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## COMMUNICABLE DISEASES AND THE RIGHT TO RE-ENTER THE UNITED STATES

J. Nicholas Murosko\*

### INTRODUCTION

American citizens generally enjoy the ability to move freely from place to place. Whether someone wishes to travel across either a state or the globe, there are relatively few government-imposed barriers to such movement. For instance, most U.S. citizens are affected only by government-imposed passport requirements when traveling internationally; thus, in most cases, government-imposed restrictions on leaving the country are a non-factor. It is important, however, not to take the ability to travel freely for granted because it is conceivable that a major threat to public health could cause the U.S. government to restrict travel. Considerable harm could befall the country if a person with a highly contagious disease boards a plane bound for the United States. Accordingly, the government has a justifiably strong interest in maintaining control over its borders.

This Note examines the federal government's authority to prevent U.S. citizens from re-entering the country after traveling abroad. This Note is not concerned with non-citizen entry into the United States or movement of any persons within the United States's borders. Additionally, this Note does not seek to explore, in depth, any constitutional protections for a citizen's ability to *exit* the country at a time of his or her liking. Rather, it is narrowly concerned with the constitutional right of a U.S. citizen to re-enter the country.

Constitutional rights become especially crucial when exigent circumstances pit the protected rights of an individual against the needs of the majority. The right to re-enter the United States is therefore most important when a person's return to the country poses a threat to a substantial number of people. For the purposes of this Note, the most notable exigent circumstance that could threaten the right to re-enter is the possibility of a serious communicable disease outbreak.

This Note begins by exploring the history and background of the right to re-enter in order to flesh out the current scope of this acknowledged, yet largely untested, constitutional right. This Note then proffers four criteria that establish the constitutional right to re-enter protection. After establishing the textual home for the right to re-enter, this Note delves into a balancing analysis between public health and individual rights. This analysis will be performed in the context of a communicable disease

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outbreak. A more frequently litigated barrier to re-entry (the No Fly List) will be used to provide a useful comparison, because courts have not extensively tested such right in the context of communicable diseases.

### I. COMMUNICABLE DISEASES

Ebola is a “deadly disease caused by infection with one of the Ebola virus strains.”<sup>1</sup> The World Health Organization first announced the most recent Ebola outbreak on March 23, 2014,<sup>2</sup> later deeming it the “largest and most complex Ebola outbreak since the Ebola virus was first discovered in 1976.”<sup>3</sup> Currently, there is no known cure for Ebola, and the average fatality rate is around 50% but can reach up to 90%.<sup>4</sup> The 2014 outbreak predominately centered in the West African countries of Guinea, Liberia, and Sierra Leone; however, a few confirmed cases of the disease were reported in the United States.<sup>5</sup> By some estimates, if the same outbreak and rate of death seen in West Africa were to occur in the United States, approximately 88,000 Americans would die.<sup>6</sup>

On July 28, 2014, the Centers for Disease Control and Prevention (CDC) announced that two U.S. citizens contracted the Ebola virus while performing healthcare work in Liberia.<sup>7</sup> The workers, later identified as Nancy Writebol and Dr. Kent

<sup>1</sup> *About Ebola Virus Disease*, CENTERS FOR DISEASE CONTROL & PREVENTION (Nov. 3, 2015), <http://www.cdc.gov/vhf/ebola/about.html> [<http://perma.cc/53K3-JVSW>].

<sup>2</sup> *See Ebola Virus Disease in Guinea*, WORLD HEALTH ORG. (Mar. 23, 2014), [http://www.who.int/csr/don/2014\\_03\\_23\\_ebola/en/](http://www.who.int/csr/don/2014_03_23_ebola/en/) [<http://perma.cc/F8X5-XLN9>]; *Ebola Virus Disease in Guinea*, WORLD HEALTH ORG. REGIONAL OFF. FOR AFR. (Mar. 23, 2014), <http://www.afro.who.int/en/clusters-a-programmes/dpc/epidemic-a-pandemic-alert-and-response/outbreak-news/4063-ebola-hemorrhagic-fever-in-guinea.html> [<http://perma.cc/H2AA-S5WS>]; *see also Previous Updates: 2014 West Africa Outbreak*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/previous-updates.html> [<http://perma.cc/9K6N-MYXU>] (last updated Jan. 14, 2016) (explaining that the Centers for Disease Control and Prevention became aware of the outbreak in West Africa in March 2014 and made an announcement on March 25, 2014).

<sup>3</sup> *Ebola Virus Disease: Fact Sheet No. 103*, WORLD HEALTH ORG., <http://www.who.int/mediacentre/factsheets/fs103/en/#> [<http://perma.cc/R7JB-NYZY>] (last updated Jan. 2016).

<sup>4</sup> *Id.*; *see also* Jeremy Ashkenas et al., *How Many Ebola Patients Have Been Treated Outside of Africa?*, N.Y. TIMES, <http://www.nytimes.com/interactive/2014/07/31/world/africa/ebola-virus-outbreak-qa.html> (last updated Jan. 26, 2015); Alexandra Sifferlin, *Here's the Difference Between MERS and Ebola*, TIME (June 8, 2015), <http://www.time.com/3910571/mers-ebola/> [<http://perma.cc/L636-QV3G>].

<sup>5</sup> *Questions and Answers: 2014 Ebola Outbreak*, CENTERS FOR DISEASE CONTROL & PREVENTION [hereinafter *Ebola Q&A I*], <http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/qa.html> [<http://perma.cc/J4LR-W2J7>] (last updated Dec. 29, 2015).

<sup>6</sup> James G. Hodge, Jr. et al., *Global Emergency Legal Responses to the 2014 Ebola Outbreak*, 42 J.L. MED. & ETHICS 595, 595 (2014).

<sup>7</sup> CDC Health Alert Network, *Ebola Virus Disease Confirmed in a Traveler to Nigeria, Two U.S. Healthcare Workers in Liberia*, CENTERS FOR DISEASE CONTROL & PREVENTION

Brantly, were eventually brought back to an Atlanta hospital where they recovered.<sup>8</sup> Although the story reached a happy ending for Writebol and Brantly, it was certainly possible that the life-saving treatment could have come too late or not at all. It also was not a forgone conclusion that Writebol's and Brantly's status as U.S. citizens would guarantee their return to this country and its superior medical facilities.

If public opinion was determinative of the missionaries' eligibility to return to the United States, Writebol and Brantly may have been denied re-entry. When news broke of the plan to bring them back to U.S. soil, it evoked an uneasy response from many Americans.<sup>9</sup> Dramatizations of Ebola in popular culture, books, and movies likely caused the fear that contributed to this backlash.<sup>10</sup> Donald Trump, real estate mogul and 2016 presidential hopeful, made his view on the matter clear when he tweeted, "Stop the EBOLA patients from entering the U.S. Treat them, at the highest level, over there. THE UNITED STATES HAS ENOUGH PROBLEMS!"<sup>11</sup>

Another prominent figure and 2016 presidential hopeful, Dr. Ben Carson, also opposed bringing Writebol and Brantly back to the United States.<sup>12</sup> Carson reasoned that there were ways to treat infected Americans overseas that would be just as effective as treating them at home.<sup>13</sup> Carson also argued that a logical "benefit-to-risk analysis" favored disallowing re-entry until the threat of transmission had passed.<sup>14</sup>

#### A. *The Tuberculosis Traveler*

Fear of contagious American travelers can readily turn into anger and animosity. The 2007 debacle surrounding Andrew Speaker, the "tuberculosis traveler," is

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(July 28, 2014, 4:30 PM), <http://emergency.cdc.gov/han/han00363.asp> [<http://perma.cc/AX92-RJQX>].

<sup>8</sup> See Maggie Fox, *Docs Declare Ebola Patients Kent Brantly and Nancy Writebol No Risk to Public*, NBC NEWS, <http://www.nbcnews.com/storyline/ebola-virus-outbreak/docs-declare-ebola-patients-kent-brantly-nancy-writebol-no-risk-n185626> [<http://perma.cc/2ZSN-GUF5>] (last updated Aug. 21, 2014, 3:30 PM).

<sup>9</sup> See Joel Achenbach et al., *American Doctor Infected with Ebola Returns to U.S.*, WASH. POST (Aug. 2, 2014), [https://www.washingtonpost.com/national/health-science/us-confirms-2-americans-with-ebola-coming-home-for-treatment/2014/08/01/c20a27cc-1995-11e4-9e3b-7f2f110c6265\\_story.html](https://www.washingtonpost.com/national/health-science/us-confirms-2-americans-with-ebola-coming-home-for-treatment/2014/08/01/c20a27cc-1995-11e4-9e3b-7f2f110c6265_story.html) [<http://perma.cc/J3FV-2UTV>].

<sup>10</sup> See *id.*; see, e.g., Alyssa Rosenberg, *The Best Movie to Watch During the Current Ebola Outbreak*, WASH. POST (Aug. 4, 2014), <https://washingtonpost.com/news/act-four/wp/2014/08/04/the-best-movie-to-watch-during-the-current-ebola-outbreak/> [<http://perma.cc/UT4X-Z8PN>].

<sup>11</sup> Donald J. Trump (@realDonaldTrump), TWITTER (August 1, 2014, 5:22 AM), <https://twitter.com/realdonaldtrump/status/495182739310936064> [<http://perma.cc/N6L2-T7Z8>] (as of Jan. 28, 2016, the tweet was liked 998 times and retweeted 1,219 times).

