10, 2021).

emerging from people coming to New York from out-of-state locations.[6] He would be proven right. Evidence emerging over summer 2020 indicated that affluent yet sparsely populated areas in the Northeast, and Connecticut in particular, became refuges for those wealthy enough to afford real estate or lengthy vacations there,[7] or to escape from those neighboring states seeing spikes in infection rates.[8]

When states took proactive steps to reduce movement in and out of their borders, both interstate and intrastate transmission of the virus declined.[9] It would follow that if compliant states could somehow seal themselves off from the non-compliant ones, and strict mitigation measures were enacted upon doing so, the virus could be mitigated, or even contained, within those borders.

Of course, it is unconstitutional to restrict the freedom of movement from state to state.[10] It follows that, under current case law, it is an impermissible restraint on movement to block non-residents from entering other states.[11] But this has so far not prevented governors from taking proactive steps to try and reduce interstate transmission as much as possible. When the pandemic first began, a number of states imposed mandatory quarantines on arriving travelers from the New York City area in an attempt to reduce transmission. Over the summer of 2020, when infection rates shifted and New York saw falling infection rates, the state imposed reciprocal quarantine orders on over thirty-four states. Soon after, New York, New Jersey, and Connecticut began collecting forms from inbound travelers subject to quarantine, receiving local addresses and other information which would allow for easier contact tracing. But this is about the extent to which individual states enforced these orders, in part because

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[6] Luis Ferré-Sadurní & Nate Schweber, *New York Confronts Second-Wave Risk: Visitors From Florida and Texas*, N.Y. TIMES (July 20, 2020), https://www.nytimes.com/2020/07/14/nyregion/coronavirus-ny-travel-cuomo.html

[7] Kurtis Lee, Richard Read, & Jaweed Kaleem, *$8,000 rentals. Private jets. How the super-rich escape the coronavirus pandemic*, L.A. TIMES (Apr. 23, 2020), https://www.latimes.com/world-nation/story/2020-04-23/how-rich-people-escape-coronavirus-epidemic

[8] *Id.*

[9] Quarantine orders, discussed *infra*, are the best example of this. To observe how publicly funded institutions might take similar steps, see *UConn Will Not Allow Out-of-State Students Taking Online Classes to Live on Campus*, NBC CONN. (Aug. 11, 2020), https://www.nbcconnecticut.com/news/coronavirus/uconn-will-not-allow-out-of-state-students-taking-online-classes-to-live-on-campus/2317145/.
But see Self-Quarantine for Travelers FAQ, N.J. DEP'T OF HEALTH (Oct. 20, 2020), https://nj.gov/health/cd/documents/topics/NCOV/Travel_advisoryFAQs_6-25-2020.pdf (exempting from quarantine individual travelers coming to New Jersey for business travel).

[10] *See* Saenz v. Roe, 526 U.S. 489, 500 (1999) (describing the constitutional right to leave one state and enter another state freely).

[11] This may include the imposition of a *cordon sanitaire* or a state sealing itself from the inside. For a broader discussion on this, see *infra* Part II.

this is the extent to which they *could*.[12] Only for a limited time had states set up checkpoints to ensure that out-of-state travelers quarantined; however, once travelers began this quarantine, the enforcement of the order became far more difficult.[13] As long as quarantine orders are unenforceable, they serve no protective effect. I argue that state governors are within their power to enforce these quarantine orders beyond simply asking travelers to fill out forms at airports. Governors are able to take greater measures to dissuade out-of-state residents from high-risk areas not to come to states that have controlled the coronavirus.[14]

In this Note, I propose the legality of a ban on in-person business from out-of-state consumers who are subject to mandatory quarantines based on their residency. Such a ban would effectively force those parties subject to quarantine to actually remain quarantined. Their interactions with in-state residents and low-risk out-of-state residents would be minimized. In doing so, the risk of infecting an already low-risk population decreases. In considering such a proposal, I look to the Constitutional arguments that are likely to come up as a result, but ultimately reach the conclusion that there are legal ways to achieve the implementation of this proposal. Furthermore, the value proposition in doing so is great enough to warrant its consideration. In Part I, I introduce my proposal and the value in its enaction. In Part II, I defend the legality of a ban on transactions from out-of-state residents through the lens of the Privileges and Immunities Clause. In Part III, I analyze this legality through the lens of the Commerce Clause. In Part IV, I conclude.

I. THE PROPOSAL: A BAN ON IN-PERSON TRANSACTIONS FROM OUT-OF-STATE RESIDENTS

It is important to first discuss what is and is not encompassed in my proposal. "Quarantine" refers to the separation, involuntary or otherwise, of individuals believed to pose a risk of infection to the outside community.[15] As the term became more widespread (and colloquial) during the early days of the pandemic, the accepted definition shifted to refer to any period of time

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[12] *See e.g.* Quarantine and Travel: Strict Penalties, Rare Enforcement, N.Y. TIMES (Aug. 21, 2020) https://www.nytimes.com/2020/08/21/travel/quarantine-enforcement.html (discussing the dilemma of "soft enforcement").

