

## Perspective

### Partitioning the Curve — Interstate Travel Restrictions During the Covid-19 Pandemic

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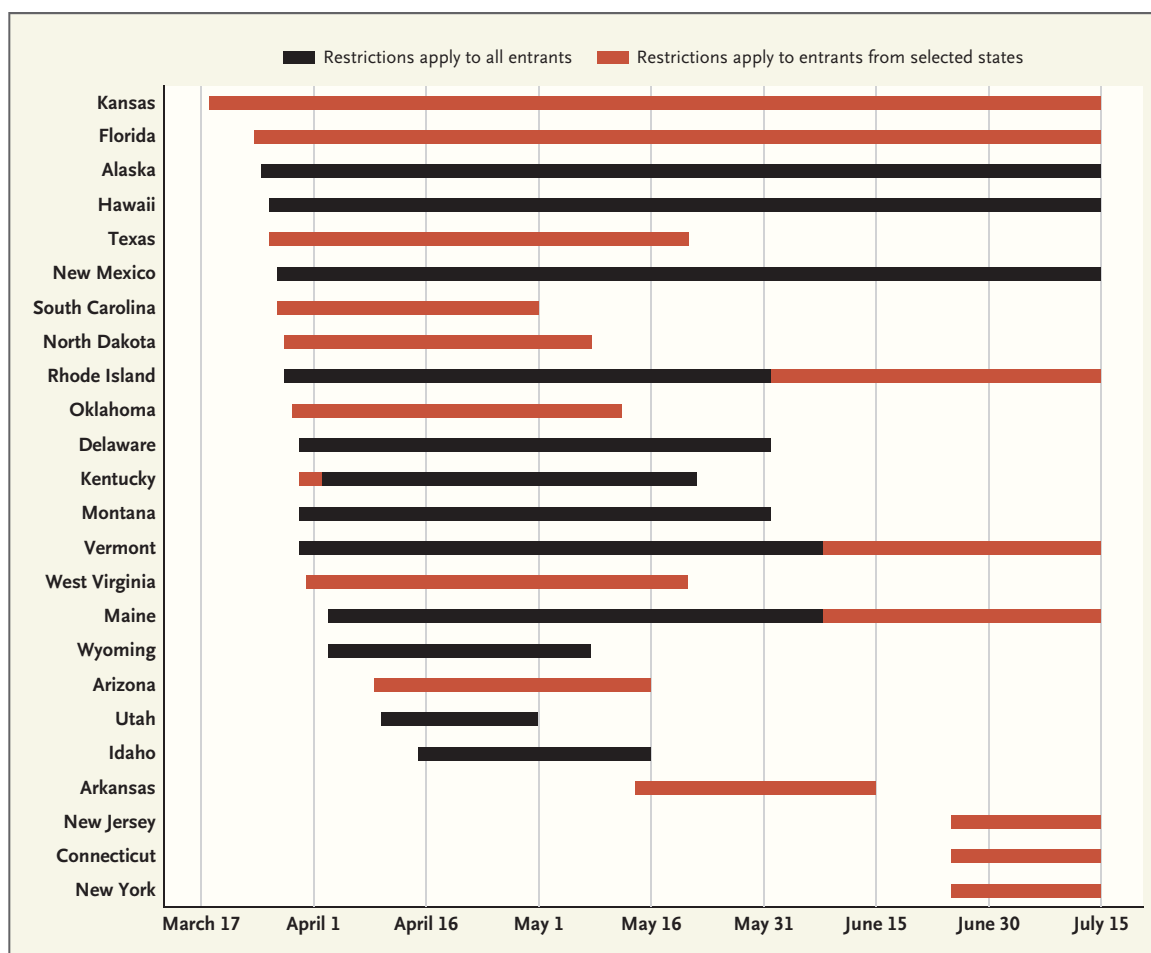
Since the onset of the Covid-19 crisis in the United States, government action taken to “flatten” the curve of disease transmission has varied dramatically among states, counties, and cities.

