

COVID-19 AND DOMESTIC TRAVEL RESTRICTIONS

*Katherine Florey**

The strict controls that many jurisdictions, including most U.S. states, established to contain the COVID-19 pandemic have proven difficult to sustain over time, and most places are moving to lift them. Internationally, many plans to ease lockdowns have retained some form of travel restrictions, including the “green zone” plans adopted by France and Spain, which limit travel between regions with widespread community transmission of COVID-19 and those without it. By contrast, most U.S. states lifting shelter-in-place orders have opted to remove limits on movement as well. This Essay argues that this situation is unwise: it tends to create travel patterns that increase the spread of COVID-19 while at the same time hindering contact tracing and information gathering. While broad quarantines have a complicated and far from perfect record in the United States, more targeted measures are likely within states’ constitutional powers to impose, might be more palatable to the public, and could play a significant role in helping to contain the spread of COVID-19.

INTRODUCTION

Starting in late April¹ and continuing through May and June 2020,² state and local governments have modified shelter-in-place or stay-at-home orders earlier imposed in response to the 2020 COVID-19 pandemic. This development has been driven by many forces, including constituent pressure,

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* Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law. Thanks to John Hunt, Kate Kretler, Lisa Ikemoto, and Kelsey Santamaria for helpful comments and to Laura Kurtz for superb research assistance.

1 See Jasmine C. Lee, Sarah Mervosh, Yuriria Avila, Barbara Harvey & Alex Leeds Matthews, *See How All 50 States Are Reopening (and Closing Again)*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html> (last updated Aug. 14, 2020).

2 See Julie Mazziotta, *Coronavirus Surges in Parts of the U.S. After Memorial Day—See What’s Happening in Your State*, PEOPLE (June 10, 2020, 12:56 PM), <https://people.com/health/coronavirus-cases-spiking-21-states-after-memorial-day-reopening/>.

the perceived need to resume some normal economic activity, and a recognition that some regions have been less affected than others.³

While reopening plans differ from state to state, they tend to share common features. First, many call for reopening in phases, in some cases based on the attainment of milestones such as a sustained decline in the number of new cases.⁴ Under such phased plans, activities believed to pose a lower risk of COVID-19 transmission are generally permitted to open first, while riskier ones are deferred.⁵ Second—and the focus of this discussion—state plans often permit counties or municipalities with fewer new cases of COVID-19 to open first.⁶ Just as particular areas may open at different times, the same may be true of closures in response to an uptick in cases. For example, three California counties chose to proceed more cautiously with reopening after initial easing resulted in an increase in COVID-19 spread.⁷

COVID-19 has thus far affected different regions of the United States unevenly, and it is understandable that, for example, a rural county in a minimally affected state with few cases may wish to open before a dense, heavily impacted urban area. Indeed, both within the United States⁸ and

3 See Kurt Wagner, *Rural Areas Reopen Around U.S. Cities Still Stuck on Lockdown*, BLOOMBERG (May 13, 2020, 9:26 AM), <https://www.bloomberg.com/news/articles/2020-05-13/path-to-reopening-has-us-states-confronting-regional-divides>; Talal Ansari, Betsy McKay & Jennifer Calfas, *All 50 States Have Now Taken Steps to Reopen*, WALL ST. J. (May 20, 2020, 8:48 PM), <https://www.wsj.com/articles/coronavirus-latest-news-05-20-2020-11589963481>; Jeffrey Gettleman, *As Virus Infections Surge, Countries End Lockdowns*, N.Y. TIMES (last updated June 29, 2020), <https://www.nytimes.com/2020/06/10/world/asia/reopening-before-coronavirus-ends.html>.

4 The White House has, for example, released criteria intended to guide reopening decisions. See *Opening Up America Again*, WHITE HOUSE, <https://www.whitehouse.gov/openingamerica/> (last visited Aug. 13, 2020) [hereinafter *Opening Up America*]. The guidance is non-mandatory, and many states have developed their own criteria that are somewhat more permissive than the federally recommended ones. See Keith Collins & Lauren Leatherby, *Most States That Are Reopening Fail to Meet White House Guidelines*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/interactive/2020/05/07/us/coronavirus-states-reopen-criteria.html>.

5 Under the White House's guidelines, for example, summer camps for children and sit-down dining with "moderate physical distancing protocols" may open in Phase 2, while visits to senior homes are deferred until Phase 3. See *Opening Up America*, *supra* note 4.

6 For example, as of May 21, forty out of fifty-eight California counties had met criteria for partial reopening. Luke Money, *40 of California's 58 Counties Get OK for More Robust Reopening*, L.A. TIMES (May 21, 2020, 10:39 AM), <https://www.latimes.com/california/story/2020-05-21/40-of-californias-58-counties-get-ok-for-more-robust-reopening>.

7 See Hannah Fry, *Coronavirus Cases Spiked After These Counties Reopened. Now, Officials Are Scaling Back*, L.A. TIMES (May 28, 2020, 1:40 PM), <https://www.latimes.com/california/story/2020-05-28/coronavirus-cases-spiked-after-these-counties-reopened-now-officials-are-scaling-back>.

8 See, e.g., Money, *supra* note 6.

elsewhere in the world,⁹ many comprehensive plans for COVID-19 recovery envision the identification of areas in which little or no community transmission is taking place. In such regions, the logic goes, precautions could be safely relaxed as long as the situation remains stable.¹⁰

The phased, county-by-county reopening now taking place in the United States superficially resembles such a program, in that most plans allow localities that have met certain benchmarks to reopen before those that have not.¹¹ Yet unlike some proposals for phased reopening that envision continuing limits on travel as part of a coordinated plan to resume some economic activity safely,¹² many reopening plans are relaxing travel rules in tandem with other restrictions.¹³ While people's desire to travel after a long period of remaining in one place is understandable, this situation creates obstacles to sustained control of COVID-19 for two reasons.¹⁴

To begin with, an inevitable effect of nonuniform reopening is to create a patchwork of COVID-19 restrictions, where conditions and regulations in one state or even one county may differ starkly from those in a nearby one. If everyone stayed within their home jurisdiction, this situation would pose little difficulty: citizens of better-faring counties or states could enjoy increased freedom while more hard-hit communities could work to get their outbreaks under control. But the same "quarantine fatigue" that has fueled pressures

9 For example, "France, Italy, and Spain . . . announced a regional approach" under which "policies may vary from one territory to another, depending on their current situation with respect to Covid-19." See MIQUEL OLIU-BARTON & BARY PRADELSKI, ESADEECPOL, GREEN-ZONE TRAVELLING: A PAN-EUROPEAN APPROACH TO SAVE TOURISM 2 (2020), <http://itemsweb.esade.edu/research/EsadeEcPol-Insight-Green-Zones-May2020.pdf>.

10 See MIQUEL OLIU-BARTON, BARY PRADELSKI & LUC ATTIA, ESADEECPOL, EXIT STRATEGY: FROM SELF-CONFINEMENT TO GREEN ZONES 4 (2020) [hereinafter EXIT STRATEGY], https://www.esade.edu/itemsweb/wi/research/ecpol/EsadeEcPol_Insigh6_Exit_Strategy.pdf.

11 Pennsylvania, for example, has designated three "phases" of reopening to be implemented on a county-by-county level: red (strict lockdown), yellow (some restrictions eased), and green (most normal activities resumed, though in some cases with capacity limits). See *Red, Yellow, Green: What to Expect in Each of Pa.'s Tiers for Reopening*, PHIL. INQ.: SPOTLIGHT PA (last updated May 27, 2020), <https://www.inquirer.com/news/pennsylvania/spl/pennsylvania-coronavirus-reopening-tiers-phases-red-yellow-green-20200501.html>.

12 See OLIU-BARTON & PRADELSKI, *supra* note 9, at 3–5.

13 See *infra* Part I.

14 See Annelies Wilder-Smith, Yaneer Bar-Yam & Dale Fisher, *Lockdown to Contain COVID-19 Is a Window of Opportunity to Prevent the Second Wave*, J. TRAVEL MED. (May 30, 2020), <https://academic.oup.com/jtm/advance-article/doi/10.1093/jtm/taaa091/5849110> (noting that, when they are part of a comprehensive epidemic control strategy, movement restrictions can "restrict the outbreak to more limited areas reducing the human and economic costs, and allowing available resources to be focused on priority regions").

to reopen in the first place¹⁵ also creates a strong incentive for people to travel from worse-affected areas with more stringent restrictions to places where the virus is less prevalent and more activities are permitted. As various media reports detail, an inconsistent easing of restrictions across state or county lines sparked a surge of travel in many parts of the United States as people in still-locked-down areas sought opportunities to go to the bar,¹⁶ stroll on a beach boardwalk,¹⁷ get a haircut,¹⁸ or enjoy a restaurant meal.¹⁹ Even when people do not deliberately cross state or county lines to participate in a reopening economy, their commuting or leisure patterns may span more than one jurisdiction, a fact that may become relevant as workplaces and businesses

15 See Julia Marcus, *Quarantine Fatigue Is Real*, ATLANTIC (May 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/quarantine-fatigue-real-and-shaming-people-wont-help/611482/> (arguing for a harm reduction approach given that many people “are experiencing the profound burden of extreme physical and social distancing”).