[13] The problem is not unique to the Northeast, and is particularly unfortunate for those areas that ought to have geographic advantages in restricting entry to quarantined individuals. *See id.* (discussing enforcement issues in Hawaii and Puerto Rico).

[14] Realistically, some state borders cannot be sealed off, even if such a restriction were constitutional. For example, it would be difficult to block all traffic coming from New Jersey into New York due to their unique and varied borders; the George Washington Bridge, Lincoln and Holland Tunnels, Outerbridge Crossing, and PATH train tunnels would all need to be effectively sealed, measures Governor Cuomo would likely not approve.

[15] *See* Parmet, *supra* note 1, at 7–8.

spent in isolation and therefore without risk of infection from the outside world. This is the inverse of the legal definition; rather than protecting an individual threat from the outside community, "quarantine" has become a defensive term of protectionism. A "quarantine order," on the other hand, has become a temporary or expiring restriction on movement on an out-of-state resident, which terminates either upon isolating for a requisite period of time, or upon departure from the jurisdiction in question. It is not a restriction on movement because the citizens subject to the quarantine order are free to enter and leave the imposing jurisdiction as they choose. They may even select the location of their isolation, and so change it as often as they choose, provided that they comply with the terms of the quarantine order.

Quarantine orders by themselves demonstrate a state's commitment to containing COVID-19 at great social expense. More often than not, however, the orders are facially weak. A boilerplate order generally advises that incoming travelers "self-quarantine" for fourteen days upon entering the jurisdiction in question.[16] Many of these orders fail to define what "self-quarantine" means, and those commonly held definitions likely vary from state to state. Furthermore, if they fail to enumerate the types of activities citizens subject to the quarantine order may participate in, the citizens themselves may self-define, leading to underenforcement and constitutional challenges. Some orders even provide for exemptions to the quarantine order if the traveler can show a negative coronavirus test within seventy-two hours of entering the jurisdiction,[17] an arbitrary exemption at odds with science.[18]

The clash here is that soon after the country's founding, it was within the states' purview to enact laws regulating the quarantine of infected individuals.[19] Ironically, it was initially the expectation of *state* governments that the federal government would assist in efforts largely dictated by the state, rather than the other way around.[20] As a result, "[s]tates have traditional authority over all issues of public health within their borders,"[21] although this function has largely remained undefined, likely due in part to

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[16] *E.g.*, *Self-Quarantine for Travelers FAQ*, *supra* note 9; Conn. Exec. Order No. 7III (July 21, 2020).

[17] *See, e.g.*, Conn. Exec. Order No. 7III (July 21, 2020). This type of exemption is distinct from that which exempts essential workers from quarantining.

[18] *See* CTRS. FOR DISEASE CONTROL, *Testing for COVID-19*, CDC (Mar. 17, 2021), https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/testing.html ("The [negative COVID-19] test result only means that you did not have COVID-19 at the time of testing. You might test negative [for COVID-19] if the sample was collected early in your infection and test positive later during your illness. You could also be exposed to COVID-19 after the test and get infected then.").

[19] Batlan, *supra* note 3, at 63.

[20] *See id.* at 63–64 (describing how states had quarantine powers superior to that of the federal government).

[21] Price, *supra* note 3, at 499.

the fact that there has not been a need to define this role since the last major national pandemic. This, in turn, led to a national confusion over how the pandemic would be handled, and which levels of government would take command over key functions in mitigating the pandemic, including the administration of tests. What the disparate actions taken by various states show, however, is that "[t]he United States is dangerously handicapped and unprepared to effectively control transmission from state to state, especially when individual states take actions that benefit it but harm their neighbors."[22] Whether this is a result of federal or state unpreparedness is a question of policy. It is ambiguous because modern courts have yet to reach the question of a pandemic on such a wide-reaching scale.[23] When they do reach such questions, courts are hesitant to precisely define the bounds of state powers.[24] Nevertheless, there is a difference between a state-imposed *quarantine* that restricts an individual's freedom of movement, and a *quarantine order* that expires either after a predetermined period of time, or upon exiting the state in question.

In a perfect world, states would seek to impose a *cordon sanitaire*, or "a prohibition against persons entering or leaving a defined boundary,"[25] on their own borders to prevent the virus from entering (or in some cases, escaping) their jurisdictions. This would be presumably unconstitutional on the state level due to its inherent restriction on the freedom to travel between the states. Starting with *Kent v. Dulles*[26] and continuing into *Saenz*, the Court has upheld the "right to travel." This "right to travel" includes "the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and . . . the right to be treated like other citizens of that State" if the alien decides to become a permanent resident.[27]

If the state cannot block out-of-state residents from entering its borders, there may still be other ways to *discourage* entry into the state that the Court would find constitutional. Broadly, the states have police powers to "protect themselves from disease . . . so long as no better less restrictive alternative exists."[28] There is, for example, precedent holding that a state may *regulate*

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[22] *Id.* at 494.

