December 2017

Ebolamania and Equal Protection of Health Care Workers Under Rational Basis with Bite Review

Jennifer Jolly-Ryan
Northern Kentucky University College of Law

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EBOLAMANIA AND EQUAL PROTECTION OF HEALTH CARE WORKERS UNDER RATIONAL BASIS WITH BITE REVIEW

Jennifer Jolly-Ryan*

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* Professor of Legal Writing, Salmon P. Chase College of Law, Northern Kentucky University. I am grateful to Krista Burton, Marchesa Peters, and Jeffrey Rosenberger, who worked with me on this Article. I particularly want to thank Jeffrey Rosenberger, my research assistant. Thank you also to April Watkins, Anne Marie Perny, and other volunteers from Haiti Austin, who provide medical care at remote mobile clinics in Léogâne, Haiti. Their helping others so greatly in need inspired me to write this Article.

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I. INTRODUCTION

The United States Supreme Court has been more flexible recently in applying equal protection analysis. The Court is willing to apply greater judicial scrutiny and review to laws and government action that affect unprotected groups under the Court’s traditional equal protection analysis and rational basis review. If an equal protection challenger of a law has some characteristics of a quasi-suspect class or the law in question burdens a significant right, the United States Supreme Court may apply something more than rational basis review. “Rational basis with bite” review is the Court’s stricter review.2

This Article analyzes whether health care workers, returning home from the front lines of fighting the spread of contagious diseases, qualify for equal protection under the Supreme Court’s more flexible rational basis with bite review. Further, this Article analyzes whether the courts could consider applying rational basis with bite3 to quarantine policies and laws. The Article concludes that health care workers involved in medical relief efforts overseas who travel back home to the United States possess some of the characteristics of a quasi-suspect class, and quarantine burdens at least quasi-fundamental rights, warranting more than rational basis review of quarantine laws that affect them.

Part II of this Article summarizes the constitutional sources for the state and federal governments’ power to quarantine. Part III provides a history of

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1 See Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015) (striking down state bans on same sex marriages); United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) (striking down a section of the Defense of Marriage Act); Romer v. Evans, 517 U.S. 620, 635 (1996) (holding that Colorado’s state constitutional amendment preventing protected status based upon homosexuality or bisexuality violated the Equal Protection Clause even though sexual orientation is not a suspect class); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985) (invalidating a zoning decision that denied a permit to construct a home for the mentally retarded, under a stricter review even though the Court held that the mentally disabled are not a suspect class under equal protection analysis); Plyler v. Doe, 457 U.S. 202, 219–20 (1982) (striking down a Texas law denying children of illegal aliens a public education).

2 See Gerald Gunther, The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 18–19 (1972). The United States Supreme Court has never used the phrase “rational basis with bite.” Rather, it is a concept first discussed by Professor Gerald Gunther. See id. Rational basis with bite’s scrutiny is closer to intermediate scrutiny than rational basis.

3 Id.
discrimination associated with quarantines, transitioning into a discussion of the most recent Ebola outbreak in West Africa. Part IV includes a discussion of equal protection tests courts use to balance individual freedoms and the government’s interest in using quarantine to protect public health.

This Article concludes that a discriminatory history of quarantine and animus against those who treat infected patients today in diverse countries like West Africa call for scrutiny under rational basis with bite judicial review. Moreover, the irrational fears about the spread of diseases, politicization of the health issues, and international goodwill generated through medical relief volunteer efforts overseas call for the Court’s scrutiny of quarantine laws. Finally, the burdening of significant liberty and travel rights, federalism concerns, and inhibition of personal relationships caused by quarantines justify a higher level of scrutiny regarding quarantine procedures, or rational basis with bite review, under the Equal Protection Clause.

II. THE CONSTITUTIONAL SOURCES OF QUARANTINE POWER

Unquestionably, the government has vast quarantine power, at both the state and federal level.\(^4\) State governments have police power under the Tenth Amendment to protect the public from the spread of contagious disease through legislation, administrative procedures, and action.\(^5\) The Tenth Amendment provides that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”\(^6\) The United States Supreme Court, in Gibbons v. Ogden,\(^7\) established that the state’s police power includes the power to quarantine its citizens.\(^8\) The state is given great deference in exercising its police power and so the courts are reluctant to second-guess government health care agencies in imposing and applying health care regulations to prevent the spread of diseases among its citizens.\(^9\) The courts have “almost universally . . . held in this country that constitutional guaranties must yield to the enforcement of the statutes and ordinances designed to promote the public health as a part of the police powers of the State.”\(^10\)

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\(^4\) U.S. Const. amend. X; Gibbons v. Ogden, 22 U.S. 1 (1824).
\(^5\) U.S. Const. amend. X.
\(^6\) Id.
\(^7\) 22 U.S. 1 (1824).
\(^8\) Id. at 78 (holding that state’s police power includes “that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government . . . [i]nspection laws, quarantine laws, health laws of every description . . . ”).
\(^9\) People ex rel. Barmore v. Robertson, 134 N.E. 815, 817 (Ill. 1922) (“Among all the objects sought to be secured by governmental laws none is more important than the preservation of public health.”).
In addition to the states’ strong police power under the Tenth Amendment, the federal government also has quarantine power, derived from the Commerce Clause. The Commerce Clause gives Congress the power “to regulate commerce with foreign Nations and among the several States . . .” While the states have primary authority to quarantine their citizens within their own borders, the Commerce Clause gives the federal government authority to regulate interstate travel and travelers entering the United States from other countries, which particularly comes into play when American health care workers return home from treating diseased patients overseas. The federal government’s authority to regulate travel includes the power to quarantine its citizens.

The Necessary and Proper Clause empowers the federal government to act through laws and executive orders to contain communicable diseases, including quarantining individuals. The Necessary and Proper Clause empowers Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

Pursuant to its powers under the Commerce Clause and the Necessary and Proper Clause, Congress enacted the Public Health Service Act of 1944. The Public Health Service Act of 1944 “gives the United States Public Health Service responsibility for preventing the introduction, transmission, and spread of communicable diseases from foreign countries to the United States” and empowers the United States Secretary of Health and Human Services to contain the spread of communicable diseases from foreign countries into the United States and between states. The government vests authority to develop procedures to quarantine individuals in the Centers for Disease Control and Prevention (“CDC”), the nation’s leading national health institute.

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11 Id.
13 U.S. CONST. art I, § 8, cl. 3.
14 Id.
16 Id.
19 Id.
III. QUARANTINE’S DISCRIMINATORY PAST AND PRESENT

Quarantine and isolation of the sick are much older than the United States Constitution. They are as ancient as the Old Testament and the Black Death. The Book of Leviticus demands the quarantine and isolation of lepers, proCLAIMING that for “[a]ll the days wherein the plague shall be in him he shall be defiled; his is unclean; he shall dwell alone . . . .”21 During the time of the Black Death in the 1300s, the government confined individuals suspected of having the plague.22 America also has a sordid history of quarantine, used as a tool for discrimination.

A. America’s Historic Quarantine Discrimination

The use of quarantine as a tool to discriminate against people is historic in America. Immigrants to the United States, Asian residents in America, and women often felt the brunt of the government’s quarantine power and discrimination.23 During the yellow fever and cholera outbreaks in the 1800s, the federal government quarantined many immigrants arriving on passenger ships from Europe.24 In 1892, the City of New York ordered the quarantine of Russian Jews arriving on the ship Massila after four Russian Jewish immigrants diagnosed

20 Leviticus 13:4–46 (King James).
21 Id.
23 Howard Markel, Quarantine! East European Jewish Immigrants and the New York City Epidemics of 1892, at 13, 190 (1997).
24 History of Quarantine, supra note 18; see also Tognotti, supra note 22, at 255.

Id. at 1302–04; see also Eugenia Tognotti, Lessons from the History of Quarantine, from Plague to Influenza A, 19 EMERGING INFECTIOUS DISEASES 254 (2013), https://wwwnc.cdc.gov/eid/article/19/2/pdfs/12-0312.pdf.
with typhoid fever lived in the same tenement house. Because of the four Russian Jewish immigrants' typhoid diagnosis, the government quarantined approximately 1200 other Russian Jews, who were mostly asymptomatic and never had the disease. Only approximately 100 Russian Jews in New York were ultimately diagnosed with typhoid fever.

Irish immigrants also faced quarantine in America. The notorious "Typhoid Mary," a female Irish immigrant, became a prominent figure in America's quarantine and isolation history. Society shunned and isolated Mary Mallon, even though she had no typhoid fever diagnosis. Although Mary Mallon was undiagnosed, her new compatriots believed that she was a dangerous carrier of the disease in New York City. The government of New York City isolated Mary Mallon for 26 years, without giving her a trial or due process. Many people believe that Mary Mallon's plight was a product of prejudice against her as a poor, female, Irish immigrant.

Asian Americans living in the United States in the early 1900s were also quarantined and isolated. The City of San Francisco, faced with the spread of the bubonic plague in the 1900s, required the vaccination of all Chinese residents. The City quarantined the Chinese under its health regulations of unvaccinated Chinese residents. The quarantine of Chinese residents was massive, as the vaccine for the plague had serious potential side effects. Many of San Francisco's residents chose to forego vaccination at the risk of being quarantined.

The vaccine was only required of Chinese and Asian residents on the scientifically unfounded premise that the "Asiatic" races were more susceptible to contracting the plague. There was no evidence, however, that any people suffered from or carried the plague virus within the city. In Wong Wai v. Williamson, a California court found that requiring vaccinations of only

26 Id.
27 MARKEL, supra note 23, at 59.
28 Daubert, supra note 22, at 1311.
29 Id.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
35 Id. at 1311–12.
36 Id. at 1312–13.
37 Id. at 1312.
38 103 F. 1 (C.C.N.D. Cal. 1900).
Chinese and Asian residents violated substantive due process.\textsuperscript{39} It held that the city’s quarantine regulations discriminated against the city’s Chinese and Asian residents because the quarantine regulations classified a group purely on race and not on any factors that related to an actual risk of exposure or infection.\textsuperscript{40}

The city’s quarantine of 12 city blocks where primarily Chinese and other Asian immigrants lived also violated the Equal Protection Clause.\textsuperscript{41} In a companion case to \textit{Wong Wai}, involving San Francisco’s quarantine regulations, \textit{Jew Ho v. Williamson},\textsuperscript{42} the same court noted that the quarantine regulations were “directed against the Asiatic race.”\textsuperscript{43} The city discriminated against Chinese residents, who were “denied the privilege of traveling from one place to another, except upon conditions not enforced against any other class of people,”\textsuperscript{44} in violation of the Fourteenth Amendment.\textsuperscript{45}

Women were also the focus of historic, government-imposed quarantine, even with a dearth of evidence that the women were ever exposed to anyone who carried a contagious disease. The Irish immigrant, Mary Mallon, was not the only woman quarantined in America. In \textit{United States ex rel. Siegel v. Shinnick},\textsuperscript{46} the government isolated a female passenger of a ship arriving into the United States from Stockholm, Sweden, because she did not carry a vaccination certificate.\textsuperscript{47} The woman had spent four days in Stockholm.\textsuperscript{48} The World Health Organization (“WHO”) had declared Stockholm a smallpox-infected city.\textsuperscript{49} The Court upheld the government’s decision to isolate the woman, without evidence that the woman was exposed to the disease.\textsuperscript{50} Emphasizing the great deference paid to government officials’ decisions, the Court emphasized that it would not substitute its judgment for health officials’ judgment, as long as health officials’ made the decision to quarantine in good faith.\textsuperscript{51}

During World War I and World War II, the United States military quarantined thousands of women prostitutes, and the quarantines particularly

\textsuperscript{39} Id. at 9–10.
\textsuperscript{40} Id. at 9.
\textsuperscript{41} Id. at 3.
\textsuperscript{42} 103 F. 10 (C.C.N.D. Cal. 1900).
\textsuperscript{43} \textit{Wong Wai}, 103 F. at 9.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{47} Id. at 790.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 791.
\textsuperscript{51} Id. The \textit{Shinnick} case stands for the proposition that a person can be deprived of liberty without any showing of disease, or even exposure to disease, if the disease has potential deadly effects. See generally id.
targeted women. The government quarantined women “to prevent the spread of venereal disease among American troops” if the government reasonably suspected the women of having such a disease. The government subjected them to mandatory testing for any offense even tangentially related to promiscuity. Treatment centers were more like women's prisons than medical facilities during World War II, surrounded with barbed wire or electric fences, located behind locked gates. Officials often jailed women for days before transporting them to the treatment centers for testing. Overall, thousands of women and girls suspected of engaging in promiscuous sexual activities with soldiers were imprisoned. Although both men and women were just as able to engage in sexual activity and spread venereal disease, the government did not quarantine men.

B. Modern Quarantine Discrimination

The recent Ebola outbreak in West Africa demonstrates that discrimination associated with quarantines, with its historic discriminatory past, is also a modern phenomenon. In the autumn of 2014, the Ebola virus was not only claiming lives in West Africa. The virus also sewed seeds of modern discrimination in the United States.