<sup>12</sup> See Ben S. Carson, *How to Keep Ebola out of America*, WASH. TIMES (Oct. 7, 2014), <http://www.washingtontimes.com/news/2014/oct/7/carson-how-to-keep-ebola-out-of-america/> [<http://perma.cc/5VGD-N8XN>].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

illustrative of the potential problems of re-entry.<sup>15</sup> Speaker is a U.S. citizen who took an international flight to Europe shortly after being diagnosed with a particularly lethal strain of tuberculosis (TB).<sup>16</sup> In January 2007, an X-ray of Speaker's ribs indicated a possible TB infection.<sup>17</sup> According to the CDC, doctors repeatedly told Speaker that he should not travel.<sup>18</sup> Around the same time, local health officials began investigating their "legal authority to prevent Speaker from traveling."<sup>19</sup> In spite of these measures, Speaker flew to Paris on May 12, 2007, two days earlier than he originally planned.<sup>20</sup> After learning that he left the country, the CDC told Speaker not to return to the United States and instead to check into a nearby hospital for evaluation.<sup>21</sup> The CDC subsequently issued an "electronic border alert" requiring border agents to isolate Speaker should he attempt to re-enter the United States.<sup>22</sup> Notwithstanding this restriction, Speaker managed to take several flights and ultimately return to the United States through Canada—all while harboring a highly dangerous and infectious disease.<sup>23</sup> The media vilified Speaker, and public outrage took the form of hate mail and death threats.<sup>24</sup>

The Speaker story highlights two points that are important for the overall purpose of this Note. First, an infected citizen abroad may not be able to count on the goodwill of his countrymen to ensure his return. Rather, such a citizen may have to rely on constitutional arguments to effectuate his trip home. Second, the unavoidable conclusion is that the government needs to add more certainty and legitimacy in its approaches to these situations. It is troubling that the government could not mitigate this potentially serious threat. More disconcerting, however, is the fact that the CDC knew the identity of the traveler, which ought to have made containment easier.

### *B. The 2014 Ebola Outbreak*

Returning to the 2014 Ebola outbreak, a previous version of the CDC's "Questions and Answers on Ebola" pamphlet seems to address the consternation surrounding

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<sup>15</sup> See generally Hilary A. Fallow, Comment, *Reforming Federal Quarantine Law in the Wake of Andrew Speaker: The "Tuberculosis Traveler,"* 25 J. CONTEMP. HEALTH L. & POL'Y 83 (2008) ("In the early summer of 2007, the nation was shocked to learn that Andrew Speaker, a thirty-one year old personal injury lawyer from Atlanta, Georgia, had taken several international flights while infected with a rare and lethal strain of tuberculosis (TB).").

<sup>16</sup> Vikki Valentine, *A Timeline of Andrew Speaker's Infection*, NPR (June 6, 2007), <http://www.npr.org/news/specials/tb/>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See *id.*

<sup>24</sup> See Peter Lattman, *Tough Times for Andrew Speaker, Esq., and TB Patient*, WALL ST. J.:L. BLOG (Sept. 14, 2007, 3:42 PM), <http://blogs.wsj.com/law/2007/09/14/tough-times-for-andrew-speaker-esq-and-tb-patient/>.

the decision to bring back the infected Americans.<sup>25</sup> In the pamphlet, the agency affirmatively declared that a citizen “has the right to return to the United States.”<sup>26</sup> This is a very simplified explanation of a complex constitutional right. Regardless of what the CDC’s pamphlet says, the right of a U.S. citizen to re-enter the country is not absolute.

For starters, the CDC discusses methods used to restrict re-entry in the very same pamphlet that declared the existence of this right.<sup>27</sup> Somewhat paradoxically, the more recent CDC pamphlet both chronicles “screening protocols” and provides for taking “any necessary public health action,” despite the previous version discussing the right to re-entry as an absolute right.<sup>28</sup> Additionally, various statutes explicitly provide for the exclusion of citizens from the country under the precise circumstances faced by Writebol, Brantly, and Speaker.<sup>29</sup> For example, 42 U.S.C. § 265 grants the Surgeon General “power to prohibit . . . the introduction of persons . . . from such countries or places as he shall designate in order to avert” the introduction of disease into the United States.<sup>30</sup> This statute makes no distinction between citizens and non-citizens, and, moreover, the statute does not describe, with any detail, the threshold severity needed to trigger its enforcement.<sup>31</sup> At the very least, both the CDC’s policies and the relevant statutes make the situation much murkier than the black-and-white assertion that a citizen has “the right to return to the United States.”<sup>32</sup>

Fortunately, the 2014 Ebola outbreak subsided.<sup>33</sup> That does not mean that this issue should be put on the back burner. Because the threat of communicable diseases is “certain to be a recurring narrative in the 21st century,” it is imperative that our global health organizations, world leaders, and even our legal systems learn from

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<sup>25</sup> *Questions and Answers on Ebola*, CENTERS FOR DISEASE CONTROL & PREVENTION [hereinafter *Ebola Q&A 2*], [http://stacks.cdc.gov/view/cdc/24819/cdc\\_24819\\_DS1.pdf](http://stacks.cdc.gov/view/cdc/24819/cdc_24819_DS1.pdf) [<http://perma.cc/GSV9-JSQV>] (last updated Aug. 28, 2014).

<sup>26</sup> *Id.* (Q: “Why were the ill Americans with Ebola brought to the U.S. for treatment? How is CDC protecting the American public?” A: “A U.S. citizen has the right to return to the United States. Although CDC can use several measures to prevent disease from being introduced in the United States, CDC must balance the public health risk to others with the rights of the individual.”).

<sup>27</sup> *Id.* (noting that the CDC can use “several measures” to prevent disease from entering the United States, but that it must also balance the public health risk with the rights of individuals).

<sup>28</sup> Compare *id.* (discussing the right to re-entry as an absolute right), with *Ebola Q&A 1*, *supra* note 5.

<sup>29</sup> See 42 U.S.C. § 264 (2012); *id.* § 265.

<sup>30</sup> *Id.* § 265.

<sup>31</sup> See *id.*

<sup>32</sup> *Ebola Q&A 2*, *supra* note 25; see also 42 U.S.C. § 265.

<sup>33</sup> See Kevin Sieff, *U.S.-Built Ebola Treatment Centers in Liberia Are Nearly Empty as Outbreak Fades*, WASH. POST (Jan. 18, 2015), [https://www.washingtonpost.com/world/africa/us-built-ebola-treatment-centers-in-liberia-are-nearly-empty-as-disease-fades/2015/01/18/9acc3e2c-9b52-11e4-86a3-1b56f64925f6\\_story.html](https://www.washingtonpost.com/world/africa/us-built-ebola-treatment-centers-in-liberia-are-nearly-empty-as-disease-fades/2015/01/18/9acc3e2c-9b52-11e4-86a3-1b56f64925f6_story.html) [<http://perma.cc/T7SA-7QT5>].

these recent troubles.<sup>34</sup> An informed dialogue concerning the interplay between public health and our legal system may help curb some of the fear and callousness demonstrated when sick citizens return home.<sup>35</sup> In particular, it is critically important to understand more fully the origin, textual hook, and scope of the right to return to the United States.

## II. HISTORICAL BACKGROUND OF THE RIGHT TO RE-ENTER

Protections for the right to travel predate this country and were familiar to our early English predecessors. The Magna Carta, created in 1215, explicitly provided: “It shall be lawful to any person . . . to go out of our kingdom, and to return, safely and securely, by land or by water, saving his allegiance to us, unless it be in time of war, for some short space, for the common good of the kingdom . . . .”<sup>36</sup> Centuries of common law decisions have interpreted and sculpted the right to travel abroad—a freedom which remained acknowledged during William Blackstone’s era.<sup>37</sup> Nevertheless, protections for the freedom to travel freely were somewhat dubious, or even ineffective, at certain times in English history.<sup>38</sup> The ability to move from one English colony to another was never seriously protected nor limited by English law, as though that freedom was simply taken for granted.<sup>39</sup> One notable exception to this

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<sup>34</sup> Lena H. Sun et al., *Ebola’s Lessons, Painfully Learned at Great Cost in Dollars and Human Lives*, WASH. POST (Dec. 28, 2014), [https://www.washingtonpost.com/national/health-science/ebolas-lessons-painfully-learned-at-great-cost-in-dollars-and-human-lives/2014/12/28/dcc8c50a-87c2-11e4-a702-fa31ff4ae98e\\_story.html](https://www.washingtonpost.com/national/health-science/ebolas-lessons-painfully-learned-at-great-cost-in-dollars-and-human-lives/2014/12/28/dcc8c50a-87c2-11e4-a702-fa31ff4ae98e_story.html) [http://perma.cc/6SGE-NLU5].

<sup>35</sup> See generally Rebecca A. Weldon, *An “Urban Legend” of Global Proportion: An Analysis of Nonfiction Accounts of the Ebola Virus*, 6 J. HEALTH COMM. 281, 292–93 (2001) (observing that alarmist depictions of threats to public health “increase ignorance regarding our biological relationship with our world”).

<sup>36</sup> MAGNA CARTA, art. XLII (stating that the right to travel described in the document is not absolute; rather, it may be curtailed during certain enumerated exigencies like war and does not apply to certain classes of people like prisoners and outlaws).

<sup>37</sup> See WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 265 (George Sharswood ed., J.B. Lippincott Co. 1893) (1765–1769), [oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-1](http://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-1) (“By the common law, every man may go out of the realm for whatever cause he pleaseth, without obtaining the king’s leave; provided he is under no injunction of staying at home . . .”).

<sup>38</sup> See generally 5 Rich. 2, stat. 1, c. 2 (1381) (Eng.), reprinted in 2 STATUTES OF THE REALM 18 (1816) (declaring a statute under which the property of most individuals becomes the property of the king if they leave the realm without the king’s permission); see also 4 Jac. 1, c. 1, § 4 (1606) (Eng.), reprinted in 4 STATUTES OF THE REALM 18 (1816) (repealing, after 225 years, the aforementioned 1381 statute whereby individuals forfeited their property by traveling abroad without permission); Jeffrey Kahn, *International Travel and the Constitution*, 56 UCLA L. REV. 271 (2008).