[23] Parmet, *supra* note 1, at 11.

[24] *Id.* at 21 (citing a lone Maine state court decision, Hickox v. Mayhew, No. CV-2014-36, 2014 Me. Trial Order LEXIS 1 (D. Me. Oct. 31, 2014), for such a rare occasion).

[25] *Id.* at 49.

[26] 357 U.S. 116 (1958).

[27] Saenz v. Roe, 526 U.S. 489, 500 (1999).

[28] Emily Palmer, *The Open Road Calls, but Authorities Say 'Stop*,*'* N.Y. TIMES (Aug. 7, 2020), https://www.nytimes.com/article/coronavirus-driving-restrictions.html.

the means of entry.[29] Others may argue that the mere existence of a quarantine order is sufficient to deter out-of-state residents. I find this argument unpersuasive as more evidence emerges that communities of affluent city-dwellers are starting to make their way into the suburbs, trading densely populated areas for bucolic vistas and greater compliance with mask orders. For example, while many seek to escape New York City, sales of single-family homes in the New York City suburbs increased 73% in Fairfield County, CT, 112% in Westchester County, NY, and 121% in the Hamptons on the east coast of Long Island.[30] There was clearly a *desire* during the early stages of the pandemic to live in states experiencing low levels of the coronavirus, and even within these low-risk areas came a desire to escape to areas with more space, and by extension, less risk of infection. This motivation also came with a constitutional right to move to those states. The question thus becomes whether a state can narrowly tailor a ban to connect with a legitimate monitoring interest: the need to control the spread of COVID-19. In doing so, I acknowledge that a broad ban is necessary to achieve the desired goal of preventing interstate transmission of the coronavirus, while acknowledging that only the least restrictive means of doing so is likely to be affirmed by the courts.

I propose that in response to increased spread of the coronavirus, state governors should dissuade out-of-state residents from at-risk areas from entering states which have sufficiently controlled the spread of coronavirus through a temporary ban on *in-person* business transactions within the state. This ban would apply to nonresidents arriving from states experiencing high levels of infection, and would last for a period of fourteen days from the first date of entry into the state. Failure to present an in-state driver's license or other state-issued identification card would serve as *prima facie* evidence that the bearer is an out-of-state resident that has not quarantined in the state. An out-of-state resident can overcome the presumption that he has not quarantined for the requisite amount of time by showing either (a) documents which would otherwise be sufficient to prove residency in the state in question, or (b) presenting a form generated within the state's borders certifying the date of entry into the state, and only after the requisite amount of quarantine time has passed since entry. In practice, this would impact any transactions requiring the out-of-state resident to interact with an in-state merchant. For example, an out-of-state resident under mandatory quarantine could not physically order takeout food from a restaurant but could place an order on an online delivery platform (GrubHub, UberEats, etc.) to be delivered to the quarantine location. A car travelling through the

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[29] *See generally* Hendrick v. Maryland, 235 U.S. 610 (1915) (holding that a Maryland regulation of the mode of transportation used to enter the state was not a regulation of interstate commerce).

[30] Anna Bahney, *Manhattan apartment sales plunge while the suburbs boom*, CNN (Aug. 6, 2020), https://www.cnn.com/2020/08/06/success/manhattan-pending-home-sales-suburbs/index.html

state would be able to pump gas but must be prepared to do so with a credit card instead of paying cash. In other words, if a non-resident wanted to seek refuge in the state, they would be free to do so, but would be effectively cornered – through these commercial transaction restrictions - into quarantining for the requisite amount of time as directed by the State.

One might argue that this is an imperfect proposal for a couple of reasons. First, and most obvious, is the question of enforcement: will the state be able to enforce such an entry quarantine on such a wide scale? Hawaii provides an excellent case study on how such a system might work, and a cautionary tale for those who let down their guard. Starting when the pandemic spread throughout the country, Hawaii introduced a mandatory fourteen-day quarantine order on all travelers entering the state.[31] This order required that all travelers must remain in place for the requisite period of time by registering their addresses with the local authorities, and immediately going to that location for the fourteen-day period.[32] State police would conduct periodic checks on those travelers and arrest and fine all who violated the order.[33] What is most notable about this order is the aggressive enforcement tactics the Hawaii State Police utilized to catch all offenders.[34] The state temporarily lifted the order with respect to inter-island travel,[35] but it was reflexively reinstated[36] with the nationwide uptick in cases looming in the background. Similarly situated states should be able to engage in similar enforcement protocols to see similar results, especially considering that to date, there have been no constitutional challenges to Hawaii's enforcement protocol.

Accusations of domestic xenophobia may arise, and some audiences will

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[31] Haw. Second Supp. Emergency Proclamation (Mar. 21, 2020), https://dod.hawaii.gov/hiema/second-supplementary-proclamation-covid-19/.

