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SHOULD HEALTHCARE BE A FUNDAMENTAL RIGHT?

Andre “Truth” McDavid and Brandon A. Robinson¹

This short essay discusses one of the most protean developments in American history—the evolution of healthcare from a rarefied luxury to a fundamental right. When our nation’s Founders wrote the Constitution, the necessity of sustainable healthcare to the enjoyment of meaningful citizenship was not conceivable—partly because the bureaucratic machinery needed to support it was centuries away and partly because the medical profession at the time existed in rudimentary form. The first Americans could not foresee, and therefore, did not expect any guarantee that government would help supply means by which they could maintain long, productive lives. However, America is a dynamic nation. Modern societal changes since Industrialization, along with substantial policy enactments by the federal government, have reasonably elevated our expectation of sustainable healthcare to such a height that it has become a desideratum, without which, life, liberty and the pursuit of happiness can scarcely be maintained.

Dynamism is the key to understanding healthcare’s evolution in the context of what America was and what it has become. One historian wrote that “happiness, like life itself, cannot survive without energy,”² and it is that innovative energy—the capacity to remake itself—that has powered America’s greatness for over two centuries. Nowhere is dynamism more evident than in the evolution of fundamental rights. Examining American history since 1776 as a dynamic

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2. SUSAN DUNN, *DOMINION OF MEMORIES: JEFFERSON, MADISON & THE DECLINE OF VIRGINIA* 12 (2007).

concept of freedom (and citizenship), we know that many rights are considered fundamental today that were not in the 18th Century. Such examples include access to the judicial process, interstate travel, the right to procreate, universal suffrage and, at least “where the state has undertaken to provide” instruction, racially-integrated public education.³ Though none of these rights were explicitly guaranteed by the Constitution, they became so necessary for entrance into the American mainstream as it evolved, that denying citizens these rights was denying them the “life, liberty and the pursuit of happiness” so inextricably tied to what it means to be an American. Due to dynamic interpretation of these rights over time, women, African-Americans, Native Americans and other previously excluded groups were incorporated into the American citizenry and now enjoy the status of first-class citizenship under the Constitution.

“Life, liberty and the pursuit of happiness” has always been the ideal standard for Americans, but historical facts on the ground have periodically bent our thinking on what is essential to realize these desiderata. As the U.S. Supreme Court recently ruled favorably on the constitutionality of the Patient Protection and Affordable Care Act (2010), it is timely to consider how increased life expectancy, federal mandates to hospitals, the prevalence of treatable, though potentially fatal, diseases and the spiraling cost of treatment have pushed healthcare to the forefront of American social consciousness.⁴ Here we posit that in order to secure the treasured blessings of America’s seminal state papers, our nation’s people must be assured a floor (not a ceiling) of basic, stabilizing care, and that with that assurance comes a commensurate duty—that of paying into the national healthcare system to ensure that this putative right remains an economically viable one for all citizens.

At what point did healthcare begin its maturation into a fundamental right? The tipping point was the early Twentieth Century, when America consolidated its gains from post-Civil War industrialization and felt its first impulse as a world power.⁵ Overlapping with

3. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 723 (3rd ed. 2009); *see also* *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

4. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

5. KRISTIN L. HOGANSON, *FIGHTING FOR AMERICAN MANHOOD: HOW GENDER POLITICS PROVOKED THE SPANISH-AMERICAN AND PHILIPPINE-AMERICAN WARS* 7, 13 (1998); *see also* LOUIS MENAND, *THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA* ix-x, xii (2001).

the growth of the coal, railroad and steel industries, and also America's naval power, was the professionalization of medicine, a field still awakening from its dark ages.⁶ Most important for public-private sector relations, the early Twentieth Century was also a time in which American politicians saw the transformative potential of centralized power—unifying the gains of science, warfare, trade and the emerging modern professions through government regulation.⁷ This cluster of ideas about reform, the new sciences, academia and government's growing role in building society percolated until it found mature expression in the Progressive Movement.⁸