<sup>39</sup> See ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 162, 177 (1956) (noting that “[b]eyond a few scattered provisions of this sort, the charters seem to have taken internal freedom of movement for granted”).

laissez-faire attitude toward the right to travel was the Rhode Island Charter, which guaranteed the right “to passe and repasse with freedome, into and through the rest of the English Collonies, vpon their lawfull and civill occasions [sic].”<sup>40</sup> Later, the revolutionary era brought some restrictions to the colonists’ ability to travel freely.<sup>41</sup> In fact, the “restriction of freedom of movement was one of the ‘injuries and usurpations’ listed in the Declaration of Independence.”<sup>42</sup>

Given our early legal system’s somewhat vacillating approach to protecting the right to travel freely, it is not entirely surprising that the Constitution is silent regarding freedom of movement.<sup>43</sup> The Constitution’s lack of an explicit textual hook for the right to travel, however, belies the Framers’ intent to guarantee this freedom. The course of the Constitution’s development highlights several indicia of a desire to protect travel.

For starters, the Articles of Confederation explicitly addressed the freedom to travel, providing that “the people of each state shall have free ingress and regress to and from any other state.”<sup>44</sup> Under the independent state scheme set forth by the Articles of Confederation, this essentially amounted to protection for quasi-international travel. The Framers of the 1789 Constitution retained much of the text surrounding the Articles of Confederation’s “ingress and regress” clause, yet declined to carry the precise “ingress and regress” language over to the new document.<sup>45</sup> At least one scholar contends that this omission should not be taken as a decision by the Framers to curtail the right to travel, as that right was never truly threatened in either the colonies or during the early history of the nation.<sup>46</sup> Additionally, a common drafting technique indicates intent to protect this right notwithstanding the lack of

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<sup>40</sup> RHODE ISLAND ROYAL CHARTER OF 1663, <http://sos.ri.gov/divisions/Civics-And-Education/charter-1663> [<http://perma.cc/95TC-4GEL>]; *see also* THE LIBERTIES OF THE MASSACHUSETTS COLLONIE IN NEW ENGLAND, art. 17 (1641) <http://history.hanover.edu/texts/masslib.html> [<http://perma.cc/P355-QDBC>] (“Every man of or within this Jurisdiction shall have free libertie, notwithstanding any Civill power to remove both himselfe, and his familie at their pleasure out of the same, provided there be no legall impediment to the contrarie [sic].”).

<sup>41</sup> Kahn, *supra* note 38, at 285–86.

<sup>42</sup> *Id.*

<sup>43</sup> CHAFEE, *supra* note 39, at 185–87.

<sup>44</sup> ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

<sup>45</sup> *See* CHAFEE, *supra* note 39, at 185 (“The third clause about ‘privileges of trade and commerce’ can be regarded as embraced in the Interstate Commerce Clause. The Constitution repeats the first clause almost verbatim, in Article IV, section 2: ‘The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.’ But there is not a trace of the second clause on ‘free ingress and regress . . . .’”); *see also* AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 251 (2005) (dismissing the omission as merely carving off “excess and confusing verbiage”).

<sup>46</sup> *See* CHAFEE, *supra* note 39, at 186–87 (“[N]obody spoke of barriers . . . against persons. Very likely none had been erected. They would have violated the Articles of Confederation and also what I have assumed to be the long practice in fact during the colonial period. So the silence in the Convention does not seem significant . . . .”).



an explicit textual hook. The omission of the “ingress and regress” language in the Constitution may be explained by the notion that the freedom of movement was already considered essential to “liberty” and did not require specific enumeration.<sup>47</sup>

### III. DISTINCTION BETWEEN FOREIGN AND DOMESTIC FREEDOMS

It is now appropriate to make the important distinction between the freedom to travel across state lines and the freedom to travel across national borders. The freedom to travel domestically and the freedom to travel internationally, despite falling under the larger umbrella of freedom of movement generally, are distinct rights afforded different levels of protection. The Supreme Court has treated the right to foreign travel less favorably than the right to domestic travel.<sup>48</sup> One justification for this distinction comes from the notion that there is a pragmatic need to protect domestic travel in order to protect other rights.

Like foreign travel, travel between the states of the Union is not a right explicitly found in the Constitution. The Court nevertheless protected this right as a means of protecting other rights, powers, or designs more directly expressed in the Constitution. Thus, the freedom to travel between states has been given heightened protection because it functions to add value to the rights and freedoms identified more easily in the Constitution’s text: associational freedoms, the participation of citizens in federal self-governance, and the pursuit of individual and national economic prosperity.<sup>49</sup>

The constitutional right to travel from one state to another is “virtually unqualified.”<sup>50</sup> By contrast, the right to travel internationally can be considered, at best, “an aspect of the ‘liberty’ protected by the Due Process Clause of the Fifth Amendment.”<sup>51</sup> This Note will now focus on only the freedom of international movement and, in particular, the right to re-enter the United States.

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<sup>47</sup> See, e.g., THE FEDERALIST NO. 84, at 537 (Alexander Hamilton) (Henry Cabot Lodge ed., G.P. Putnam’s Sons 1895) (1787) (“[W]hy declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?”).

<sup>48</sup> See Kahn, *supra* note 38, at 286 (“The Court granted strong constitutional protections for interstate travel, but permitted restriction of foreign travel within the far less protective bounds of due process.”).

<sup>49</sup> *Id.* at 287.

<sup>50</sup> *Califano v. Torres*, 435 U.S. 1, 4 n.6 (1978).

<sup>51</sup> *Id.*

*A. Freedom of Foreign Movement*

Moving from the revolutionary era into our nation's more recent history, we have generally strengthened our support for the right to international travel. The freedom to travel—and specifically the narrower right of re-entry after having traveled abroad—numbers amongst the rights contained in the 1948 Universal Declaration of Human Rights (UDHR).<sup>52</sup> The UDHR, signed by the United States and scores of other nations, contains a provision that “[e]veryone has the right to leave any country, including his own, *and to return to his country.*”<sup>53</sup> In 1956, however, shortly after Congress signed onto this seemingly unambiguous endorsement of a fundamental right to travel internationally, the U.S. Department of State adopted a measure that restricted such travel.<sup>54</sup> This new regulation provided the foundation for the passport cases—the most extensive Supreme Court review of the right to travel abroad.<sup>55</sup>

The U.S. Department of State, by this point in the nation's history, held the power to accept or reject passport applications.<sup>56</sup> The 1956 regulation allowed for the denial of a passport to any person whose conduct abroad would be detrimental to American interests.<sup>57</sup> This regulation was broad in its language and application. A similar regulation provided that the Secretary of State could restrict passports for communists or communist sympathizers.<sup>58</sup> Under this policy, the U.S. Department of State denied a passport to Arthur Miller, preventing him from seeing a performance of his play, *The Crucible*, in Brussels.<sup>59</sup> The U.S. Department of State also denied a passport to Rockwell Kent, finding that he was a communist.<sup>60</sup> To the U.S. Department of State's credit, it did provide for judicial review of its determinations, which Kent used to appeal his passport denial to the U.S. Supreme Court.<sup>61</sup> Through

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<sup>52</sup> CHAFEE, *supra* note 39, at 162.

<sup>53</sup> G.A. Res. 217(III)A, Universal Declaration of Human Rights, art. 13 cl. 2 (Dec. 10, 1948) (emphasis added).

<sup>54</sup> 22 C.F.R. § 51.136 (1956) (“In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) Violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States.”).

<sup>55</sup> *See, e.g.,* Haig v. Agee, 453 U.S. 280 (1981); Jones v. Helms, 452 U.S. 412 (1981); Kent v. Dulles, 357 U.S. 116 (1958). The Passport Cases exemplify cases brought in response to the restrictions placed on international travel.

<sup>56</sup> *See* CHAFEE, *supra* note 39, at 194.

<sup>57</sup> 22 C.F.R. § 51.136 (1956).

<sup>58</sup> 22 C.F.R. § 51.135 (1952).

<sup>59</sup> CHAFEE, *supra* note 39, at 197.

<sup>60</sup> *Kent*, 357 U.S. at 117–18.

<sup>61</sup> *See* 22 C.F.R. § 51.137 (1952); *Kent*, 357 U.S. at 118.

the 1958 case, *Kent v. Dulles*, in its “first substantial case on the question”<sup>62</sup> of freedom to travel outside of the United States, the Supreme Court acknowledged the pedigree of the right to travel internationally:

Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.<sup>63</sup>

It is evident from the Court’s strong wording in *Kent* that freedom of movement is a “right.” The Court reaffirmed this, with modest skepticism, in a subsequent case arising under similar circumstances,<sup>64</sup> thus, by 1981 Supreme Court jurisprudence on the right to travel internationally became more aligned with the unambiguous endorsement given to the right under the UDHR. Even today, however, it is somewhat unclear where exactly that right comes from, and “the textual source of this right has been the subject of debate.”<sup>65</sup> Several theories for the source of this protection have emerged. The prior discussion on the omission of the “ingress and regress” language from the Constitution alluded to one of them: substantive due process. This theory will now be explored in more detail, along with three competing theories.

#### *B. Possible Sources of the Right to Re-enter: Criteria*

Courts and scholars alike have proffered several theories for where the right to re-enter the country derives. This Note analyzes four of those theories successively. Before delving into the theories, an objective set of criteria should be developed so that each theory can be scrutinized in an empirical manner. The essence of the following criteria is that the right to re-enter the United States should be guaranteed in a textual home that provides strong, but not absolute, protection. To make the right to re-enter an absolute and utterly unyielding right would be an error because it would overlook the sheer necessity of the government’s role in protecting the public health of its citizens. On the other hand, to make the right to re-enter overly weak and pliable would also be an error because it would devalue the importance of the ability to return from abroad. Thus, the home for the right to re-enter must strike a balance between those two ends of the spectrum. The following criteria should ensure that the appropriate balance is met.

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<sup>62</sup> Kahn, *supra* note 38, at 302.

<sup>63</sup> *Kent*, 357 U.S. at 126.

<sup>64</sup> See *Haig v. Agee*, 453 U.S. 280, 307 (1981).

<sup>65</sup> *Jones v. Helms*, 452 U.S. 412, 418 (1981).

### 1. First Criterion: Protect Re-entry Where an Individual Carries No Serious Communicable Disease

The first criterion is the simplest. It modestly holds that the right to re-enter the country should stand where the individual is neither contagious nor a threat to the public health of the nation. Thus, the ideal home for the right to re-enter must give the right at least as much “teeth” to withstand arbitrary government actions unsupported by any demonstrable threat to public health.