[32] *Id.*

[33] Christina O'Connor, *Nearly 200 people arrested for violating Hawaii's 14-day mandatory quarantine*, PAC. BUS. NEWS (July 17, 2020) https://www.bizjournals.com/pacific/news/2020/07/17/hawaii-200-quarantine-violation-arrests.html.

[34] *See id.* (detailing face-to-face compliance checks with tourists residing in hotels, and the arrest of hundreds of tourists violating the quarantine order). *See also Social Media Posts Lead to Another Visitor Arrest*, STATE OF HAWAII (May 15, 2020), https://governor.hawaii.gov/newsroom/latest-news/hawaii-covid-19-joint-information-center-news-release-social-media-posts-lead-to-another-visitor-arrest-may-15-2020/ (showing authorities' tracking of social media and reliance on tips from local residents to enforce the quarantine order). *Cf. Breaking Quarantine in Hawaii? A Citizens Group Is Watching*, HONOLULU CIVIL BEAT, (May 31, 2020), https://www.civilbeat.org/2020/05/breaking-quarantine-in-hawaii-a-citizens-group-is-watching/ (for the extent to which private citizens' groups would assist local authorities in enforcing these orders).

[35] Haw. Ninth Supp. Emergency Proclamation for COVID-19 (June 10, 2020), https://governor.hawaii.gov/wp-content/uploads/2020/06/2006097A-ATG_Ninth-Supplementary-Proclamation-COVID-19-distribution-signed.pdf

[36] Haw. Eleventh Supp. Emergency Proclamation for COVID-19 (Aug. 6, 2020), https://governor.hawaii.gov/wp-content/uploads/2020/08/2008022-ATG_Eleventh-Proclamation-for-COVID-19-distribution-signed.pdf.

view my proposal as an example of "coastal elitism." To be fair, this reaction is not without precedent.[37] There may, however, come a time when daily infections rise again. They may be regionally isolated, but unless our current vaccines can adequately address rapidly spreading variants, the country may see a resurgence of the coronavirus. One might do well to recall initial quarantine orders by governors across the country in response to the explosion of COVID-19 cases in the New York City metropolitan area.[38] This is not to suggest hypocrisy, but necessity; in support of true federalism, the Supreme Court has affirmed the power of the states to address evils as it sees fit, whether to protect the country as a whole or merely its own citizens.[39] The Court recognizes extenuating circumstances, and, even when it comes to something as small as hunting wildlife, is rather lenient in how it grants its hall passes.[40]

Critics may also argue that statewide isolationism could lead to detrimental results nationwide.[41] Analogous to the loss of public trust if a faulty vaccine were to be released before substantial data were made available, a failure to uphold such a regulation in court might poison the well for all future attempts to protect a state's population in this manner. This criticism seems dubious on its face because the courts would be burdened with multiple state statutes to sort through, each of which may be tailored slightly differently, and thus requiring an entirely different decision, risking inconsistent application of judicial principles.[42] If one state's policy were to fail constitutional muster, it is far from certain that an identical statute from another state would have the same fate, which makes state-by-state experimentation and implementation crucial to the successful passage of such a regulation.

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[37] *See* Batlan, *supra* note 3, at 69 ("Furthermore, elite and middle-class New Yorkers urged an extraordinarily strong state response to the threatened epidemics [of 1892], believing that such state power would be exerted to control the bodies of immigrants. When the elite and middle class became the subject of such power, however, the state came under intense criticism.").

[38] *See, e.g.*, Ga. Exec. Order GA-11 (Mar. 26, 2020) (requiring travelers originating in Connecticut, New York, or New Jersey and arriving in Texas to quarantine for fourteen days); Fla. Exec. Order No. 20-80 (Mar. 23, 2020) (requiring the same for inbound travelers to Florida).

[39] The right to address public health "evils" has already been addressed by the Court. *See, e.g.* Compagnie Francaise & Co. v. Board of Health, 186 U.S. 380 (1902) (holding a state-enforced quarantine of Americans returning from overseas in the name of public health to be constitutional); see also Zemel v. Rusk, 381 U.S. 1, 24 ("The right to travel within the United States is of course also constitutionally protected . . . [b]ut that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area or the Nation as a whole.").

[40] E.g. Baldwin v. Fish and Game Commission, 436 U.S. 371 (1978).

[41] *See* Price, *supra* note 3, at 495 (exploring "the dangers of protectionism when state and local governments attempt to exclude outside threats from local communities").

[42] *See* Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 18 URB. LAW 567, 571 (1986) (describing how identical state regulations may nevertheless be subject to distinct legal outcomes).

