THE RIGHT TO TRAVEL DURING THE COVID-19 PANDEMIC

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States have responded to the novel COVID-19 pandemic by restricting interstate travel through mandatory quarantines. These actions may have violated the right to travel protected by the Privileges and Immunities Clause. Generally, each state's action did not implicate the Privileges and Immunities Clause because the quarantine requirement applied to residents and non-residents equally. Additionally, the states' actions would still be constitutional even if they implicated the right to travel because stopping COVID-19 through a reasonable quarantine is a compelling state interest. However, if future actions unreasonably restrict interstate travel in response to COVID-19, then those acts would violate the Privileges and Immunities Clause. These conclusions will be impacted as state actions become less or more reasonable over time, or by the distribution of vaccines.

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INTRODUCTION

I was in Mesa, Arizona with my wife and son on a much-deserved spring break from law school when Arizona Governor Doug Ducey issued Declaration of Emergency *COVID-19* (Mar. 11, 2020). Consequently, my father's 65th birthday party was canceled, and we abruptly returned to our apartment in Tucson. Between then and August, my three-year-old son did not play on a playground, swim in a public pool, or meet anyone new. In September, my uncle succumbed to COVID-19 and left this earth. Then, in December, I contracted the disease during finals while living in a 900-square-foot apartment with my wife and two children. Others likely have similar stories of how COVID-19 impacted their lives, and many have been impacted more than me. I doubt that anyone who lived through the pandemic will forget the endless summer that ensued and the uncertainty they faced.

The United States changed significantly during the COVID-19 pandemic, and one cannot help but wonder how the legal landscape has reacted to those changes. This Note responds to that query by exploring whether state restrictions of the right to travel during the COVID-19 pandemic were constitutional under the Privileges and Immunities Clause (the "Clause"). The Clause itself is silent on the issue of emergency restrictions on travel,[1] and the Supreme Court has never directly

1. U.S. CONST. art. IV, § 2, cl 1.

addressed the issue.[2] However, a federal appellate court did touch on the issue, but only in dicta.[3]

First, this Note will lay out the limitations of the analysis and present the narrow question examined. Next, it will give a history of the Clause up to its inclusion in the U.S. Constitution, followed by the general purpose and understanding of the Clause. Then, this Note will determine the current rule by analyzing the Clause, the right to travel, and state powers. Subsequently, it will apply the rule to current actions taken by states and to some hypothetical actions to illustrate how far states would need to go to violate the right to travel protected by the Clause. Finally, this Note will summarize its findings and propose some additional questions to explore.

I. LIMITATIONS[4]

A. Scope of Analysis

While the Clause has been held to protect many rights—freedom of speech,[5] access to courts,[6] property ownership,[7] and the practice of business[8]—this Note will examine the Clause and its interaction with the right to travel. Analyzing any mixture of the above rights protected by the Clause may require different rules, levels of scrutiny, and varying amounts of context. Therefore, this Note will only consider the right to travel devoid of any other competing or complementing rights. Additionally, there are three distinct rights within the right to travel:

> [T]he 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,

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2. *See infra* Part IV.

3. *See* W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 497 (7th Cir. 1984) ("On this ground a state could keep out nonresidents who had been exposed to some communicable disease of which the state was still substantially free.").

4. While researching for this Note, I was surprised to find that law articles generally do not express the limitations of their analysis. Recognizing the limitations of an article is a common practice in other scholarly journals and can make an article stronger. *See* James Adams et al., *Elite Interacts and Voters' Perceptions of Parties' Policy Positions*, 65 AM. J. POL. SCI. 101, 105–06 (2021) ("[W]e are under no illusions that [our measure] perfectly captures either the true nature of parties' underlying interactions or citizens' perceptions of these interactions as filtered through the media."); Lauren Cohen et al., *Internal Deadlines, Drug Approvals, and Safety Problems*, 3 AM. ECON. REV.: INSIGHTS 67, 72–73 (2021) ("There are several limitations to the use of adverse events data as a measure of safety."); David J.A. Jenkins et al., *Glycemic Index, Glycemic Load, and Cardiovascular Disease and Mortality*, 384 NEW ENG. J. MED. 1312, 1319–20 (2021) ("Our study has some potential limitations."). Hence, I decided to make this Note a model for how other authors might approach expressing their limitations. Notably, my approach is more forthright than the examples I provided, but it nonetheless serves as an example that an author makes a paper stronger even when the paper extensively address its limitations.

5. Friends of Rockland Shelter Animals, Inc. v. Mullen, 313 F. Supp. 2d 339, 344 (S.D.N.Y. 2004).

6. Cole v. Cunningham, 133 U.S. 107, 113–14 (1890).

7. Ward v. Maryland, 79 U.S. 418, 430 (1870).

8. Doe v. Bolton, 410 U.S. 179, 199 (1973).

> and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[9]

This Note will specifically focus on a citizen's right to leave and enter another state.

Yet there is no case law on whether each facet of the right to travel has its own unique test to determine the constitutionality of acts. The right to travel is often discussed in broad terms in case law and produces tests that apply to the right to travel in general no matter which facet is at issue.[10] Thus, this Note may use case law from each facet of the right to travel to determine the current state of the rule because there is no jurisprudential difference between them.

Finally, this Note assumes that all state executives and their agencies have the emergency powers necessary to curb the right to travel protected by the Clause during a pandemic. This assumption is warranted given that more than a quarter of states have restricted travel through an executive order, an emergency declaration, or a combination of the two.[11] Therefore, this Note will set aside the query of state-granted powers and only consider whether states have authority under federal law to curb the right to travel protected by the Clause during the COVID-19 pandemic.

B. Scope of Application

There are many ways a state can restrict the right to travel, and some of those ways may even be legal. This Note will only apply the analysis to actions taken by the state governor or the state health department. Additionally, states may have taken more than one action that restricted the right to travel in light of the COVID-19 pandemic. For convenience, this Note's application will only consider the first governor or state health department action from each state that responded to the COVID-19 pandemic by restricting travel via quarantine. This will limit the scope of the application to state actions that were taken in the beginning of a pandemic. Additionally, a majority of the state actions in the application[12] were issued in the first four months of 2020[13] when COVID-19 may have still been considered novel. Thus, the application is being conducted with the above framework in mind and would be conducted differently had it focused on state actions that occurred in 2021 or following the production of the vaccine. While this basic application is limited in scope, it will serve as a blueprint for applying the Clause to future state actions that restrict the right to travel during a pandemic.

C. Question

In light of the limitations above, this Note will explore whether states have the authority to restrict the right to travel during the COVID-19 pandemic despite

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9. Saenz v. Roe, 526 U.S. 489, 500 (1999); *see also* Pollack v. Duff, 958 F. Supp. 2d 280, 288 (D.D.C. 2013), *aff'd*, 793 F.3d 34 (D.C. Cir. 2015).

10. *See infra* Part IV.

11. *Id.*

12. *See infra* Section V.A.