16 See, e.g., Kate Linticum, *Partygoers Have Been Packing Arizona Bars. Now the State Is a Coronavirus Hot Spot*, L.A. TIMES (June 15, 2020, 3:26 PM), <https://www.latimes.com/world-nation/story/2020-06-15/partygoers-have-been-packing-arizona-bars-and-nightclubs-now-the-state-is-a-coronavirus-hot-spot> (noting that after Arizona bars reopened, “visitors from other states with stricter social distancing guidelines, including California, began flocking in”).

17 See, e.g., Katherine Shaver, *Thousands from Coronavirus Hot Spots Flocked to Maryland and Virginia as Parts of the States Reopened*, WASH. POST (May 20, 2020, 5:27 PM), https://www.washingtonpost.com/local/trafficandcommuting/thousands-from-coronavirus-hotspots-flocked-to-maryland-and-virginia-as-parts-of-the-states-reopened/2020/05/20/c34172b6-99e7-11ea-89fd-28fb313d1886_story.html (describing an eighteen percent increase in travel in states near the D.C. metro region over the May 16–17 weekend as driven by people’s desire for a change of scene such as the boardwalk in Ocean City, Maryland); see also Katherine Shaver, *Smartphone Data Shows Out-of-State Visitors Flocked to Georgia as Restaurants and Other Businesses Reopened*, WASH. POST (May 7, 2020, 6:00 AM), https://www.washingtonpost.com/local/trafficandcommuting/smartphone-data-shows-out-of-state-visitors-flocked-to-georgia-as-restaurants-and-other-businesses-reopened/2020/05/06/b1db0056-8faf-11ea-9e23-6914ee410a5f_story.html (noting a thirteen percent increase in travel to Georgia, mostly from adjacent states, after the early reopening of some businesses there) [hereinafter Shaver, *Smartphone Data*].

18 See Leila Miller, *He Drove More Than 600 Miles for a Haircut. He’s Not Alone.*, L.A. TIMES (May 16, 2020, 3:18 PM), <https://www.latimes.com/california/story/2020-05-16/lame-driving-hours-for-a-haircut-during-coronavirus> (telling story of a man who drove from Washington State to his hometown of Yuba City, California, to take advantage of the reopening of hair salons, and noting that other customers had flocked to the area from both within and outside California).

19 See Bob Chiarito, *While State Remains Shut Down, Illinois Residents Head to Neighboring States To Shop, Eat Out*, CHICAGO SUN-TIMES (May 17, 2020, 10:41 AM), <https://chicago.suntimes.com/coronavirus/2020/5/17/21261537/illinois-wisconsin-indiana-stay-at-home-order-open-coronavirus-covid-19> (“In the first weekend that Indiana and Wisconsin largely were open for business, many Illinois residents, feeling confident they won’t get sick, crossed state lines to patronize stores, restaurants and bars.”).

reopen and commutes resume.²⁰ In consequence, epidemiologists and public health officials have noted the perverse incentive potential uneven restrictions create for efficient spread of the virus, as people from areas where the virus is active travel to less affected regions, presumably carrying the possibility of COVID-19 contagion with them.²¹

The general phenomenon of states with less restrictive policies becoming “havens” for people from areas with more stringent rules is a well-documented problem in non-COVID-19 contexts; Allan Erbsen has called the possibility that “one state will become a haven for behavior that other states seek to restrain” a “constant threat to interstate harmony.”²² This problem is particularly pernicious, however, in the area of infectious disease control, where visitors may not merely engage in undesirable behavior but spread disease to local residents or bring it back to their home jurisdictions.²³

A second problem with allowing widespread travel is that it complicates efforts to identify, warn, and test contacts of infected people—a process that many experts see as an essential component of reopening the economy safely.²⁴ A recent *New York Times* report highlighted this issue in Las Vegas, where casinos reopened with some restrictions in early June.²⁵ While the vast majority of visitors to the Strip are from out of state, the state compiles COVID-19 statistics only for Nevada residents, excluding even visitors who were tested or hospitalized for COVID-19 during their stay in Nevada.²⁶ While some casinos are making efforts to keep track of COVID-19 cases on their premises, they are not required to, and “understaffed health departments can

20 See, e.g., Shaver, *Smartphone Data*, *supra* note 17 (“In densely populated places such as the New York tri-state area and the Washington metropolitan region, many residents live in one state, work in a second and routinely attend evening or weekend outings in a third.”).

21 See *id.* (“Any impetus to travel, public health experts say, increases the number of people coming into contact with each other and raises the risk of transmission.”).

22 Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 516 (2008).

23 Travel also helps create conditions for a classic “race to the bottom,” under which states experience economic pressures to loosen restrictions to match the business-friendly climate of their neighbors. See *id.* at 525–27.

24 See Andrew Joseph, *Contact Tracing Could Help Avoid Another Lockdown. Can It Work in the U.S.?*, STAT NEWS (May 29, 2020), <https://www.statnews.com/2020/05/29/contact-tracing-can-it-help-avoid-more-lockdowns/> (“To suppress their epidemics to manageable levels, countries around the world have turned to contact tracing And, to varying degrees, it has worked.”).

25 See Jo Becker, ‘Cruise Ships on Land’: As Las Vegas Reopens, a Huge Test for Casinos, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/08/us/las-vegas-coronavirus-casinos.html>.

26 See *id.*

barely keep up with what is happening within their own states,” let alone track infected out-of-state residents.²⁷

Such a situation is troublesome for two reasons. First, people who do not know of their exposure may unknowingly spread disease while asymptomatic or presymptomatic, possibly seeding additional clusters of infections.²⁸ Second, an inability to follow up also deprives the public health community of information about where community transmission is occurring and which activities are lower- or higher-risk.²⁹

Two recent, well-publicized incidents within a single state illustrate the relative difficulty of contact tracing across state and county lines versus among predominantly local citizens. On the one hand, when two hairstylists in Springfield, Missouri, exposed 140 clients to COVID-19, the local health department was able to identify and offer tests to all potentially infected people, ultimately reporting no new cases among those tested.³⁰ While not all customers were tested, all were quarantined and monitored, likely preventing any asymptomatic spread.³¹ By contrast, when a bargoer tested positive after a raucous Memorial Day weekend gathering at Missouri’s Lake of the Ozarks, contact tracers had difficulty following up given that participants had traveled to the site from many areas throughout the Midwest.³² A related case in Kansas was not identified until two and a half weeks later, and public health authorities in various counties could not say definitively if more would ultimately arise.³³ Cases related to the Lake of the Ozarks exposure continue

27 See *id.* By contrast, public health officials in Kansas City, Missouri, were able to identify, monitor twice daily, and quarantine 140 people (presumably mostly in the local community) exposed to two hair stylists with COVID-19. See Chacour Koop, *No New COVID-19 Cases After Infected Missouri Hairstylists Worked with Over 140. How?*, KANSAS CITY STAR (June 9, 2020, 3:08 PM), <https://www.kansascity.com/news/coronavirus/article243395651.html>.

28 See Lois Parshley, *Asymptomatic Coronavirus Spread Is Real*, VOX (June 10, 2020, 12:15 PM), <https://www.vox.com/2020/6/10/21286426/can-asymptomatic-people-spread-coronavirus-who-transmission>.

29 Some experts believe, for example, that widespread mask wearing or moving activities outdoors may dramatically decrease the risk of COVID-19 transmission, while poor ventilation indoors may do the opposite. See, e.g., Marcus, *supra* note 15 (noting that “casual interaction in outdoor settings seems to be much lower risk” and describing masks as an “imperfect but helpful” precaution).

30 Masks worn by customers and stylists were credited with limiting transmission, although authorities were not able to test everyone exposed. See Todd C. Frankel, *The Outbreak That Didn’t Happen: Masks Credited with Preventing Coronavirus Spread Inside Missouri Hair Salon*, WASH. POST (June 17, 2020, 9:49 AM), <https://www.washingtonpost.com/business/2020/06/17/masks-salons-missouri/>.

31 See *id.*

32 See Michele Munz, *Still Too Soon To Shut the Book on Lake of the Ozarks, Experts Warn, as Kansas Reports Case*, ST. LOUIS POST-DISPATCH (June 12, 2020), https://www.mdjonline.com/neighbor_newspapers/extra/news/still-too-soon-to-shut-the-book-on-lake-of-the-ozarks-experts-warn-as/article_7aa4720c-08e3-53ee-9d71-292bf5cbf908.html.