II. OVERCOMING THE PRIVILEGES AND IMMUNITIES CLAUSE

The most obvious argument to be made against an out-of-state transaction ban, other than the dormant Commerce Clause,[43] is that a ban on transactions from out-of-state residents necessarily presumes out-of-state residents to be unfriendly aliens, rather than welcome visitors. From a Privileges and Immunities Clause perspective, the Supreme Court is notably ambiguous on this point. It is true that one of the "privileges" associated with the clause is that out-of-state citizens must be able to conduct business on the same footing as that state's citizens.[44] But this right is by no means absolute. A state's disparate treatment between residents and nonresidents can occur when "there are perfectly valid independent reasons for it."[45] In defending against a Privileges and Immunities challenge, a state can provide a "justification for its different treatment of nonresidents, including an explanation of how the discrimination relates to the State's justification."[46] The current standard for this justification requires demonstrating both that "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."[47] In particular, this reason should be analyzed while valuing "the principle that the States should have considerable leeway in *analyzing local evils and in prescribing appropriate cures*."[48]

In determining what such an "evil" is, courts are surprisingly ambiguous (though, to be fair, the modern Court has not seen a pandemic on the scale of COVID). Furthermore, the Supreme Court has not ruled on the legality of a forced quarantine for over a century.[49] The opportunity to present "test cases" with relatively minor impacts is passed, and we are now seeing infection rates balloon to levels where local and state governments are implementing quarantine orders for their populations. This makes it inevitable that through political will, at least one state's actions will be brought to court.[50] From case precedent, we have some examples of what

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[43] *See infra* Part III.

[44] Toomer v. Witsell, 334 U.S. 385, 396 (1948) ("[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.").

[45] *Id.*

[46] Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 299 (1998).

[47] *Id.* at 298 (quoting Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 294 (1985)).

[48] *Toomer*, 334 U.S. at 396 (emphasis added).

[49] Parmet, *supra* note 1, at 26.

[50] *See id.* at 31 ("With many more cases, and longer periods of confinement, the probability that some habeas petitions would make their way to appellate decisions would increase substantially.").

does *not* constitute such an evil.[51] We also know that the Court tends to rule against discriminating states when there are less discriminatory ways of accomplishing this target objective.

But there are also some exceptions to this rule that would support governors acting in their states' best interests. In *Baldwin v. Fish and Game Commission*,[52] the Court upheld a Montana hunting regulation requiring nonresidents to purchase a combination license for a cost of over seven times that which a Montana resident would pay for the same license.[53] The question the Court had to wrestle with was whether "the distinction made by Montana between residents and nonresidents . . . threaten[ed] a basic right in a way that offends the Privileges and Immunities Clause,"[54] and in doing so, the Court acknowledged Montana's unique interest in preserving its supply of elk as a reason to dissuade out-of-state hunters.[55] Ultimately, the Court held that such an interest was sufficient to uphold a hunting regulation for out-of-state residents.[56]

While the Supreme Court has not had an opportunity to address the specific issue presented here,[57] courts have recently been more lenient with states asserting substantial interests in discriminating against nonresidents, especially when discrimination is a result of an inability to monitor nonresidents. New York has wrestled with the question of monitoring nonresident behavior before, and given current Second Circuit precedent, it is likely states would succeed in the context of COVID-19. In *Bach v. Pataki*,[58] the Second Circuit upheld a New York regulation which prohibited nonresidents from acquiring a handgun license unless they were local workers.[59] On the Privileges and Immunities question, the court held that New York had a substantial interest in blocking most nonresidents from acquiring this license because it would be unable to monitor questionable

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[51] For examples of where residence classifications run afoul of the Privileges and Immunities Clause, see Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 389–95 (1979) (discussing state bar admission and barriers to running for public office).

[52] 436 U.S. 371 (1978).

[53] *Id.* at 392.

[54] *Id.* at 388.

[55] *Id.* ("The elk supply, which has been entrusted to the care of the State by the people of Montana, is finite and must be carefully tended in order to be preserved.").

[56] *Id.*

[57] For further discussion on this scarcity in case law, *see* Parmet, *supra* note 1, at 26.

[58] Bach v. Pataki, 408 F.3d 75 (2d Cir. 2005).

[59] *Id.* at 81 ("The only nonresidents eligible for a license are local workers, who may apply to the licensing officer in the city or county of their principal employment or principal place of business.").

activity that occurred out of state.[60] Furthermore, the court found that other states "cannot adequately play the part of monitor for the State of New York . . . [because t]hey do not have the incentives to do so."[61] However, this does not mean that New York would have been able to get away with a "catch-all" nonresident ban. The court acknowledges that the ban impacts nonresidents based on where they "spend their time" such that the monitoring requirement is "tailored" to the state's monitoring interest.[62]

While the impacts of the COVID-19 pandemic are felt nationwide, it would be hard to exclude the moniker of "local evil," the cure for which would be any immediate measures designed to slow the spread of the pandemic. The Court would likely uphold this proposal as constitutional on Privileges and Immunities grounds, and it would be prudent for governors to take advantage of the lack of jurisprudence on the issue before it is shaped without their input.