1. History of the 2014 Ebola Outbreak in West Africa

The Ebola virus was “first discovered in 1976 near the Ebola River in what is now the Democratic Republic of the Congo.” Researchers believe that the virus is animal-borne and likely originated in African bats. Although Ebola outbreaks in West Africa had been sporadic in the past, West Africa suffered a significant outbreak of the disease in 2014.
While the Ebola virus raged in West Africa, the United States’s health protection agency, the CDC reported only four Ebola cases in the nation. On September 30, 2014, the CDC confirmed the first Ebola case in the United States. The virus took its hold in a man who had returned to Dallas, Texas, from Liberia. Although the “man did not have any symptoms when he left Liberia, he developed symptoms approximately four days after arriving in the United States.” The man quickly passed away on October 8, 2014, at Texas Presbyterian Hospital of Dallas.

Within one week of the man’s death in Dallas, two health care workers who treated the patient at Presbyterian Hospital of Dallas also tested positive for Ebola. Both health care workers fully recovered after a brief period of isolation and medical treatment. Despite one of the health care worker’s traveling on two airline flights full of passengers between Dallas and Cleveland shortly within days of testing positive for Ebola, no one else contracted Ebola from the health care worker. On October 24, 2014, the CDC confirmed an Ebola diagnosis in a fourth person. A health care worker who returned to New York City from Guinea after serving with Doctors Without Borders contracted Ebola. The patient fully recovered after treatment and discharge from Bellevue Hospital Center in less than one month.

In just over a month, with the four patients connected with travel to Liberia and Guinea, Ebola became a huge concern in the United States, publicly and politically. The epicenter of the disease, however, remained in Sierra Leone, West Africa, where aggressive medical relief efforts led by American

63 Id.
64 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 Id.
70 Id.
71 Id.
72 Id.
73 See supra Part III.
volunteer health care workers took place.\textsuperscript{74} Those efforts were extraordinarily successful.\textsuperscript{75}

On March 29, 2016, the WHO terminated the Public Health Emergency of International Concern ("PHEIC") for the Ebola outbreak in West Africa.\textsuperscript{76} But the Committee emphasized the "crucial need for continued international donor and technical support to prevent, detect and respond rapidly to any new Ebola outbreak in West Africa" and expressed the dire need for continued international support.\textsuperscript{77}

2. The Prejudice Against Travelers from Africa and African Ethnicity

Although the medical relief efforts involving volunteer American health care workers were successful, they were not without health care workers' personal cost and sacrifice. One of the most notorious cases of a health care worker facing quarantine and public ridicule after treating diseased patients overseas involved a nurse named Kaci Hickox.\textsuperscript{78} During the height of the Ebola outbreak in West Africa, nurse Hickox volunteered with Doctors Without Borders to treat Ebola patients in Sierra Leone.\textsuperscript{79} The nurse not only risked her own health in October of 2014 when she returned home from her medical relief mission, but she also risked her freedom of movement and professional reputation as a nurse.\textsuperscript{80}

A matter of days before nurse Hickox’s return home to the United States, New York Governor Andrew Cuomo and New Jersey Governor Chris Christie jointly announced new quarantine regulations, tougher than any imposed by the CDC on the national level.\textsuperscript{81} Under the regulations, officials at the airport would question health care workers returning to New York or New Jersey after treating

\textsuperscript{76} Cases of Ebola, supra note 62.
\textsuperscript{77} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
Ebola patients in West Africa and could place them under a mandatory quarantine, regardless of the results of any non-contact fever check.82

Under its new mandatory quarantine procedures, the State of New Jersey quarantined nurse Kaci Hickox upon her entry to the United States at Newark Liberty International Airport.83 Immigration and health officials questioned nurse Hickox for several hours. They confined her for two nights in a tent that served as an emergency room outside of the hospital.84 The nurse complained that the conditions in the tent were unreasonable after a long international flight and lengthy questioning by government officials at the airport.85 The tent had no shower, flushable toilet, or television.86 She also had little chance to eat or to talk to her lawyer.87 The government continued her quarantine for a total of 24 days between the two nights she spent in the tent outside of the hospital and subsequent confinement to her home.88

During her quarantine and after her release, the public ridiculed and criticized the nurse for protesting her quarantine and for asserting her constitutional rights of due process.89 The nurse questioned how a nurse returning home to America from treating patients overseas with Doctors Without Borders could be detained and confined for days with no notice, hearing, or ability to consult with a lawyer.90 On the other hand, some people questioned


84 Rajwani, supra note 78.


86 Id.

87 Id.


how any nurse worth her salt could defy health officials’ decision to quarantine her and, thereby, risk exposing others to disease by traveling about in public.\textsuperscript{91} The public criticism questioned her professional ethics as a nurse who “ignor[ed] the will of the public” and “behave[ed] in a manner so self-obsessed and juvenile that it reflects poorly on her and the selfless members of her profession who devote their time and energies to containing the Ebola outbreak in Africa.”\textsuperscript{92}

The Ebola outbreak not only affected health care workers like Kaci Hickox, who treated Ebola patients. Travelers to and from the large African continent, even where Ebola was not an issue, felt the impact of the public’s fear of Ebola. For example, an elementary school banned a seven-year-old girl when she returned from a trip to Nigeria for a wedding with her family even though she showed no Ebola symptoms and had no exposure to Ebola.\textsuperscript{93} Nigeria had not reported any Ebola case for two months, and Nigeria was “hundreds of miles from the epicenter of the Ebola outbreak.”\textsuperscript{94}

A Texas college reportedly denied admission to two Nigerian students due to the fear that the students carried the Ebola virus.\textsuperscript{95} The college’s admissions committee explained in rejection letters that the college would flatly not accept international students from countries with Ebola cases.\textsuperscript{96}

A Louisville, Kentucky, school suspended a teacher upon her return to the United States after serving on a medical mission trip in Kenya. Her students’ parents feared Ebola.\textsuperscript{97} The closest Ebola case was over 3,000 miles from where the teacher stayed in Kenya,\textsuperscript{98} which demonstrated that anyone whose feet touched African soil was suspect. The students’ parents distributed articles around the community, reporting that Kenya was a “high risk” country for Ebola.\textsuperscript{99} The parents also expressed their fears about the teacher and Ebola to the

\begin{itemize}
\item \textsuperscript{91} Rothman, supra note 89.
\item \textsuperscript{92} Id.
\item \textsuperscript{94} Id.
\item \textsuperscript{95} Did A Texas College Deny Men Admittance Because Of Ebola?, CBS DFW (Oct. 14, 2014, 10:02 PM) [hereinafter CBS DFW], http://dfw.cbslocal.com/2014/10/14/did-a-texas-college-deny-men-admittance-because-of-ebola/.
\item \textsuperscript{97} Antoinette Konz, Former St. Margaret Mary Teacher: ‘resignation had nothing to do with Kenya or Ebola’, WDRB.COM (Nov. 5, 2014, 10:57 AM), http://www.wdrb.com/story/27285185/former-st-margaret-mary-teacher-resignation-had-nothing-to-do-with-kenya-or-ebola.
\item \textsuperscript{99} Konz, supra note 97.
\end{itemize}
local media.\textsuperscript{100} Because of parental concerns and public hysteria about Ebola, the teacher resigned from her position at the school.\textsuperscript{101}

The backlash and hysteria over Ebola extended to people who had never set foot in an Ebola-infected country but were perceived as being of African descent. In some cases, people were harassed solely because of their skin color or ethnicity. For example, classmates mocked and bullied children with dark skin, chanting, “You’re Ebola,” as the children played on school playgrounds.\textsuperscript{102} Robin Wright, a fellow at the Woodrow Wilson International Center, for CNN, wrote that in the United States, “Ebola is increasing racial profiling and reviving imagery of the ‘Dark Continent.’”\textsuperscript{103} She observed that “[t]he disease is persistently portrayed as West African, or African, or from countries in a part of the world that is racially black, even though nothing medically differentiates the vulnerability of any race to Ebola.”\textsuperscript{104}

In addition to the racial connectivity surrounding Ebola, the backlash may have affected women who treat patients through medical relief efforts overseas more than men who do the same. Many health care workers are women.\textsuperscript{105} As a group, they overwhelmingly represent the health care industry.\textsuperscript{106} They hold over 74% of health care practitioner positions.\textsuperscript{107} Ninety percent of registered nurses are women.\textsuperscript{108} Therefore, as a group, women health care workers may feel the greatest impact of quarantine laws.

Similar to the quarantine of immigrants, Asians, and women in America’s history, the Ebola outbreak raises the issue of whether quarantines and the threat of quarantines have created discrimination again. The discrimination may also reach beyond the traditionally protected groups and individuals quarantined, as demonstrated by the “Ebola” bullying and association of Ebola with race.

\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{104} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
IV. EQUAL PROTECTION LIMITS ON THE GOVERNMENT’S QUARANTINE POWER

As history and the most recent Ebola outbreak in West Africa have demonstrated, when the government paints an individual as a public health threat and offers quarantine as the solution, the result is fear, possible discrimination, and hate against individuals or classifications of people. Discrimination laws, however, historically, do not protect health care workers simply because they volunteer for medical relief work overseas, travel internationally, and treat diverse populations. The question is whether the Equal Protection Clause of the Fourteenth and Fifth Amendments limits the government’s power in any way, to impose involuntary quarantines and confine health care workers returning from overseas without the Court’s heightened scrutiny.109

The Equal Protection Clause potentially limits the government’s power to impose involuntary quarantines, although equal protection arguments on behalf of health care workers would be quite novel. The Fourteenth Amendment provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”110 The government may legitimately classify groups of people and place restrictions on some groups and not others. However, under the Equal Protection Clause, the government is required to treat similarly situated people equally.111

Equal protection analysis focuses upon the amount of deference or scrutiny the courts will pay to classifications and legislation. There are three levels of scrutiny the Court may apply: strict scrutiny, rational basis review, or intermediate scrutiny.112 The Court applies its strictest scrutiny if the challenger of the legislation is a member of a suspect class, if the challenger is protected under discrimination laws, or if the challenger’s fundamental right under the Constitution is infringed.113 To survive strict scrutiny, a classification must be

109 Daubert, supra note 22, at 1310.
110 U.S. CONST. amend. XIV, §1 (emphasis added).
111 McGowan v. Maryland, 366 U.S. 420, 425 (1961); see, e.g., Ross v. Moffitt, 417 U.S. 600, 609 (1974) ("Equal Protection... emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 60 (1973) (Stewart, J., concurring) ("[T]he basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes.").
compelling, and the law itself must be necessary to achieve the objective.\textsuperscript{114} Moreover, the classification must be “narrowly tailored” to meet the objective and must not have a “less restrictive” alternative.\textsuperscript{115} Rational basis review is on the opposite end of the constitutional spectrum compared to strict scrutiny. Under the Court’s rational basis review, the Court will uphold a classification if “there is some rational relationship between treatment and some legitimate governmental purpose.”\textsuperscript{116}

The Court’s scrutiny may be something in between strict scrutiny and rational basis review. The Court’s intermediate scrutiny traditionally applies to “quasi-suspect” classifications, such as classifications based on sex or illegitimacy, or to “review a law that affects ‘an important though not constitutional right.’”\textsuperscript{117} To survive a constitutional challenge under an equal protection constitutional challenge applying intermediate scrutiny, “classifications . . . must serve important governmental objectives and must be substantially related to achievement of those objectives.”\textsuperscript{118} The objectives for the discriminatory laws subjected to intermediate scrutiny “must be genuine, not hypothesized or invented post hoc in response to litigations,” and the state’s justification for the discriminatory laws must be “exceedingly persuasive.”\textsuperscript{119}

Health care workers returning from medical relief efforts, as explained below, are unlikely members of a suspect class who would qualify for the Court’s strict scrutiny review. Moreover, equal protection claims of health care workers returning from medical relief efforts overseas would likely fail under the Court’s most deferential review, traditional rational basis review, given the states’ undeniably strong police power to protect the public’s health and welfare. Rational basis review is so deferential to the state that its critics describe it as a “rubber stamp.”\textsuperscript{120} Health care workers’ strongest argument would be for the Court to apply intermediate scrutiny, traditionally applied to “quasi-suspect” classifications, or to “review a law that affects ‘an important though not constitutional right.’”\textsuperscript{121}

\begin{flushright}
\textsuperscript{114} See, e.g., Loving v. Virginia, 388 U.S. 1, 11 (1967).
\textsuperscript{115} See Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997).
\textsuperscript{117} Ramos v. Town of Vernon, 331 F.3d 315, 321 (2d Cir. 2003).
\textsuperscript{118} Craig v. Boren, 429 U.S. 190, 197 (1976).
\textsuperscript{121} Ramos, 331 F.3d at 321.
\end{flushright}
A. Equal Protection Limits: Traditional "Rational Basis" Review