13. *Travel Restrictions Issued by States in Response to the Coronavirus (COVID-19) Pandemic, 2020-2021*, BALLOTPEDIA, https://ballotpedia.org/Travel_restrictions_issued_by_states_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021 [https://perma.cc/4F9J-PKSH] (last visited Jan. 23, 2021).

the Clause. The Note will then apply the findings to recent state actions and determine if any state has acted beyond its authority. The Note will also present possible scenarios of state actions to see if they would move beyond the states' authority granted under the Clause. While the analysis will be specific to the COVID-19 pandemic, the rules and principles identified in this Note will be insightful to permissible state actions in future pandemics.

II. BACKGROUND OF THE PRIVILEGES AND IMMUNITIES CLAUSE

A. History

The concept of the Clause and the phrase "privileges and immunities" made its first debut in American legal text via the Articles of Confederation.[14] Notably, there appears to be little to no debate about its inclusion within the Articles of Confederation.[15] The subsequent four-month debate before the ratification of the Constitution also barely mentions the Clause.[16] This may indicate that the concepts contained in the Clause were generally understood and accepted at the time. In any event, the concepts were finally ratified and embodied in the U.S. Constitution.[17]

B. General Purpose and Understanding of the Privileges and Immunities Clause

From a general perspective, some federal courts have held that "[t]he words 'privileges and immunities' [only] relate to the rights of persons, place or property."[18] Even if the Clause is viewed in light of this restriction, the Clause is still applicable to this Note because the right to travel is exercised by a person's interstate travel.

One established purpose of the Clause is to ensure that foreign[19] state citizens are given the same rights as local[20] state citizens within the local state.[21] Another established purpose is to create unity in the federalist United States.[22] For example, in 1948 the Supreme Court held in *Toomer* that local statutes attempting

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14. ARTICLES OF CONFEDERATION OF 1781, art. IV; Slaughter-House Cases, 83 U.S. 36, 75 (1872).

15. 1 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION OF PHILADELPHIA IN 1787, 70-78-13 (2d ed. 1836) (note the lack of any noteworthy discussion on the privileges and immunities of the several states).

16. *Notes on the Debates in the Federal Convention*, THE AVALON PROJECT, https://avalon.law.yale.edu/subject_menus/debcont.asp [https://perma.cc/29UD-GKMG] (last visited Feb. 8, 2021) (see June 19, Aug. 6, Aug. 20, and Sept. 12 for references to the Clause).

17. U.S. CONST. art. IV, § 2, cl. 1.

18. United States v. Morris, 125 F. 322, 323 (E.D. Ark. 1903); Magill v. Brown, 16 F. Cas. 408, 428 (E.D. Pa. 1833).

19. For the remainder of this Note, the word "foreign" means that a citizen, document, or otherwise is from a different state than the state whose laws are at issue in the example.

20. For the remainder of this Note, the word "local" means that a citizen, document, or otherwise is from the state whose laws are at issue in the example.

21. Toomer v. Witsell, 334 U.S. 385, 395 (1948); Util. Contractors Ass'n of New England v. City of Worcester, 236 F. Supp. 2d 113, 116–17 (D. Mass. 2002).

22. *Toomer*, 334 U.S. at 395; *Util. Contractors Ass'n*, 236 F. Supp. 2d at 117.

to protect local shrimp fishers by regulating foreign shrimp fishers violated the Clause.[23] The local statutes required a $25 license of local fishers, a $2,500 license of foreign fishers, proof of income tax paid on all shrimp caught in the local state, all boats catching shrimp to process the catch in the local state, and prescribed pecuniary and criminal liability for violations.[24] The Court reasoned that the local state's choice to create regulation that essentially prohibited foreign citizens from shrimping was a clear violation of the Clause.[25] The Court further explained that the local regulation could have focused on shrimping methods to protect the shrimp rather than which citizen helmed a shrimping boat.[26] Thus, the Court concluded that the local statutes violated the Clause by favoring local citizens over foreign citizens, which effectively divided rather than unified the federalist United States.[27]

Also, the Clause does not grant new rights to citizens but simply protects the privileges and immunities that already exist in the state.[28] In *Osborne*, the Court chose not to use the Clause to impute liability to a defendant where no federal law existed, but sustained the local law that absolved the defendant of liability.[29] The Court reasoned that federal law must generally defer to local law to determine local rights because states have almost complete authority to determine their rights and the application of those rights.[30]

Furthermore, the Clause does not impute the special rights found in a foreign state to a local state visited by a foreign citizen.[31] Nor does the Clause consider a foreign state's statutes and constitution when determining the constitutionality of the privileges and immunities in a local state.[32] In *Austin*, the Court held that a local statute violated the Clause where tax credits available only to local citizens effectively made only foreign citizens liable to the tax.[33] Further, the Court provided that the Clause would still be violated even if the local state allowed foreign states to adopt the tax credits, thereby making the tax uniform.[34] Thus, the Court concluded that the issue at hand was that the tax effectively differentiated between local and foreign citizens via special rights.[35] Consequently, the Court held that a local statute cannot depend on foreign statutes to comply with the Clause.[36]

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23. *Toomer*, 334 U.S. at 403.
24. *Id.* 389–91, 398–99.
25. *Id.* at 396–99.
26. *Id.*
27. *See id.* at 395–97, 403.
28. City of Detroit v. Osborne, 135 U.S. 492, 498 (1890); Slaughter-House Cases, 83 U.S. 36, 76 (1872).
29. *See Osborne*, 135 U.S. at 495–96, 500.
30. *Id.* at 497–98.
31. *See* Hauge v. Comm. for Indus. Org., 307 U.S. 496, 511 (1939); McKane v. Durston, 153 U.S. 684, 687 (1894).
32. Austin v. New Hampshire, 420 U.S. 656, 668 (1975).
33. *Id.* at 659, 668.
34. *Id.* at 667–68.
35. *See id.*
36. *Id.* at 668.

Additionally, the Clause protects "[o]nly . . . those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity,"[37] which are generally labeled as "fundamental."[38] If a right is not considered fundamental, such as some hunting rights,[39] then local states can discriminate based on state citizenship.[40] In *Baldwin*, the Court upheld a statute requiring foreign citizens to pay up to 25 times the price charged to local citizens for hunting elk.[41] The Court maintained that the elk hunting was a sport and that hunting for sport was not a fundamental right.[42] Accordingly, the Court authorized discrimination based on citizenship when a right was not fundamental, despite the Clause.[43]

In contrast, the right to travel is a fundamental right that is protected by the Clause.[44] In *Wheeler*, the Court held that local state actions that forcibly excluded foreign citizens from the state and threatened death or bodily harm if the foreign citizens returned violated the right to travel protected by the Clause.[45] The Court further reasoned that the right to travel was a fundamental right protected by the Clause because of its inclusion in the Constitution, its reference to the Articles of Confederation, and case law that had incontrovertibly decided the matter.[46]