III. OVERCOMING THE DORMANT COMMERCE CLAUSE

The Commerce Clause assigns jurisdiction over commerce "among the several States" to the federal government.[63] It does not explicitly provide for intrastate commerce jurisdiction.[64] Nor does it, importantly, *compel* a state to engage in business.[65] It is in this grey area that a ban on transactions from out-of-state residents subject to quarantine finds legal grounding. Even before the Spanish Flu pandemic of 1918-19, legal scholars debated the constitutionality of such a ban in the context of a pandemic.[66] The challenge of answering this question rests in whether it is framed through the lens of quarantine, or if it is framed through the lens of a quarantine *order*.[67] This is where the negative, or "dormant," Commerce Clause inhibits a state's

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[60] *See id.* at 92 ("New York has just as much of an interest . . . in discovering signs of mental instability demonstrated in New Jersey as in discovering that instability in New York. The State can only monitor those activities that actually take place in New York.").

[61] *Id.* at 92.

[62] *Id.* at 94.

[63] U.S. CONST. art. I, § 8, cl. 3.

[64] *Id.*

[65] *Id.*; *see also* Christine Kwon, *The Dormant Commerce Clause Can't Override State and Local Lockdowns*, LAWFARE (May 6, 2020), https://www.lawfareblog.com/dormant-commerce-clause-cant-override-state-and-local-lockdowns (arguing that state lockdowns do not run afoul of the dormant Commerce Clause).

[66] *Compare* Blewett Harrison Lee, *Limitations Imposed by the Federal Constitution on the Right of the States to Enact Quarantine Laws*, 2 HARV. L. REV. 293, 306 (1889) ("The doctrine of the case seems to be that a State police law which obstructs interstate commerce to a greater extent than is strictly necessary for the accomplishment of the purpose of the law, is an unconstitutional regulation of commerce.") *with* H. Campbell Black, *The Police Power and the Public Health*, 25 AM. L. REV. 170, 180 (1891) ("[T]he power to establish quarantine regulations rests with the States and has not been surrendered to the Federal government.").

[67] *See supra* Part II.

ability to discriminate from out-of-state resources. The mere fact that a state regulation such as the proposal outlined here regulates interstate commerce does not make it *per se* unconstitutional, but it does make it subject to a different level of scrutiny.

The "dormant Commerce Clause" is case precedent; however, such a regulation will be upheld if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental."[68] A statute is "even-handed" when it applies equally to both in-state and out-of-state commerce. From here, the Court looks to a question of "degree" to determine if the state's justification for its regulation is acceptable.[69] For example, in *Old Bridge Chemicals, Inc. v. New Jersey Department of Environmental Protection*,[70] the plaintiff, an energy production corporation, sued an agency of the state of New Jersey on the grounds that a regulation requiring hazardous wastes to be labelled pursuant to a New Jersey-specific scheme was unconstitutional. The court disagreed, recognizing that the label requirements applied to all hazardous wastes handled in the state equally; there were no specific requirements for out-of-state hazardous wastes that did not apply to in-state hazardous wastes;[71] therefore, the regulation was held to be constitutional.

Intellectually separate from the analysis under the Privileges and Immunities Clause, the Supreme Court is even hesitant to recommend a "least-restrictive" analysis under the dormant Commerce Clause, choosing instead to afford deference to a state's chosen manner of regulation so long as it makes sense to do so.[72] In *Minnesota v. Clover Leaf Creamery Co.*[73], the Court upheld a Minnesota statute banning the sale of milk in plastic containers on both Commerce and Equal Protection Clause challenges.[74] Relevant to the analysis here was the Court's commentary on the state's goals of environmental conservation as a legitimate interest, and its

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[68] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[69] *Id.*

[70] Old Bridge Chems., Inc. v. N.J. Dep't of Env't Prot., 965 F.2d 1287 (3d Cir. 1992).

[71] *Id.* at 1295.

[72] Such "rational basis review" is linked to the Commerce Clause's "balancing test," and as such, the relevant analyses are interchangeable as far as the Court is willing to grant a comparative analysis of a State's "interests." *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, n.14 (1981) (describing the "obvious factual connection" between the Equal Protection and Commerce Clause analyses in that case). A similar factual connection is developed in this Note's proposal. *But see* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) (detailing how some measures are unconstitutional if they do not meet the "strictest scrutiny of any purported legitimate local purpose" and there are no "non-discriminatory alternatives.").

[73] 449 U.S. 456 (1981).

[74] 449 U.S. at 470.

balancing test[75] when compared to the economic discrimination which would result from the regulation. The Court ultimately concluded that the regulation was "even-handed" because the prohibition on plastic containers extended to both in-state and out-of-state merchants, even if the effect was disproportionately felt out of Minnesota.[76] The "inconvenience" of requiring out-of-state merchants to conform to different packaging requirements was outweighed by the state's interest in conservation,[77] and rendered minimal "in relation to putative local benefits."[78]

Protectionist regulations are not by themselves unconstitutional.[79] Even if the proposal is found to be "protectionist," it still may be upheld as constitutional for two reasons. The first reason is that it is *Congress's* role to decide whether and when to regulate commerce; the courts defend Congress's right to do so, but if Congress is passive in regulating commerce, its intent may not read in by the courts.[80] The second reason is that courts look favorably on states imposing such regulations when the ends justify the means. The cost of individuals quarantining for two weeks (even at their own expense) is small compared to the benefits of reducing the spread of COVID-19, particularly since those benefits *are* spread nationwide.