The rational basis test is the most common and most deferential level of scrutiny under equal protection analysis.\(^{122}\) Under the traditional rational basis test, the Court must uphold legislation if it is rationally related to any legitimate interest of the state.\(^{123}\) Under the traditional rational basis test, the Court presumes the validity of the legislation. A challenger under the Equal Protection Clause bears the stringent burden of not only proving that the legislature acted with irrational motives, but the challenger also bears the burden to negate "every conceivable basis which might support it."\(^{124}\) In *Federal Communications Commission v. Beach*,\(^{125}\) the Supreme Court held that economic regulations satisfy equal protection if "there is any conceivable state of facts that could provide a rational basis for the classification."\(^{126}\) Justice John Paul Stevens, concurring in the judgment, described how low the threshold of rational basis review must be for a law or regulation to pass constitutional muster. He commented that rational basis review is "tantamount to no review at all."\(^{127}\)

Courts will uphold government classifications and legislation even if there is not a perfect fit between the means and ends.\(^{128}\) In *Railway Express Agency, Inc. v. New York*,\(^{129}\) the Supreme Court upheld a city ordinance that prohibited advertisements on a commercial vehicle unless the advertisement was for the vehicle owner's business.\(^{130}\) The ordinance, designed to reduce distractions to drivers, was under-inclusive because it did not prohibit advertisement on all commercial vehicles, even though all would be equally distracting.\(^{131}\) Although the ordinance was under-inclusive, the Court upheld the ordinance under an equal protection challenge.\(^{132}\) The case demonstrates that the fit between means and ends can be far from perfect.\(^{133}\)

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126 *Id.* at 313.
127 *Id.* at 323 n.3.
130 *Id.* at 109.
131 *Id.* at 110–11.
132 *Id.*
133 See generally *id.*
In *Vance v. Bradley*, the Court upheld an over-inclusive statute that required mandatory retirement for Foreign Service personnel at age 60. The legislature had enacted the statute to ensure that all personnel were physically and mentally competent to perform their duties overseas in conditions that can be more demanding than in the United States. Even though some Foreign Service personnel were never subjected to overseas service, and hence the classification was over-inclusive, the Court upheld it under a rational basis standard because it was rationally related to the legitimate interest of maintaining a competent Foreign Service.

Moreover, under the rational basis test, legislation will be upheld even if the underlying evidence or science behind it is entirely incorrect, speculative, or in conflict with expert opinions. In *Minnesota v. Clover Leaf Creamery Co.*, the Court upheld a state statute banning the use of non-refillable, nonreturnable plastic milk jugs. The state legislature erroneously based the ban on studies claiming that plastic milk jugs occupied more space in landfills and consumed more energy in production compared to paper containers. These studies were disputed by expert testimony that showed both of them were based on flawed methodology. However, the Court noted that “since in view of the evidence before the legislature, the question clearly is ‘at least debatable,’” it is not the role of the courts to substitute their own judgment. Rational basis review is so deferential that the Court does not even require the legislature to support statutes with evidence or empirical data. Mere rational speculation is sufficient, and the courts will not second-guess it. Therefore, even if the legislature does not

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135 Id. at 97.
136 Id. at 108–09.
137 Cf. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (discussing that states are not required to prove the “correctness” of their legislative judgments, and so long as the evidence before the legislature could reasonably support the classification, challengers cannot invalidate the legislation by simply showing the legislature was mistaken).
138 Id. at 456.
139 Id. at 470.
140 Id. at 469.
141 Id.
142 Id. (quoting United States v. Carolene Prod. Co., 304 U.S. 144, 154 (1938)).
143 *See* Bhd. of Locomotive Firemen & Enginemen v. Chi., Rock Island & Pac. R.R. Co., 393 U.S. 129, 138–39 (1968) (stating that a court’s responsibility is not to resolve conflicts in evidence against the legislature or to reject legislative judgment without convincing statistics in the record to support it).
144 *Clover Leaf Creamery*, 449 U.S. at 465–66 (noting that Minnesota’s approach of reasonably speculating that a ban on plastic nonreturnables would “buy” time for the development and promotion of “environmentally preferable alternatives” is supportable under precedent).
rly on any evidence for a quarantine law, the courts applying rational basis review would likely uphold it under the “rational speculation” standard.145

The great deference paid to government action under the rational basis test, with its tolerance for over-inclusiveness and false science, has major implications for anyone challenging quarantine laws or procedures. In conjunction with the state’s strong police power and its legitimate interest to prevent the spread of serious disease among the public,146 a challenger to quarantine laws would have great difficulty “negat[ing] every conceivable basis”147 for quarantine laws under the traditional rational basis test. Classifications that have a rational basis for broadly confining health care workers and travelers will likely be valid under the Equal Protection Clause of the Fourteenth Amendment. Even if the evidence that supports quarantine practices is incorrect, a challenger would have a difficult time under equal protection’s rational basis test.148 For example, even if science shows that Ebola is not transmitted through an airborne virus,149 and therefore confinement is not always a necessary or proportional prevention measure, quarantine would likely be valid under the Court’s most deferential, rational basis review. Traditional rational basis review leaves little hope for a health care worker’s equal protection challenge.

B. Equal Protection Limits: “Rational Basis with Bite” Review

An equal protection challenger to government-imposed, mandatory quarantine will fare better if the Court views a law through the lens of rational basis with bite review.150 The United States Supreme Court has very rarely

145 See Vance v. Bradley, 440 U.S. 93, 109–12 (1979) (holding that although the evidence was “imperfect,” Congress’s desire to maintain competence in the Foreign Service was rationally related to requiring a mandatory retirement age of 60); Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955) (holding that “[g]eographical location may be an important consideration” to the legislature for the purpose of raising optometry to a professional level, and therefore the regulation was rationally related to the objective).

146 U.S. CONST. amend. X; see also Gibbons v. Ogden, 22 U.S. 1, 203 (1824) (stating that the states’ police power includes “quarantine laws, health law of every description”).


148 Cf. Clover Leaf Creamery, 449 U.S. at 464 (“Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.”).

149 Ebola spreads through direct contact with the body fluids and does not spread through an airborne virus like the influenza. See CDC, Is IT FLU OR EBOLA? (2015) [hereinafter FLU OR EBOLA], http://www.cdc.gov/vhf/ebola/pdf/is-it-flu-or-ebola.pdf.

150 See Gunther, supra note 2, at 18–19. Although the United States Supreme Court has never used the phrase “rational basis with bite review,” scholars use the phrase to describe the Supreme Court’s evolving, more recent flexible judicial review. Rational basis with bite is a concept Professor Gerald Gunther discusses in his article published in the Harvard Law Review, The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A
invalidated legislation under a rational basis analysis. In over 100 equal protection challenges where the United States Supreme Court applied a rational basis level of scrutiny, very few succeeded.151 The United States Supreme Court, in the rare successful equal protection challenges, applied something (now labeled as rational basis with bite review) more searching than traditional, deferential rational basis review to state laws implicating equal protection concerns.152

1. Rational Basis with Bite: The Standard of Review

Rational basis with bite review is significant to anyone bringing an equal protection challenge. Unlike traditional rational basis review, which requires the challenger under the Equal Protection Clause to show the government acted arbitrarily, capriciously, and with no rational basis at all, rational basis with bite shifts the burden to the government to show the rationality of its action.153

The Court’s scrutiny under a rational basis with bite review is closer to intermediate scrutiny than rational basis. Justice Marshall, concurring in the judgment and dissenting in part in Cleburne v. Cleburne Living Center,154 described rational basis with bite review as “intermediate review of decisions masquerading in rational-basis language.”155 To pass constitutional muster under the Court’s intermediate review, “classifications... must serve important

Model for a Newer Equal Protection. See generally id. Professor Ronald Krotoszynski also suggests that while the United States Supreme Court in Romer v. Evans, City of Cleburne v. Cleburne Living Center, and Plyler v. Doe purported to apply rational basis review, it actually applied rational basis with bite review. Ronald J. Krotoszynski, Jr., If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of Smith, 102 Nw. U. L. Rev. 1189, 1264–65 (2008). It required the government to “offer the actual reason for the enactment and to establish that the government’s purpose was actually advanced by the application of the law on the facts presented.” Id.


152 Holoszycz-Pimentel, supra note 151, at 2071–72.

153 Plyler, 457 U.S. at 224 n.21 (noting that the state must “overcom[e] the presumption that [the classification] is not a rational response to legitimate state concerns”).


155 Id. at 460 n.4 (Marshall, J., concurring in part and dissenting in part).
governmental objectives and must be substantially related to achievement of those objectives.”

Rational basis with bite review under the Equal Protection Clause has three crucial advantages for a challenger to government-imposed, mandatory quarantine over traditional rational basis review. First, it is doubtful whether the government could cast a wide net over all travelers returning from Ebola-infected countries with strict travel bans. It is also doubtful that the government could cast a wide net to capture with quarantine laws all asymptomatic health care workers who treated patients in an Ebola-infected country.

Second, the burden of proof to show rationality shifts to the government under rational basis with bite review. Therefore, the government would need to support its quarantine with reliable scientific evidence, and the Court would apply a higher level of scrutiny to the scientific evidence underlying quarantine procedures. The burden to overcome scientific evidence about a disease like Ebola would be upon the government. Quarantine procedures based on faulty science that Ebola is an airborne disease or that its early symptoms are somehow distinguishable from symptoms of the common flu and other easily curable diseases would have greater difficulty passing constitutional muster under rational basis with bite review. Strict travel bans or mandatory quarantine that capture all travelers who enter the United States from a large continent such as Africa, inconsistent with the scientific evidence about the spread of a disease, would be highly suspect.

Third, unlike rational basis review, which validates a law if there is any “conceivable basis” to “support it,” the court applying rational basis with bite review will be more likely to consider the harm caused to a person quarantined. These harms may include the inability to travel, leave home, socialize, care for friends or family, or work, resulting in lost wages and relationships. The United States Supreme Court has held that civil commitment “for any purpose constitutes a significant deprivation of liberty.” The Court may also consider any psychological harm caused to the person quarantined. Studies show that the psychological harm quarantine causes a person can be substantial. Even short durations of quarantine can cause a quarantined person to suffer posttraumatic stress disorder (“PTSD”) and depression. In the weighing, the Court might

157 Plyler, 457 U.S. at 224 n.21.
159 Addington v. Texas, 441 U.S. 418, 425 (1979) (addressing the question of what standard of proof is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital).
160 Quarantined individuals suffer PTSD symptoms at a rate of 28.9%, and 31.2% of quarantined individuals exhibit signs of depression. Laura Hawryluck et al., SARS Control and Psychological Effects of Quarantine, Toronto, Canada, 10 EMERGING INFECTIOUS DISEASES 1206,
2. Rational Basis with Bite Factors

In the rare successful equal protection challenges that might have been reviewed under rational basis in the past, the presence of one or more factors prompted the Court’s higher scrutiny or rational basis with bite review.\textsuperscript{162} Many of the factors are similar to those the Court considers in determining whether a person is a member of a suspect class, including a “history of discrimination, political powerlessness, capacity to contribute to society, and immutability.”\textsuperscript{163} Other factors the Court considers include “burden[s on] significant rights, animus, federalism concerns, discrimination of an unusual character, and inhibiting personal relationships.”\textsuperscript{164}

Suspect classifications and infringement of fundamental rights trigger strict scrutiny, the Court’s highest level of judicial review.\textsuperscript{165} The Court is more likely to apply rational basis with bite review and a more probing level of scrutiny in cases where the plaintiff has some of the characteristics of a quasi-suspect class or the law or regulation burdens a quasi-fundamental constitutional right or significant right.\textsuperscript{166}

First, without creating a new suspect, protected class with broad future implications, the Court will give rational basis review more “bite,” and the Court


\textsuperscript{161} See Bob Jones Univ. v. United States, 461 U.S. 574, 575 (1983) (“Government’s fundamental, overriding interest in eradicating racial discrimination in education substantially outweighs whatever burden denial of tax benefits places on ... [the] exercise of ... religious beliefs.”).

\textsuperscript{162} Holoszyc-Pimentel, \textit{supra} note 151, at 2072.

\textsuperscript{163} \textit{Id.} at 2078.

\textsuperscript{164} \textit{Id.} at 2072.


\textsuperscript{166} Holoszyc-Pimentel, \textit{supra} note 151, at 2078.
will apply intermediate scrutiny if the classified and burdened group has some characteristics of a suspect class.\textsuperscript{167}

Second, in light of the history of quarantine as a tool to discriminate, the animus against those who have treated Ebola patients, combined with irrational fears about the spread of diseases, may call for the Court’s scrutiny of quarantine laws. Closer scrutiny may be appropriate, especially when the government’s interests in quarantine laws are weighed against the international goodwill generated through medical relief volunteer efforts. Quarantine laws with broad impact, if infected with irrational fear, justify a more probing judicial review under the Equal Protection Clause. Moreover, because quarantine laws affect large groups of travelers, the recruitment of health care workers to combat the spread of diseases, and even entire countries, modern quarantine cases are ripe for the Court’s rational basis with bite review.