III. ANALYSIS

A. Summarization of the Rule

The rule for curbing the right to travel protected by the Clause can be thought of as a decision tree. First, does the state action speak to the right to travel covered by the Clause?[47] If not, then the state action implicates the basic individual rights of the public, and a legitimate state end matched with reasonably taken measures are required to justify the state action.[48] However, if the right to travel in the Clause is implicated, then the question becomes whether discrimination based on citizenship is present.[49] If there is no discrimination based on citizenship, then, again, the state action implicates the basic individual rights of the public and a legitimate state end matched with reasonably taken measures are required to justify the state action.[50] In the event of discrimination, the state action is still legal despite the Clause if it complies with one of the various exceptions developed by case law:

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37. Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 383 (1978).
38. Hauge v. Comm. for Indus. Org., 307 U.S. 496, 511 (1939); Coates v. Lawrence, 46 F. Supp. 414, 425 (S.D. Ga. 1942), *cert. denied*, 318 U.S. 759 (1943).
39. *Baldwin*, 436 U.S. at 388; Minn. *ex rel.* Hatch v. Hoven, 370 F. Supp. 2d 960, 967 (D.N.D. 2005).
40. *Baldwin*, 436 U.S. at 388; Stalland v. S.D. Bd. of Bar Exam'rs, 530 F. Supp. 155, 158 (D.S.D. 1982).
41. *Baldwin*, 436 U.S. at 373–76, 388.
42. *See id.* at 388.
43. *Id.* at 388.
44. United States v. Wheeler, 254 U.S. 281, 294 (1920).
45. *Id.* at 292, 299–300.
46. *Id.* at 294–95.
47. *See supra* Section III.B.
48. *See infra* Section IV.B.
49. *See infra* Section IV.C.
50. *See supra* Section III.B.

actions limited to public areas, not based on a duration requirement, or closely related to a substantial state interest.[51] Finally, note that the Supreme Court has found that stopping the pandemic is a compelling state interest that can satisfy the strict scrutiny test.[52]

B. Legitimate Ends Allow States to Curb Basic Individual Rights

The Constitution addresses state powers in the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[53] However, it does not list what specific powers states have.[54] Furthermore, the Constitution does not grant the states any new powers but instead "reserves to the states" the power they already possessed.[55] The reserved powers are likely the powers that are not explicitly given to Congress in the Constitution,[56] and, at a minimum, may reserve "to the states at least as much legislative power to alter equitable rights as . . . legal rights."[57]

Additionally, federalism may require that state actions be free from federal court intervention as "long as no constitutional right of any individual or group is adversely affected to any discernable degree."[58] However, a reserved power can neither overcome nor be overcome by constitutional restrictions.[59] In the event of a conflict with basic individual rights, a state action typically must speak to a "legitimate end and the measures taken . . . [must be] reasonable and appropriate to that end" to be constitutional.[60]

For example, federal courts have traditionally held that states have police powers.[61] In *Brown*, a federal court upheld a state statute that disallowed a form of prostitution as constitutional.[62] The court reasoned that the state lawfully used its police in compliance with the Tenth Amendment, that prostitution was not a constitutional right, and that the general moral opposition to prostitution at the time constituted a legitimate end for which the state could intervene.[63] Thus, federal courts have recognized that states have the power to restrict individual rights not

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51. *See infra* Section IV.C.2.
52. *See infra* Section IV.D.
53. U.S. CONST. amend. X.
54. *See id.*
55. United States v. Sprague, 282 U.S. 716, 733–34 (1931); Allsup v. Knox, 508 F. Supp. 57, 60 (E.D. Ky. 1980).
56. *E.g.*, United States v. Hubbard, 474 F. Supp. 64, 73 (D.D.C. 1979).
57. Humble Oil & Refining Co. v. Sun Oil Co., 191 F.2d 705, 713 (5th Cir. 1951).
58. *See* Campbell v. Bd. of Educ., 310 F. Supp. 94, 105–06 (E.D.N.Y. 1970).
59. City of El Paso v. Simmons, 379 U.S. 497, 509 (1965).
60. *See* Gen. Motors Corp. v. Belvins, 144 F. Supp. 381, 397 (D. Colo. 1956) (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 438 (1934)).
61. *See* Peel v. Fla. Dep't of Transp., 600 F.2d 1070, 1083 (5th Cir. 1979); Brown v. Brannon, 399 F. Supp. 133, 147 (M.D.N.C. 1975).
62. *Brown*, 399 F. Supp. at 147–48.
63. *See id.*

constitutionally protected in light of a two-part test: (1) does it speak to a legitimate state end, and (2) are the actions taken by the state reasonable.[64]

C. States Hold the Unenumerated Power to Curb the Right to Travel Despite the Privileges and Immunities Clause

"The Citizens of each State *shall* be entitled to all Privileges and Immunities of Citizens in the several States."[65] Despite the Clause appearing to completely protect privileges and immunities from state action, some federal courts have allowed states to curb privileges and immunities protected by the plain language of the Clause.[66]

Additionally, the Supreme Court has held that absolute equity is not always requisite under the Clause.[67] In *Barnard*, the Court maintained that a local statute violated the Clause when it required a period of residency and a promise to continue to reside in the local area to practice law there.[68] Yet the Court reasoned that there are circumstances in which a state can restrict privileges and immunities based on citizenship, but that the current case did not meet those standards.[69] Therefore, the Court recognized that the Clause is not an absolute and has exceptions.[70] Thus, whether a state can curb a privilege or immunity covered by the Clause depends on two queries: is there discrimination, and, if so, is absolute equity required?

1. State actions may not be discriminatory if required of both local and foreign citizens or they do not facially discriminate against all foreign states

Discrimination in violation of the Clause is likely proved when a foreign citizen demonstrates discrimination of a privilege or immunity "in fact" based on citizenship.[71] In *Bach*, a federal court held that a local statute that required residency to receive a handgun license did not violate the Clause because there was a substantial state interest justifying the discrimination.[72] In its reasoning, the court set a standard of proof to determine when a violation of the Clause has occurred: factual discrimination of a privilege or immunity based on citizenship.[73]

There are at least two cases applicable to this Note in which a state's actions may have the appearance of discrimination but are not factual discrimination in violation of the Clause. First, mandating a unique state procedure if the procedure is

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64. *Belvins*, 144 F. Supp. at 397; *see Brown*, 399 F. Supp. at 147–48.

65. U.S. CONST. art. IV, § 2 (emphasis added).

66. *E.g.*, Toomer v. Witsell, 334 U.S. 385, 396 (1948); Bach v. Pataki, 289 F. Supp. 2d 217, 227–28 (N.D.N.Y. 2003) (holding that a state law that only issued conceal and carry firearm licenses to non-residents with significant ties to the state did not violate the Privileges and Immunities Clause).

67. *See* Barnard v. Thorstenn, 489 U.S. 546, 552–53 (1989); Kreitzer v. P.R. Cars, Inc., 417 F. Supp. 498, 507 (D.P.R. 1975).

68. *Barnard*, 489 U.S. at 558–59.

69. *Id.* at 552–53, 558.

70. *See id.* at 552–53.

71. *See Bach*, 408 F.3d at 88 (quoting Connecticut *ex rel.* Blumenthal v. Crotty, 346 F.3d 84, 94 (2d Cir. 2003)), *overruled on other grounds by* McDonald v. Chicago, 561 U.S. 742 (2010).