Furthermore, courts often find in favor of overarching state interests justifying discrimination on interstate commerce when the relevant interests are distinct from commerce itself. This is especially true when the legitimate interest is somehow tied to the police power, and the best example of this is when states legislate to protect public health and safety. There have been quarantine measures that were found constitutional because the measures were taken to prevent "contagion and other evils."[81] The boundaries of this definition are explored in *City of Philadelphia v. New Jersey*, in which the Court held that a New Jersey regulation permitting only certain types of waste to enter the state was unconstitutional economic-protectionism.[82] The biggest obstacle to the regulation was that the State of New Jersey failed to argue how the distinction between in-state and out-of-state waste was

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[75] *See also Old Bridge Chems.*, 965 F.3d at 1291 (explaining the balancing test applies to all cases not subject to deferential review for "peculiarly strong state interest" or subject to heightened scrutiny for actions "that purposefully or arbitrarily discriminate against interstate commerce or undermine uniformity").

[76] *Clover Leaf Creamery Co.*, 449 U.S. at 472.

[77] *Id.* at 472.

[78] *Id.* at 472 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

[79] *See* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 430 (1982) ("The commerce clause does not expressly prohibit the states from enacting protectionist economic legislation. It merely gives Congress the power to rectify such excesses by superseding enactments.").

[80] *See id.* ("[O]ne might tend to conclude that the Framers left protection of the national market to congressional supervision rather than judicial enforcement.").

[81] City of Philadelphia v. New Jersey, 437 U.S. 617, 628–29 (1978).

[82] *Id.* at 629.

necessary, rather than convenient.[83] However, if the overall result of such a regulation was more substantial, the Court implies it would pass constitutional muster.[84] Even if the result were not as substantial, New Jersey could have still seen its regulation survive if it required the same obstacle to be overcome by *all* waste coming into the state.[85] In the case of regulating *people* instead of waste, other questions must be asked. When restrictions are tailored to impact *persons* and not categories of goods, does the Commerce Clause apply? If it does apply, does the Court treat persons in the same way it treats goods?

The best answer to this question comes from applying the evidentiary standards courts tend to accept when deciding dormant commerce clause cases. Under a statute that does not facially discriminate, this is a two-pronged process. First, the state has to "rebut the facial discrimination claim."[86] If they are successful, the state must next "prov[e] that the benefits of the regulation outweigh the incidental impact on the interstate market defined by the court."[87] Governors should not be dissuaded from having their regulations labeled as facially discriminatory because the Supreme Court has outlined the "degree analysis" they need to justify their actions.[88] They should instead argue such substantial circumstances when defending their laws in front of federal judges, in much the same way as they do in front of the public.

The cases where the Court has discussed this analysis show that a pandemic is on an unprecedented scale to which state deference is owed.[89] Far from being an arbitrary ban on interstate commerce, a proposal to ban in-person transactions from out-of-state residents serves the legitimate interest of protecting a population from COVID-19. Unlike in the many cases where the Court has ruled against protectionist measures, here states would be protecting the population, rather than their economies, with merely an *auxiliary* effect of such a policy being the interference in interstate

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[83] *See id.* ("The harms caused by waste are said to arise *after* its disposal in landfill sites . . . . ") (emphasis added).

[84] *See id.* (discussing how the Court looked favorably on protectionist measures taken to prevent the movement of "noxious articles").

[85] *See id.* at 626 ("[I]t may be assumed . . . that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected.").

[86] Blair P. Bremberg & David C. Short, *The Quarantine Exception to the Dormant Commerce Power Doctrine Revisited: The Importance of Proofs in Solid Waste Management Cases*, 21 N.M. L. REV. 63, 68 (1990).

[87] *Id.*

[88] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[89] *But see* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (invalidating a state statute requiring different truck lengths for safety reasons); Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981) (same).

commerce. The instrumentalities of commerce shift to become all those seeking to do business in the state, and the dangerous variable being introduced into the economy is far worse and more volatile than a "noxious article[]."[90] Governors should heed the lesson the Court has gifted them: persons are a far more dangerous means of introducing threats into a jurisdiction than mere goods.