Wrestling with this young concept of “progress” was the noted historian and writer Henry Adams—descendant of two American presidents and progenitor of the “dynamic theory of history.”⁹ Adams, in the early 1900s, sought to make sense of a nation rapidly transformed through such innovations as railroads, steel and oil production, the modern academy, the organized professions and the burgeoning of American sea power. These things, plus the influx of large capital into the global financial community, represented “forces” that seemed to threaten man's free will to chart his own course.¹⁰ In previous times, Adams observed that the influential factors in society—art, science, literature, technology, politics, economics, communications, transportation and law—could operate at varying speeds and in isolated, semi-autonomous spheres.¹¹ However, from 1900 on, each of these societal factors transformed the others, simultaneous with the changes as to each individual factor.¹² Thus, Adams reasoned, “modern” society would forever be different from “pre-modern” society, not just in the speed of change, but in the *in-*

6. *Id.*

7. *See generally* GAIL BEDERMAN, *MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880-1917* (1995); *see also* ROBERT WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967). (Wiebe developed the thesis that during the titular time period, America evolved from a rural, loose network of isolated “island communities” to a more urban, centralized power structure—truly a nation, rather than just a country.).

8. *See generally* RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO FDR* (1955).

9. HENRY ADAMS, *THE EDUCATION OF HENRY ADAMS* 395 (Ira B. Nadel ed., 1999) (1907).

10. *Id.* at 396, 398.

11. *Id.* at 405-406.

12. *Id.* at 406.

terconnectedness of change across all things that touch our lives.¹³ This is what Adams meant by “dynamic,” and he correctly predicted that modern America would be the world’s bellwether for Twentieth Century progress.¹⁴

American jurisprudence owes much to Adams, who did not explore these ideas in isolation, but rather with a select, well chosen coterie of first rate minds.¹⁵ He was a key figure among the intelligentsia of his day and shared his ideas about dynamism with influential and powerful friends, among them Justice Oliver Wendell Holmes.¹⁶ Holmes, Roscoe Pound (a Harvard Law dean) and Karl Llewellyn (the principal drafter of the Uniform Commercial Code) were leading voices in the sociological jurisprudence movement in the United States, the key contention of which was that law should not be rigidly classical, but fluid and dynamic; it should reflect hard realities of the social order, but also be informed with insights from the new social and behavioral sciences.¹⁷ Not only Adams, but also the governing class to which he belonged, understood that a new American society was emerging, requiring a different, more malleable perspective in making and interpreting law.¹⁸ This recognized necessity for dynamic interpretation of law and rights forever changed what the U.S. Supreme Court deemed essential to life, liberty and the pursuit of happiness.

The dynamic analysis of Adams, Holmes, Pound, Llewellyn and their peers did not immediately impact American jurisprudence, but these men sowed portentous seeds that would germinate, beginning in the 1930s and maturing with the Warren Court and its progeny.¹⁹ Specifically describing Holmes’ approach to law, one Supreme Court scholar wrote: “Holmes took from the battlefield a Darwinian affinity

13. *Id.*

14. RICHARD BROOKHISER, *AMERICA’S FIRST DYNASTY: THE ADAMSES, 1735-1918* 167 (2002).

15. *See generally*, PATRICIA O’TOOLE, *THE FIVE OF HEARTS: AN INTIMATE PORTRAIT OF HENRY ADAMS AND HIS FRIENDS, 1880-1918* (1990).