### 2. Second Criterion: Protect the Re-entry Where an Individual Carries a Serious Communicable Disease, but the Government Can Take Reasonable Efforts to Prevent Transmission

The second criterion is as murky as the first criterion is simple. This criterion holds that the home for the right to re-enter should allow the right to stand even where an individual carries a communicable disease, provided the government can take reasonable means to contain the threat of mass transmission. This criterion contemplates the exact situation faced by Nancy Writebol and Dr. Kent Brantly.<sup>66</sup> It also assumes that the government took the right course of action in bringing them home under stringent quarantine precautions.

Essentially, this criterion requires that the textual hook for the right to re-enter the country be one that permits balancing the individual’s interest in returning against the government’s interest in protecting the majority. Thus, the ideal home for the right will be one where the jurisprudence of the textual hook focuses on weighing and balancing competing interests.

### 3. Third Criterion: Do Not Constrain the Government’s Responses to Imminent and Certain Other Threats to Public Health

The third criterion represents the pragmatic stance that, at a certain point, the government must do what is necessary to ensure the public health of the majority, even if it runs against the individual’s right to re-enter the country. Therefore, this criterion requires that the right be guaranteed by a constitutional provision that is non-absolute. Further explanation is necessary.

Although “[i]t is a widely held opinion that there are no absolute rights,”<sup>67</sup> such view also has its detractors.<sup>68</sup> At any rate, this philosophical debate does not need to be resolved for the purposes of this Note. This Note makes no assertion that the right to re-enter the country is, or even ought to be, absolute. If there are absolute

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<sup>66</sup> See *supra* notes 7–8 and accompanying text.

<sup>67</sup> Alan Gewirth, *Are There Any Absolute Rights?*, 31 PHIL. Q. 1 (1981).

<sup>68</sup> See, e.g., *id.* at 2 (arguing that there are certain absolute rights).

rights, this criterion simply holds that the right to re-enter the country should not be one of them. If there are no absolute rights, this criterion holds that the individual's right to re-enter the country should yield in situations where the government action is necessary to prevent imminent and certain threats to public health.

#### 4. Fourth Criterion: Harmonize the Provision with Related Acts

The fourth, and final, criterion addresses a different concern than those behind the first three criteria. Rather than ensuring a balance in the strength of the right to re-enter, the last criterion simply concerns suitability. A major canon of statutory interpretation is the notion that a statutory provision should be construed to harmonize with the rest of the act of which it is a part.<sup>69</sup> Similarly, a provision should be construed to harmonize with the provisions of other related acts.<sup>70</sup> In the same vein, the right to re-enter should be protected in a textual home that protects similar rights. For the purposes of this criterion, a particular right is "similar" to the right to re-enter if the rights have comparable historical development and importance. Also relevant to this comparison is the level of pervasiveness: whether the right to re-enter and the right it is being compared to are exercised by citizens with the same frequency.

#### IV. POSSIBLE SOURCES OF THE RIGHT TO RE-ENTER: CRITERIA APPLIED

Armed with the aforementioned criteria, each of the possible homes for the right to re-enter can now be analyzed in a formulaic manner. The criteria will be applied to the following textual homes that scholars and courts have proffered as sources for the right to travel internationally: (1) the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution; (2) an integral component of what it means to be a U.S. citizen; (3) the First Amendment; and (4) the substantive due process doctrine of the Fifth Amendment. Importantly, these theories originated in the context of the right to international travel *generally*, not the right to re-enter *specifically*. That said, theories put forward for the source of the right to travel internationally provide an excellent starting point for analyzing the narrower issue of returning to the country.

##### A. *Privileges and Immunities*

The freedom to return to the country may be considered a privilege belonging to U.S. citizens pursuant to Article IV, Section 2 of the Constitution.<sup>71</sup> After all,

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<sup>69</sup> See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *FTC v. Mandel Bros.*, 359 U.S. 385, 389 (1959).

<sup>70</sup> See, e.g., *United States v. Estate of Romani*, 523 U.S. 517, 530–31 (1998); *United States v. Fausto*, 484 U.S. 439, 453 (1988).

<sup>71</sup> U.S. CONST. art IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

courts have used the Privileges and Immunities Clause of Article IV as support for the freedom of *interstate* travel.<sup>72</sup> In an important early case interpreting Article IV, the United States District Court for the Eastern District of Pennsylvania held that the Privileges and Immunities Clause extends to protect “[t]he right of a citizen of one state to pass through . . . any other state.”<sup>73</sup> Therefore, it may seem to follow that the same should hold for *international* travel and international *re-entry*; however, this theory does not meet all of the criteria. For starters, it is not entirely clear that the Privileges and Immunities Clause of Article IV would provide enough strength for the right to re-enter the country to stand even in the absence of any communicable disease. The Privileges and Immunities Clause was viewed as “a means of promoting harmony between the states by requiring the equal treatment of visitors from one state in another.”<sup>74</sup> These goals are not furthered by citizens traveling freely on the international stage.

Additionally, unlike interstate travel, the ability to leave the country and subsequently re-enter is not necessary to support other aims of citizenship like participation in the federal government.<sup>75</sup> Therefore, the Privileges and Immunities Clause fails the first criterion—it is not likely that this textual hook can provide any teeth to the right to re-enter. Because the Privileges and Immunities Clause fails the first criterion, it necessarily fails the more demanding second and third criteria.

The fourth criterion of harmony is also not satisfied by this textual hook. The Privileges and Immunities Clause of Article IV, otherwise known also as the “Comity Clause,” speaks against preferential treatment.<sup>76</sup> Accordingly, the clause “forbids the states from giving unfavorable treatment to visiting out-of-state Americans with respect to the body of rights that constitutes the privileges and immunities of state citizenship.”<sup>77</sup> Beyond the fact that the Privileges and Immunities Clause is used to protect *interstate* travel, there is scant support for harmonization with re-entering the country. The history of the Privileges and Immunities Clause of the Constitution does not jibe with the right to re-enter the country. Article IV, Section 2 of the Constitution is a near-identical retooling of Article IV, Section 1 of the Articles of Confederation.<sup>78</sup> In fact, the only readily apparent textual difference between Article IV, Section 2 of the Constitution and Article IV, Section 1 of the Articles of Confederation is the

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<sup>72</sup> See Kahn, *supra* note 38, at 288.

<sup>73</sup> Corfield v. Coryell, 6 F. Cas. 546, 552 (E.D. Pa. 1823) (No. 3230).

<sup>74</sup> Kahn, *supra* note 38, at 303.

<sup>75</sup> See *id.* at 287.

<sup>76</sup> See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1398 (1992).

<sup>77</sup> *Id.* at 1398.

<sup>78</sup> ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1 (“The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union [and] the free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states . . .”).

preamble of the latter, which articulates the goal of maintaining relations between states.<sup>79</sup> Extrapolating the purpose of the Privileges and Immunities Clause, as it appears in the Articles of Confederation, to the current Constitution, shows that nothing about Article IV, Section 2 speaks to the right to re-enter. No “mutual friendship and intercourse” among citizens of different states is achieved when a given individual exercises his right to re-enter the country. Similarly, the relations between people of different states do not suffer when an individual is denied re-entry to the United States.

In sum, the theory that the textual hook for the right to re-enter is found in the Privileges and Immunities Clause of Article IV is unconvincing. If that particular right is guaranteed in the Constitution, it must be guaranteed under a textual hook other than the Privileges and Immunities Clause.

### B. Citizenship

A second theory proffers citizenship itself as the best source for the right to re-enter the country from abroad.<sup>80</sup> This theory takes the stance that our traditions, Constitution, and national identity make us citizens of a democratic republic—to be distinguished from mere subjects of a monarch.<sup>81</sup> The ratification of the Fourteenth Amendment, particularly the Citizenship Clause contained therein, bolstered the importance of citizenship. In pertinent part, the Fourteenth Amendment provides that “[a]ll persons born or naturalized in the United States . . . are citizens of the United States.”<sup>82</sup> Setting aside, for a moment, the “privileges *or* immunities” language that follows the passage excerpted above, the Citizenship Clause alone carries weight. The Framers of the Fourteenth Amendment intended this clause to overrule the *Dred Scott* decision, but that may not have been its sole purpose.<sup>83</sup> It also may have been intended to act as an independent source of rights, including the right to travel internationally. If the Citizenship Clause is accepted as an independent source for certain rights, it does not matter that the *Slaughterhouse Cases* Court jettisoned the “privileges *or* immunities” language that follows.<sup>84</sup>

Unfortunately, however, this textual home fails several of the criteria because it would protect the right to travel—and the right to re-enter—too strongly. If it is

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<sup>79</sup> Compare U.S. CONST. art. IV, § 2, with ARTICLES OF CONFEDERATION of 1781, pmbl.

<sup>80</sup> See Kahn, *supra* note 38, at 323 (“The right to depart from and reenter one’s country [is] . . . an intrinsic part of what it means to be a citizen of our democratic republic.”).

<sup>81</sup> See *id.* at 325 (noting that the distinction between citizens and subjects is advanced in Article III, Section 2 of the Constitution as well as in the Eleventh Amendment to the Constitution).

<sup>82</sup> U.S. CONST. amend. XIV, § 1.

<sup>83</sup> *Sugarman v. Dougall*, 413 U.S. 634, 652 (1973) (Rehnquist, J., dissenting) (“The paramount reason [for passing the Citizenship Clause of the Fourteenth Amendment] was . . . to overrule explicitly the *Dred Scott* decision.”); see also Lisa Maria Perez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1054 (2008) (arguing that the Framers intended to codify the common law doctrine of *jus soli*).