Criticisms against protectionism as undue interference with other states are largely unfounded. The Court has taken steps to address *reverse* discrimination against states' commercial interests, and a similar standard could be applied to any proposed regulation deemed to infringe on states that are quarantining correctly and adhering to the correct public health standards. In *Hunt v. Washington State Apple Advertising Commission*,[91] the Court dealt with a North Carolina regulation that required apples sold in the state to contain state-specific labels. Apple growers from the state of Washington sued North Carolina, contending that this regulation was a violation of the Commerce Clause. The Court found that North Carolina had a burden to justify the regulation "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[92]

The Court is equally interested in analyzing *internal* economic policy outcomes from this perspective, which bodes well for any state looking to secure its borders.[93] This does *not*, however, negate the leniency the Court provides under a "least-restrictive analysis" as the Court still looks to the "factual connection" in each instance.[94] The fact that the Court is willing to consider economic policy suggests that the Court has developed a framework for judging a state's policy justification as well, and that it does have a role to play in the constitutionality of protectionist regulations.[95] From a free-market perspective, it is logical to expect a state to control its own borders and the instrumentalities of commerce. It would only make sense for the Court to affirm a state's decision to exclude, to its own fiscal detriment, commerce which would otherwise save a state in financial peril. This is especially true for any state relying heavily, if not almost exclusively,

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[90] *City of Philadelphia*, 437 U.S. at 629.

[91] Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333 (1977).

[92] *Id.* at 353.

[93] *See* Farber, *supra* note 42, at 579 (discussing the Court's cost-benefit approach to judging interstate regulation).

[94] *E.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 456 (1981).

[95] *See* Farber, *supra* note 42, at 579 (discussing the Court's tendency to favor *laissez-faire* economics in its decision-making).

on wealthy taxpayers to fund its lagging cities.[96] It might seem attractive for fiscally challenged states to prioritize the entry of wealthy nonresidents to stimulate their pandemic-stricken economies, but it is simultaneously the state's prerogative to prioritize the health of its residents at the expense of intrastate commerce. Such a decision should be welcomed by any court trafficking in *laissez-faire* economics and state independence.[97]

States are already showing eagerness by taking the first steps to make this proposal a reality. In August 2020, the University of Connecticut banned out-of-state students—even those taking online classes—from residing in university housing for the fall semester.[98] While the ban does not require out-of-state students to remain outside the state's borders, it will effectively keep most out-of-state students from Connecticut, much less the physical university campus. Similar to my proposal, the ban does not apply to students already on campus,[99] for as long as they have been in the state for the requisite period of time, they likely pose no greater risk for transmission than any other Connecticut resident. In many ways, the University of Connecticut policy is primed for a constitutional challenge, as evidenced by the university president teeing up a rational interest as justification in case the university policy is challenged.[100]

My proposal would be less restrictive than the University of Connecticut policy because out-of-state residents would be allowed to intermingle with in-state business provided they had proof of quarantine. On the other hand, there is no path for out-of-state University of Connecticut students to eventually live in university housing if they decided to quarantine for a length of time mandated by the state. There is no way for students to "prove" they are not infectious with a negative coronavirus test.[101] The government is *less* restrictive than the university. It is already clear that out-of-state resident tuition classifications are acceptable.[102] It is surely a matter of time

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[96] *See* Derek Thompson, *What on Earth Is Wrong With Connecticut?*, THE ATLANTIC (July 5, 2017), https://www.theatlantic.com/business/archive/2017/07/connecticut-tax-inequality-cities/532623/ ("The so-called Gold Coast in southwest Connecticut is one of the richest places in the world. Meanwhile, the poverty rate in Connecticut's largest city, Bridgeport, is still rising.").

[97] *See* Farber, *supra* note 42, at n.78 ("In particular, the Court believed that the Illinois statute increased the risk that tender offers would fail, an outcome that it viewed as undesirable.").

[98] *UConn Will Not Allow Out-of-State Students Taking Online Classes to Live on Campus*, NBC CONN. (Aug. 11, 2020), https://www.nbcconnecticut.com/news/coronavirus/uconn-will-not-allow-out-of-state-students-taking-online-classes-to-live-on-campus/2317145/#:~:text=UConn%20has%20just%20announced%20that,stay%20home%20for%20the%20semester

[99] *Id.*

[100] *See id.* ("'By asking our out-of-state students who don't need to be here in person for their studies to stay home, we are aiming at preserving the extraordinary progress Connecticut has made in arresting the spread of the virus.'").

[101] *Contra* Conn. Exec. Ord., *supra* note 16.

[102] Simson, *supra* note 51, at 395–97.

before the government catches up.

IV. CONCLUSION

As the pandemic rages on, states must be empowered to take actions which benefit the overall health and welfare of their residents. The boundaries of federalism need not constrict states' powers to protect their populations in the most prudent fashion. While safe and effective vaccines have finally been made available, we must be prepared for the possibility that vaccine hesitancy and the spread of new coronavirus variants will require a return to social distancing and quarantining. Should the unthinkable recur, individual states have the power to curb the pandemic within their borders, and by banning out-of-state residents from conducting in-person transactions, they can take proactive measures to protect their citizens, even if other states fail to cooperate.