72. *Id.* at 95.

73. *Id.* at 88.

required of both local and foreign citizens is not considered discrimination under the Clause.[74] In *Kimmish*, the Court held a statute that prohibited ranchers from importing cattle to a local state did not violate the Clause because all ranchers were required to follow the mandate regardless of citizenship.[75] The statute also only applied to cattle wintered in a specific region of foreign states susceptible to "Texas Fever," a disease not prevalent in the local state.[76] Additionally, the Court admitted that the local statute likely benefited local citizens because they generally wintered their cattle outside of the foreign region by default.[77] Yet the Court also believed this benefit was accessible to foreign ranchers if they chose to winter their cattle in the local state and could be forfeited by local ranchers depending on where they chose to winter their cattle.[78] Finally, the Court recognized that stopping the damage of a spreadable disease was a state interest and held that the Clause was not violated by a unique local procedure if it is required of both local and foreign citizens.[79]

Similarly, the circuit court in *Randor* held the right to travel protected by the Clause was not violated when a special needs student from a foreign state did not receive services mandated by federal statute in the local state.[80] The student did not receive the services simply because he had not completed an evaluation that was required by local state law of all special needs students regardless of citizenship.[81] Further, the court reasoned there was no discrimination in violation of the Clause because all special needs students required the evaluation to receive services regardless of their citizenship.[82] In conclusion, the court admitted that requiring a foreign citizen to undergo another evaluation even if one has already been performed in a foreign state may slightly hinder the right to travel, but dismissed this worry because of the "incidental[]" nature of the hinderance.[83]

Finally, a state action that differentiates foreign citizens based on the policies or circumstances of some of the foreign states but does not "facially discriminate" against foreign states may not be considered discriminatory under the Clause.[84] In *Deal*, a federal district court held that a local state law that refused to accept a foreign-state driver's licenses as proof of national citizenship did not discriminate under the Clause because the law did not "facially discriminate" against foreign states.[85] Individuals seeking the foreign-state driver's license did not have to prove national citizenship; therefore, the license could not logically be used to verify

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74. Kimmish v. Ball, 129 U.S. 217, 222 (1889); Michael C. *ex rel.* Stephen C. v. Randor Twp. Sch. Dist., 202 F.3d 642, 654–55 (3d Cir. 2000).

75. *Kimmish*, 129 U.S. at 222.

76. *Id.* at 219–220.

77. *See id.* at 222.

78. *Id.* at 221–22.

79. *See id.* at 222.

80. Michael C. *ex rel.* Stephen C. v. Randor Twp. Sch. Dist., 202 F.3d 642, 654–55 (3d Cir. 2000).

81. *Id.*

82. *Id.* at 655.

83. *Id.*

84. Ga. Latino All. for Hum. Rts. v. Deal, 793 F. Supp. 2d 1317, 1337–38 (N.D. Ga. 2011) (citation omitted), *aff'd in part overruled in part by* Ga. Latino All. for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012).

85. *Id.*

the citizenship of the holder.[86] Further, the court reasoned that the ruling was supported by the fact that the purpose of the law was to address illegal immigration and not to discriminate based on foreign citizenship.[87] Even though the federal government also did not accept drivers licenses as proof of national citizenship at the time, and the local state provided other ways to prove citizenship besides producing a driver's license, the court reasoned that a lack of general discrimination based on foreign citizenship was enough to dismiss claims of discrimination under the Clause.[88]

2. Absolute equity may not be required if state actions are limited to public areas, not based on a duration requirement, or closely related to a substantial state interest

There are at least three forms of discrimination relevant to this Note, and each form has a different test to determine whether the discrimination is allowed under the Clause.

First, discrimination limited to specific public areas is not prohibited.[89] In *Vincent*, the court held that a policeman did not violate the right to travel contained in the Clause when he prohibited a local citizen from entering a town's public property.[90] The court further reasoned that the Clause did not apply to the policeman's prohibition because it restricted the intrastate travel of a local citizen and not interstate travel.[91] Additionally, the court reasoned that the policeman's prohibition would not have violated the Clause even if it involved a foreign citizen because the prohibition only applied to public property but not to streets.[92] Thus, the court established a distinction between discrimination in specific public areas and discrimination from public roads, which implement the right of travel covered by the Clause.[93]

Second, if discrimination based on citizenship does not have a duration requirement, courts "need only apply the rational relation test to determine whether the . . . [discrimination] is justified."[94] In *Walsh*, the court considered whether a state provision was "rationally related to a legitimate policy goal" to determine its constitutionality when the provision implicated the right to travel protected by the Clause.[95] The local statute required local residency to qualify for some state jobs, was only temporarily implemented, and explicitly stated there was no duration requirement.[96] The court further reasoned that because a duration requirement was

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86. *Id.*
87. *Id.* at 1332, 1337–38.
88. *See id.* at 1337–38.
89. *See* Vincent v. City of Sulphur, 28 F. Supp. 3d 626, 648–49 (W.D. La. 2014).
90. *Id.* at 649.
91. *Id.*
92. *See id.*
93. *See id.*
94. Walsh v. City of Honolulu, 423 F. Supp. 2d 1094, 1102 (D. Haw. 2006); *see* Janes v. Triborough Bridge & Tunnel Auth., 977 F. Supp. 2d 320, 332–36 (S.D.N.Y. 2013), *aff'd*, 774 F.3d 1052 (2d Cir. 2014), *cert. denied*, 136 S. Ct. 80 (2015).
95. *Walsh*, 423 F. Supp. 2d at 1097–98, 1104, 1107.
96. *Id*.

distinctly different from residency in fact, applying a different test in the presence of a duration requirement was appropriate.[97]

Nonetheless, the court held that the state's provision failed the rational-relation test because the provision was made to hinder immigration, the requirement did not apply evenly to all public jobs, and local citizenship had no rational relation to the policy objective of preventing employment turnover beyond a drain on resources and cultural differences.[98] The court further explained that any state statute designed to hinder immigration is almost always unconstitutional and that the state provision did just this because its legislative history specifically discussed how the provision would discourage immigration.[99] The court also believed that the state provision was ostensibly discriminatory because no explanation was given as to why all public jobs did not require residency.[100] Furthermore, the court held that a difference in citizenship must be rationally related to a public interest in a material way to be justified.[101] In conclusion, the court maintained that any one of these issues would have been enough to fail the rational-relation test and hold the state provision as unconstitutional in light of the right to travel protected by the Clause.[102]

Finally, discrimination based on a citizenship requirement may be constitutional if it is "closely related to the advancement of a substantial state interest"[103] such as eliminating "a peculiar source of [] evil."[104] A majority of the case law on this issue declines to find that foreign citizenship can be a peculiar source of evil. Beyond that, there is a lack of case law that finds other substantial state interests that exist and constitutionally justify discrimination in opposition to the Clause. Thus, one can generally assume that discrimination based on foreign citizenship will only be allowed given a peculiar source of evil and that peculiar sources of evil generally do not exist.