<sup>84</sup> See Kahn, *supra* note 38, at 327.

decided that the right to travel internationally is at the very core of what it means to be a U.S. citizen, the government would have an intolerably difficult time abridging that right in response to a serious communicable disease outbreak. Under this theory, a government restriction on an individual's ability to travel internationally would trigger strict scrutiny and thus require the government to demonstrate that the restriction is the least restrictive means for achieving a compelling government interest.<sup>85</sup> That standard, in isolation, might provide an acceptable level of protection, but the thrust of this theory is that it tips the scale in favor of re-entry.

Accordingly, this home satisfies the first criterion because it would ensure protection of an individual's ability to re-enter the country when he poses no threat to the public health of the nation. It also satisfies the second criterion because the right would continue to stand even if the individual presents a threat to public health, albeit one that the government can take reasonable steps to contain. It fails the third criterion, however, because it would prevent the government from being able to exclude a person who presents a risk that cannot be contained by reasonable means. In short, housing the right to re-enter the country in our conception of what it means to be a U.S. citizen simply makes the right too strong.

Finally, this theory fails the fourth criterion. Placing the right to re-enter the country here would constitute a significant shift in Fourteenth Amendment jurisprudence. The Citizenship Clause has not been called on to protect any similar fundamental rights—in fact, “[t]he Court has never interpreted the meaning of the Citizenship Clause, and it has only considered what a right of citizenship might be in a handful of cases.”<sup>86</sup> It is, therefore, unlikely that the Court would open up an entire new realm of constitutional jurisprudence just to accommodate the relatively untested right to travel internationally. Although it would be intriguing to test the theory and ingrain the right to re-enter as a powerful right, it should not be favored. It is an unlikely route, not without shortcomings.

### C. First Amendment

Although it is not the most obvious candidate, the First Amendment's protection against “abridging the freedom of speech”<sup>87</sup> may be the guarantor of the right to re-enter. This is a version of the stance taken by Justice Douglas in two cases decided in consecutive terms: *Zemel v. Rusk*<sup>88</sup> and *Aptheker v. Secretary of State*.<sup>89</sup> In *Zemel*,

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<sup>85</sup> See *id.* at 330.

<sup>86</sup> Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 AKRON L. REV. 717, 766 (2003).

<sup>87</sup> U.S. CONST. amend. I.

<sup>88</sup> 381 U.S. 1, 24 (1965) (Douglas, J., dissenting) (explaining that the right to travel is necessary for First Amendment rights).

<sup>89</sup> 378 U.S. 500, 520 (1964) (Douglas, J., concurring) (analogizing the freedom of travel to the rights of association and assembly).



Justice Douglas argued that “the right to travel is at the periphery of the First Amendment”<sup>90</sup> and that the First Amendment protects travel as a method for learning and observing “social, physical, political and other phenomena abroad.”<sup>91</sup> This notion is derived from First Amendment doctrine protecting the right to *receive* information and experiences.<sup>92</sup>

The idea that in-person communications are more aligned with the First Amendment’s goals rather than indirect channels of communication supports Douglas’s assertions that the right to travel is protected, in some way, by the First Amendment.<sup>93</sup> When information in a foreign country is sought, government-imposed restrictions on travel “should not be dismissed as insignificant time-place-manner regulations of speech.”<sup>94</sup> Proponents of attributing the right to travel to the umbrella of the First Amendment contend that this strategy strengthens the protection because courts reviewing an alleged violation will apply a high standard of review.<sup>95</sup>

Ultimately, however, assigning the right to travel internationally to the auspices of the First Amendment is not ideal. As an initial matter, this theory arguably affords too much protection for the right to travel. As the majority in *Zemel* observed, “There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.”<sup>96</sup> Thus, the *scope* of a First Amendment-based right could be too broad. Additionally, the level of protection afforded to First Amendment rights may leave the government shackled when confronted with a serious risk to public health which could otherwise be mitigated by restricting travel. Restrictions “on travel that implicate first amendment interests are . . . likely to trigger a heightened standard of review.”<sup>97</sup> Thus, the *strength* of the right could be too robust under this textual home. Therefore, placing the right to re-enter under the umbrella of the First Amendment would make the right strong enough to pass muster under the first and second criteria; however, this source would possibly fail the third criterion.

The third criterion calls for the right to re-enter to yield when necessary to prevent a catastrophic and imminent harm to the country’s public health. It cannot be

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<sup>90</sup> 381 U.S. at 26 (Douglas, J., dissenting).

<sup>91</sup> *Id.* at 24.

<sup>92</sup> See Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 250 (2004) (arguing for a First Amendment right to gather different types of information); see also *Stanley v. Georgia*, 394 U.S. 557 (1969) (establishing a constitutional right to receive information and ideas); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (striking down a local ordinance banning door-to-door handbilling).

<sup>93</sup> See Thomas E. Laursen, *Constitutional Protection of Foreign Travel*, 81 COLUM. L. REV. 902, 923 (1981).

<sup>94</sup> *Id.*

<sup>95</sup> See *id.* at 919.

<sup>96</sup> 381 U.S. at 16–17 (“For example, the prohibition of unauthorized entry into the White House diminishes . . . opportunities to gather information . . . but that does not make entry into the White House a First Amendment right.”).

<sup>97</sup> Laursen, *supra* note 93, at 919.

said for certain whether this requisite yielding would occur here. On one hand, the First Amendment's protections are very strong.<sup>98</sup> On the other, however, the First Amendment's protections are not absolute. The freedom of speech and the freedom of the press may give way when the communication in question is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>99</sup> Similarly, the freedom of religion under the First Amendment is bounded—at least in the sense that not everything qualifies as a religion.<sup>100</sup> This might suggest that, if the right to re-enter is guaranteed under the First Amendment, it, like the freedoms of religion, speech, and the press, could yield when necessary. If this is the case, then this theory for the source of the right to re-enter could satisfy the third criterion. Ultimately, there is no need to actually determine whether the First Amendment definitively satisfies the third criterion because it undoubtedly fails the fourth criterion.

The right to re-enter the country does not harmonize with the rights traditionally understood to fall under the umbrella of the First Amendment.<sup>101</sup> From the plain language of the First Amendment, one can easily extract the protections for religion, speech, press, and assembly. By contrast, absolutely nothing speaks directly to either travel or the right to re-enter. Furthermore, the history of the right to re-enter does not square with the rights guaranteed by the First Amendment. Concerns over freedom of speech and the freedom of the press were at the forefront of the American Revolution and contributed, in part, to the decision to break away from England.<sup>102</sup> By contrast, concerns over freedom to travel were not central to the decision to break away from England.<sup>103</sup> Similarly, the Framers of the Bill of Rights deemed the right to international travel not necessary for specific enumeration.<sup>104</sup>

Another problem with this theory is that it gained virtually no traction with the Court. In *Aptheker*, none of the Justices joined Justice Douglas in his concurrence,<sup>105</sup> and in the later *Zemel* case, only one Justice signed on to support Justice Douglas's

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<sup>98</sup> *Id.*

<sup>99</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

<sup>100</sup> *See, e.g., United States v. Seeger*, 380 U.S. 163, 165–66 (1965) (“[T]he test of belief . . . is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God . . . .”); *Reynolds v. United States*, 98 U.S. 145, 162–67 (1878) (analyzing the meaning of “religion” and holding that polygamy does not fall under First Amendment protections).

<sup>101</sup> U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

<sup>102</sup> *Bridges v. California*, 314 U.S. 252, 264 (1941) (noting the “generally accepted historical belief that ‘one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press’” (quoting Henry Schofield, *Freedom of the Press in the United States*, 9 AM. SOC. SOC’Y 67, 76 (1914))).

<sup>103</sup> *See CHAFEE, supra* note 39, at 1–3.

<sup>104</sup> *Id.*

<sup>105</sup> *Aptheker v. Sec’y of State*, 378 U.S. 500, 519 (1964) (Douglas, J., concurring).

dissent.<sup>106</sup> In fact, the majority in *Zemel* explicitly rejected the notion that government restriction on travel implicated the First Amendment.<sup>107</sup> The Court in *Haig v. Agee* also casted doubt on whether the First Amendment spoke to international travel.<sup>108</sup> Moreover, this theory does not contemplate the modern impediment to international travel discussed in this Note—communicable diseases. Justice Douglas’s First Amendment theory can best be thought of as a product of immediate circumstances. In *Zemel* and *Aptheker*, the government policies under review were founded on a fear of communism and the dissemination of communist propaganda.<sup>109</sup> Accordingly, those cases clearly called the freedom of speech into question. The First Amendment fit, for *Zemel* and *Aptheker*, in a way that is inapplicable to restrictions founded on communicable diseases.

#### *D. Substantive Due Process*

A fourth possible home for the right to re-enter is in substantive due process doctrine. The freedom to travel may stem from the word “liberty,” which is protected by the Due Process Clause of the Fifth Amendment.<sup>110</sup> The Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests.”<sup>111</sup> In ascertaining whether a particular substantive right is protected by the Due Process Clause, the Court looks to whether the proffered right is objectively “deeply rooted in this Nation’s history and tradition”<sup>112</sup> and “implicit in the concept of ordered liberty.”<sup>113</sup> The Court recognizes a wide range of rights as deeply rooted and implicit in liberty, including, but not limited to, the right to an abortion<sup>114</sup> and the right to decline life-saving medical assistance.<sup>115</sup> Unlike the other possible sources for the right to re-enter the country, substantive due process doctrine provides an acceptable level of protection.

The first three criteria—those relating to the strength of the right in various situations—are all met when the right to re-enter is guaranteed through substantive due process. One of the distinguishing features of substantive due process jurisprudence is that it permits a consideration of the government’s interest.<sup>116</sup> This allows for a

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<sup>106</sup> 381 U.S. 1, 23 (1965) (Douglas, J., dissenting).

<sup>107</sup> *Id.* at 16 (majority opinion).

<sup>108</sup> 453 U.S. 280, 308 (1981).

<sup>109</sup> See generally *Zemel*, 381 U.S. at 1; *Aptheker*, 378 U.S. at 500.

<sup>110</sup> *Jones v. Helms*, 452 U.S. 412, 418 (1981).

<sup>111</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

<sup>112</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

<sup>113</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>114</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>115</sup> *Cruzan v. Mo. Dep’t of Health*, 497 U.S. 261 (1990).