33 See *id.*

to surface in many locations, though it is unclear if they are linked directly to the Memorial Day event.³⁴

Travel across state and county lines thus hinders public health authorities' efforts to monitor and control COVID-19 transmission. As a result, efforts to limit travel could play a key role in containing the epidemic in the United States. Considering this issue, this Essay proceeds in five parts. It first discusses the plans of many jurisdictions to lift travel restrictions as part of reopening. Next, it discusses ways in which limits on travel could facilitate safe reopening, with attention to the "green zone" plans currently being implemented in some European countries. Parts III and IV consider, respectively, what constitutional scope states have to implement such restrictions and the historical pitfalls that counsel caution in imposing them. Finally, the Essay proposes measures to limit travel in ways that would be constitutionally sound and potentially tolerable to the public.

I. THE CURRENT SITUATION: FROM STRICT TRAVEL RESTRICTIONS TO FEW OR NONE

While there have been calls for regional cooperation or other means of controlling travel and reducing COVID-19 spread,³⁵ many reopening plans fail to provide mechanisms for reducing transmission across jurisdictions.

Initial stay-at-home orders imposed at the state and local level (or by tribes within the United States)³⁶ were highly concerned with local citizens' movement and sought to limit it in various ways—for example, by prohibiting people from traveling by vehicle to nonessential activities,³⁷ by ordering people to stay at home "except as needed to maintain continuity of operations

34 In the weeks following Memorial Day, two Lake-area restaurants each closed because an employee tested positive, and several clusters of cases developed, although many appeared to have contracted the disease in the weekends following Memorial Day. See *New Cluster Of Covid Cases at the Lake Not Related to Memorial Day*, Health Dept. Says, LAKEEXPO (June 17, 2020), https://www.lakeexpo.com/news/coronavirus/new-cluster-of-covid-cases-at-the-lake-not-related-to-memorial-day-health-dept/article_c265b9b6-b0d9-11ea-8d74-132f3b73a492.html.

35 See Shaver, *Smartphone Data*, *supra* note 17 (citing medical school professor as advocating for "coordinated reopenings among neighboring states, since new outbreaks in one would quickly spill over into others").

36 See, e.g., Navajo Nation Public Health Emergency Order, No. 2020-003 (Mar. 20, 2020), <https://www.navajonnsn.gov/News%20Releases/NNDOH/2020/March/NDOH%20Public%20Health%20Emergency%20Order%202020-003%20Dikos%20Ntsaigii-19.pdf> (ordering that "all individuals living on the Navajo Nation shall limit their movement within and outside of their immediate communities").

37 See City and County of San Francisco Order of the Health Officer, No. C19-07 (Mar. 16, 2020), <https://web.archive.org/web/20200317231911/https://www.sfdph.org/dph/alerts/files/HealthOrderC19-07-%20Shelter-in-Place.pdf> (imposing this restriction on San Francisco residents).

of the federal critical infrastructure sectors,”³⁸ by directing people to “minimize” nonessential travel,³⁹ and by restricting travel into or out of a county, except for certain defined activities.⁴⁰

In addition to limiting movement *within* a particular jurisdiction, many states⁴¹ and several tribes⁴² also imposed quarantines and other restrictions on those traveling to the jurisdiction from elsewhere. Numerous states imposed a fourteen-day quarantine for both residents and nonresidents arriving from any other state.⁴³ Several other states required quarantines for international travelers or travelers from states or regions perceived to be coronavirus

38 See California Executive Order, No. N-33-20 (Mar. 4, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/EO-N-33-20-COVID-19-HEALTH-ORDER-03.19.2020-002.pdf> (directing Californians to stay at home except for these activities).

39 See Oregon Executive Order, No. 20-12 (Mar. 23, 2020), https://www.oregon.gov/gov/Documents/executive_orders/eo_20-12.pdf (directing Oregonians to do so).

40 For example, effective March 16, 2020, six Bay Area counties adopted a Shelter-in-Place order that permitted travel into or out of each county only “to perform Essential Activities, operate Essential Businesses, or maintain Essential Governmental Functions.” See, e.g., County of San Mateo Order of the Health Officer (Mar. 16, 2020), https://www.smcgov.org/sites/smcgov.org/files/HO%20Order%20Shelter%20in%20Place%2020200316_0.pdf; see also *Health Order—Shelter in Place*, CITY SAN MATEO CAL., <https://web.archive.org/web/20200402061602/https://www.cityofsanmateo.org/4241/Health-Order—Shelter-in-Place> (last visited Aug. 13, 2020) (describing circumstances surrounding the six counties’ adoption of a uniform order). Internationally, some countries have also sought to limit the distance traveled by individuals. See, e.g., Natasha Turak, *‘Everyone Is Afraid of Everyone’: Life Under Lockdown in France*, CNBC (Mar. 25, 2020, 2:38 PM), <https://www.cnbc.com/2020/03/25/coronavirus-lockdown-in-france-everyone-is-afraid-of-everyone.html> (describing rules in France requiring individuals to stay within a one-kilometer radius of their homes). Restrictions were later eased to allow travel up to one-hundred kilometers. See Tangi Salaün & Richard Lough, *France Emerges Cautiously Out of Coronavirus Lockdown*, REUTERS (May 10, 2020, 10:11 PM), <https://www.reuters.com/article/us-health-coronavirus-france/france-emerges-cautiously-out-of-coronavirus-lockdown-idUSKBN22N073>.

41 See *Travel Restrictions Issued by States in Response to the Coronavirus (COVID-19) Pandemic*, 2020, BALLOTPEDIA, [https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_\(COVID-19\)_pandemic_2020#Travel_restrictions.2C_advisories.2C_and_recommendations_by_state](https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_(COVID-19)_pandemic_2020#Travel_restrictions.2C_advisories.2C_and_recommendations_by_state) (last visited Aug. 13, 2020) [hereinafter *Travel Restrictions*].

42 See, e.g., Shannon Marvel, *Pine Ridge Reservation Holds Strong During COVID-19 Pandemic*, GLOBE (June 10, 2020, 3:00 PM), <https://www.dglobe.com/newsmd/coronavirus/6529999-Pine-Ridge-Reservation-holds-strong-during-COVID-19-pandemic>.

43 At one point, Alaska, Delaware, Hawaii, Idaho, Kentucky, Maine, Massachusetts, Montana, New Mexico, Rhode Island, Vermont, and Wyoming had such restrictions. See *Travel Restrictions*, *supra* note 41. Most of these quarantines had been lifted or modified at the time of writing. See *id.* But see *infra* text accompanying notes 53 and 60.

hotspots.⁴⁴ Finally, some states opted for less restrictive measures to limit travel, including suggested quarantines⁴⁵ and checkpoints on interstates or at airports.⁴⁶ Utah, for example, put in place a program under which text messages were sent to travelers entering the state by road or air asking them to supply information about travel history and COVID-19 symptoms.⁴⁷

Many tribes also implemented innovative measures to keep COVID-19 off tribal lands,⁴⁸ including border monitoring by the Oglala Sioux, which has been credited with keeping cases among tribal members to a minimum,⁴⁹ and mandatory testing at a pop-up site for all visitors to the Picuris Pueblo within the borders of New Mexico.⁵⁰

Some reopening plans and revised orders, particularly in their early phases, have maintained similar restrictions on travel, easing lockdown rules instead by allowing a broader range of businesses and activities to take place.⁵¹ Most initially relaxed limits on movement in tandem with easing of other

44 In the early days of the pandemic, Arizona, Arkansas, Florida, Kansas, North Dakota, Oklahoma, South Carolina, Texas, and West Virginia had quarantines targeted at hotspots. *Id.* In the wake of the sharp increase in COVID-19 cases beginning in June 2020, other states have since added them. *See id.*

45 Iowa, Nebraska, Nevada, New Hampshire, Ohio, Pennsylvania, Virginia, and Wisconsin requested that travelers quarantine but did not make quarantines mandatory. *See id.* Some recommended quarantines applied only to hotspots. *See id.*

46 *See* Christopher Cicchiello, *Here's Everything You Need to Know About Flying in the COVID-19 Era*, TODAY (June 26, 2020, 8:07 PM), <https://www.today.com/money/airports-airlines-air-travel-during-coronavirus-what-know-t184480>.

47 *See* Simone Seikaly, *Governor Announces Travel Restrictions into Utah* (Apr. 8, 2020, 6:03 PM), KSL NEWS RADIO, <https://kslnnewsradio.com/1922929/governor-announces-travel-restrictions-into-utah/>. The program expired on May 1, 2020. *See* Entry, UTAH, <https://entry.utah.gov/> (last visited Aug. 13, 2020).