Yet peculiar sources of evil may exist in specific instances.[105] In *Bach*, a district court prohibited a foreign citizen with a foreign permit to carry a concealed weapon from carrying a concealed weapon in a local state where local statute made obtaining such a permit practically reliant on state residency and subject to background checks.[106] In justification, the court reasoned that regulating firearms was allowed for three reasons[107]: (1) the regulation addressed a peculiar source of evil because the regulation directly related to the safety of the local citizens; (2) the administrative burden of enforcing procedures on foreign citizens would be

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97. *Id.* at 1102–04.
98. *Id.* at 1104–07.
99. *Id.* at 1105.
100. *Id.* at 1107.
101. *See id.*
102. *See id.* at 1104–07.
103. Supreme Ct. of Va. v. Friedman, 487 U.S. 59, 65 (1988); Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 284 (1985).
104. Toomer v. Witsell, 334 U.S. 385, 397–98 (1948); Bach v. Pataki, 289 F. Supp. 2d. 217, 227 (N.D.N.Y. 2003).
105. *Bach*, 289 F. Supp. 2d at 227.
106. *Id.* at 220–21, 227–29.
107. *See id.* at 227–28.

expensive and impossible;[108] and (3) the court maintained that the enormousness of the administrative burden would lead to errors that would allow unqualified foreign citizens to carry concealed weapons and threaten the safety of local citizens.[109] Considering all of these factors together, the court firmly stated "that disparate treatment of nonresidents is justifiable."[110]

D. Stopping the COVID-19 Pandemic is a Compelling State Interest

State governments can restrict personal liberties not explicitly stated in the Constitution to stop the spread of a fatal disease.[111] In *Jacobson*, the Supreme Court held that a municipal statute requiring local residents to receive smallpox vaccinations was constitutional even though the statute restricted personal liberty.[112] Additionally, the Court reasoned that the states—and municipalities, by imputation—have always held the power to create laws at the expense of some personal liberty because no rights were completely free from being burdened in furtherance of the public welfare.[113] Further, the Court held that smallpox was a spreadable and fatal disease and that requiring vaccinations for it easily fell within the state's power to further the public welfare.[114]

Yet smallpox had a mortality rate of up to 30%[115] while COVID-19 currently has an estimated mortality rate of 1%.[116] This makes one wonder if the Court's holding would still apply.

Interestingly, the Court broadened the importance of stopping a pandemic in their recent decisions permitting states to limit the constitutional free exercise of religion[117] in an effort to stop the spread of COVID-19.[118] The Court in both *Sisolak* and *Newsom* issued a memorandum opinion that contained no majority opinion and four dissenting opinions.[119] Both opinions denied requests from religious organizations for exemptions from gathering restrictions that applied to worship services during the COVID-19 pandemic.[120] These decisions are important because they show there is room for a fundamental right protected by the Constitution to be restricted in light of a pandemic.

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108. *See id.*
109. *Id.*
110. *Id.* at 228.
111. Jacobson v. Massachusetts, 197 U.S. 11, 12–13, 39 (1905).
112. *See id.*
113. *Id.* at 25–27.
114. *See id.* at 34–35.
115. *Smallpox*, WORLD HEALTH ORG., https://www.who.int/health-topics/smallpox#tab=tab_2 [https://perma.cc/S5YH-RYBF] (last visited Aug. 10, 2020).
116. *Estimating Mortality from COVID*-19, WORLD HEALTH ORG. (Aug. 4, 2020), https://www.who.int/news-room/commentaries/detail/estimating-mortality-from-covid-19 [https://perma.cc/HBD8-NJH2].
117. U.S. CONST. amend. I.
118. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).
119. *Sisolak*, 140 S. Ct. 2603; *Newsom*, 140 S. Ct. 1613.
120. *Sisolak*, 140 S. Ct. 2603; *Newsom*, 140 S. Ct. 1613.

However, their application should stop there. The memorandum form of the opinions shows they were not meant to be conclusory, as there are no direct explanations for the opinions and no principles listed that lower federal courts could follow. In addition, there is only one concurring opinion from which meaningful governing principles can be gleaned.[121] If anything, the lack of supporting opinions shows that the Court was unsure how to proceed and was waiting to make determinable principles. Whether for better or worse, time helped the Court determine its opinion on the matter. Justice Ginsburg passed in September of 2020,[122] and Justice Barrett was appointed the following month.[123]

Subsequently, the Court clarified its position on the issue of how important stopping the COVID-19 pandemic is: stopping a pandemic is a "compelling state interest" that satisfies the requirements of the "strict scrutiny" test.[124] In *Cuomo*, the Court held that a governor's restrictions on religious organizations aimed at stopping the spread of COVID-19 violated the Constitution.[125] The restrictions implicated the constitutional protection of free exercise of religion and were enacted by colored zones rather than being impartial and applicable generally.[126] A "red zone" only allowed congregations of 10 to gather, but did not restrain certain designated businesses' patronization.[127] An "orange zone" only allowed congregations of 25 to gather, but allowed all other businesses to admit as many customers as they wished.[128] Additionally, the religious organizations suing for relief were proven non-spreaders of COVID-19 and had austerely implemented measures to ensure the health and safety of their patrons.[129]

Furthermore, the Court reasoned that strict scrutiny applied to the case because of the constitutional rights implicated by the restrictions and the disproportional treatment of different establishments.[130] The Court then clarified that stopping the spread of COVID-19 was a compelling state interest because of its pandemic status, because of its mortality rate, and because no vaccine was available at the time.[131] Yet the Court found the restrictions were not "narrowly tailored" to

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121. *Newsom*, 140 S. Ct. at 1613 (Roberts, J., concurring) (noting that COVID-19 is novel, that COVID-19 has killed more than 100,000 people nationwide, and that "[s]imilar or more severe restrictions apply to comparable secular gatherings . . . where large groups of people gather in close proximity for extended periods of time").

122. *Ruth Bader Ginsburg*, WIKIPEDIA, https://en.wikipedia.org/wiki/Ruth_Bader_Ginsburg [https://perma.cc/9WCU-AVKH] (last visited Mar. 8, 2021).

123. *Amy Coney Barrett Supreme Court Nomination*, WIKIPEDIA, https://en.wikipedia.org/wiki/Amy_Coney_Barrett_Supreme_Court_nomination#:~:text=In%20the%20subsequent%20confirmation%20vote,Democrats%20voting%20to%20confirm%20her [https://perma.cc/AVP4-3NQT] (last visited Mar. 8, 2021).

124. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)).