The early epicenters — New York City, Washington State, and the San Francisco Bay Area — implemented aggressive measures in mid-March, many of which remain in place. Other states and localities opted for milder restrictions, acted much later, or barely intervened at all. Many states began unwinding restrictions weeks ago, although surging case numbers are prompting some to change course. The patchwork nature of the response helps explain the current situation: Covid-19’s spread now has many different trajectories, which partly track jurisdictional boundaries. In the third week of July, for example, Covid-19 incidence was 10 times as high in some states as in others.

Many jurisdictions have responded to the unevenness of the unfolding pandemic by batten down their borders. Nearly half the states have imposed interstate travel restrictions to date (see graph). Eight have imposed restrictions on entrants from all states, 12 have imposed them only on entrants from selected high-prevalence areas, and 4 have shifted between these positions. A common feature of these orders is a requirement that entrants — both residents and nonresidents — self-quarantine for 14 days, although news reports suggest that states are not actively monitoring compliance. Several states recently modified their orders to permit proof of

negative tests for Covid-19 infection in lieu of self-quarantine. A stark illustration of the shifting geographic dynamics is that some states, such as Florida and Texas, that months ago targeted “fugitives” from Covid-19 hotspots in the Northeast now find the tables turned.

Other federations have turned to controls on movement, too. Interprovincial travel restrictions have been a prominent feature of the Covid-19 response in Canada; they are beginning to give way to other arrangements, such as the “Atlantic bubble,” a regional pact that lowers travel barriers across Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland and Labrador. Four of Australia’s eight states and territories are currently restricting all domestic entrants, three restrict entrants from certain states, and one maintains an open border. In Germany, the federal and state



**States with Orders Restricting Interstate Travel, March 17 through July 15, 2020.**

Start dates shown reflect the day on which the order came into effect. Information is from state government websites, news reports, and Ballotpedia (<https://ballotpedia.org>).

governments have agreed to frame travel bans around small, local areas of outbreaks within states.

In the United States, attempts to restrict interstate travel present distinctive legal issues. The U.S. Supreme Court has long recognized an implicit constitutional right to travel, consisting of three elements: the right to enter and leave a state, the right “to be treated as a welcome visitor rather than an unfriendly alien” when visiting a state, and the right to become a citizen of any state.<sup>1</sup> The first element is among the liberty interests protected by the due process clauses of the 5th

and 14th Amendments to the Constitution; the second and third elements are grounded in the privileges and immunities clause of Article IV.

When laws infringing the right to travel across state lines are challenged in court, they are usually subjected to heightened scrutiny: courts uphold them only if they serve an important government interest (variously described as “substantial” or “compelling”) and are “narrowly tailored” — meaning that the government’s purpose cannot feasibly be achieved through less restrictive means. The Supreme

Court has never explained the nature and extent of the right to travel during a natural disaster or public health crisis. Precedent upholding state and local governments’ authority to quarantine incoming ships (domestic and foreign) for health reasons is relevant but predates modern right-to-travel cases.<sup>2</sup> Courts could choose to apply no greater judicial scrutiny than they do to many other legal measures adopted to fight contagious diseases; following the seminal holding in *Jacobson v. Massachusetts*, courts typically ask only whether such measures are reasonable and neces-

sary. But it seems more likely that courts will choose the heightened scrutiny they have applied to public health orders affecting specially protected rights, such as church attendance and abortion access.

Indeed, two federal trial courts have recently done just that in Covid-19 right-to-travel cases, with different results. One court suspended Kentucky's orders that residents and nonresidents entering the state must self-quarantine for 14 days, finding them overbroad.<sup>3</sup> In a poorly reasoned opinion, the court simply assumed that a less restrictive alternative existed, without indicating what it was. Nor did the court address the state's arguments that the orders were time limited, included some exceptions, didn't affect intrastate travel, and could be no narrower because Covid-19 conditions were constantly changing in other states.

In Maine, an alliance of campground and restaurant owners and prospective visitors challenged the state's mandatory self-quarantine for incoming travelers, which applied to both residents and nonresidents. The court turned away the plaintiffs' request for a preliminary injunction, noting that the less restrictive alternatives they offered were "unworkable."<sup>4</sup> However, the court expressed openness to hearing additional evidence about alternatives as the suit progressed.