48 Tribes do not have the same general police power as do states, which has limited the tools available to them in responding to COVID-19, and in some cases they face additional challenges in combating the virus. The Navajo Nation, for example, has had to confront a “high population of people with pre-existing health problems, the lack of easy access to health care, and the significant number of families without running water.” *See* Paul Spruhan, *COVID-19 and Indian Country: A Legal Dispatch from the Navajo Nation*, NW. UNIV. LAW. R.: NULR NOTE (May 5, 2020), <https://northwesternlawreview.org/uncategorized/covid-19-and-indian-country-a-legal-dispatch-from-the-navajo-nation/>. Tribes claim the power to exclude nonmembers, which the Navajo Nation and other tribes have relied upon as one possible basis for movement restrictions, although there is some lack of clarity about whether the measures they have taken are permissible under existing law. *See id.*

49 *See* Marvel, *supra* note 42 (noting that the reservation has limited cases to around thirty as of early June and quoting lead counsel Chase Iron Eyes as saying that “[t]he only defense that seems to be working are the health checkpoints”).

50 *See* Morgan Lee, *Small Tribes Seal Borders, Push Testing to Keep Out Virus*, ASSOCIATED PRESS (May 9, 2020), <https://apnews.com/f6c94b76bde530ac6f0450759f5975a>.

51 *See* Dena Bunis & Jenny Rough, *List of Coronavirus-Related Restrictions in Every State*, AARP, <https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html> (last updated Aug. 20, 2020).

restrictions,⁵² although a few states maintained quarantines on travelers from other states.⁵³ A representative plan by Washington State, for example, envisions progression to normal activity in four phases.⁵⁴ In the first two, travel is permitted only for essential activities and for limited nonessential activities, with the list of acceptable nonessential activities expanded in Phase Two.⁵⁵ Phases Three and Four, however, permit all travel to be resumed.⁵⁶

Where interstate travel is concerned, some states that previously imposed quarantines on incoming travelers have made them voluntary or allowed them to expire along with the stay-at-home orders of which they are part.⁵⁷ While some states abandoning quarantines have replaced them with other measures—Maine, for example, now permits visitors to submit a negative COVID-19 test within seventy-two hours as an alternative to quarantining⁵⁸—others, such as Idaho, have not.⁵⁹ The surge in cases and development of new hotspots in late June 2020 has prompted New York and other northeastern states to reimpose quarantines.⁶⁰ Nonetheless, in general, reopening has tended to create new opportunities for both intrastate and interstate travel.

II. EXPERT VIEWS ON TRAVEL LIMITS AND GREEN ZONES

Most authorities continue to recognize a role for limiting travel in efforts to contain and mitigate the spread of COVID-19. The CDC, for example, continues to caution that “[t]ravel [within the United States] increases your chances of getting and spreading COVID-19,” noting that it can be “especially

52 *See id.*

53 *See* Julie Mazziotta, *These Are the States Requiring Out-of-State Travelers to Quarantine Due to Coronavirus*, PEOPLE (Aug. 5, 2020, 1:40 PM), <https://people.com/health/states-requiring-out-of-state-travelers-quarantine-coronavirus/> (discussing quarantines imposed or extended by some states in response to summer surges in cases in many areas of the country).

54 *See* SAFE START WASHINGTON: A PHASED APPROACH TO RECOVERY, OFFICE OF THE GOVERNOR 6 (2020), https://www.governor.wa.gov/sites/default/files/SafeStartWA_4May20_1pm.pdf?utm_medium=email&utm_source=govdelivery.

55 *See id.*

56 *See id.*

57 *See Travel Restrictions*, *supra* note 41 (noting, for example, that Arizona’s quarantine expired along with the state’s stay-at-home order).

58 *See Keep Maine Healthy: Protecting Maine People and Tourists Amidst COVID-19*, MAINE.GOV, <https://www.maine.gov/covid19/restartingmaine/keepmainehealthy/> (last visited Aug. 14, 2020).

59 *See Travel Restrictions*, *supra* note 41.

60 *See* J. David Goodman, *N.Y. Will Impose Quarantine on Visitors From States With Big Outbreaks*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/06/24/nyregion/ny-coronavirus-states-quarantine.html?action=click&module=Spotlight&pgtype=Homepage>.

dangerous” for those in risk groups.⁶¹ The World Health Organization has in the past recommended internal travel restrictions, if implemented with attention to ethical and legal considerations, in the hypothetical scenario of an extraordinarily severe influenza pandemic.⁶² Researchers have suggested that travel limitations in Europe, particularly coupled with other interventions, may have been effective in helping to control COVID-19 transmission there.⁶³

Some plans for safe resumption of some economic activity during the COVID-19 pandemic incorporate travel restrictions as a core element of their proposals. For example, a prominent European plan advocates geographically phased reopening by designating certain areas “green zones.” The authors describe this model as building on the principle of “fencing between infected and healthy communities, termed *cordon sanitaire* and reverse *cordon sanitaire*, [which] has been deployed during a variety of outbreaks for centuries.”⁶⁴

61 See *Travel: Frequently Asked Questions and Answers*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/faqs.html> (last visited Aug. 14, 2020).

62 See WORLD HEALTH ORGANIZATION, NON-PHARMACEUTICAL PUBLIC HEALTH MEASURES FOR MITIGATING THE RISK AND IMPACT OF EPIDEMIC AND PANDEMIC INFLUENZA 18 (2019), <https://apps.who.int/iris/bitstream/handle/10665/329438/9789241516839-eng.pdf?ua=1>.

63 See Kevin Linka, Mathias Peirlinck, Francisco Sahli Costabal & Ellen Kuhl, *Outbreak Dynamics of COVID-19 in Europe and the Effect of Travel Restrictions*, 23 *COMPUTER METHODS IN BIOMECHANICS & BIOMEDICAL ENGINEERING* 710, 714 (May 5, 2020), <https://www.tandfonline.com/doi/full/10.1080/10255842.2020.1759560> (using modeling to conclude that “mobility is a strong contributor to the global spreading of COVID-19”). Another study concluded that, while restrictions on travel within China caused only modest delay in the COVID-19 epidemic, other travel restrictions were more effective. See Matteo Chinazzi et al., *The Effect of Travel Restrictions on the Spread of the 2019 Novel Coronavirus (COVID-19) Outbreak*, 368 *SCIENCE* 395, 395 (Apr. 24, 2020) <https://science.sciencemag.org/content/368/6489/395>. Within the United States, researchers have used genetic analysis to conclude that travel to and from New York City seeded most outbreaks elsewhere. See Benedict Carey & James Glanz, *Travel From New York City Seeded Wave of U.S. Outbreaks*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/05/07/us/new-york-city-coronavirus-outbreak.html>. While these sources dealt with the initial spread of COVID-19 after its first appearance in Wuhan, China, presumably similar dynamics would apply to efforts to contain a second COVID-19 wave.

64 See OLIU-BARTON ET AL., *EXIT*, *supra* note 10, at 4 (some emphasis omitted).

Under this plan, which has been adopted in modified form by France and Spain⁶⁵ (and praised by some commentators in the United States),⁶⁶ municipalities that have seen no new infections within seven days are declared green zones, in which people would gradually be permitted to resume their normal activities.⁶⁷ Neighboring communities that subsequently succeed in controlling their new infections are then combined to create a larger green zone,⁶⁸ with the ultimate aim of completing total reunification (that is, an entire country designated a green zone) within two to four months.⁶⁹ Local outbreaks might require the carve-out of a “red zone,” in as small a geographical area as possible, where activities would be temporarily restricted.⁷⁰ A subsequent refinement of the proposal calls for allowing travel between green zone areas either within the same country or between countries that have adopted a version of the system.⁷¹

A group of U.S. researchers have put forth their own proposal for a green zone system, focusing on how travel restrictions might be used to implement it.⁷² Their proposal suggests the designation of green, red, and yellow zones based on whether in the past two weeks there has been, respectively, no community transmission, some community transmission, and transmission identified through tracing an infected person’s contacts (as opposed to wider community spread) in a particular area.⁷³ Zones would be maintained by control checkpoints at the boundaries of the zone.⁷⁴ Visitors to green zones from yellow or red zones would be expected to quarantine for two weeks, with some more relaxed rules for essential workers, deliveries, and temporary transit through the green zone.⁷⁵

65 See Miquel Oliu-Barton, Bary Pradeliski & Luc Attia, *Green Zones: A Proposal to Exit the COVID-19 Lockdown*, VOXEU (Apr. 25, 2020), <https://voxeu.org/article/proposal-exit-covid-19-lockdown>.