\textit{i. Quasi-Suspect Class? Health Care Workers and Medical Relief Efforts Overseas}

Traditionally, suspect classifications include race,\textsuperscript{168} national origin,\textsuperscript{169} religion,\textsuperscript{170} and alienage.\textsuperscript{171} Any government action that discriminates against these classifications is subject to the most probing type of judicial review, strict scrutiny.\textsuperscript{172} On the other end of the equal protection analysis spectrum,


\textsuperscript{169} See Graham v. Richardson, 403 U.S. 365 (1971) (discussing national origin as a suspect classification).

\textsuperscript{170} Marcy Strauss, \textit{Reevaluating Suspect Classifications}, 35 \textit{Seattle U. L. Rev.} 135, 146 (2011) ("Facial classifications based on race, national origin, and religion are considered suspect and receive strict scrutiny."); see also Oyler v. Boles, 368 U.S. 448, 456 (1962) ("[I]t was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.").

\textsuperscript{171} Legal aliens are members of a suspect class, and courts review state laws concerning them under strict scrutiny. Bernal v. Fainter, 467 U.S. 216, 219 (1984); Graham v. Richardson, 403 U.S. 365, 371–72 (1971). Federal immigration laws where classifications are based on alienage receive rational basis review because the federal government has authority to regulate immigration. See Rajah v. Mukasey, 544 F.3d 427 (2d Cir. 2008) ("[T]he most exacting level of scrutiny that we will impose on immigration legislation is rational basis review."). However, undocumented aliens receive rational basis review unless the concern is educating undocumented alien children, and in that case, courts will apply intermediate scrutiny. Plyler v. Doe, 457 U.S. 202, 219 n.19, 223–24 (1982).

\textsuperscript{172} See Strauss, supra note 170, at 135–37. The genesis for strict scrutiny analysis under the Equal Protection Clause is the history of isolating and quarantining American citizens. It is well
classifications based on age,\textsuperscript{173} disability,\textsuperscript{174} and wealth\textsuperscript{175} are not suspect, so legislation affecting these classifications is subject only to rational basis review.\textsuperscript{176}

Traditional quasi-suspect classifications in equal protection analysis that are entitled to intermediate scrutiny include gender\textsuperscript{177} and legitimacy of birth.\textsuperscript{178} But most recently, when a sympathetic group is involved, and the individual interest is especially strong, the Court has been more willing to apply a higher level of scrutiny, rational basis with bite review, to state law and regulations.\textsuperscript{179} Recent cases where the Court has applied rational basis with bite include cases known that the federal government imposed curfews and confined Japanese-American citizens in internment camps after the attack on Pearl Harbor. This history may be helpful in arguing that the higher scrutiny of rational basis with bite review should apply in quarantine cases involving health care workers. See Hirabayashi v. United States, 320 U.S. 81, 104–05 (1943) (holding that the application of curfews against members of Japanese-Americans was constitutional); see also Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (holding that ordering Japanese-Americans into internment camps was constitutional because the government's need to protect against espionage outweighed the liberty interests of Japanese-American citizens). However, writing a strong dissent to the Court's opinion, Justice Robert Jackson noted the immutable character of the Japanese-American prisoner's race. \textit{Id.} at 243 (Jackson, J., dissenting). Justice Jackson wrote, "[H]ere is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign." \textit{Id.}

\textsuperscript{173} See, e.g., Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (stating that a class of police officers over age 50 did not constitute a suspect class).

\textsuperscript{174} See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (concluding that the lower court erred in holding mental retardation as a quasi-suspect classification).

\textsuperscript{175} See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (concluding that "the Texas system does not operate to the . . . disadvantage of any suspect class").

\textsuperscript{176} Strauss, \textit{supra} note 170, at 146.

\textsuperscript{177} See, e.g., Miss. Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982) (holding that the state's policy of excluding males from enrolling in the school lacked an "exceedingly persuasive justification"); see also Craig v. Boren, 429 U.S. 190, 204 (1976) (holding that the relationship between gender and traffic safety was too tenuous to be substantially related to the statutory objective and holding that the analysis was not "strict scrutiny" review and, therefore, gender was not recognized as a suspect class).

\textsuperscript{178} See, e.g., Clark v. Jeter, 486 U.S. 456, 464 (1988) (striking down a state statute requiring paternity and support actions to be brought within six years of an illegitimate child's birth).

\textsuperscript{179} See \textit{City of Cleburne}, 473 U.S. at 450 (holding that a zoning decision that denied a permit to construct a home for the mentally retarded violated the Equal Protection Clause); Plyler v. Doe, 457 U.S. 202, 230 (1982) (holding that a Texas law denying children of illegal aliens a public education did not further any substantial state interest); see also United States v. Windsor, 133 S. Ct. 2675, 2696 (2013), Lawrence v. Texas, 539 U.S. 558, 574–75 (2003); Romer v. Evans, 517 U.S. 620, 635 (1996) (applying something more searching than traditional rational basis review).
where irrational fear and a history of discrimination enter into the mix, such as with the mentally disabled, illegal aliens, and same sex couples.

The courts use four factors to determine whether a group is a quasi-suspect class, warranting more scrutiny than rational basis review. The factors include: (1) animus and a history of discrimination against the group; (2) political powerlessness of the group; (3) relationship of the group to its capacity to contribute to society; and (4) immutability. The Court may be willing to apply a heightened standard of review without establishing “a new suspect class with potentially far-reaching consequences,” especially when the heightened review is “motivated by the policy concerns underlying the suspect-class factors.”

It is arguable that health care workers traveling from disease-infected countries have some characteristics of a quasi-suspect class. In addition, the important public policies surrounding worldwide medical relief efforts and health care workers who risk their lives fighting diseases at their source may motivate the Court to apply rational basis with bite review.

a. Animus and a History of Discrimination

Rational basis with bite review is the most appropriate level of judicial review when irrational fears or animus enter into and distort the decision-making or legislative process. A history of discrimination may prompt the Court’s rational basis with bite review, even if the Court does not find that the case involves members of a traditional suspect class.

Animus, or private bias, can not be a basis for a constitutional law. Unpopular social groups fall into the quasi-suspect category. For example, the

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180 City of Cleburne, 473 U.S. at 472 (discussing how “heightened scrutiny” or “second order rational-basis” is the appropriate standard of review).

181 Plyler, 457 U.S. at 224 (stating that the discrimination contained in the law at issue cannot be considered rational, unless it furthers a substantial goal of the State).

182 Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015) (striking down state bans on same-sex marriages); Windsor, 133 S. Ct. at 2695–96 (striking down a section of DOMA); Lawrence, 539 U.S. at 558 (striking down a Texas sodomy law); Romer, 517 U.S. at 620–21 (holding that Colorado’s state constitutional amendment preventing protected status based upon homosexuality or bisexuality violated the Equal Protection Clause).

183 Holoszyc-Pimentel, supra note 151, at 2078.

184 Frontiero v. Richardson, 411 U.S. 677, 684–88 (1973) (plurality opinion); Holoszyc-Pimentel, supra note 151, at 2078.

185 Holoszyc-Pimentel, supra note 151, at 2079.


United States Supreme Court, in *USDA v. Moreno*, invalidates Congress’s amendments to the Food Stamp Act that sought to exclude “hippies” from receiving federal food stamp benefits. The legislative history contained statements that the legislature intended to exclude “hippies” and “hippie communes” from receiving food stamps. Even though the Court did not consider “hippies” or “hippie communes” to be members of a suspect class, the Court struck down the amendment to the Food Stamp Act. It held that the amendments could not be based on private biases against unpopular social groups. Similarly, in *Palmore v. Sidotti*, the Court invalidated a family court’s custody decision to remove a child from his white mother because private biases against interracial couples tainted the family court’s custody decision.

Although not members of a suspect class, people with mental or cognitive disabilities have received treatment as a quasi-suspect class because of the public bias they face. In *City of Cleburne v. Cleburne Living Center*, the government denied a special use permit to a living center that applied for a permit to establish a group home for the mentally disabled. The living center claimed the denial of the permit violated the Equal Protection Clause. One of the issues in the case was whether mental disability was a suspect class, warranting heightened scrutiny of legislation affecting people with mental disabilities. Typically, mental disability is not a classification entitled to any more than rational basis review, and the Court declined to classify the mentally disabled as a suspect class. Thus, under traditional rational basis review, if the legislationrationally relates to a legitimate governmental purpose, the regulation affecting the mentally disabled will survive.

Even though people with mental disabilities are not members of a suspect class, the Court held that the legislation was not rationally related to a legitimate governmental purpose. The Court held that the only rationale for

189 413 U.S. 528 (1973).
190 *Id.* at 538.
191 *Id.* at 534.
192 *Id.* at 538.
193 *Id.* at 534–35.
195 *Palmore*, 466 U.S. at 433.
198 *Id.* at 432.
199 *Id.* at 437.
200 *Id.* at 442–43.
201 *Id.* at 446.
202 *Id.* at 440.
203 *Id.* at 448.
the denial of the permit was the animosity felt towards the mentally disabled. The Court found strong evidence of animus in the city council’s decision to deny the permit. City council heard and relied on neighbors’ opinions of the proposed residents of the living center, indicating that the neighbors feared people with disabilities. The Court found that the City denied the permit to placate the neighbors’ “negative attitude” and “fears” about people with mental disabilities.

The United States Supreme Court’s more recent decisions in Romer v. Evans and United States v. Windsor crystalized the definition of “animus.” Animus is hostility, animosity, prejudice, private bias, and/or fear, which cannot be a basis for a law. In striking down the Defense to Marriage Act (“DOMA”), the Supreme Court in Windsor noted the law’s “unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage.” The Court noted that this deviation from tradition “operates to deprive same-sex couples of the benefits and responsibilities that come with federal recognition of their marriages.” The Court emphasized that “[t]his is strong evidence of a law having the purpose and effect of disapproval of a class recognized and protected by state law.”

The United States Supreme Court has stated that “[i]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare... desire to harm... cannot constitute a legitimate governmental interest.” In Romer, Colorado’s Amendment violated the Equal Protection Clause because it served no legitimate purpose other than to express hostility toward gays, lesbians, and bisexuals. The plaintiffs in Romer, similar to the plaintiffs in Cleburne, successfully brought an equal protection challenge even though they were not members of a suspect class. In Romer, Colorado passed a constitutional amendment that repealed prior provisions protecting homosexuality and bisexuality. Like people with mental disabilities in...

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204 Id.
205 Id.
206 Id.
207 Id.
209 133 S. Ct. 2675 (2013).
210 See, e.g., id. at 2693; Romer v. Evans, 517 U.S. 620, 635 (1996).
211 Windsor, 133 S. Ct. at 2693.
212 Id.
213 Id. at 2681.
214 Romer, 517 U.S. at 634.
215 Id. at 634.
216 Id. at 631.
217 Id. at 624.
Cleburne, sexual orientation is not a suspect class, requiring only rational basis review.\textsuperscript{218} Also similar to the Court in Cleburne, the Colorado legislation failed rational basis review.\textsuperscript{219} The law singled out a group of people, making it more difficult for that group to seek aid from the government.\textsuperscript{220}

Moreover, a law entangled with a history of discrimination will also more likely receive rational basis with bite review. A history of discrimination against undocumented immigrant children in Doe v. Plyler\textsuperscript{221} and the intellectually disabled in Cleburne\textsuperscript{222} was an important consideration, even though the plaintiffs in those cases were not members of a suspect class.

Although Good Samaritan health care workers and travelers from Africa are not members of a suspect class, rational basis with bite may be an appropriate level of review if the government seeks to quarantine them. A history of discrimination, stigmatization, and public disdain for infected or potentially-exposed individuals shrouds quarantine law.\textsuperscript{223} The recent Ebola threat demonstrates that discrimination produced through fear is not simply a matter of history. It is painfully current.