In a third lawsuit, three U.S. mainland residents who own property in Hawaii and one Hawaii resident have challenged that state's mandatory self-quarantine of all entrants. The U.S. Department of Justice has intervened with a "statement of interest" supporting the plaintiffs, as it

did in the Maine case. The nub of the federal government's argument is that these states' rules could have been crafted less restrictively; they could have been applied only to visitors from Covid-19 hotspots or exempted visitors who tested negative for or had recovered from Covid-19. On July 2, a federal district court judge rejected this argument.<sup>5</sup> Applying the more lenient standard of review from *Jacobson*, the court found ample evidence that the restrictions were justified by the emergency at hand and concluded that it would reach the same result applying heightened scrutiny. The same judge invoked similar reasoning on July 22 to reject another attempt at suspending Hawaii's travel restrictions; she noted that the spike in Covid-19 cases and deaths since early July had made the case for requiring entrants to self-quarantine even stronger.

Notably, the orders challenged to date have applied to residents as well as nonresidents entering the state. Even so, the court that initially upheld Maine's order was persuaded that it discriminated against out-of-state residents in practice because visitors who don't own a home in Maine would have greater difficulty self-quarantining. This finding matters because when states treat out-of-state travelers differently, they confront greater constitutional uncertainty than when their regulations affect residents and nonresidents even-handedly. Courts are mindful that, historically, differential travel restrictions have served as a pretext for turning away minorities or impoverished people and for economic protectionism. Courts also tend to be more skeptical when exceptions are granted to some interests

and activities but not to other, similar ones.

In sum, states seeking to impose interstate travel restrictions must navigate a very uncertain legal path, aiming for rules that are neither over- nor under-inclusive. Nevertheless, basic legal principles suggest that travel restrictions stand the best chance of withstanding constitutional scrutiny if they apply equally to residents and nonresidents, allow well-justified exceptions (e.g., for people with recent negative SARS-CoV-2 tests), are time limited and regularly reviewed, and are grounded in epidemiologic data (e.g., focused on entrants from states with higher incidence of Covid-19). Conscientious judges will carefully weigh the gravity of local pandemic conditions and consider whether less restrictive alternatives, such as mass testing at the border, might do as well in containing spread.

Whether or not the travel restrictions ultimately pass legal muster, the impulse to adopt them is understandable. Early in the pandemic, states with few cases wanted to keep it that way. Today, people in areas that have endured crushing losses of liberty worry that unregulated borders will jeopardize their hard-won gains in controlling Covid-19.

Yet state or regional isolationism is a poor substitute for national leadership in pandemic response. Even as it refused to suspend Maine's travel restrictions, the Maine court quoted Supreme Court Justice Benjamin Cardozo's admonition in *Baldwin v. Seelig*, an economic protectionism case, that "The Constitution was framed . . . upon the theory that the peoples of the several states must sink or swim together, and that in the long run pros-

perity and salvation are in union and not division.” Cardozo’s plea for unity could be read today as a call for the coordinated, coherent federal response to Covid-19 that has been so lacking. Such a response might have mitigated the disparities now driving interstate divisions and the desperation states feel to protect themselves when no one else will. Infectious diseases may not recognize po-

litical boundaries, but disease-control policies certainly do.

Disclosure forms provided by the authors are available at NEJM.org.

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1. Saenz v. Roe, 526 U.S. 489 (1999).
2. Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana, 186 U.S. 380 (1902).
3. Roberts v. Neace, No. 2:20CV054 (WOB-CJS), 2020 WL 2115358 (E.D. Ky. May 4, 2020).
4. Bayley’s Campground Inc. v. Mills, No. 2:20-CV-00176-LEW, 2020 WL 2791797 (D. Me. May 29, 2020).
5. Carmichael v. Ige, No. 20-00273 JAO-WRP, 2020 WL 3630738 (D. Hawaii Jul. 2, 2020).

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