66 Several researchers have promoted green zones as part of a comprehensive strategy to “reduce transmission to zero (#CrushTheCurve) and restore normal activity.” See AARON GREEN, CHEN SHEN & YANEER BAR-YAM, TRAVEL RESTRICTIONS FOR LIMITING COMMUNITY DISEASE SPREAD 1 (2020), <https://static1.squarespace.com/static/5e7b914b3b5f9a42199b3337/t/5eb6d4fb21f556696b788112/1589040380155/TravelRestrictions3.pdf>.

67 See OLIU-BARTON ET AL., EXIT, *supra* note 10, at 5.

68 See *id.* at 7.

69 See *id.* In actuality, French president Emmanuel Macron declared all of mainland France a unified green zone beginning June 15, 2020, a little over a month after the green zone plan went into effect on May 11. See *Paris Bars, Restaurants and Pools to Reopen Fully as Region Moves to ‘Green Zone’*, LOCAL (June 14, 2020), <https://www.thelocal.fr/20200614/paris-bars-restaurants-and-pools-to-reopen-as-region-moves-to-green-zone>.

70 See OLIU-BARTON ET AL., EXIT, *supra* note 10, at 7.

71 See OLIU-BARTON & PRADELSKI, *supra* note 9, at 3.

72 See GREEN, SHEN & BAR-YAM, *supra* note 66, at 1.

73 See *id.*

74 See *id.*

75 See *id.* at 1–2.

Like the green zone concept, plans for the phased end of lockdowns in many U.S. jurisdictions provide for identification of low-risk areas as candidates for the earliest easing of restrictions.⁷⁶ Yet most involve a fundamental difference: while recognizing that some areas have low rates of COVID-19 at a particular time, many plans do not provide for travel controls aimed at maintaining that status. This omission is puzzling and has the potential to slow progress against COVID-19 in the United States. To be sure, green zone proposals bear potential for misuse and are likely too restrictive to command widespread public support in the United States.⁷⁷ But travel restrictions need not be draconian or uniform, and they need not be in place for a long period of time. While green zone proposals are one route that jurisdictions within the United States might consider, alternatives, discussed *infra* in Part V, are possible as well.

III. TRAVEL RESTRICTIONS AND THE CONSTITUTION

The Constitution permits states to impose significant travel restrictions during an infectious disease outbreak. Although they have come to new prominence during the COVID-19 pandemic, travel restrictions, particularly

⁷⁶ See, e.g., *supra* text accompanying note 11.

⁷⁷ Many have noted that the COVID-19 response has become somewhat politicized and bound up with wider population differences about, for example, the role of government, making consensus around strict measures to combat the disease difficult. See Frank Newport, *The Partisan Gap in Views of the Coronavirus*, GALLUP (May 15, 2020), <https://news.gallup.com/opinion/polling-matters/311087/partisan-gap-views-coronavirus.aspx>. Further, the establishment and maintenance of green zones may be difficult within existing U.S. governance structures given that they may not track state or county lines. Green zones, that is, might happen to track state or local boundaries, but in many cases they might not. See *supra* note 69 (describing how France's green zone tracked national boundaries).

isolation and quarantine, have long been a tool of epidemic response (albeit not a universally fair or effective one) in the United States.⁷⁸

The ability to impose measures, including aggressive quarantine, to control the spread of infectious disease has often been seen as a cornerstone of state police power.⁷⁹ Long prior to the onset of COVID-19, most states had fairly broad statutes on the books authorizing quarantine measures for communicable diseases.⁸⁰ Quarantines and other travel restrictions at both the federal and state level have been used broadly and extensively throughout U.S. history,⁸¹ including during the 1918 influenza pandemic, when some states, in a preview of COVID-19 shutdowns a century later, “placed [an] entire state under quarantine, closing all places of amusement, churches, schools, and such places of business where crowds could congregate.”⁸²

States have historically had significant constitutional latitude in imposing quarantines or other travel restrictions in the context of a public health emergency, particularly when such curbs apply to a broad swath of the

78 See Katy M. Jobe, Comment, *The Constitutionality of Quarantine and Isolation Orders in an Ebola Epidemic and Beyond*, 51 WAKE FOREST L. REV. 165, 166 (2016) (explaining that “[q]uarantine laws in America have existed for more than three hundred years, and both isolation and quarantine tactics have been employed in the United States throughout the nation’s history,” initially at the state and later also at the federal level). As a matter of terminology, it is important to note that, “[i]n a public health context, quarantine and isolation are carefully distinguished interventions[;] . . . [i]solation is the separation of a patient known to have an infectious disease from otherwise healthy people,” while quarantine is an attempt to prevent spread of an illness by people who appear healthy but may have been exposed. Lesley A. Jacobs, *Rights and Quarantine During the SARS Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto*, 41 LAW & SOC’Y REV. 511, 513 (2007). Quarantine can be further divided into, on the one hand, a “geographic quarantine” (also called a *cordon sanitaire*) that aims to separate areas where community transmission of disease is occurring from those where it is not and, on the other, “individual or one-off quarantines” applied to “one person or a relatively small group of people.” Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 101, 111 (2007).

79 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, 9–10 (2018) (“Judicial deference to quarantine goes back to the earliest days of the Constitution when the nation was repeatedly threatened by horrific epidemics, and the protection of population health was viewed as one of the primary responsibilities of governments.”).

80 See *State Quarantine and Isolation Statutes*, NAT’L CONF. STATE LEGISLATORS, (Aug. 7, 2020), <https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx>.

81 See Jennifer Jolly-Ryan, *Balancing Interests and Risk of Error: What Quarantine Process Is Due After Ebola*, 96 NEB. L. REV. 100, 110–14 (2017). Early federal quarantines were imposed in response to cholera and yellow fever outbreaks. See *id.* at 110.

82 See *id.* at 113.

population.⁸³ Famously, two foundational Supreme Court cases—*Gibbons v. Ogden*⁸⁴ and *Jacobson v. Massachusetts*⁸⁵—explicitly affirmed that state public health authorities have broad powers in an emergency to impose quarantines⁸⁶ and limit other aspects of personal freedom.⁸⁷

The state quarantine power, to be sure, is not unlimited, and may be looked on less favorably by courts today than in the nineteenth century when both infectious disease and quarantines were rampant and when the state police power was subject to minimal judicial scrutiny in general.⁸⁸ In the wake of several probably unnecessary state-imposed quarantines of people traveling from Ebola-afflicted regions, many scholars have also advocated for limits on states' quarantine powers.⁸⁹ Further, as will be discussed further in the next section, courts even as long ago as the early twentieth century showed willingness to declare restrictions unconstitutional when they were used as cover for racial or ethnic discrimination.⁹⁰ Nonetheless, courts both

83 See *id.* at 112–13. Counties (if authorized under state law) and tribes may also have significant legal authority to impose certain kinds of travel restrictions. See *supra* text accompanying notes 40, 48. The issues attending the extent of tribal sovereignty, particularly in a public health emergency, are too complex to detail here. It is important, however, that tribes' sovereign autonomy, public health conditions, and territorial integrity should be taken into account as part of any coordinated cross-jurisdictional response to COVID-19.

84 22 U.S. 1 (1824).

85 197 U.S. 11 (1905).

86 Though *Gibbons* concerned the extent of Congress's powers to regulate interstate commerce and not the constitutionality of quarantines directly, the Court discussed state quarantines at length and implicitly affirmed their propriety, reasoning, for example, that “[q]uarantine laws . . . may be considered as affecting commerce; yet they are, in their nature, health laws.” *Gibbons*, 22 U.S. at 20 (emphasis omitted). Likewise, while *Jacobson* primarily dealt with a state's power to require vaccination, the Court also noted that it “has distinctly recognized the authority of a State to enact quarantine laws.” *Jacobson*, 197 U.S. at 25.

87 *Jacobson*, for example, affirmed a mandatory smallpox vaccination policy. *Jacobson*, 197 U.S. at 39.

88 See Michelle A. Daubert, Comment, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights*, 54 BUFF. L. REV. 1299, 1313–16 (2007) (noting that, prior to the expansion of substantive due process in the 1960s and 1970s, “courts often deferred to state statutes that fell within the police power to protect public health,” but that more recently, courts have subjected them to greater scrutiny).

89 See, e.g., Jolly-Ryan, *supra* note 81, at 104–09; Jobe, *supra* note 78, at 183–86; Polly J. Price, *Do State Lines Make Public Health Emergencies Worse? Federal Versus State Control of Quarantine*, 67 EMORY L.J. 491, 509–10 (2018) [hereinafter Price, *Worse*].

90 See *infra* text accompanying notes 119–20.

historically⁹¹ and more recently⁹² have also allowed state governments significant latitude in the tools they use to fight a major disease outbreak.