During the most recent Ebola outbreak in West Africa, media accounts of government-imposed stigma, possible discriminatory impact of quarantines, and animus against people who traveled from, or treated patients in, Ebola infected countries were plentiful.\textsuperscript{224} The presence of animus requires “a more searching form of rational basis review” under the Equal Protection Clause.\textsuperscript{225}

Media reports show a connection between the public’s fear of Ebola and the race of people who occupy Ebola-infected countries. The historic discrimination associated with quarantines may make the Court more willing to create a new quasi-suspect class and apply rational basis with bite review to

\textsuperscript{218} Id. at 640 n.1.
\textsuperscript{219} Id. at 635.
\textsuperscript{220} Id.
\textsuperscript{221} See Doe v. Plyler, 628 F.2d 448, 458 (5th Cir. 1980) (stating that undocumented immigrant children are “saddled with . . . disabilities [and] subjected to . . . a history of purposeful unequal treatment”).
\textsuperscript{222} City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 454 (1985) (Stevens, J., concurring) (observing that the intellectually disabled “have been subjected to a history of unfair and often grotesque mistreatment”) (quoting Cleburne Living Ctr. v. City of Cleburne, 726 F.2d 191, 197 (5th Cir. 1984)), aff’d in part, vacated in part, 473 U.S. 432 (1985); see id. at 461–64 (Marshall, J., concurring in judgment in part and dissenting in part) (citations omitted) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 303 (1978)) (stating that the intellectually disabled “have been subject to a ‘lengthy and tragic history’ of segregation and discrimination that can only be called grotesque”).
\textsuperscript{223} See generally Gibbons v. Ogden, 22 U.S. 1 (1824); People ex rel. Baker v. Strautz, 54 N.E.2d 441 (Ill. 1944); People ex rel. Barmore v. Robertson, 134 N.E. 815 (Ill. 1922); Market, supra note 23; Daubert, supra note 22; Tognotti, supra note 22.
\textsuperscript{224} See supra Part III.
quarantine laws that zero-in on health care workers who treat diverse populations.

b. Political Powerlessness: Irrational Fears and Politics in Quarantine Cases

Political powerlessness may also be a factor in determining whether a person is a member of a quasi-suspect class. The Court considered the possible political powerlessness of undocumented immigrant children in Plyler,226 the intellectually disabled in Cleburne,227 and gays and lesbians in Romer228 and Windsor229 even though none of the plaintiffs in those cases were members of a suspect class. In Plyler, the Supreme Court held that states and localities could not override the right of every child, no matter his or her immigration status, to attend a public school from kindergarten through 12th grade.230 In its landmark decision on immigrant rights, the Court recognized the political powerlessness of undocumented immigrant children, noting that they “can affect neither their parents' conduct nor their own status,” so there is no rational justification to punish them.231 Similarly, the lower court in Cleburne concluded that the intellectually disabled lack political power and “may well be a paradigmatic example of a discrete and insular minority for whom the judiciary should exercise special solicitude.”232

However, the Supreme Court in Cleburne signaled that political powerlessness is not a crucial factor in determining whether a classification is suspect and subject to heightened scrutiny.233 The Court rejected the argument that the intellectually disabled are politically powerless, citing legislative action on the national and state levels addressing the difficulties of persons with intellectual disabilities.234 The Court held that the political progress for people with disabilities “belys a continuing antipathy or prejudice and a corresponding

226 See Plyler, 628 F.2d at 458.
227 City of Cleburne, 473 U.S. at 445.
229 United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013). But see Obergefell v. Hodges, 135 S. Ct. 2584, 2606 (2015) (indicating that political power is not an important factor when fundamental rights are infringed when the Court stated that “[i]t is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process”).
230 See Plyler, 628 F.2d at 461.
233 Id. at 445.
234 Id. at 443.
need for more intrusive oversight by the judiciary."235 Despite finding that the intellectually disabled are not politically powerless, the Court nevertheless applied rational basis with bite.236

Although not a crucial factor, the Court should consider the politicization of disease outbreaks in determining whether health care workers traveling from infected countries after fighting diseases are members of a quasi-suspect class. The Court may be more apt to guard against political exploitation of a controversy and the political powerlessness it creates.

Studies show that once a controversy plays out in the media, it is difficult to change public perception.237 That is so even if people confront facts that directly contradict those beliefs.238 Research suggests that once people are committed to a belief, they are not likely to change their minds, even when presented with contradictory facts.239 In fact, they are more likely to recommit to their original belief even more strongly.240 Researchers call this phenomenon "backfire," which "plays an especially important role in how we shape and solidify our [political] beliefs on immigration, the president’s place of birth, welfare and other highly partisan issues."241 Like many other politically charged issues, once the quarantine issue played out in the media or political arena, and the public perceived that health care workers returning from treating Ebola patients were a public health threat, the health care workers became a politically powerless group who could not change public opinion.

The Ebola outbreak in West Africa was highly politicized in the United States. The perceived dangers presented by health care workers returning to the United States after treating Ebola patients were repeatedly in the media. The fact that the Ebola outbreak coincided with an important election cycle in the United States likely created excessive media coverage. Then, on September 30, 2014, the CDC confirmed the first case of Ebola diagnosed in the United States.242 The patient was asymptomatic when he left Liberia but began exhibiting symptoms

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236 Id. at 446–47.


238 Id.

239 Id.

240 Id.

241 Id.

242 Cases of Ebola, supra note 62.
four days after arrival and sought treatment at a local hospital.\textsuperscript{243} By the time the patient passed away on October 8, 2014, two hospital workers were infected.\textsuperscript{244} These initial cases of Ebola on United States soil caused widespread fear and hysteria. A poll conducted from October 12 through October 14, 2014, showed that nearly two-thirds of Americans feared a widespread Ebola epidemic.\textsuperscript{245} Additionally, nearly two-thirds of the respondents supported travel restrictions on anyone arriving from Ebola-stricken countries, regardless of whether they had any contact with Ebola patients and regardless of whether they had any symptoms of Ebola.\textsuperscript{246} Over 90\% of respondents favored stricter screening at United States airports, while a mere 33\% of respondents felt that the government was doing all it could to prevent the spread of Ebola in the United States.\textsuperscript{247} In the midst of this very public climate of fear, Dr. Craig Spencer arrived in New York City on October 17, 2014, after working with Ebola patients in Guinea.\textsuperscript{248} He was diagnosed with Ebola six days later on October 23, 2014.\textsuperscript{249} In those six days, he rode the subway system and visited a bowling alley, sparking a public fear that he had exposed others to Ebola.\textsuperscript{250}

Largely in response to Dr. Spencer’s public travels, on October 24, 2014, 11 days before the mid-term election, Governor Chris Christie of New Jersey and Governor Andrew Cuomo of New York held a joint press conference.\textsuperscript{251} The two governors announced a new quarantine policy, mandating a 21-day quarantine for all health care workers entering the United States after treating Ebola patients in Africa.\textsuperscript{252} Both governors stoked the public fear when they stated that a single patient riding the public subway could infect hundreds of people with a deadly

\begin{itemize}
\item \textsuperscript{243} \textit{Id.}
\item \textsuperscript{244} \textit{Id.}
\item \textsuperscript{246} \textit{Id.}
\item \textsuperscript{247} \textit{Id.}
\item \textsuperscript{249} \textit{Id.}
\item \textsuperscript{250} \textit{Id.}
\item \textsuperscript{252} \textit{Id.}
\end{itemize}
The governors of New Jersey and New York, together, implied that the CDC-recommended protocols for returning health care workers were insufficient to ensure public safety and therefore state-initiated quarantine policies, much stricter than those recommended by the federal CDC, were necessary.\textsuperscript{254}

Fortuitously for Governor Christie, Kaci Hickox, the nurse who volunteered for a medical relief organization and treated Ebola patients in Sierra Leone, West Africa, arrived at the Newark’s Liberty International airport the same day that the state quarantine procedure was announced.\textsuperscript{255} She was one of the very first travelers subject to the new quarantine policy.\textsuperscript{256} Despite the nurse’s claim that her confinement violated her civil rights, Governor Christie defended the quarantine policy as necessary to protect the public.\textsuperscript{257} He continued to publicly state to the media that the nurse was symptomatic, despite evidence to the contrary.\textsuperscript{258} He insisted that any deprivation of the nurse’s liberty interest was justified by the need to “protect the public health.”\textsuperscript{259}

The Ebola outbreak became politically charged; both major political parties attempted to use the American public’s fear of Ebola to their advantage.\textsuperscript{260} The GOP used the Ebola outbreak to imply that the Democratic-run government was unable to keep citizens safe and proposed widespread travel bans that were not feasible or realistic, although they appealed to a fearful public. The Democrats, in turn, blamed the Republicans’ slashing of the CDC budget as a potential risk in preventing the spread of Ebola, despite the fact that the White House had previously said that funding was adequate.\textsuperscript{261}

The public’s fear and support of strict screening procedures, quarantines, and travel bans, as well as political rhetoric, starkly contrasted significant scientific expert opinion. The Infectious Disease Society of America, the Society for Healthcare Epidemiology of America, and the Association for Professionals in Infection Control and Epidemiology all opposed the quarantine of returning

\textsuperscript{253} Id.
\textsuperscript{254} Id.
\textsuperscript{256} Id.
\textsuperscript{258} Id.
\textsuperscript{259} Id.
\textsuperscript{261} Id.
health care workers in a joint statement in October 2014. These groups opposed the mandatory quarantine of asymptomatic health care workers, explaining that quarantines would further public misconceptions about how the virus spreads, undermine the heroic efforts of the volunteers, and dangerously hinder the efforts to fight Ebola overseas. In addition, seven scientists wrote an editorial stating that the quarantine was not based in science and would impede efforts to fight Ebola overseas. They wrote that the evidence shows that the fever stage precedes the contagious stage, so health care workers can self-monitor and report to authorities before any real risk emerges. The scientists opined that mandatory quarantines only serve as barriers to recruiting sorely needed volunteers in the fight against Ebola.

Defying the experts and scientific evidence, some members of Congress pushed for complete travel bans for all people traveling from West Africa. Other politicians wanted to close the border between the United States and Mexico even though there were no reported Ebola cases in Mexico. Politicians’ debate and any mention of Ebola by the media, however, disappeared almost immediately after the midterm elections.

In such a charged political atmosphere, combined with the political powerlessness of health care workers subject to quarantine, the Court should consider applying rational basis with bite review.
weight to science and expert opinions in its review. The science does not support
the need for quarantine in some cases.

Without a doubt, Ebola is an extremely deadly disease. During the most
recent Ebola outbreak in West Africa, the virus killed two out every five people
it infected.\textsuperscript{271} The Ebola outbreak lasted for two years with a suspected death toll
of over 11,000 people.\textsuperscript{272} In the public’s view, the epidemic spread of diseases
like Ebola conjure visions of \textit{The Walking Dead}.\textsuperscript{273} Given the statistics, the
public’s fear of Ebola’s prognosis and politicians’ public response to Ebola are
rational. The courts would likely uphold laws designed to calm the public’s fear
under rational basis review.

When left unchecked, the Ebola virus is a devastating public health
hazard and a fierce foe of health care workers who are in the trenches trying to
stop the virus from spreading. The onset of the Ebola virus’s symptoms begins
between 2 and 21 days following exposure to the bodily fluids of another person
affected with the Ebola virus.\textsuperscript{274} Initial symptoms of the deadly Ebola virus,
similar to the common flu, include fever, diarrhea, and vomiting.\textsuperscript{275} However,
the symptoms become increasingly dreadful in a short period. The symptoms
quickly progress to intense abdominal pain and bleeding from bodily orifices,
including an infected person’s mouth, eyes, and ears.\textsuperscript{276} Ebola waged a war
against one’s immune system, more deadly than AIDS.\textsuperscript{277}

As Ebola sweeps through you, your immune system fails, and
you seem to lose your ability to respond to viral attack. Your
body becomes a city under siege, with its gates thrown open and
hostile armies pouring in, making camp in the public squares
and setting everything on fire; and from the moment Ebola
enters your blood stream, the war is already lost; you are almost
certainly doomed. You can’t fight off Ebola the way you fight

\begin{itemize}
\item the selection of a man over a woman to serve as administrator of an estate when both were equally
qualified; \textit{see also} Frontiero v. Richardson, 411 U.S. 677, 686 & n.17 (1973) (stating that a
plurality of the Court noted that “women are vastly underrepresented in this Nation’s decision-
making councils . . . ”).
\item \textsuperscript{271} \textit{2014–2016 Ebola Outbreak, supra note 61.}
\item \textsuperscript{272} \textit{Id.}
\item \textsuperscript{273} \textit{The Walking Dead} is an American post-apocalyptic horror television series where the world
is overrun by zombies. \textit{The Walking Dead}, IMDB, http://www.imdb.com/title/tt1520211/ (last
visited Nov. 9, 2017).
\item \textsuperscript{274} \textit{Ebola (Ebola Virus Disease), supra note 59.}
\item \textsuperscript{275} \textit{Ebola (Ebola Virus Disease): Signs & Symptoms,} CDC (Nov. 2, 2014) [hereinafter Signs &
\item \textsuperscript{276} \textit{Viral Hemorrhagic Fevers (VHFs),} CDC (Jan. 29, 2014),
\item \textsuperscript{277} \textit{Richard Preston, The Hot Zone} 46 (3d ed. 1994).
\end{itemize}
off a cold. Ebola does in ten days what it takes AIDS ten years
to accomplish.\textsuperscript{278}

Though fear of the prognosis of quarantinable communicable diseases is
facially rational, the fear of the spread of diseases is not always rational. First,
problems that hinder early detection of the diseases can cause overbreadth in
procedures leading to quarantining of asymptomatic individuals or those who
exhibit symptoms of far less serious diseases. As of 2014, the federal list of
quarantinable communicable diseases included cholera, diphtheria, infectious
tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers (Lassa,
Marburg, Ebola, Crimean-Congo, South American, and others not yet isolated or
named), and severe acute respiratory syndromes.\textsuperscript{279} Facialy, the spread of
the diseases listed in the federal list of quarantinable communicable diseases is a
concern because they all have high mortality rates if left untreated.\textsuperscript{280}

One of the significant difficulties in imposing broad quarantine laws or
early detection, however, is that nearly all of the diseases on the 2014 federal list
of quarantinable communicable diseases, including Ebola, share common early
symptoms such as fever, weakness, and body aches that are non-specific.\textsuperscript{281} Early
symptoms of Ebola are similar to those of the common flu, so broad quarantine
laws could potentially capture people with the common flu.\textsuperscript{282}

Second, public fear of contagious diseases can understandably prompt
elected officials to take some action to quell that fear even though those actions
are not always based on rational science. For example, because people contract
the Ebola virus through direct contact with body fluids, the airborne influenza
virus is much more contagious.\textsuperscript{283} Asymptomatic people, even if infected with
Ebola, cannot transmit Ebola.\textsuperscript{284}

\textsuperscript{278} Id. at 46–47.