125. *Id.* at 66–69.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See id.*

comply with strict scrutiny because following them meant limiting religious, in-person worship to 25 people while next door hundreds of people could be gathered together buying holiday hams.[132] Although the Court did not recognize restrictions that implicated a constitutional right as legal in this instance, it did clarify that stopping a pandemic is a compelling state interest.[133] Thus, the door has been opened to restrict constitutional rights in attempts to stop the spread of COVID-19 if those restrictions are done in the right way.[134]

Later, the Court continued to hold to the view that restrictions of a constitutional right to stop a pandemic are permissible if done in the proper way and that stopping COVID-19 is a compelling state interest.[135] In three brief memorandum opinions following *Cuomo*, the court both recognized and denied religious exemptions to restrictions put in place to stop the spread of COVID-19.[136] Based on the citations in the memorandum opinions and arguments used in the concurring opinions, the Court has settled on applying the basic principles of *Cuomo* when analyzing the legality of state acts that restrict constitutional rights to stop the spread of COVID-19.[137]

IV. APPLICATION

This Application will proceed as follows. First, it will provide a snapshot of the state actions taken by September 2020 that restricted travel in response to COVID-19; then, it will apply the rule to current state actions and hypothetical state actions to show how far states would need to go to violate the right to travel protected by the Clause. As a reminder, this Application is being conducted from the perspective that the COVID-19 pandemic is still considered novel.[138] This Application would be conducted differently had it considered state restrictions on travel when a non-novel pandemic was ongoing, or when the vaccine was available during a pandemic.

A. Snapshot of State Actions

By September 2020, approximately half the states in the United States imposed restrictions on travel through a governor's declaration, a state health

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132. *See id.*

133. *Id.*

134. *See id.*; Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603 (2020); S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020).

135. *See* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021); Danville Christian Acad., Inc. v. Beshear, 141 S. Ct. 527 (2020); High Plains Harvest Church v. Polis, 141 S. Ct. 527 (2020).

136. *Newsom*, 141 S. Ct. 716 (granting an injunction on a restriction of a religious worship in part but denying the injunction for other parts of religious worship that could spread COVID-19); *Beshear*, 141 S. Ct. 527 (acknowledging that an injunction on restrictions of religious worship would be granted if the restrictions persisted despite COVID-19); *Polis*, 141 S. Ct. 527 (granting an injunction for restrictions on religious worship that occurred because of COVID-19).

137. *See Newsom*, 141 S. Ct. 716; *Beshear*, 141 S. Ct. 527; *Polis*, 141 S. Ct. 527.

138. *See supra* Section II.B.

department mandate, or a combination of the two.[139] The several states each issued unique regulations, but there were five general kinds of regulation issued.[140] Some states issued more than one kind in a single declaration or mandate:

	State Action	State
1	Local citizens returning from a foreign state must quarantine.	Kentucky
2	All citizens traveling to the local state from a foreign state by airplane must quarantine.	Florida, New Mexico, Wyoming
3	All citizens traveling to the local state from a foreign state must quarantine.	Alaska, Delaware, Hawaii, Idaho, Kansas, Maine, Massachusetts, Montana, Rhode Island, Vermont
4	All citizens traveling to the local state from a foreign state in which COVID-19 is widespread must quarantine.	Arizona, Arkansas, Connecticut, New Jersey, New York, North Dakota, Utah
5	All citizens traveling to the local state from specific foreign states, which at the time had high rates of COVID-19, must quarantine.	Arizona, Arkansas, Oklahoma, South Carolina, Texas, West Virginia

Figure 1: Types of state travel regulations in response to COVID-19[141]

Keep in mind that the use of the word "quarantine" does not mean self-isolation for an indefinite amount of time because no state required a quarantine longer than 14 days.[142] This is in line with the suggested quarantine procedures by the Center for Disease and Control ("CDC").[143] Thus, "quarantine" in this Note implies self-isolation for roughly the period of time adequate to stop the spread of COVID-19 and no longer.

139. *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,_2020-2021 [https://perma.cc/C3AN-TZSD] (last visited Jan. 23, 2021).

140. *See id.*

141. *Id.*

142. *Id.*

143. *Quarantine and Isolation*, CTR. FOR DISEASE CONTROL & PREVENTION (Feb. 11, 2021), https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fif-you-are-sick%2Fquarantine.html [https://perma.cc/Z6NP-6GFX].

B. Application to Current State Actions and Hypothetical State Actions

This Application is split into three sections: state actions that do not implicate the Clause, hypothetical state actions that do not violate the Clause, and hypothetical state actions that do violate the Clause.

1. Past state actions taken in response to COVID-19 do not implicate the Privileges and Immunities Clause

The first of the general state actions listed in Figure 1—local citizens returning from a foreign state must quarantine—does not implicate the right to travel protected by the Clause. This state action does not implicate the Clause because it only applies to local citizens.[144] Unlike the state action in *Toomer*, this state action does not encumber foreign citizens traveling into the local state.[145] Also, unlike the state action in *Toomer*,[146] this state action does not have the practical effect of excluding foreign citizens from traveling to the local state. In fact, the state action may even encourage foreign citizens to travel to the local state. Foreign citizens traveling to the local state can rest assured that local citizens are unlikely to spread COVID-19 from other foreign states because of the quarantine requirement. Thus, the foreign citizen receives an extra protection in the local state, which may encourage them to travel there.

Also, the foreign citizens may be additionally favored by the local statute because they are not required to quarantine and are free to travel about the local state. This benefit becomes especially clear when comparing a local citizen and foreign citizen who both travel to the local state from the same foreign state. While the local citizen will be required to quarantine, the foreign citizen is free to roam as they please. Thus, the local statute does not implicate the Clause because there is neither encumbrance nor exclusion of a foreign citizen's right to travel in the local state.

Further, the local state acted within its power to implement the statute even though it infringed on the basic individual rights of local citizens. This Note is focused on the right to travel protected by the Clause devoid of any competing or complementing rights. Thus, falling outside the protection of the Clause would implicate basic individual rights that can be curbed by the two-part legitimate-state-ends test: (1) does it speak to a legitimate state end, and (2) were the actions taken reasonable.[147]

Like the state's use of power in *Brown,*[148] the local state acted within its power because stopping the spread of a pandemic is a legitimate state end and the measures taken were reasonable. As discussed in *Cuomo*, stopping the COVID-19 pandemic is a compelling state interest that satisfies the standard for the strict

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144. *See supra* Section III.B.
145. *See* Toomer v. Witsell, 334 U.S. 385, 389–91, 398–99 (1948).
146. *See id.* at 396-99.
147. *See* Brown v. Brannon, 399 F. Supp. 133, 147–48 (M.D.N.C. 1975); *supra* Section IV.B.
148. *Brown*, 399 F. Supp. at 147–48.

scrutiny test.[149] Hence, stopping COVID-19 easily qualifies as a legitimate state end given that strict scrutiny is a more stringent standard.

From another perspective, stopping the spread of COVID-19 is also at least as important as other legitimate state ends that have been used to curb basic individual rights in the past. For instance, some federal courts have held that the moral significance of stopping prostitution is a legitimate state end that allows the restriction of basic individual rights.[150] Now, consider the fact that stopping the spread of a national pandemic by restricting the movement of local citizens may save lives from a deadly disease. It stands to reason that the protection of human lives in a national pandemic is at least as weighty as the moral reasons used to justify restriction of individual rights in the past. Hence, stopping COVID-19 is a legitimate state end and easily satisfies the first prong of the two-part legitimate-state-ends test.