In general, courts are likely to continue to extend significant deference to states in the context of the current COVID-19 emergency. The most important signal comes from *South Bay United Pentecostal Church v. Newsom*, in which the U.S. Supreme Court—albeit by a narrow five to four vote—denied a church’s application for injunctive relief on First Amendment grounds against enforcement of California’s COVID-19 restrictions on religious services.⁹³ Justice Roberts’s concurrence noted that states have broad power to act within constitutional limits under such circumstances and that, when acting within such limits, state orders “should not be subject to second-guessing by an ‘unelected federal judiciary,’ which lacks the background, competence, and expertise to assess public health and is not accountable to the people.”⁹⁴ Roberts—like many lower courts considering challenges to COVID-19 control measures⁹⁵—explicitly relied on *Jacobson v. Massachusetts* in his reasoning.⁹⁶

Lower courts have largely rejected challenges to mandatory quarantines and other travel restrictions imposed in the context of the COVID-19 emergency. In *Bayley’s Campground v. Mills*, a federal district court considered a challenge on constitutional right-to-travel and procedural due process grounds by out-of-state residents and campground owners to Maine’s fourteen-day quarantine.⁹⁷ To be sure, the court was not wholly unsympathetic to the plaintiffs: it noted that the restrictions “effectively close[d] the border for many would-be travelers,”⁹⁸ found that the action “ha[d] potential,”⁹⁹ and (writing before the *South Bay United* opinion was

91 See *Gibbons*, 22 U.S. at 20; *Jacobson*, 197 U.S. at 25.

92 See Price, *Worse*, *supra* note 89, at 506–08 (suggesting that even unwarranted quarantine orders are difficult to successfully challenge in court); see also Anthony Michael Kreis, *Contagion and the Right to Travel*, HARV. L. REV. BLOG (Mar. 27, 2020), <https://blog.harvardlawreview.org/contagion-and-the-right-to-travel/> (“[T]he simple reality is this: federal courts will not enjoin temporary measures that are facially calculated to save lives.”).

93 See *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020).

94 See *id.* at 1614 (Roberts, C.J., concurring in the denial of application for injunctive relief) (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)).

95 *Id.* at 1613 (Roberts, C.J., concurring in the denial of application for injunctive relief); see, e.g., *Six v. Newsom*, No. 8:20-cv-00877, 2020 WL 2896543, at *3–4 (C.D. Cal. May 22, 2020); *Lawrence v. Colorado*, No. 1:20-cv-00862, 2020 WL 2737811, at *5 (D. Colo. Apr. 19, 2020). By contrast, the court in *Bayley’s Campground Inc. v. Mills*, No. 2:20-cv-00176, 2020 WL 2791797, at *8 (D. Me. May 29, 2020) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)), described *Jacobson* as “‘see also’ authority” that “does not provide the standard of review for this case.”

96 See *South Bay United*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in the denial of application for injunctive relief).

97 See *Bayley’s Campground*, 2020 WL 2791797, at *1.

98 *Id.* at *10.

99 *Id.* at *13.

available)¹⁰⁰ declined to apply the lenient *Jacobson* framework.¹⁰¹ Yet the judge nonetheless denied a preliminary injunction, noting that “I am not persuaded, at this date, that the measure is not the least burdensome way to serve a compelling governmental interest, given all that we do now know.”¹⁰² More recently, a federal court in Hawaii more forcefully rejected a quarantine challenge, noting that it was not a “travel ban” and applied equally to residents and nonresidents; as the court concluded, “[t]his limited restriction (not ban) is a reasonable one. We are in the middle of a pandemic”¹⁰³

Some litigants have attempted to challenge *intrastate* as well as interstate movement restrictions on right-to-travel grounds.¹⁰⁴ In *Six v. Newsom*, a federal district court rejected that argument as asserted against California’s stay-at-home order, explaining that “neither the Supreme Court nor the Ninth Circuit have recognized as a protected component the right to *intrastate* travel.”¹⁰⁵ Citing *Jacobson* as the relevant framework, the court refused to grant a temporary restraining order on the other constitutional grounds plaintiffs had invoked as well.¹⁰⁶ In *Lawrence v. Colorado*, the court likewise rejected a *pro se* litigant’s request to enjoin enforcement of Colorado’s restrictions on travel, among other activities.¹⁰⁷ Noting that, under *Jacobson*, “[s]tates have broad powers to act during an emergency to secure public health and safety,” the court—while not dismissing the idea that intrastate travel could be constitutionally protected¹⁰⁸—found that the “right to travel may be restricted where necessary to protect [an] area from disease.”¹⁰⁹

These cases suggest that both *Jacobson* and, more broadly, the deferential approach to public health regulation it represents retain significant force. Nonetheless, there are a few more worrisome indicators for states seeking to

100 Both opinions were released on May 29, 2020.

101 *Bayley’s Campground*, 2020 WL 2791797, at *8.

102 *Id.* at *9.

103 See *Carmichael v. Ige*, No. 20-00273, 2020 WL 3630738, at *7 (D. Haw. July 2, 2020).

104 In addition to the cases discussed *infra*, see *Calvary Chapel Lone Mountain v. Sisolak*, No. 2:20-cv-00907, 2020 WL 3108716, at *1, *4 (D. Nev. June 11, 2020) (finding, in part, “no cognizable right to travel claim” in case challenging Nevada’s restrictions on religious services); *Best Supplement Guide, LLC v. Newsom*, No. 2:20-cv-00965, 2020 WL 2615022, at *3, *5 (E.D. Cal. May 22, 2020) (finding, in a challenge to gym closures, that even assuming that a right to intrastate travel were to exist, the court would apply the *Jacobson* framework under which plaintiffs must show at minimum a serious question as to whether the measures at issue “beyond all question” invaded their fundamental rights, and ultimately concluding that “[t]his Court cannot find that the State and County orders violate ‘beyond all question’ a right that is not yet known to exist”) (quoting *Cross Culture Christian Center v. Newsom*, No. 2:20-cv-00832, 2020 WL 2121111, at *5 (E.D. Cal. May 5, 2020)).

105 *Six v. Newsom*, No. 8:20-cv-00877, 2020 WL 2896543, at *5 (C.D. Cal. May 22, 2020).

106 See *id.* at *3.

107 See *Lawrence v. Colorado*, No. 1:20-cv-00862, 2020 WL 2737811, at *1, *12 (D. Colo. Apr. 19, 2020).

108 *Id.* at *5. The court noted that “[s]urely . . . a permanent ban on social visits or travel would warrant close judicial scrutiny.” *Id.* at *10.

109 *Id.* at *10 (citing *Zemel v. Rusk*, 381 U.S. 1, 15–16 (1965)).

maintain travel restrictions as part of a COVID-19 response. In addition to the cases mentioned, scores of challenges to shelter-in-place restrictions have been filed.¹¹⁰ While most have been mooted (or otherwise found nonjusticiable)¹¹¹ by governors' decisions to lift such measures as part of a reopening plan, it seems possible that lawsuits (and the possibility of their success) nonetheless contributed to the public pressure that may have hastened reopening decisions in some cases.¹¹² Further, courts have not uniformly deferred to states' pandemic response orders, including their travel-related aspects. As previously noted, the *Bayley's Campground* court, while ultimately declining to enjoin Maine's quarantine, suggested that the *Jacobson* approach was overly lenient and outdated.¹¹³ In *Roberts v. Neace*, plaintiffs challenged Kentucky's executive order, carrying criminal penalties, forbidding out-of-state travel and mass gatherings for Kentucky residents and requiring non-Kentucky visitors and Kentucky residents who violate these orders to quarantine for fourteen days.¹¹⁴ The district court granted a preliminary injunction, noting that while "[t]he Court is aware that the pandemic now pervading the nation must be dealt with [T]hese travel regulations are not narrowly tailored to achieve the government's purpose."¹¹⁵ The court was particularly concerned about several specific scenarios, including the problem of travelers passing through Kentucky on their way to another destination, the possibility of traffic jams at checkpoints, the lack of availability of quarantine facilities, and the separation of family members living on opposite sides of Kentucky's border, among other issues.¹¹⁶ In *Wisconsin Legislature v. Palm*, the Wisconsin Supreme Court also cited travel

110 See Caitlin Oprysko, *Democratic Governors Hit with Flurry of Legal Challenges to Coronavirus Lockdowns*, POLITICO (last updated May 17, 2020, 8:59 PM), <https://www.politico.com/news/2020/05/17/democratic-governors-coronavirus-lockdown-legal-challenges-261428>.

111 See, e.g., *Martinko v. Whitmer*, No. 20-CV-10931, 2020 WL 3036342, at *3 (E.D. Mich. June 5, 2020) (challenge to travel restrictions moot because relevant order was rescinded); *Faust v. Inslee*, No. C20-5356, 2020 WL 2557329, at *1-2 (W.D. Wash. May 20, 2020) (challenge to restrictions on public transportation, among other prohibitions, not ripe, among other reasons for dismissal); *W.O. v. Beshear*, No. 3:20-cv-00023, 2020 WL 2314880, at *1, *6 (E.D. Ky. May 9, 2020) (plaintiffs lacked standing following modification of executive orders); *Krach v. Holcomb*, No. 1:20-CV-184, 2020 WL 2197855, at *1 (N.D. Ind. May 6, 2020) (challenge to order prohibiting nonessential travel moot because order had expired).