<sup>116</sup> See Timothy P. Lydon, Note, *If the Parole Board Blunders, Does the Fourteenth Amendment Set the Prisoner Free? Balancing the Liberty Interests of Erroneously Released Prisoners*, 88 GEO. L.J. 565, 567 (2000) (describing one test used to resolve substantive due process claims as “weighing state interests against an individual’s competing . . . liberty interests”).

balancing of competing interests that is crucial to satisfying the first three criteria. The first criterion is met because, in a scenario where an individual poses no threat to the public's health, the individual's interest in returning will trump any government interest in excluding the return. The second criterion is met because, if the government can take reasonable steps to bring an infected citizen home, the individual's interest will outweigh the government's interest and the right will stand. On the other hand, if the measures necessary to permit safe re-entry into the country would be unreasonably costly or risky, the government could legally deny re-entry. The third criterion is met because the right will yield—and the government will be able to legally exclude a citizen—in cases where the government's interest in protecting the majority outweighs the individual's interest in returning. The fourth criterion of harmony is also met.

Amongst the long list of rights protected through substantive due process are: the right to privacy,<sup>117</sup> the right to learn languages other than English,<sup>118</sup> and the right to refuse unwanted medical treatment.<sup>119</sup> Like the right to travel internationally and subsequently return, these are important rights; however, it is unlikely that anyone would list them amongst the top five most important rights.<sup>120</sup> Additionally, many of the rights enshrined in substantive due process doctrine are enjoying increased popularity as of late.<sup>121</sup> They are undeniably more important to the average American in the twenty-first century than they were in the eighteenth century. Many of the rights already protected in substantive due process doctrine arose, or became more of an everyday concern, because of advancements in technology.<sup>122</sup> Concern for a substantive due process right to use contraceptives was sparked by the development of a safe, discrete, and reliable contraceptive method.<sup>123</sup> Constitutional pushbacks

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<sup>117</sup> See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>118</sup> See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>119</sup> See *Cruzan*, 497 U.S. at 261.

<sup>120</sup> See, e.g., William Booth, *The U.S. Citizenship Test: Learning, and Earning, Their Stripes*, WASH. POST, Nov. 17, 1996, at C03 (stating that the right to vote is the correct answer, for the purposes of citizenship exams, to the question “[W]hat is the most important right granted to United States citizens?”); *Citizenship Rights and Responsibilities*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/citizenship/learners/citizenship-rights-and-responsibilities> [<http://perma.cc/D8YB-Q7QR>] (omitting the right to intrastate, interstate, and international travel from a list of rights compiled to inform potential new citizens).

<sup>121</sup> See, e.g., *Cruzan*, 497 U.S. at 270 (“Until about [1976] . . . the number of right-to-refuse-treatment decisions was relatively few.”); Martha J. Bailey, “*Momma’s Got the Pill*”: *How Anthony Comstock and Griswold v. Connecticut Shaped US Childbearing*, 100 AM. ECON. REV. 98, 110 (2010) (“The post-*Griswold* increase [in contraception use] is consistent with the idea that women . . . would have been using the birth control pill in greater numbers had laws not been so restrictive.”).

<sup>122</sup> See *supra* note 121 and accompanying text.

<sup>123</sup> Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women’s Career and Marriage Decisions*, 110 J. POL. ECON. 730, 732–35 (2002); see also *Oral Contraceptives: The Liberator*, ECONOMIST, Dec. 23, 1999, <http://www.economist.com>

against government restrictions on an individual's ability to refuse life-sustaining treatment arose as medical advancements extended life expectancy.<sup>124</sup>

In this respect, international travel is similar to the rights currently protected by the substantive due process doctrine. Pushes to recognize the ability to travel internationally as a constitutional right are a twentieth-century phenomenon.<sup>125</sup> Advancements in technology make it possible to fly to Europe or Asia and get there faster than ever before. Importantly, the cost of international travel has dropped significantly with the new technology, making it more routine for Americans to travel internationally—not just the wealthy.<sup>126</sup> The combination of faster means of transportation and cheaper fares has profoundly increased the prevalence of international travel.<sup>127</sup> More and more people are finding employment in positions that require international travel.<sup>128</sup> Simply put, the right to travel is more important now than it was in the eighteenth century—and it is only becoming even more important. International travel is, therefore, similar to other substantive due process rights, in that they all protect twentieth- to twenty-first-century needs and are trending toward increased importance. Because the right to re-enter the country is comparable to the already recognized substantive due process rights, it makes sense to house them all under the same clause.

Having determined that substantive due process doctrine would satisfy all of the criteria, the textual home for the right to re-enter the country should be the Due Process Clause of the Fifth Amendment. Of course this determination is just the beginning of this right's analysis. There are questions that still need to be answered. Therefore, this Note will now explore how the right to re-enter would be analyzed under the substantive due process doctrine, in the context of denied re-entry due to infection with a serious communicable disease. A substantive due process "formula," for the purposes of communicable diseases, will first be constructed.

## V. THE FORMULA

The Supreme Court has repeatedly held that the Due Process Clause of the Fifth Amendment gives individuals two distinct, yet intertwined types of protection from

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/node/347484 [http://perma.cc/5YSD-89D3] (calling the birth control pill the most important invention of the twentieth century).

<sup>124</sup> *Cruzan*, 497 U.S. at 270 (stating that "cases involving the right to refuse life-sustaining treatment have burgeoned" in light of medical advancements, making it possible to sustain life "well past the point where natural forces would have brought certain death in earlier times").

<sup>125</sup> See generally *Zemel v. Rusk*, 381 U.S. 1 (1965) (upholding the Secretary of State's denial of travel to Cuba); *Kent v. Dulles*, 357 U.S. 116 (1958) (overturning the Secretary of State's decision to refuse passports to alleged communists).

<sup>126</sup> See RAYMOND A. AUSROTAS, MIT FLIGHT TRANSP. LAB., NASA CONTRACTOR REPORT 165654, PREDICTING THE IMPACT OF NEW TECHNOLOGY AIRCRAFT ON INTERNATIONAL AIR TRANSPORTATION DEMAND (1981).

<sup>127</sup> See *id.* at 3.

<sup>128</sup> See *id.* at 11.

government actions.<sup>129</sup> Those protections are substantive due process and procedural due process.<sup>130</sup> The substantive due process doctrine can be defined as “the body of law produced by the courts as they employ the due process clauses to review government action on its merits.”<sup>131</sup> The key inquiry in analyzing a substantive due process claim is whether an asserted right is “fundamental.”<sup>132</sup> This inquiry largely hinges on historical tradition.<sup>133</sup> A proffered substantive due process right is more likely to be found “fundamental” if it is “deeply rooted in this Nation’s history and tradition.”<sup>134</sup> However, a backward-looking perspective is not the only approach a court will take when evaluating an asserted right.<sup>135</sup> Recent Court decisions suggest using another tool: examination of the collective conscience of the nation. In fact, a forward-looking perspective was crucial to the Court’s decision in *Lawrence v. Texas*,<sup>136</sup> where the majority found an “emerging awareness” of the notion that the private sex lives of all consenting adults ought to be defended.<sup>137</sup> Moreover, the precise manner in which an asserted right is framed can be controlling for the purposes of this inquiry. For example, in *Bowers v. Hardwick*,<sup>138</sup> the Court defined the relevant right as the “right [of] homosexuals to engage in sodomy.”<sup>139</sup> So defined, the Court rejected the assertion that such a right was fundamental.<sup>140</sup> In a later case arising under similar circumstances, however, the Court recrafted the inquiry and, instead, defined the relevant right as the right of consenting adults to engage in private conduct.<sup>141</sup> After tweaking the inquiry, the Court found that such a right is in fact fundamental and protected by substantive due process.<sup>142</sup> As *Bowers* and *Lawrence* show, the exact manner in which a right is defined—for example, whether it is broadly framed as the right to travel internationally or narrowly framed as the

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<sup>129</sup> *United States v. Salerno*, 481 U.S. 739, 746 (1987) (addressing the constitutionality of the Bail Reform Act).

<sup>130</sup> *Id.*

<sup>131</sup> Michael J. Phillips, *The Substantive Due Process Rights of College and University Faculty*, 28 AM. BUS. L.J. 567, 569 (1991).

<sup>132</sup> *Reno v. Flores*, 507 U.S. 292, 305 (1993) (explaining the appropriate standard of review in analyzing INS deportation procedures).

<sup>133</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997); *Moore v. City of East Cleveland*, 431 U.S. 494, 501 (1977) (plurality opinion).

<sup>134</sup> *Washington*, 521 U.S. at 721 (quoting *Moore*, 431 U.S. at 503).

<sup>135</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”).

<sup>136</sup> 539 U.S. 558, 572 (2003).

<sup>137</sup> *Id.* at 572 (relying on the American Law Institute’s recommendations, trends in state laws, and more when examining the nation’s emerging awareness).

<sup>138</sup> 478 U.S. 186 (1986).

<sup>139</sup> *Id.* at 190.

<sup>140</sup> *Id.* at 190–91.

<sup>141</sup> *Lawrence*, 539 U.S. at 578.