Additionally, all state restrictions are reasonably taken in accomplishing this legitimate end because they only require a quarantine for the period generally accepted to stop the spread of COVID-19.[151] Remember, no state required quarantine beyond the accepted standard of quarantine suggested by the CDC.[152] Hence, the state actions are reasonable and satisfy the second prong of the two-part legitimate-state-ends test.

Therefore, requiring local citizens returning from a foreign state to quarantine is constitutional because the state action was in pursuit of the legitimate end of stopping the spread of a pandemic and was done in a reasonable manner.

Now, consider the remaining state actions: all citizens traveling to the local state from a foreign state by airplane must quarantine; all citizens traveling to the local state from a foreign state must quarantine; all citizens traveling to the local state from a foreign state in which COVID-19 is widespread must quarantine; and all citizens traveling to the local state from specific foreign states that had high rates of COVID-19 at the time must quarantine. They all have something in common, which is that they are all required of all citizens whether local or foreign.

They also do not implicate the right to travel protected by the Clause because the restrictions are required of both local and foreign citizens. Unlike the state action in *Toomer*, these state actions do not encumber foreign citizens traveling to the local state with special requirements.[153] Rather, both local and foreign citizens are required to quarantine for the same time if they have traveled to the local state from a foreign state in the same way. Thus, there is no encumbrance unique to foreign citizens traveling to the local state because there is no requirement unique to foreign citizens alone.

Additionally, unlike the state action in *Toomer*, these state actions do not have the practical effect of excluding foreign citizens from traveling to the local

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149. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993))*; see supra* Section IV.D.

150. *Brown*, 399 F. Supp. at 147–48.

151. *See supra* Section V.A.

152. *See id.*

153. *See* Toomer v. Witsell, 334 U.S. 385, 396–99 (1948); *supra* Section III.B.

state.[154] Again, both local and foreign citizens are required to quarantine for the same amount of time if they have traveled to the local state from a foreign state in the same way. Hence, foreign citizens are not practically excluded because they are treated as any local citizen of the state.

Finally, the states acted within their authority when they took these actions. As explored above, the actions taken by the states infringed on the basic individual rights of citizens. However, the actions were aimed at the legitimate state end of saving lives by stopping the spread of COVID-19. Additionally, the state actions were reasonably taken because they required a quarantine in line with the CDC's recommendation of 14 days.[155] Therefore, the actions satisfied the two-part legitimate-state-ends tests and are constitutional as well.

2. Hypothetical state actions that neither implicate nor violate the Privileges and Immunities Clause

Next, consider general state actions 2 through 5 in Figure 1 if they had only applied to foreign citizens: foreign citizens traveling to the local state from a foreign state by airplane must quarantine; foreign citizens traveling to the local state from a foreign state must quarantine; foreign citizens traveling to the local state from a foreign state in which COVID-19 is widespread must quarantine; and foreign citizens traveling to the local state from specific foreign states that had high rates of COVID-19 at the time must quarantine. None of these state actions violate the right to travel protected by the Clause, and the final two may not implicate the right to travel protected by the Clause.

a. Requiring foreign citizens traveling to a local state from a foreign state by airplane to quarantine

This restriction is unique in that it only impacts a certain kind of travel. A court could find that the limited discrimination of travel by plane does not implicate the Clause because not all methods of travel are implicated. If this were true, then the state actions would curb the basic individual rights of citizens, and the state actions would be justified following the logic of the previous application.

Yet a court would likely hold that the right to travel protected by the Clause is implicated by this particular state action. This is reasonable given that the restriction extends beyond public areas and it is more restrictive than other state actions that implicated the Clause in the past. Unlike the state action that implicated the Clause in *Vincent*,[156] this action would not be exclusive to public areas. While an airport may contain public areas that necessarily would be impacted by the action, the action would also impact the air travel of foreign citizens, which is not a public space. Therefore, this action impacts more rights than other actions that have implicated the Clause in the past. Then, it stands to reason, federal courts would accept this action as implicating the right to travel protected by the Clause given its larger area of impact than other actions in case law.

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154. *See id.*

155. *Quarantine and Isolation*, *supra* note 143.

156. *See* Vincent v. City of Sulphur, 28 F. Supp. 3d 626, 649 (W.D. La. 2014); *supra* Section IV.C.2.

Additionally, the court in *Vincent* reasoned in dicta that a state act restricting the use of public roads by foreign citizens would implicate the right to travel protected by the Clause.[157] This restriction on air travel is similar to a restriction on the use of public roads because both are forms of interstate travel. Hence, this state act would likely implicate the right to travel protected by the Clause because it extends beyond public areas and burdens the throughfares used by foreign citizens to enter a local state.

From another perspective, this particular state action would likely be viewed as implicating the right to travel protected by the Clause because it is more inclusive than other state actions that have implicated the Clause in the past. As opposed to the state action taken in *Toomer* that impacted specific kinds of boat captains,[158] this state action restricts an entire throughfare of foreign citizens' right to travel. Restricting the right to travel by plane to a local state has the potential to impact innumerable foreign business personnel and foreign industries in light of the relative ease of air travel by plane today. Thus, both by content and scope, the state act of requiring all citizens traveling to a local state from a foreign state by airplane to quarantine would likely implicate the right to travel protected by the Clause.

Notwithstanding that this state action likely implicates the right to travel protected by the Clause, the state action may still be justified because it is closely related to the advancement of a substantial state interest[159] and may eliminate a peculiar source of evil. Satisfying either of those requirements would justify the state action; each will be examined in turn.

First, the state interest pursued in this action may be closely related to the advancement of a substantial state interest. Here, the interest of stopping the spread of the COVID-19 pandemic is exactly the same as the interest in *Cuomo* where the Court ruled it was a compelling state interest that satisfies the requirements of strict scrutiny.[160] Thus, the action is easily related to a substantial state interest because of its compelling nature. Additionally, similar to the test in *Cuomo*,[161] the test here also requires the advancement of that interest. Advancement of that interest depends on the states in play. For example, consider a state that is more heavily infected than the country as a whole and merely requires foreign citizens traveling to the local state from a foreign state to quarantine. Because foreign citizens pose a much lower risk of spreading COVID-19 than local citizens, the advancement of the state interest in this policy seems meager at best. One could argue that the state action does not

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157. *See Vincent*, 28 F. Supp. 3d at 649.

158. *Toomer*, 334 U.S. at 389–91, 398–99, 403 (1948); *see supra* Section III.B.

159. This Application proceeds by disregarding the rational-relation test in *Walsh* when the substantial state interest test in *Bach* can be met. The rational relation may apply when there is no duration requirement in discrimination based on citizenship. *See* Walsh v. City of Honolulu, 423 F. Supp. 2d 1094, 1097–98, 1104, 1107 (D. Haw. 2006). Leaving out the rational relation test is reasonable given that if the more stringent substantial state interest test can be passed, then the rational relation test would be passed and exploration of it would be moot.

160. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993)); *see supra* Section IV.D.