112 See, e.g., Laurel Rosenhall, *Even Harder Than Shutting Down: How Does Newsom Reopen California?*, CAL MATTERS (Apr. 23, 2020), <https://calmatters.org/health/coronavirus/2020/04/newsom-coronavirus-california-reopen-pressure-decisions/> (observing that lawsuits and U.S. Attorney General William Barr's announcement that the federal government might join them created pressures on California Governor Gavin Newsom to modify the state's strict stay-at-home order).

113 See *Bayley's Campground Inc. v. Mills*, No. 2:20-cv-00176, 2020 WL 2791797, at *8 (D. Me. May 29, 2020).

114 *Roberts v. Neace*, No. 2:20cv054, 2020 WL 2115358, at *1-2 (E.D. Ky. May 4, 2020).

115 *Id.* at *5.

116 See *id.*

restrictions several times in a close decision invalidating stay-at-home orders issued by a Wisconsin public health official, though the decision was founded on state statutory rather than federal constitutional grounds.¹¹⁷

IV. REASONS FOR CAUTION IN THE USE OF TRAVEL RESTRICTIONS

Aside from potential legal challenges to travel restrictions, there are historical grounds for caution in their use. Large-scale quarantine measures have been abused in the past for discriminatory purposes. Travel restrictions have been used to implement racist prejudices and baselessly stigmatize communities.¹¹⁸ Notoriously, for example, San Francisco in the late nineteenth century attempted to quarantine the city's so-called "Chinese Quarter," allegedly to prevent the spread of bubonic plague but with no evidence that such a limited quarantine would be effective.¹¹⁹ Other quarantines have simply been wasteful and ineffective, such as nineteenth-century "shotgun quarantines," so called because communities that had imposed them reportedly used armed patrols to turn away travelers.¹²⁰ Shotgun quarantines were used commonly in the post-Civil War South in a futile attempt to control yellow fever, which is spread primarily by mosquitos and not, as was believed at the time, by infected cargo or direct person-to-person transmission.¹²¹ Finally, some early quarantines had an aggressive component; as Polly Price has pointed out, they were often conceptualized as targeted barriers *against* people from a disease-burdened region rather than a measure to limit the spread of illness more generally.¹²² In consequence, they were sometimes used in service of local rivalries and grudges. An 1889 law review article pointed to "gross abuses" of the quarantine power for

117 See *Wis. Legislature v. Palm*, 942 N.W.2d 900, 916–18 (Wis. 2020).

118 See Batlan, *supra* note 78, at 60 ("[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 [and it has served as] . . . a form of stigma inflicted on those who are already stigmatized."); Jolly-Ryan, *supra* note 81, at 110 ("[S]ome quarantines were used as a platform to discriminate against immigrants.").

119 See Daubert, *supra* note 88, at 1311–12; *Wong Wai v. Williamson*, 103 F. 1, 2–4, 7 (N.D. Cal. 1900) (striking down quarantine and mandatory inoculation program applicable to a heavily Chinese portion of San Francisco on the grounds that it was discriminatorily and without evidence directed solely at the "Asiatic . . . race as a class, without regard to the previous condition, habits, exposure to disease, or residence of the individual").

120 Polly J. Price, *Epidemics, Outsiders, and Local Protection: Federalism Theater in the Era of the Shotgun Quarantine*, 19 U. PA. J. CONST. L. 369, 380–81 (2016) [hereinafter Price, *Theater*].

121 The role of mosquitos as a vector for yellow fever transmission "would not be understood until the turn of the twentieth century." *Id.* at 376. As Price notes, however, the prevailing understanding of yellow fever transmission was not wholly incorrect, as mosquitos can only spread the disease in the presence of an infected person. See *id.* at 377.

122 See *id.* at 381.

purposes such as that of “commercial retaliation . . . against places where [the presence of] disease was not even suspected.”¹²³

Quarantines have been criticized more recently for being overly burdensome and often pointless. Quarantines of individuals have often been misguided.¹²⁴ During the Ebola epidemic, states imposed controversial quarantines on travelers from West Africa who were likely at little or no risk for spreading the disease.¹²⁵ Similarly, restrictions aimed at totally preventing the introduction of a disease into a community tend to be ineffective because of the inevitable porosity of borders.¹²⁶ Scholars have also noted that travel restrictions can be counterproductive if they cause panic or induce the affected public to “try to flee, risking the spread of infection.”¹²⁷

Arguably, many of the travel restrictions at the U.S. border imposed by the Trump administration to combat COVID-19 embodied some of these historical pitfalls. Restrictions on travel from China effective on February 2, 2020, proved to be extremely porous, allowing up to 40,000 people to enter the United States after the ban was imposed, frequently with inadequate screening for COVID-19 symptoms or exposure.¹²⁸ A later ban on travel from Europe may have been affirmatively counterproductive, causing people to return to the United States in haste under crowded conditions that likely seeded outbreaks in many parts of the country.¹²⁹

Thus, even assuming state authorities are within constitutional bounds when they impose quarantines, it is important that they use them in a way that does not impose undue burdens on particular communities or subvert the purposes they are trying to achieve. COVID-19 has already exacerbated much inequality within the United States. For example, the early toll of the virus

123 See Blewett H. Lee, *Limitations Imposed by the Federal Constitution on the Right of the States to Enact Quarantine Laws*, 2 HARV. L. REV. 267, 268–69 (1889).

124 See Parmet, *supra* note 79, at 17–18 (noting that quarantines of individuals are ineffective for the many diseases spread “by insects and animal vectors” or contaminated water and that, in addition, they “can be costly and run counter to the high regard that Americans place on autonomy”).

125 See *id.* at 1–3.

126 See Price, *Worse*, *supra* note 89, at 499.

127 See Parmet, *supra* note 79, at 29. While not opposed to quarantines in appropriate circumstances, Parmet urges that they should be “imposed in conformity with other constitutional norms and in furtherance of public health.” *Id.* at 30.

128 See Steve Eder, Henry Fountain, Michael H. Keller, Muye Xiao & Alexandra Stevenson, *430,000 People Have Traveled From China to U.S. Since Coronavirus Surfaced*, N.Y. TIMES (Apr. 15, 2020), <https://www.nytimes.com/2020/04/04/us/coronavirus-china-travel-restrictions.html> (noting that 430,000 people had traveled from China to the United States since the disease appeared, nearly 40,000 of whom made the trip after restrictions were imposed).

129 See Greg Miller, Josh Dawsey & Aaron C. Davis, *One Final Viral Infusion: Trump’s Move to Block Travel from Europe Triggered Chaos and a Surge of Passengers from the Outbreak’s Center*, WASH. POST (May 23, 2020, 11:14 AM), https://www.washingtonpost.com/world/national-security/one-final-viral-infusion-trumps-move-to-block-travel-from-europe-triggered-chaos-and-a-surge-of-passengers-from-the-outbreaks-center/2020/05/23/64836a00-962b-11ea-82b4-c8db161ff6e5_story.html.

has been borne disproportionately by people of color and lower-income workers.¹³⁰ Widespread testing for COVID-19 antibodies in San Francisco’s Mission District, for example, found “stark ethnic and economic disparities” among past and current infections.¹³¹ It is vitally important that affected communities should not be overly burdened and that the historical frame of “quarantine against” be scrupulously avoided.¹³²

Because of the door they open to discriminatory use and the stringent restrictions required to implement them, strict European-style green zones are likely infeasible in the United States. Nonetheless, parts of the plan may be worth borrowing, particularly insofar as division into zones can be used to direct resources to more affected communities rather than stigmatizing them. In thinking about such efforts, it is worth noting that travel can in itself perpetuate COVID-19’s unequal toll. For example, in the early days of the pandemic in the United States, the “uber-wealthy” often fled from urban areas to resort towns reliant on the labor of Latinx people, sometimes bringing the virus with them and overwhelming rural health care systems.¹³³

V. EFFECTIVELY IMPLEMENTING AND TAILORING TRAVEL RESTRICTIONS AND OTHER MEASURES

Despite travel restrictions’ inauspicious history, measures to control travel—if carefully designed—may be a key part of returning safely to more normal conditions. Travel-discouraging provisions can be imposed in a manner that is constitutionally sound and minimally coercive while still effectively contributing to the control of COVID-19. Rules in place to limit or discourage movement may be effective in establishing norms of conduct even without stringent enforcement or penalties.¹³⁴

130 See Aaron Williams & Adrian Blanco, *How the Coronavirus Exposed Health Disparities in Communities of Color*, WASH. POST (May 26, 2020), <https://www.washingtonpost.com/graphics/2020/investigations/coronavirus-race-data-map/>.