<sup>142</sup> *Id.*

right to return from abroad—may have a considerable impact on its analysis as a substantive due process right.<sup>143</sup>

When an asserted substantive due process right is implicated and found to be not “fundamental,” the government may infringe upon that right if there is a “‘reasonable fit’ between governmental purpose . . . and the means chosen to advance that purpose.”<sup>144</sup> This “reasonable fit” standard is deferential to government action;<sup>145</sup> therefore, if an asserted right is not fundamental, it may be readily infringed by the government, provided the government can show *some* plausible justification for the infringement. When a substantive due process right is implicated and determined to be “fundamental,” the government is not *automatically* precluded from acting in a way that restricts the right; the government’s intrusion is permissible provided it is “narrowly tailored to serve a compelling [government] interest.”<sup>146</sup>

Applying both the historical tradition and emerging awareness tests to the right to re-enter shows that this right ought to be considered fundamental. Under the backward-looking perspective of whether the right is “deeply rooted” in the country’s history and tradition, the right to re-enter appears to be fundamental. The right to re-enter the country is, more or less, expressly listed in three of our four most important legal documents: the Magna Carta,<sup>147</sup> the Declaration of Independence,<sup>148</sup> and the Articles of Confederation.<sup>149</sup> Even though the right to re-enter the country is not expressly mentioned in the Constitution, that silence is readily explained and should thus not diminish the right’s importance.<sup>150</sup> Participation in global affairs requires, and has always required, the ability to leave the country to conduct business with the assurance of one’s ability to return thereafter. Moreover, the ability to re-enter the country bears on our capacity to continue our most intimate relationships with friends, family, and loved ones. Surely rights protecting those relationships are “deeply rooted” in the nation’s history and “implicit in the concept of ordered liberty.”<sup>151</sup>

Through the forward-looking perspective of whether the right is supported by an “emerging awareness” of its importance, the right to re-enter again passes as fundamental. All of the historical considerations are amplified by the increased prevalence

<sup>143</sup> See, e.g., *id.* at 558; *Bowers*, 478 U.S. at 186.

<sup>144</sup> *Reno v. Flores*, 507 U.S. 292, 305 (1993).

<sup>145</sup> *Id.* at 302–03 (upholding the government action where the right was determined to not be fundamental).

<sup>146</sup> *Id.* at 302.

<sup>147</sup> See MAGNA CARTA, art. XLII.

<sup>148</sup> THE DECLARATION OF INDEPENDENCE para. 9 (1776) (“He has endeavoured [sic] to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.”).

<sup>149</sup> See ARTICLES OF CONFEDERATION of 1781, art. IV, para. 1.

<sup>150</sup> See *supra* notes 44–47.

<sup>151</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); see also *Bowers v. Hardwick*, 478 U.S. 186, 214 (1986).

of international travel in today's world. The enumeration of this right in the UDHR is further evidence that the right is enjoying increased global recognition in more recent years.<sup>152</sup>

The four criteria discussed herein, indicate that the best textual home for the right is through the substantive due process doctrine. Having determined that the right to re-enter the country should qualify as "fundamental," there is finally a formula that can be used to analyze government restrictions on this right in the context of communicable diseases. The historical tradition of the right as well as forward-looking considerations indicate that the right is a "fundamental" right for the purposes of substantive due process. Accordingly, the government should be justified in preventing a U.S. citizen from re-entering the country only where doing so is "narrowly tailored to serve a compelling [government] interest."<sup>153</sup> Every new formula, however, ought to be tested. Testing this proffered analysis for the right to re-enter, when pitted against the threat of a communicable disease, is difficult because there are no cases on point to see whether this framework would work. In other words, there is no data with which to test the formula. To help with this dilemma, it may be useful to analogize the threat of communicable diseases to the threat of terrorism. Much like the threat of a communicable disease, the threat of a possible terrorist attack can be the basis for a government-imposed restriction on travel. Unlike the communicable disease scenario, however, there are actual cases on point in the context of the No Fly List.<sup>154</sup> These cases can supply the data with which the formula may be tested. If plugging the facts from various No Fly List cases into the fundamental substantive due process right framework produces desirable results, then the same desirable results should be expected in the context of communicable disease cases.

#### *A. Testing the Formula: Applying Substantive Due Process to the No Fly List*

Through the No Fly List, the Federal Bureau of Investigation (FBI) and other government agencies can utterly shut down a person's ability to return to the United States. Although the No Fly List is actually maintained by the Transportation Security Administration (TSA), the names on the list are "largely compiled from classified evidence collected by confidential sources."<sup>155</sup> Several agencies work together to add names to the list; however, the largest role is played by the FBI's Terrorist Screening Center (TSC).<sup>156</sup> The No Fly List is something of a misnomer because it

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<sup>152</sup> G.A. Res. 217(III)A, *supra* note 53.

<sup>153</sup> *Reno v. Flores*, 507 U.S. 292, 302 (1993).

<sup>154</sup> *See, e.g., Mohamed v. Holder*, 995 F. Supp. 2d 520 (E.D. Va. 2014).

<sup>155</sup> Justin Florence, Note, *Making the No Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 *YALE L.J.* 2148, 2155 (2006).

<sup>156</sup> *Id.*



reaches beyond airlines and may also restrict travel via trains and ships.<sup>157</sup> The exact number of names contained on the list is not disclosed to the public, but some sources estimate that as many as 325,000 people are on it.<sup>158</sup> The statute authorizing the No Fly List is even more vague (read broader) than that authorizing denied re-entry for communicable disease purposes.<sup>159</sup> Under 49 U.S.C. § 114(h)(3), the TSA may “use information from government agencies to identify individuals on passenger lists who may be a threat to civil aviation or national security.”<sup>160</sup> Once an individual is identified as a threat, the TSA may “prevent the individual from boarding an aircraft, or take other appropriate action.”<sup>161</sup> The effects triggered by placement on the list can cause a serious burden on an individual’s ability to travel. The 2014 U.S. District Court for the Eastern District of Virginia case, *Mohamed v. Holder*, is representative of this matter.<sup>162</sup>

Gulet Mohamed is a citizen of the United States and a resident of Virginia.<sup>163</sup> In March 2009, he “temporarily left the United States to learn Arabic and connect with members of his family living abroad.”<sup>164</sup> While overseas, he traveled to Yemen, Somalia, and Kuwait without any trouble.<sup>165</sup> Mohamed alleged that in December 2010, after attempting to renew his Kuwaiti visitor’s visa, agents of the U.S. government detained, interrogated, and tortured him.<sup>166</sup> Mohamed eventually obtained a ticket to return to the United States on January 16, 2011.<sup>167</sup> However, after arriving at the Kuwaiti airport, officials denied his entry onto the plane.<sup>168</sup> Finally, on January 20, 2011, Mohamed successfully boarded a commercial plane and returned to the United States.<sup>169</sup> Mohamed was neither charged nor detained upon his arrival home.<sup>170</sup> Mohamed then filed an action against the Attorney General, the director of the FBI, and the director of the TSC.<sup>171</sup> In his complaint, he alleged that his placement on the No Fly List violated his constitutional rights.<sup>172</sup> Specifically, he alleged “a violation of his right as a U.S. citizen to reside in the United States and reenter it from abroad.”<sup>173</sup>

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<sup>157</sup> *Id.* at 2154.

<sup>158</sup> *Id.* at 2153.

<sup>159</sup> Compare 49 U.S.C. § 114(h)(3) (2012), with 42 U.S.C. § 265 (2012).

<sup>160</sup> 49 U.S.C. § 114(h)(3)(A).

<sup>161</sup> *Id.* § 114(h)(3)(B).

<sup>162</sup> 995 F. Supp. 2d 520 (E.D. Va. 2014).

<sup>163</sup> *Id.* at 523.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 524.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 522.

<sup>172</sup> *Id.* at 524–25.

<sup>173</sup> *Id.* at 524.

Before discussing the actual outcome of the case, the formula developed in the previous section can be tested using these facts. Pursuant to the formula, the government was legally authorized to deny re-entry to Mohamed, if doing so was narrowly tailored to serve a compelling government interest. In this case, the government interest is national security. It is well established that no government interest is more compelling than national security;<sup>174</sup> therefore, the fundamental substantive due process right formula will support denied re-entry, provided the denial was “narrowly tailored.” The factors that should be considered when analyzing whether the action was narrowly tailored are: length of the denial; whether the group of people denied was over-inclusive or under-inclusive; and whether less restrictive means were available to fulfil the government’s interest. The first step in testing the “narrowly tailored” prong is to examine the length of time during which the right was denied. Here, the length of time probably cuts against Mohamed’s case because he was only denied re-entry for a few days.<sup>175</sup> The second step is to ask whether the government action was over-inclusive or under-inclusive. On one hand, it is tough to make the argument that the No Fly List is over-inclusive or under-inclusive because the exact breadth of the list is not known to the public. On the other hand, however, the denied re-entry was over-inclusive in Mohamed’s specific case because he in fact did not pose a threat to national security.<sup>176</sup> The third step for the purposes of the “narrowly tailored” inquiry is to ask whether there was a less restrictive means available for satisfying the government interest. Here, the government could have done a few things differently that would have been just as effective in mitigating the perceived threat. They could have brought Mohamed back to the United States in isolation. They also could have completed a more thorough inquiry into his background to make a more informed assessment of his threat potential. That said, the government could argue that these proffered alternatives were in fact not available given the costs and administrative burdens that would be associated with their implementation. This third step is likely a wash under these facts. It is hard to say whether a consideration of less-restrictive means favors Mohamed or the government.

The end result of applying the facts of *Mohamed* to the communicable disease framework is that there is not a clear answer. Reasonable people could weigh these three considerations differently and come to different opinions as to whether the government’s actions were “narrowly tailored.” However, one factor clearly suggests a finding of no impermissible deprivation of Mohamed’s right to re-enter. That factor is the length of time during which his right to re-enter was denied. Thus, the best conclusion to draw from the formula is that the government action was not an *impermissible* curtailment of Mohamed’s right. This predicted result can now be compared to the actual result of *Mohamed*.

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<sup>174</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214, 218–19 (1944) (upholding the internment of Japanese Americans during World War II).

<sup>175</sup> *Mohamed*, 995 F. Supp. 2d at 523–24.

<sup>176</sup> *Id.* at 523 (explaining that Mohamed was studying Arabic and visiting family).