161. *Cuomo*, 141 S. Ct at 67.

advance the interest of stopping the spread of COVID-19 and simply discriminates against a foreign citizen in violation of the Clause.

If anything—and similar to *Cuomo*—the Court has shown a propensity to follow the rules determined by case law even in the face of a national pandemic. While the unique circumstance of being more infected than the nation may cause a court to hold a state action unconstitutional, any perceivable advancement of a state interest could cause a court to uphold a discriminatory act as constitutional. This is easily achievable especially because there is no requirement of equal treatment in the substantial-state-interest test.[162] Thus, any effort that reasonably stops the spread of COVID-19 during a pandemic could be seen as advancing a substantial state interest and validate the state action despite the disparity in treatment.

From another perspective, requiring foreign citizens traveling to a local state from a foreign state by airplane to quarantine could easily be justified when viewed as eliminating a peculiar source of evil. Like the peculiar source of evil in *Bach*, the administrative burden of identifying foreign citizens with COVID-19 and then ensuring they quarantine is difficult, costly, and could directly threaten the safety of the local citizens in the face of an error.[163] Admittedly, verifying that someone has COVID-19 when they arrive at an airport may be easier than searching every piece of luggage for a gun, but the burden is nonetheless comparable in that it would take individual verification and record keeping, among other things. Thus, the courts could easily rely on *Bach* and justify the disparaging treatment of foreign citizens because of the peculiar source of evil that COVID-19 presented at the time. Hence, the court could easily hold this hypothetical state action constitutional because it is related to a substantial state interest and can be seen as eliminating a peculiar source of evil.

Therefore, despite the Clause being implicated by this state action, requiring foreign citizens traveling by airplane to a local state from a foreign state to quarantine could easily be held legal under federal case law.

b. Requiring foreign citizens traveling to a local state from a foreign state to quarantine

This action includes public areas, travel by air, and every other conceivable form of travel. In that sense, this state action is considerably more restrictive than the previous application because of its inclusion of a vast array of rights. Thus, there is no doubt that this state action implicates the right to travel protected by the Clause.

Yet again, this state action is aimed at advancing a substantial state interest in stopping the pandemic and eliminating the peculiar source of evil COVID-19. Given the reasoning of the previous application, the court could easily justify the state action. Therefore, requiring foreign citizens traveling to a local state from a foreign state to quarantine would implicate the Clause but likely be held legal by the courts.

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162. *See supra* Section IV.C.2.

163. *See* Bach v. Pataki, 289 F. Supp. 2d 217, 227–28 (N.D.N.Y. 2003); *supra* Section IV.C.2.

c. Requiring foreign citizens to quarantine if they travel to a local state from a foreign state where COVID-19 is widespread or from a specific state where COVID-19 is widespread

Here, a court could hold that these state actions do not implicate the right to travel protected by the Clause. This is because they do not facially discriminate against foreign citizens and can be construed as not designed to discriminate against foreign citizens.

Like the state action in *Deal*, these state actions do not facially discriminate against foreign citizens. Instead, these acts impact a foreign citizen's ability to travel based on the likelihood of having COVID-19 and not on foreign citizenship.[164] Widespread cases of COVID-19 could easily shift from state to state and are not guaranteed to exist in any state at a given time, which avoids targeting a specific foreign citizenship. Additionally, those state acts that do target specific states are discriminating against travel from the state and not against the foreign citizens. Consider a foreign citizen from a highly infected state specifically named in a state act. If that foreign citizen were to travel to the local state from an unnamed foreign state, then there would be no requirement to quarantine. Thus, these restrictions do not facially discriminate against foreign citizens even though citizenship is used in the discrimination process.

Also, similar to the state action in *Deal*, these state actions are not aimed at discriminating against foreign citizens. [165] The very nature of the actions focuses on states with widespread infections and merely restricts travel to the accepted amount of time required to stop the spread of COVID-19, which the Supreme Court considers a compelling state interest.[166] This implies that these state actions are aimed at stopping the pandemic and not at stopping the immigration of foreign citizens.

Therefore, a court could hold that these state actions do not implicate the right to travel protected by the Clause in two ways: first, the acts do not implicate the Clause because they do not facially discriminate; and second, the acts do not implicate the Clause because they are not designed to discriminate against foreign citizens but rather to stop the spread of COVID-19.

On the other hand, if a court were to hold the right to travel protected by the Clause was implicated by these state acts, then the state acts would still be justified. Based on the analysis in the previous sections, these state acts could easily be justified because they relate to a substantial state interest or can be seen as eliminating a peculiar source of evil. By meeting those criteria, these state actions would be justified despite implicating the Clause.

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164. *See* Ga. Latino All. for Human Rights v. Deal, 793 F. Supp. 2d 1317, 1337–38 (N.D. Ga. 2011), *aff'd in part overruled in part sub nom.* Ga. Latino All. for Human Rights v. Governor of Ga., 691 F.3d 1250 (11th Cir. 2012).

165. *See id.*

166. *Cuomo*, 141 S. Ct. at 66–69.

3. A hypothetical state action that does violate the Privileges and Immunities Clause

In light of all the previous analysis, a state would have to go to extreme lengths to violate the right to travel protected by the Clause during a pandemic. The restriction would need to only apply to foreign citizens, facially discriminate, and not be designed in line with the compelling state interest of stopping the pandemic. Aside from naming specific foreign citizens in a travel restriction, there is another possible state act that likely violates the Clause: requiring quarantine of foreign citizens traveling to the local state for longer than the CDC's recommended two weeks of quarantine.[167]

Such an act would clearly implicate the Clause because of its breadth and depth of restriction. Any form of travel and any foreign citizen would be impacted while local citizens are given favored treatment. The act would speak to the compelling state interest of stopping the spread of COVID-19 and eliminating the peculiar source of evil, but it would also appear to only pay lip service to those ends because the length of the quarantine surpasses what is reasonable with no apparent benefit. A court would likely hold that such an act's design discriminates against foreign citizens in violation of the Clause because there is no rationally relatable state interest met by the additional quarantine requirement.

CONCLUSION

In summary, I believe *Cuomo* captures how courts will approach limiting the right to travel protected by the Clause during a pandemic. The question is not whether the right to travel can be curbed, but whether the state actions taken have curbed the right to travel in the appropriate way. Most state actions taken treated foreign and local citizens the same and thus did not implicate the Clause at all. Yet even if the state actions were limited to foreign citizens, the importance of stopping the pandemic easily meets standards set by some federal courts that allow the right to travel to be curbed despite the Clause. Therefore, all states likely acted within their legal authority when they initially took action to stop the spread of COVID-19 through travel restrictions. Finally, states would have to go as far as requiring travel restrictions of only foreign citizens and either specifically naming which foreign citizens are excluded or requiring unreasonable quarantine requirements of all foreign citizens to violate the right to travel protected by the Clause.

Finally, additional questions arise from this Note. Namely, how would the introduction of the vaccine and the passage of time change the analysis? These questions will be particularly interesting in the wake of what is now the COVID-19 pandemic.

167. *Quarantine and Isolation*, *supra* note 143.