131 GABRIEL CHAMIE ET AL., SARS-COV-2 COMMUNITY TRANSMISSION DURING SHELTER-IN-PLACE IN SAN FRANCISCO 10 (2020), <https://www.medrxiv.org/content/10.1101/2020.06.15.20132233v1.full.pdf>. In the study, positive rates were twenty times higher among Latinx than non-Latinx residents, and “recent infections were concentrated almost exclusively among low-income, Latinx people working frontline jobs.” *Id.*

132 See *supra* text accompanying note 122.

133 See Kirk Siegler, *Sun Valley, Idaho: ‘No One Should Come Here’*, NPR (Mar. 27, 2020, 2:01 PM), <https://www.npr.org/2020/03/27/822122059/sun-valley-idaho-no-one-should-come-here> (noting that resort towns have high rates of income inequality and “tend to rely heavily on a mostly lower income Latino workforce”).

134 See Lance Gable, *Evading Emergency: Strengthening Emergency Responses Through Integrated Pluralistic Governance*, 91 OR. L.R. 375, 399–400 (2012) (“Laws may establish and codify norms of conduct and cooperation, as well as setting the overall goals to be sought through public health emergency preparedness and response efforts.”).

To begin with, some of the broad outlines of green zone plans could be helpful in controlling the COVID-19 pandemic. State and local leaders could, for example, be encouraged to map the prevalence of COVID-19 in terms of its actual geography rather than arbitrary county and state lines.¹³⁵ Understanding which regions—whether individual neighborhoods in a large metropolitan area or adjoining portions of several rural states—are more or less affected by COVID-19 would provide helpful information about patterns of infection, where worrisome trends may be arising, and where resources should be directed. Even if no formal restrictions were put in place, simply communicating information about green zones and using them as a basis for recommendations to the public about travel could inform individual decisionmaking and help shape social behavior.

As discussed, caution is nonetheless warranted to prevent green zones from being used in a discriminatory or stigmatizing fashion,¹³⁶ with emphasis on the fact that, while some areas have more cases at a given time, the potential for spread of the virus is the same in all communities. Any restrictions should be flexible and forward looking; it makes little sense, for example, to target travelers from a hotspot far across the country when a more concerning situation may be local traffic between two nearby counties where infections are low but growing.

Second, public authorities could take into account information about travel patterns in designing and implementing COVID-19 restrictions. Jurisdictions with low COVID-19 prevalence might work together with surrounding communities in deciding whether and how to reopen businesses. A community might, for example, hold off on opening bars that attract many visitors from surrounding areas even as it allows more locally focused establishments to open with fewer restrictions. Alternatively, it might choose to prioritize enforcement of mask and social distancing requirements in businesses where out-of-towners concentrate;¹³⁷ such enforcement might also make such establishments less attractive destinations for visitors, who may be searching for places in which they can gather in groups mask-free. In addition to working together to implement regionally consistent policies, states could better coordinate contact tracing across jurisdictions in areas that attract

135 Polly J. Price has noted the challenges of negotiating jurisdictional borders in an epidemic that fails to honor such arbitrary lines. *See* Price, *Worse*, *supra* note 89, at 494 (“State lines demarking political units present challenges in the face of a potential national epidemic.”); *see also* Gable, *supra* note 134, at 403 (“A significant concern with the design of the emergency response system stems from the division of legal powers across federal, state, and local governments.”).

136 *See supra* text accompanying notes 130–33 (discussing the disparate impact of COVID-19 on people of color and lower-income workers).

137 Many crowded bars and restaurants that have attracted visitors have actually been acting in defiance of (presumably inadequately enforced) local rules. *See, e.g.*, Erin Robinson, *Two Spokane Valley Bars Reopen, Defying State Order*, KXLY.COM (May 19, 2020, 8:31 AM), <https://www.kxly.com/two-spokane-valley-bars-reopen-defying-state-order/> (describing “packed” tables at bars operating in violation of Washington state law).

numerous visitors. To be sure, public health departments may have pre-COVID-19 mechanisms in place for cooperation with their neighbors, and some regional coordination has occurred in the COVID-19 response—perhaps most prominently in the decision by six Bay Area counties to jointly agree to and announce a strict shelter-in-place order in the early days of the pandemic.¹³⁸ At other times, however, jurisdictions have failed to work together effectively.¹³⁹

Cooperation between states will inevitably run into logistical and political obstacles.¹⁴⁰ Better coordination of COVID-19 response among cities and counties *within* states is easier to implement and may ultimately be equally important. States (or groups of counties acting on their own) could, for example, create mechanisms to facilitate tracing of contacts across multiple counties, while state reopening plans could take into account regional travel patterns rather than allowing counties to make decisions based solely on local conditions.

Third, noncoercive or minimally coercive measures, such as voluntary quarantines, offering COVID-19 tests as an alternative to quarantines, or forceful recommendations to limit travel, may on their own have significant effect.¹⁴¹ As the experience of the Oglala Sioux has shown, checkpoints for visitors that simply remind them of the rules may encourage awareness of local conditions and compliance with appropriate precautions.¹⁴² Public employees or volunteers could likewise distribute masks and provide information at checkpoints or other areas frequented by visitors.¹⁴³ While checkpoints might excessively burden travel in many locations, they might be

138 See Rebecca Robbins, *In Strictest U.S. Coronavirus Response So Far, Six Bay Area Counties Order ‘Shelter in Place’*, STAT NEWS (Mar. 16, 2020), <https://www.statnews.com/2020/03/16/coronavirus-bay-area-counties-shelter-in-place/>.

139 See, e.g., *supra* text accompanying note 32.

140 Polly J. Price, for example, has observed that “state and local governments lack sufficient incentives to cooperate . . . to stem a public health emergency of potentially wide geographic scope. . . . [L]ittle has been done on a regional or multi-state basis.” See Price, *Worse*, *supra* note 89, at 494. For this reason, some have in the past advocated federal involvement in the quarantine process. See *id.* at 495. The stalled federal response to COVID-19, however, makes such a plan unlikely in the current pandemic. See Sheryl Gay Stolberg, Noah Weiland, Sarah Mervosh & David E. Sanger, *With the Federal Health Megaphone Silent, States Struggle With a Shifting Pandemic*, N.Y. TIMES (June 17, 2020), <https://www.nytimes.com/2020/06/17/us/politics/coronavirus-pandemic-federal-response.html>.

141 See Mark A. Rothstein, *Are Traditional Public Health Strategies Consistent with Contemporary American Values?*, 77 TEMP. L. REV. 175, 191–92 (2004) (suggesting that, given the legal and cultural climate in the United States, “mandatory, court-ordered quarantine would be less effective than voluntary quarantine as a public health response to an epidemic”).

142 See *supra* text accompanying note 49.

143 During the 1918 influenza pandemic, for example, the Red Cross distributed masks to commuters at San Francisco’s ferry terminal. See *San Francisco, California and the 1918–1919 Influenza Epidemic*, UNIV. MICH. CTR. HISTORY MED.: INFLUENZA ENCYCLOPEDIA, <https://www.influenzaarchive.org/cities/city-sanfrancisco.html#>.

useful in others, perhaps especially in sparsely populated areas that nonetheless have discrete attractions that draw visitors. States using checkpoints might take care to structure them in a way that responds to the concerns of the *Roberts v. Neace* court, such as designing a system to avoid undue traffic delay and to allow visitors merely traversing the state to do so freely.¹⁴⁴ Although glitches ultimately forced the state to abandon the program,¹⁴⁵ Utah's innovative system of notifying travelers of screening requirements by advance text message provides a possible model for other states.

CONCLUSION

The COVID-19 pandemic in the United States has proved resistant to many efforts to control it. The virus undoubtedly spreads through travel, and the decentralized response to the disease in the United States creates opportunities for people wishing to avoid more stringent requirements to travel to areas with more lax rules. As part of a comprehensive pandemic response plan, measures to limit travel between places where few active COVID-19 cases are present and places where many are could make a significant difference in slowing the epidemic. Although states have significant constitutional latitude to impose mandatory quarantines and other restrictions, less coercive measures—including voluntary quarantines, coordinating regional reopening and contact tracing, and visitor checkpoints for gathering and distributing information—may be more politically palatable while also improving the effectiveness of the COVID-19 response.

144 See *supra* text accompanying note 116.

145 See Sean P. Means, *Utah's 'Bold Experiment' To Text Alerts to Road Travelers To Collect Coronavirus Data Ends Abruptly*, SALT LAKE TRIB. (Apr. 13, 2020), <https://www.sltrib.com/news/2020/04/13/utahs-bold-experiment/>.