\textsuperscript{280} Cholera causes acute renal failure, severe electrolyte imbalance, severe dehydration caused
by profuse watery diarrhea, coma, and death within hours in an infected person. Cholera—vibrio
cholera infection: Illness & Symptoms, CDC (Oct. 3, 2014) [hereinafter Cholera: Illness &
Symptoms], http://www.cdc.gov/cholera/illness.html. Septicemic plague causes skin and tissue
(especially on the fingers, toes, and nose) to turn black and die. Plague: Symptoms, CDC (Sept. 14,
produces a toxin that destroys tissue in an infected person’s respiratory system. Diphtheria:
Symptoms, CDC (Jan. 15, 2016), http://www.cdc.gov/diphtheria/about/symptoms.html. Within
days, the dead tissue forms a thick gray coating that makes breathing difficult and causes death in
about half of untreated patients. Id.

\textsuperscript{281} See generally Cholera: Illness & Symptoms, supra note 280; Diphtheria: Symptoms, supra
note 280; Plague: Symptoms, supra note 280.

\textsuperscript{282} FLU OR EBOLA, supra note 149.

\textsuperscript{283} Id. Ebola is spread through direct contact with body fluids, e.g., blood, sweat, vomit, feces,
of a symptomatic person. Id. Ebola can also be spread through exposure to objects that are
contaminated with the virus, such as needles. Id.

\textsuperscript{284} Id.
Arguably, for some diseases on the 2014 federal list of quarantinable diseases, the risk of an outbreak in the United States is minimal.\textsuperscript{285} In many instances, the disease on the federal list is arguably a third-world problem.\textsuperscript{286} For example, Cholera is exceedingly rare in the United States due to modern sewage and water treatment systems.\textsuperscript{287} Widespread vaccination in the United States has largely eliminated diphtheria.\textsuperscript{288} Moreover, there are sufficient vaccine stockpiles to inoculate every person in the United States if a smallpox outbreak occurs.\textsuperscript{289} Plague cases already occur in the western half of the United States, and doctors treat them with antibiotics.\textsuperscript{290}

Experts believe that the threat of Ebola to the United States is "a scintilla" of what it is in places like Africa where hospitals and the CDC are ready to respond.\textsuperscript{291} In an interview with National Public Radio, Kent Sepkowitz, an infectious disease specialist and the deputy physician-in-chief at Memorial Sloan-Kettering Cancer Center in New York City answered the question whether there was a serious threat of Ebola breaking out in the United States.\textsuperscript{292} He answered,

Not at all. There's certainly a threat for the occasional case . . . , but the notion that we would have the type of out-of-control, almost biblically tragic outbreak that's going on in West Africa right now is really not feasible . . . . We have health care here. We have the CDC. We have health care infrastructure. We have all those things that tax dollars have been supporting all this time, but more than anything else, we have a tradition of getting supplies to and from places. We have enough rooms. We have enough beds. We have enough gloves. We can afford the type of over-the-top waste creation that of taking care of an infectious patient can make . . . . [I]f we were talking about smallpox, if we


\textsuperscript{286} See General Information, supra note 285.

\textsuperscript{287} Signs & Symptoms, supra note 275.

\textsuperscript{288} Diphtheria: Surveillance, supra note 285.


\textsuperscript{290} Plague: Symptoms, supra note 280.


\textsuperscript{292} Id.
were talking about flu, my answer would be entirely different because those are highly contagious infections.\textsuperscript{293}

Because of the politicization and publicity about Ebola, it has been said that health care workers battling diseases like Ebola battle two enemies: “the unprecedented Ebola epidemic ... and fear ...”\textsuperscript{294} Health care workers returning from disease-infected countries overseas are no political match for apocalyptic epidemics played out by politicians and the media.\textsuperscript{295} Courts may take care that quarantine policies do not cast too wide of a net and catch the politically powerless within the net by applying greater scrutiny than rational basis review.

Courts should weigh the science behind the spread of diseases, possible treatment and diagnosis, and political realities before depriving individual liberty and freedom of movement through quarantine. Due to the potential for irrational fear and political motives, the Court should apply rational basis with bite review even though a health care worker subject to the quarantine procedures is not a member of a suspect class.

c. Good Samaritan Health Care Workers’ Contribution to Society

Under a rational basis with bite standard of review, the government must overcome the impact of public fear and political motives in explaining its rationale for quarantines.\textsuperscript{296} In determining whether to apply rational basis with bite, the Court will consider the class members’ “ability or capacity to contribute to society.”\textsuperscript{297} Under the rational basis with bite standard and in the context of quarantine laws, the Court will consider the “costs to the Nation and [to the] ... victims,”\textsuperscript{298} as well as the effectiveness of the laws.\textsuperscript{299}

Aside from the potentially greater spread of disease across national borders, the costs to international relations may be heavy if medical relief efforts, supported by thousands of volunteer health care workers, suffer significant, unnecessary government interference. The American Diplomatic Mission of

\textsuperscript{293} Id.


\textsuperscript{296} See, e.g., USDA v. Moreno, 413 U.S. 528, 534 (1973) (“[D]esire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”).


\textsuperscript{299} Id. at 228 n.24.
International Relations supports the activities of volunteer medical relief organizations like Doctors Without Borders.300

[Doctors Without Borders] saves lives by providing medical aid where it is needed most—in armed conflicts, epidemics, natural disasters, and other crisis situations. Many contexts call for a rapid response employing specialized medical and logistical help, but we also run longer-term projects designed to tackle health crises and support people who cannot otherwise access health care.301

Medical relief charities warn that quarantine laws deter American health care workers from traveling to other countries to help fight dangerous diseases that have the potential to spread around the world.302 Under rational basis with bite review, the courts would likely consider the impact of quarantines on medical volunteer recruiting and the goodwill volunteers create for the United States in other countries. Loss of life resulting from fewer health care workers available to fight diseases, fewer volunteers available to treat all patients, and loss of goodwill between the United States and nations that seek aid are all risks flowing from unsuccessful medical relief recruitment efforts.303

Health care workers on the front lines of fighting disease generously contribute to society.304 Public policy may give the Court incentive to treat health care workers returning to the United States after fighting the spread of disease as quasi-suspect, entitled to more scrutiny than rational basis review. To date, the Court has focused on the negative when it comes to the "capacity to contribute to society" factor.305 If the group’s characteristics “frequently bear[] no relation to ability to perform or contribute to society,”306 the Court will consider the group to be a suspect class, and the Court will apply a higher level of scrutiny.307 However, if the Court is more willing to focus on health care workers’ positive


301 The Nobel Peace Prize for 1999, NOBELPRIZE.ORG (Oct. 15, 1999) [hereinafter Nobel Peace Prize], https://www.nobelprize.org/nobel_prizes/peace/laurates/1999/press.html. Doctors Without Borders was awarded the Nobel Peace Prize in 1999 in Oslo, Norway, for its humanitarian efforts across the globe. Id.; see also Where We Work, DOCTORS WITHOUT BORDERS, http://www.doctorswithoutborders.org/our-work/countries (last visited Nov. 9, 2017); see generally AM. DIPLOMATIC MISSION, supra note 300.

302 SHEA Press Release, supra note 262.

303 See generally Drazen, supra note 264.

304 See Dixon, supra note 295.


306 Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion).

307 See id.
contributions, this factor could weigh in favor of health care workers as a quasi-suspect class.

Health care workers returning to the United States after treating patients infected with serious, communicable diseases in other countries, as a group, have a great capacity to contribute to society. President Barack Obama applauded health care workers’ great contribution to society and their status in his White House address, delivered on October 29, 2014.309

[W]e know that the best way to protect Americans from Ebola is to stop the outbreak at its source. And we’re honored to be joined today by some of the extraordinary American health workers who are on the front lines of the fight in West Africa . . . . [A]ll of them have signed up to leave their homes and their loved ones to head straight into the heart of the Ebola epidemic. Like our military men and women deploying to West Africa, they do this for no other reason than their own sense of duty. Their sense of purpose. Their sense of serving a cause greater than themselves. And we need to call them what they are, which is American heroes. They deserve our gratitude, and they deserve to be treated with dignity and with respect.310

Because health care workers who serve overseas in medical relief efforts do so at great personal sacrifice, and their contributions to society are great, the Court may be more willing to apply greater scrutiny to quarantine laws, policies, and regulations that affect them and discourage their humanitarian efforts.

d. Immutable Characteristics

The Court is most likely to classify as quasi-suspect a group that possesses at least some immutable characteristics or traits. Traditionally, the Supreme Court took a very strict view in defining an immutable characteristic. Under the Court’s original, strict definition, an immutable characteristic was a

309 Id.
310 Id.
311 See generally id.
312 See id.
314 See id. at 441.
trait that was very difficult to change and beyond a person’s control.\textsuperscript{315} The Court originally limited the definition of an “immutable characteristic”\textsuperscript{316} under a constitutional equal protection analysis to human traits that were a product of birth.\textsuperscript{317} For example, in early cases, the Court held that race and national origin are suspect classes.\textsuperscript{318} In Weber v. Aetna Casualty and Surety Company,\textsuperscript{319} the Court noted that illegitimacy was also immutable as no child “is responsible for his birth.”\textsuperscript{320} The Court reasoned that people should only be legally liable for actions that “bear some relationship to individual responsibility or wrongdoing.”\textsuperscript{321} The Court later added gender as an “immutable characteristic determined solely by the accident of birth.”\textsuperscript{322}

The key to finding an immutable characteristic is found in a footnote in United States v. Carolene Products, Inc.\textsuperscript{323} “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”\textsuperscript{324} Legislation aimed at “discrete and insular minorities” who lack the normal protections of the political process will be subject to the Court’s strict scrutiny.\textsuperscript{325}

Under a narrow definition of immutability, it is very questionable whether health care workers who travel to disease-infected countries to treat patients could be considered a suspect or even quasi-suspect class due to an immutable characteristic. Health care workers, as a group, are not discrete and insular minorities. Health care workers are not one race, gender, or accident of birth.

The Supreme Court, however, does not take a strict view of immutability.\textsuperscript{326} The Court has not limited the doctrine of immutability to pure

\textsuperscript{315} See id.
\textsuperscript{316} Id.
\textsuperscript{318} Oyama, 332 U.S. at 640 (holding that the discriminatory law was “based solely on his parents’ country of origin”). The Court began by declaring “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.” Korematsu, 323 U.S. at 216.
\textsuperscript{319} 406 U.S. 164 (1972).
\textsuperscript{320} Id.
\textsuperscript{321} Id.
\textsuperscript{322} Frontiero v. Richardson, 411 U.S. 677, 686 (1973).
\textsuperscript{323} 304 U.S. 144 (1938).
\textsuperscript{324} Id. at 153 n.4.
\textsuperscript{325} Id.
genetics or traits that are impossible to change.\textsuperscript{327} For example, both religion and alienage are suspect classifications,\textsuperscript{328} although neither are truly accidents of birth. Unlike race, for example, a person may freely and easily change his or her religion. Citizenship can be changed through the legal naturalization process.\textsuperscript{329}

Additionally, while the presence of strictly immutable characteristics may be a factor in the Court’s finding that a person is a member of a suspect class or quasi-suspect class, it is not a necessary factor.\textsuperscript{330} In many cases, the Court has either downplayed the importance of immutability or failed to include it in as an element in the analysis.\textsuperscript{331} The Court in \textit{Plyler} applied the rational basis with bite standard, despite noting that the status of being an undocumented alien was not an immutable characteristic.\textsuperscript{332} Likewise, in \textit{Cleburne}, although people with mental disabilities were not a quasi-suspect class with immutable characteristics, and they were not politically powerless, the Court applied rational basis with bite nonetheless.\textsuperscript{333} Finally, when listing the traditional elements of a suspect class, the Court in \textit{San Antonio Independent School District v. Rodriguez}\textsuperscript{334} did not include immutable characteristics.\textsuperscript{335}

Likewise, the Court in its more flexible application of immutability may borrow from the legislature and other areas of law defining immutability. Largely in response to the Supreme Court’s decision in \textit{Cleburne}, holding that a disability is not an immutable characteristic, the legislature expanded statutory protections for people with disabilities.\textsuperscript{336} For example, the legislature rejected a strict “accident of birth” rationale when it enacted the Americans with Disabilities Act of 1990, designed to protect people from discrimination based on their actual or perceived disabilities.\textsuperscript{337} Congress recognized that some permanent disabilities exist from birth, some disabilities occur later in a person’s life, and some