The *Mohamed* court accepted as valid, the right of a U.S. citizen to re-enter the country.<sup>177</sup> In fact, the defendants apparently did not even contest the existence of that right.<sup>178</sup> Rather, the defendants argued that the constitutional right only attaches once the individual arrives at a U.S. port of entry.<sup>179</sup> In other words, the defendants contended that the right to re-entry applies in only cases where the citizen is turned away at a U.S. border and not in cases where government actions impede his ability to get on a plane bound for the United States. The court disagreed with the defendants and held that “[a]t some point, governmental actions taken to prevent or impede a citizen from reaching the boarder [sic] infringe upon the citizen’s right to reenter the United States.”<sup>180</sup> In making this distinction, the court assigned a broader scope to the right to re-entry. Rather than considering only the narrow situation of being denied access at a border, the court recognized that government actions can have the practical effect of unconstitutionally denying re-entry, notwithstanding that an individual may be thousands of miles away from the border.<sup>181</sup>

Ultimately, the *Mohamed* court concluded that the allegations did not give rise to a constitutionally unacceptable violation of Mohamed’s right to re-entry.<sup>182</sup> “[T]he four to five-day delay that Mohamed experienced in his ability to reenter the United States did not unduly burden his right of reentry and therefore, as a matter of law, did not constitute a constitutional deprivation.”<sup>183</sup> The predicted result matches the actual result. Additionally, the predicted result turned on the length of Mohamed’s denial, and that consideration of time also seemed to be crucial to the court’s decision. In this case, the formula passes muster.

### *B. More Data Supporting No Fly List Cases*

Other courts had the opportunity to address fact patterns similar to that in *Mohamed*. A 2014 U.S. District Court for the District of Oregon case, *Fikre v. FBI*,<sup>184</sup> similarly involved a citizen plaintiff who had difficulties returning to the United States from abroad after being placed on the No Fly List.<sup>185</sup> In his claims, he alleged a violation of his substantive due process right to re-enter.<sup>186</sup> The *Fikre* plaintiff took his claims one step further than Mohamed by seeking both an injunction against future barred re-entry and to compel the U.S. Department of State to “establish information

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<sup>177</sup> *Id.* at 536.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 536–37.

<sup>181</sup> *Id.* at 537.

<sup>182</sup> *Id.* at 539.

<sup>183</sup> *Id.* at 537.

<sup>184</sup> 23 F. Supp. 3d 1268 (D. Or. 2014).

<sup>185</sup> *Id.* at 1273–74.

<sup>186</sup> *Id.* at 1276.

and protocols to assist United States citizens to return to their homeland who, once abroad, are placed in the No-Fly List.<sup>187</sup> The *Fikre* court held that the plaintiff's claims established a sufficiently ripe case or controversy, even though the plaintiff was never unsuccessful in an attempt to return to the United States.<sup>188</sup> The court found sufficient ripeness in the fact that a credible source told the plaintiff that his name appeared on the No Fly List.<sup>189</sup> In other words, "it is not necessary for Plaintiff to attempt to make futile travel plans in order to establish constitutional ripeness."<sup>190</sup> Taken together, the *Mohamed* and *Fikre* cases lend support for the idea that the federal government can unconstitutionally deprive an individual of the right to re-entry, notwithstanding the fact that the individual is neither at a U.S. border nor presently attempting to return.

The *Fikre* court also recognized the existence of the right to re-entry as a fundamental substantive due process right, and in this case, that right was recognized over a direct assertion to the contrary on the part of the defendants.<sup>191</sup> The *Fikre* court, purporting to rely on the *Mohamed* decision, described an exhaustion element as necessary to an infringement of the substantive due process right.<sup>192</sup> No such exhaustion element is apparent in the *Mohamed* decision, yet the *Fikre* court found it necessary.<sup>193</sup> Using this requirement, the *Fikre* court dismissed the plaintiff's claim, finding that the plaintiff could have gone to the embassy overseas to attempt to secure passage back to the United States.<sup>194</sup>

A final case following similar fact patterns as the *Mohamed* and *Fikre* cases is the 2014 U.S. District Court for the District of Oregon case *Tarhuni v. Holder*.<sup>195</sup> Tarhuni is an American citizen of Libyan descent who temporarily visited Libya to perform humanitarian work.<sup>196</sup> Tarhuni planned to leave Tunisia and return to his home in Oregon via an initial flight to Paris on January 17, 2012.<sup>197</sup> At the airport in Tunisia, commercial airline personnel informed him that he would not be permitted to board his plane.<sup>198</sup> Like the *Mohamed* and *Fikre* plaintiffs, Tarhuni's name appeared on the No Fly List, and, like those plaintiffs, Tarhuni claimed that the government violated his Substantive Due Process rights to international travel.<sup>199</sup>

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<sup>187</sup> *Id.* (citation omitted).

<sup>188</sup> *Id.* at 1278.

<sup>189</sup> *Id.* at 1279.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 1282.

<sup>192</sup> *Id.* ("[T]o plead a substantive due-process claim based on a deprivation of the right to return to the United States, Plaintiff must allege facts sufficient to demonstrate that Defendants have deprived him of every viable means of returning to the country.").

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Tarhuni v. Holder*, 8 F. Supp. 3d 1253 (D. Or. 2014).

<sup>196</sup> *Id.* at 1262.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 1265.

The *Tarhuni* court followed *Mohamed*, finding a constitutionally protected substantive due process right to international travel.<sup>200</sup> The court then examined the extent to which placement on the No Fly List would hinder that right, suggesting adherence to the exhaustion element of *Fikre*.<sup>201</sup> The court concluded that “with the exception of a relatively few countries in North and Central America, travel by air is not merely the most convenient form of international travel, but, given time and financial realities, travel by air is the *only* practical mode of international travel for the vast majority of travelers.”<sup>202</sup> Taken together with the *Fikre* case, this reasoning indicates that denied access to flights, in particular, may be enough to constitute a deprivation; however, only being placed on the No Fly List may not be enough to constitute a deprivation if other channels to return home are available.

As the *Mohamed*, *Fikre*, and *Tarhuni* decisions indicate, district courts are beginning to recognize—and apply—the right to re-enter in No Fly List cases. That said, there are still significant gaps in the right. Moreover, the right and the substantive due process formula herein assigned to it, have never been discussed in the context of restricted travel due to the threat of communicable diseases.

### C. Returning to Communicable Diseases

The *Mohamed*, *Fikre*, and *Tarhuni* triad of cases seems to indicate that the fundamental substantive due process framework would work fairly well in the context of communicable diseases. For starters, each of those courts entertained the notion of a substantive due process right to travel internationally. Also, in differing degrees, each court flirted with the narrower concept of the right to re-enter the country. Moreover, each court recognized that the government has a highly compelling interest in national security. This translates well into the realm of communicable diseases—it suggests that courts will be appreciative of the sheer necessity to abridge some rights in the event of a bona fide threat. In other words, it shows that the framework would likely allow the government to deny re-entry when absolutely necessary to stop the spread of disease.

More importantly, each court displayed a willingness to perform a thoughtful analysis of the “narrowly tailored” component. For example, the *Mohamed* court determined that a four-to-five-day delay in re-entry was acceptable.<sup>203</sup> This suggests that a court reviewing a denied re-entry in the context of communicable diseases would find a four-to-five-day delay within the confines of narrow tailoring. It also suggests that courts would consider factors that bear on the narrowness of tailoring in the communicable diseases scenario. Those factors may include: the virulence of the disease; the incubation period of the disease; the availability of simple quarantine

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<sup>200</sup> *Id.* at 1275.

<sup>201</sup> *Id.* at 1276.

<sup>202</sup> *Id.* at 1271.

<sup>203</sup> *Mohamed v. Holder*, 995 F. Supp. 2d 520, 537 (E.D. Va. 2014).

measures; whether targeted screening procedures can identify only those individuals who pose legitimate threats; and the availability of adequate medical treatment outside of the United States.

#### CONCLUSION

Currently, the two most likely justifications that the government would have for restricting a person's re-entry into the United States are the containment of communicable diseases and the prevention of terrorism. Pursuant to a number of disconcertingly broad statutes, the government is empowered to deny a citizen's re-entry into the country.<sup>204</sup> Recent technological advances have made international travel faster, cheaper, and more routine for more individuals. Unfortunately, constitutional law regarding travel has failed to keep pace. This failure is made blatantly obvious by the lingering uncertainty as to whether the right to travel and the right to re-enter are protected. The possible sources of the right to return are the Privileges and Immunities Clause, the Citizenship Clause, the First Amendment freedom of speech, and substantive due process under the Fifth Amendment.

Protecting the right to return should be accomplished by using substantive due process. This travel-centric right is similar to the other rights already protected through this doctrine, such as the right to contraception and the right to refuse life-sustaining medical treatment. Moreover, this right already has support, albeit shaky support, from decisions such as *Kent v. Dulles*<sup>205</sup> and *Mohamed v. Holder*.<sup>206</sup> Most importantly, however, the right to re-enter should be protected by substantive due process because it provides the appropriate level of protection. Unlike the theory that travel is protected by virtue of citizenship, which would plausibly lead to no permissible government restrictions, substantive due process would allow courts to engage in balancing. If it is determined that the government's interest in maintaining the public health and safety of the American people outweighs a given curtailment, the government will be vindicated in that decision. This is a desirable outcome, especially when considering that many of the alternatives would not allow for any government restriction and could seriously preclude the government's ability to protect its citizens against disease outbreaks.

Any murkiness in applying the proffered substantive due process formula to re-entry cases can be reduced by establishing clear protocols. Bright-line rules that delineate the permissible length of a given travel restriction—adopted either through statutes or by CDC regulations—would be very helpful and easy to implement. For example, a government imposed travel restriction due to the fear of a disease outbreak could

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<sup>204</sup> 49 U.S.C. § 114(h)(3) (2012) (No Fly List); 42 U.S.C. § 264 (2012) (detention involving communicable diseases); *id.* § 265 (suspension of entry communicable diseases).

<sup>205</sup> 357 U.S. 116 (1958).

<sup>206</sup> 995 F. Supp. 2d 520.

state that the length of the restriction is simply the incubation period for the disease. This would assist courts in performing the substantive due process balancing test by signaling what constitutes a permissible delay and what constitutes an *impermissible* delay. Additionally, such a bright-line rule would tell those individuals whose re-entry has been restricted, the length of time that they will have to wait before returning home. Perhaps most importantly, additional clarity in the right to re-enter would give both assurance to people like the Ebola missionaries and understanding to concerned citizens back home.