\textsuperscript{327} \textit{Id.}
\textsuperscript{328} \textit{Id.}
\textsuperscript{329} Naturalization is the process by which United States citizenship is granted to a foreign citizen or national after he or she fulfills the requirements established by Congress in the Immigration and Nationality Act (INA). 8 U.S.C. §§ 1421–59 (2012). The process includes a number of eligibility requirements, including age, a period of permanent residency and presence in the United States, good moral character, knowledge of the United States Government, and ability to read, write and speak basic English language. \textit{Id.} § 1427.
\textsuperscript{331} \textit{Id.}
\textsuperscript{334} 411 U.S. 1 (1973).
\textsuperscript{335} \textit{Id.} at 28.
\textsuperscript{337} \textit{Id.}
disabilities are perceived or temporary. Yet a disability is an immutable
class characteristic as far as disability law is concerned. 338

While it appears the Supreme Court’s equal protection analysis is
stronger if immutability from a purely “accident of birth” is present as a factor
in a case, the Supreme Court has applied a much more flexible standard outside
of equal protection cases. An example is the broader definition of immutability
applied in asylum law. 339 In Matter of Acosta, 340 the Court defined an immutable
characteristic as “one that the . . . [person] . . . cannot change, or should not be
required to change because it is fundamental to their individual identities or
consciences.” 341 The Court reasoned that the immutable characteristic serves to
identify members of a “particular social group.” 342 Under this line of reasoning, it
appears the Court does not look at how the person acquired the immutable
characteristic. Rather, the Court considers whether it is an identifiable,
unchangeable trait. The asylum court went as far as holding that a person’s
former profession was an immutable characteristic. 343

Courts should borrow a broader definition of immutability from asylum
law. Health officials make quarantine decisions after a person makes a significant
professional and life choice to engage in medical relief efforts. The health care
worker cannot change the fact that he or she volunteered to treat disease-infected
patients overseas. His or her service overseas is a trait that the government can
easily identify at the airport entry point to the United States. Indeed, past service
is the precise trait that the government uses to subject health care workers to
quarantine.

Adopting a broad definition of immutability, borrowed from other areas
such as asylum law, would make sense in equal protection analysis and the
rational basis with bite standard applied to health care workers returning from
medical relief efforts overseas. The Court would avoid creating a new quasi-
suspect class with the attendant risk of potential long-term implications. The
looser standard allows for a case-by-case analysis while ensuring that there is, at
a minimum, a shared, immutable trait that links the members of the group.

In any event, the court does not need to find that health care workers
returning from medical relief efforts overseas possess immutable characteristics
to be quasi-suspect. Moreover, the Court need not find that health care workers
returning from medical relief efforts overseas are members of a quasi-suspect

338 Id.
341 Id.
342 Id.
a former member of the national police in El Salvador was an immutable characteristic).
class at all for rational basis with bite to apply if laws burden significant constitutional rights.

ii. Burdening Significant Rights: Liberty Interests and the Right to Travel

In addition to laws discriminating against a suspect class, laws infringing upon fundamental rights are subject to strict scrutiny.\(^{344}\) Fundamental rights are those rights that the Constitution directly identifies or those rights that have been found under the Court’s due process analysis.\(^{345}\) Significantly, application of strict scrutiny to laws that infringe upon fundamental rights is entirely independent of the Court’s finding that the equal protection challenger is a member of a suspect class.\(^{346}\)

If a burdened right has some characteristics of a fundamental right, or in other words, is a quasi-fundamental right, the United States Supreme Court may apply rational basis with bite review.\(^{347}\) The Court is willing to apply rational basis with bite when a law “burdens an interest that is very important or ‘quasi-fundamental’ but is not a recognized fundamental right . . . .”\(^{348}\) Applying rational basis with bite to quarantine laws that burden a “significant right” that may not rise to the level of a fundamental right, again, gives the Court leeway without creating additional rights “with potentially far-reaching consequences.”\(^{349}\)

While the United States Supreme Court in Plyler and Romer purported to apply rational basis review, it actually applied rational basis with bite review to laws that burdened significant rights concerning education and marriage.\(^{350}\) In Plyler, the Supreme Court struck down a state statute that attempted to deny undocumented immigrant children funding for education and also invalidated the school district’s attempt to charge immigrant children an annual $1,000 tuition


\(^{345}\) See Plyler v. Doe, 457 U.S. 202, 223–24 (1982) (stating that a law that imposes severe burdens on its victims “can hardly be considered rational unless it furthers some substantial goal of the State”).

\(^{346}\) In Obergefell, the Supreme Court stated that when fundamental rights are infringed, “[i]t is of no moment whether advocates of same-sex marriage now enjoy or lack momentum in the democratic process.” Obergefell, 135 S. Ct. at 2606.

\(^{347}\) Holoszyc-Pimentel, supra note 151, at 2089.

\(^{348}\) Id.

\(^{349}\) Id. at 2079.

\(^{350}\) Krotoszynski, supra note 150, at 1264–65.
fee.351 In applying intermediate scrutiny, the Court noted that a law that imposes severe burdens on its victims can “hardly be considered rational unless it furthers some substantial goal of the State.”352 The Court in Windsor held that DOMA was an unconstitutional “deprivation of the liberty of the person.”353 The Court also noted in Plyler that “certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis.”354

a. Health Care Workers’ Significant Liberty Interests

The Supreme Court has held that the interest of being free from physical detention by one’s own government is among “the most elemental of liberty interests . . . “355 The Fourteenth Amendment specifically prohibits the State from depriving a citizen of “liberty . . . without due process of law.”356 Accordingly, liberty is a fundamental right. This fundamental and elemental right of liberty may prompt the Court to apply more than rational review if the Court is faced with an equal protection challenge in the quarantine context.

Detention at the airport burdens a health care worker’s freedom of movement. The subsequent confinement to his or her home through quarantine results in loss of liberty.357 During the quarantine period, the health care worker is like a prisoner in his or her own home. Essentially, the quarantine is like house arrest. Daily activities, such as going to work, going to the grocery, attending school, and socializing with family and friends could come to an abrupt halt because of quarantine. If not strict scrutiny, the Court should apply rational basis with bite to health care workers deprived of significant liberty.

b. Significant Travel Interests

Quarantine laws and their airport screening measures also affect large groups of travelers coming into the United States, travelers across state borders, and the recruitment of health care workers to travel internationally to combat the spread of diseases.358 The government’s screening and quarantine procedures

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351 Id. For additional facts, see Doe v. Plyler, 628 F.2d 448, 450 (5th Cir. 1980).
354 Plyler, 457 U.S. at 233.
355 Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (holding that the national security risk did not outweigh the liberty interest at stake under the Mathews v. Eldridge test, so detainee was entitled to notice and hearing before a neutral decision maker).
356 U.S. CONST. amend. XIV, § 1.
357 Margolin & Keneally, supra note 88.
may infringe health care workers’ ability and right to travel. A quarantined person can no longer ride the bus or even walk to the sidewalk to take his or her garbage to the curb, much less travel internationally, interstate, or intrastate.

Although not specifically listed in the Constitution, the right to interstate travel is a fundamental right. Citizens of all states possess “the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom.” The Court applies heightened scrutiny to cases involving the fundamental right to interstate travel. When the fundamental right to interstate travel is restricted, the government must show that the practice that restricts this fundamental right to interstate travel furthers a compelling state interest. Moreover, the government must employ the least restrictive means of achieving that compelling state interest.

A state law implicates the fundamental right to travel “when it actually deters such travel . . . when impeding travel is its primary objective . . . or when it uses “any classification which serves to penalize the exercise of that right.” When the infringement of the right is the result of a classification, the Court will

359 Margolin & Keneally, supra note 88.
362 See Shapiro, 394 U.S. at 638 (stating that a law that required a residency period of at least one year before social services benefits could be claimed “touches on the fundamental right of interstate movement, [and, therefore,] its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest”).
363 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978). In Bakke, a California medical school reserved a specified number of admissions to disadvantaged minority students. Id. at 269–70. The Supreme Court held that creating racial diversity in higher education was a compelling state interest and, therefore, race could be used a factor. Id. at 311. However, pre-allocating a set number of admissions was not the least restrictive means of achieving that interest and therefore in violation of the Equal Protection clause. Id. at 357.
364 Att’y Gen. of N.Y. v. Soto-Lopez, 476 U.S. 898, 903 (1986) (quoting Dunn v. Blumstein, 405 U.S. 330, 340 (1986)). In Soto-Lopez, New York enacted a law that created an employment preference for veterans of wars who were New York residents at the time they enlisted. Id. at 900. The law created the preference by adding points to the civil service examination for qualifying veterans. Id. The Supreme Court held that this law was a violation of the Equal Protection clause as it created a classification that penalized any current resident veterans who had enlisted outside of the state. Id. at 911. The Court noted that New York’s compelling state interests of promoting enlistment into the armed forces and employment of veterans could be served by giving credits to all veterans, not just those who had enlisted while residents of New York. Id. at 910.
employ an “intensified equal protection scrutiny of that law.” Laws that allow non-traveling United States residents to self-monitor for symptoms, while mandating confinement of those entering the country through airports, creates a classification between travelers and non-travelers that may be subject to heightened scrutiny.

However, in the end, an equal protection challenge to quarantine law arguing that a significant right to travel is burdened would likely lose, given the Court’s stance on the right to travel and quarantines. The United States Supreme Court has specifically held that the government may impose quarantines to prevent the spread of disease even though interstate commerce is affected.

3. Federalism Concerns

The Court may also consider issues of federalism as one factor in determining whether to apply a heightened scrutiny, or rational basis with bite in its equal protection analysis. In addition to assuring that individuals in similar circumstances are treated equally, the purpose of the Equal Protection Clause is to protect the federal-state balance: “[T]he Equal Protection Clause . . . operates to maintain . . . principle[s] of federalism.” The federal government governs issues that affect the entire country, while the state and local governments remain autonomous and govern on domestic issues within their own borders. Equal protection and federalism work together to “require a closer than usual review.” That closer than usual review, rational basis with bite, should arguably apply to quarantine procedures.

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365 Id. at 904. For example, the Court has routinely held provisions that penalize new residents to a state over older residents unconstitutional. See Mem’l Hosp. v. Maricopa Cty., 415 U.S. 250, 269 (1974) (finding that Arizona’s one-year residency requirement for non-emergency free medical care neither served a compelling state interest nor was the least restrictive option to further the stated interest); Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (finding that a Tennessee law requiring residency of over one year before a person could gain voting rights did not serve a compelling state interest).

366 See Zemel v. Rusk, 381 U.S. 1, 15 (1965) (stating that the right to travel “does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area”); see also Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health, 186 U.S. 380 (1902).


370 See generally McCulloch v. Maryland, 17 U.S. 316 (1819).

371 Massachusetts v. U.S. Dep’t of Health & Human Servs., 682 F.3d 1, 8 (1st Cir. 2012).
A law should be highly scrutinized if it has the "unusual character" of departing from traditional federal and state roles.372 Although the state police power traditionally includes protecting the public’s health and safety, the federal-state balance walks a tight rope where state-imposed quarantine is involved. The federal government historically and traditionally acts to protect the public health from travelers arriving into the United States, while each state is concerned with the public health and safety within its own borders. However, the distinction between state and federal quarantine powers becomes murky once an international traveler arrives in the United States and becomes an interstate traveler. A virus knows no border.

The states may not burden interstate commerce or engage in economic protectionism.373 Arguably, individual states’ quarantine orders restricting travel could do both. Moreover, although quarantines are within the state’s traditional police power, the federal government has enacted laws that empower the CDC to create and enforce quarantines.374 Federal involvement in this area of state power could serve to preempt state quarantine laws if they conflict with the federal purpose.375 State quarantine laws that vary from the CDC guidelines are obstacles to the federal purpose of fighting the epidemic globally if they stigmatize United States health care workers and reduce the number of volunteers.376

State-imposed restrictions on health care workers and other travelers entering the United States often exceed the federal guidelines.377 However, contrary to state law procedures with force of law, the federal procedures are merely guidelines.378 Indeed, each state may have its own quarantine protocol, subjecting health care workers returning to the United States to a hodgepodge of screening and quarantine procedures. That was the case in October 2014, when nurse Kaci Hickox entered the United States through New Jersey's Newark Liberty International Airport, after treating patients suffering from the deadly

372 Windsor, 133 S. Ct. at 2691–92 (quoting De Sylva v. Ballentine, 351 U.S. 570, 580 (1956)). The Court explained that “there is no federal law of domestic relations” and that “the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations.” Id. The Court also explained that “DOMA . . . depart[ed] from this history and tradition.” Id. at 2692.


375 Id. at 24.

376 Id. at 31–32.

377 Margolin & Keneally, supra note 88.

Ebola virus in Sierra Leone.\textsuperscript{379} New Jersey law subjected her to stricter screening and quarantine procedures than the federal government’s CDC recommended.\textsuperscript{380} New Jersey law included a mandatory 21-day quarantine.\textsuperscript{381} The CDC procedures, however, did not require or even recommend mandatory quarantine for people who were not contagious and asymptomatic.\textsuperscript{382}

The assortment of state quarantine regulations is not always harmonious with federal health programs that rely on quarantines to protect the public health.\textsuperscript{383} If the CDC’s federal quarantine recommendations were mandatory requirements rather than guidelines, the Court might be more likely to apply a higher level of scrutiny to state health regulations that potentially quarantine health care workers returning from overseas. However, at this point, the federal government has not adopted a mandatory national scheme for dealing with contagious diseases.\textsuperscript{384}

A state or local government responds to the public sentiment within its own borders, while the federal government is concerned with both domestic issues as well as national and far reaching issues, such as international relations, international travel, and its citizens’ welfare nationwide. Classifying health care workers based on their medical relief effort overseas may run counter to some of the federal government’s concerns. According to the CDC, quarantining people who are not sick and cannot spread disease puts American at a higher risk because medical workers are discouraged from volunteering to fight diseases.\textsuperscript{385} Dr. Thomas R. Frieden, the director of the CDC, in an interview regarding the quarantine of Yale University students returning from a Liberia Health Ministries mission, stated, “Can you imagine what it would have been like for the people of Iowa if [Ebola] had become endemic in Africa?”\textsuperscript{386} The director of the nation’s

\textsuperscript{379} Margolin & Keneally, supra note 88.

\textsuperscript{380} See id.

\textsuperscript{381} Id.

\textsuperscript{382} Notes on the Interim, supra note 378.

\textsuperscript{383} Margolin & Keneally, supra note 88.

\textsuperscript{384} Control of Communicable Diseases, 82 Fed. Reg. 6890 (Jan. 19, 2017) (to be codified at 42 C.F.R. pt. 70 and 71). While there is no mandatory national scheme, the CDC released a final rule on January 19, 2017, that will become effective on February 21, 2017. Id. This final rule adds several new requirements designed to protect the due process rights of quarantined travelers arriving in the United States that the federal government must follow. Id. The most significant rules include a requirement that CDC issue a federal order within 72 hours after apprehending an individual, a requirement that the CDC provide legal counsel to any quarantined “indigent” person who requests a medical review, and a requirement that the CDC provide translation services for public health orders and medical reviews as needed. Id. The Rule also binds the CDC to use the least restrictive means necessary to prevent the spread of communicable disease. Id.

\textsuperscript{385} Notes on the Interim, supra note 378.

top health agency meant that the virus would have become "so widespread and persistent that many more travelers would have been affected."387 Longer-term arguments, however, often do not resonate with the broader public.388

Given the national concerns, a national quarantine policy might not intrude on the states’ strong police power in violation of the Constitution.389 However, it is not necessary for the Court to find that a classification raises federalism concerns to apply rational basis with bite: “Although the Windsor Court openly suggested that careful scrutiny may be warranted when the classification raises federalism concerns, the Court has applied this principle on only a few occasions. Therefore, federalism may not be a driving force behind rational basis with bite.”390

4. Discrimination of an Unusual Character

The Court may also consider discrimination of an unusual character in determining whether to apply the heightened scrutiny of rational basis with bite review. The Supreme Court in Windsor held that “[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”391 Unusual deviations from the traditional federal-state balance implicate “[d]iscriminations of an unusual character.”392 For example, the Supreme Court in Romer noted the unusual and “unprecedented” deviation from tradition by Colorado’s Amendment 2, repealing housing, employment, and other protections.393 The Court noted that it served no legitimate purpose other than to express hostility toward gays, lesbians, and bisexuals.394

Similarly, the Supreme Court in Windsor noted DOMA’s “unusual deviation from the tradition of recognizing and accepting state definitions of marriage.”395 The Court held that this unusual deviation from tradition was

387 Id.
388 Id.
389 See United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (stating that “it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance”).
390 Holoszyc-Pimentel, supra note 151, at 2097.
391 Windsor, 133 S. Ct. at 2692 (citing Romer v. Evans, 517 U.S. 620, 633 (1996)).
393 Romer, 517 U.S. at 633.
394 Windsor, 133 S. Ct. at 2696.
395 Id. at 2681.
"strong evidence" that DOMA’s purpose and effect was to disapprove of same-sex couples, depriving same-sex couples of the benefits and responsibilities of federally-recognized marriages.\textsuperscript{396} In \textit{Plyler}, a history of discrimination against undocumented immigrant children, inconsistent with federal policy, was an unusual deviation from tradition state and federal balance.\textsuperscript{397} The classification of children as aliens in the context of education was inharmonious with the federal program.\textsuperscript{398}

Because health care workers returning from overseas are not members of a traditionally protected class under discrimination laws, it will be difficult for them to assert direct discrimination based on race, gender, or ethnicity under traditional civil rights laws.\textsuperscript{399} Moreover, because there is no mandatory federal quarantine law in place, it may be difficult for a challenger under the Equal Protection Clause to argue discrimination of an unusual character based upon a departure from traditional federal and state roles.

Rational basis with bite review, however, does not require a perfect fit of all factors and can be more flexible. It may be that in a case like Ebola, where the disease’s stigma spreads to anyone visiting the African continent and anyone with a particular skin color,\textsuperscript{400} the Court could find discrimination of an unusual character.

5. Inhibiting Personal Relationships

When a law inhibits personal relationships, the Court is more likely to apply the rational basis with bite standard and find the law unconstitutional, as was the case in \textit{Lawrence v. Texas}.\textsuperscript{401} In cases like \textit{Moreno, Cleburne, Romer},

\textsuperscript{396} \textit{Id.}

\textsuperscript{397} \textit{See Doe v. Plyler, 628 F.2d 448, 458 (5th Cir. 1980) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (stating that undocumented immigrant children are “saddled with . . . disabilities[] [and] subjected to . . . a history of purposeful unequal treatment”).}

\textsuperscript{398} \textit{Plyler v. Doe, 457 U.S. 202 (1982).}


\textsuperscript{400} Chapman, \textit{supra} note 102; CBSDFW, \textit{supra} note 399.

\textsuperscript{401} \textit{Lawrence v. Texas, 539 U.S. 558, 580–81 (2003) (O’Connor, J., concurring).}
and Lawrence, the unconstitutional laws sought to restrict personal relationships to some degree, in addition to having a suspect government objective.\textsuperscript{402} The fear and animus that Quarantine laws produce are equally suspect and indirectly inhibit the personal relationships of affected health care workers. Like in Moreno, where the law denying food stamps to households with unrelated members burdened the personal relationships of “hippies,”\textsuperscript{403} overbroad quarantine laws have the effect of burdening health care workers’ abilities to maintain personal relationships with their family, friends, and professional colleagues.

During the height of the Ebola outbreak in West Africa, quarantine by state and local governments was widespread.\textsuperscript{404} Although the most highly publicized quarantine was that of Kaci Hickox, there were many more quarantines. The Yale Global Health Justice Partnership and the American Civil Liberties Union reported that “at least 40 people in 18 states” were quarantined for up to three weeks, and an “additional 233 went into so-called voluntary quarantines to avoid legal action and unwanted publicity.”\textsuperscript{405} The United States military reportedly quarantined 2,815 service members when they returned to the United States after assisting in the Ebola response.\textsuperscript{406} Reports and interviews show that those who were quarantined felt isolation, stress, and fear. Some were direct victims of the public’s fear, as they returned home to be publicly “excoriated, mocked, and threatened on social media.”\textsuperscript{407}

household from receiving food stamps violated equal protection because the purpose of the law was to “discriminate against hippies.” The asserted governmental interest in preventing food stamp fraud was not deemed sufficient to satisfy rational basis review. In Eisenstadt v. Baird, we refused to sanction a law that discriminated between married and unmarried persons by prohibiting the distribution of contraceptives to single persons. Likewise, in Cleburne v. Cleburne Living Center we held that it was irrational for a State to require a home for the mentally disabled to obtain a special use permit when other residences—like fraternity houses and apartment buildings—did not have to obtain such a permit. And in Romer v. Evans, we disallowed a state statute that “impos[ed] a broad and undifferentiated disability on a single named group”—specifically, homosexuals.

\textit{Id.} (citations omitted).


\textsuperscript{403} USDA v. Moreno, 413 U.S. 528, 534 (1973) (reviewing a law preventing households with any non-related member from receiving food stamp benefits, thus making it more difficult for “hippies” to establish shared residences).

\textsuperscript{404} Fink, \textit{supra} note 386.

\textsuperscript{405} \textit{Id.}

\textsuperscript{406} \textit{Id.}

\textsuperscript{407} \textit{Id.}

Dr. Nancy Snyderman, then an NBC journalist who had been in Liberia, across a room from a cameraman a day before he developed Ebola symptoms, was initially asked by her local health department in New Jersey to stay away from large gatherings, monitor herself for fever, and notify a health officer of her
Unfortunately, the public and the government do not always treat their American heroes with dignity and respect. For example, Vietnam veterans faced stigma and prejudice as the first veterans of a war not publicly treated as heroes upon their return home to the United States.\textsuperscript{408} Many veterans suffered from PTSD after the Vietnam War, but because of the unpopularity of the war and the delayed onset of PTSD, their problems were often ignored.\textsuperscript{409} The public and the government also do not treat quarantined individuals as heroes after treating diseased patients. These individuals often exhibit a high prevalence of psychological distress.\textsuperscript{410} Even short durations of quarantine can cause PTSD and depression, directly stemming from isolation.\textsuperscript{411} Quarantines, at least indirectly, likely inhibit personal relationships of health care workers.

V. CONCLUSION

The recent Ebola outbreak in West Africa will not be the last disease that threatens public health and jumps international borders. The CDC reports that "cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers (such as Marburg, Ebola, and Congo-Crimean), and severe acute respiratory syndromes," continue to pose a public health risk.\textsuperscript{412} The government’s threat to detain, medically examine, and possibly quarantine “travelers aboard airplanes, ships, and at land border crossings” will also continue\textsuperscript{413} and is largely justified, given the health risks (some deadly), very contagious diseases with airborne permeations pose.

As the potential for the spread of disease grows, however, the potential for burdening significant individual rights connected to liberty and travel also

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\textsuperscript{408} Josh Hochgesang, Tracye Lawyer & Toby Stevenson, The Psychological Effects of the Vietnam War, EDGE: ETHICS OF DEV. IN A GLOBAL ENV’T (July 26, 1999), https://web.stanford.edu/class/e297c/war_peace/media/psych.html.

\textsuperscript{409} Id.

\textsuperscript{410} See supra note 160 and accompanying text; see also Robertson, supra note 160. After serving others and risking their own health, the last thing they want to face is stigma and prejudice in their homeland because of their sacrifices.

\textsuperscript{411} Hawryluck, supra note 160.

\textsuperscript{412} History of Quarantine, supra note 18 (listing the quarantinable diseases contained in an executive order).

\textsuperscript{413} Id.
grows—as does the potential for historic discrimination associated with quarantine. The government’s decision to classify groups of its people as a public health threat and confine them through quarantine has serious repercussions. Quarantine significantly restricts liberty and freedom of movement, including travel. Quarantine may result in lost wages and isolation from family and friends. Like the lepers in biblical times, society shuns and fears a person whom the government labels as a public health threat. If a person questions the government’s quarantine authority or defies its confinement order, he or she may face public ridicule. If the person who questions the government’s quarantine authority is a health care worker, the public may attack the health care worker’s professional integrity and denigrate his or her very reason for engaging in medical relief efforts: saving lives by fighting a disease at its frontline.

Despite the sometimes harsh repercussions of quarantine, the pseudoscience behind imposing overbroad quarantines may be faulty.

The very political and public outcry for quarantine and travel bans for people traveling from the large continent of Africa in 2014 defied much expert opinion about the way Ebola spreads. Strong public sentiment and the politicization of diseases pose their own danger to the public. Health care workers fighting diseases overseas save many lives through medical relief efforts. They help prevent the spread of diseases around the world through their international travel and service. Health care workers treating dangerous, contagious diseases around the world have been analogized to heroic military veterans who risk their health and lives in service to our country.

If those seeking public office or the government politicize a disease and if it is questionable whether science supports quarantine for it, the United States Supreme Court should consider applying a more flexible equal protection analysis without creating a new protected class. Health care workers returning to the United States after serving in medical relief have at least some characteristics of a quasi-suspect class, and quarantine laws do burden their significant liberty and travel interests. Rational basis with bite review of

415 Flu or Ebola, supra note 149.
416 Id. (explaining that Ebola is spread through direct contact with the body fluids and is not spread through an airborne virus like the influenza).
417 Id.
418 SHEA Press Release, supra note 262.
419 Nobel Peace Prize, supra note 301 (indicating that Doctors Without Borders was awarded the Nobel Peace Prize in 1999 in Oslo, Norway, for its humanitarian efforts across the globe); see also On American Health Care Workers, supra note 308.
420 See case cited supra note 1.
quarantine laws potentially interfering with recruiting volunteers to fight diseases at their source may be fitting.\textsuperscript{421}

\textsuperscript{421} Gunther, \textit{supra} note 2.