16. ERNEST SAMUELS, *HENRY ADAMS* 58, 179 (1989).

17. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 109-10 (1987, 2001); *see also* CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 12-13 (6th ed. 2007); *see generally* BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

18. LON L. FULLER, *THE MORALITY OF LAW* 106-111 (1964).

19. PETER IRONS, *A PEOPLE’S HISTORY OF THE SUPREME COURT: THE MEN AND WOMEN WHOSE CASES AND DECISIONS HAVE SHAPED OUR CONSTITUTION* 416-420, 423, 474 (1999).

for natural selection, and insisted that the common law—that is, law made by judges, rather than legislatures—reflected, like all law, the will of forces that were dominant at any point in history.”²⁰ This perspective, taken for granted today, was actually the minority view in the early Twentieth Century, coming as it did from Justice Holmes’ dissenting opinion in *Lochner v. New York* (1905).²¹ In *Lochner*, the Supreme Court rejected New York’s police power justification for limiting the number of hours bakers could work per day on the grounds that the labor law interfered with the freedom to contract and was offensive to the Fourteenth Amendment.²² Justice Holmes, observing that the Progressive Movement’s concern with labor rights reflected an emerging majority view, vigorously dissented:

I think that the word ‘liberty’ in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a *dominant opinion*, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.²³

The crux of Holmes’ thinking was that, absent a clear, egregious violation of the Constitution, legislatures, as the representative voice of the people, should be given wide latitude and deference by the courts to enact what society generally desires. Holmes reasoned that since the New York legislature had the political capital to enact the maximum-hour law, the people of New York must have collectively desired its prescribed limit.²⁴ In other words, law changes with society, and the judiciary should accommodate these changes (as they are reflected in legislative enactments) so long as they do not offend the Constitution.

By Holmes’ standard, early Twentieth Century America had modernized far ahead of its highest tribunal. Not until 1937—thirty-two years after Holmes’ *Lochner* dissent—did the Supreme Court

20. JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 89 (2007). (The “battlefield” Rosen refers to is the Civil War, in which a young Holmes distinguished himself before gaining fame as an author, lecturer, professor and jurist.)

21. *Lochner v. New York*, 198 U.S. 45, 75 (1905).

22. *Id.* at 64. (The statutory limit was ten hours per day, fifty hours per week. The plaintiff in error, Joseph Lochner, had been convicted for allowing one of his employers to work over sixty hours in a week.)

23. *Id.* at 76 (emphasis added).

24. *Id.* at 75.

adopt a dynamic interpretation of the Constitution.²⁵ This new interpretation was necessitated by the Great Depression, an unprecedented epoch of national misery.²⁶ Between the Great Crash of 1929 and the first year of President Franklin D. Roosevelt's tenure in 1933, business construction had fallen from \$8.7 billion to \$1.4 billion; durable manufacturers had declined by 77 percent; U.S. bank deposits exceeding \$3 billion had been lost; 28 percent of the total population had no income at all; approximately 1,500 colleges and universities had closed or gone bankrupt; and unemployment had skyrocketed from 3.2 percent to 24.9 percent.²⁷ The 1932 election of New York Governor Franklin D. Roosevelt was not only a repudiation of his predecessor, President Herbert Hoover; it was a national referendum on capitalism and the entire social order. Could capitalism and democracy coexist, and if so, would the nation support greater federal intervention in the national economy? It was during the 1930s that the American citizenry explored these questions and furthered the nation's progression toward healthcare as a fundamental right.²⁸

The Great Depression is central to understanding today's healthcare question because it was the time when Americans came to expect the federal government to protect the American Dream from forces that threatened its destruction. President Roosevelt and the American people essentially had a choice: either expand the federal government's reach into economic matters to ensure a safety net for all Americans or abandon the Founders' democratic experiment in favor of dictatorship, anarchy or, in extreme potentialities, fascism.²⁹

25. LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789-2008* 213 (2009).

26. DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945* 65-69 (1999).

27. PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 742-743 (1997).

28. Alan Brinkley, *Prosperity, Depression, and War, 1920-1945*, in *THE NEW AMERICAN HISTORY* 143-149 (Eric Foner ed., 1997). (This essay explores how the social safety net, enacted piece by piece during Franklin D. Roosevelt's administration (1933-1945), made the idea of universal healthcare conceivable to the American people. Brinkley also notes that such robust federal involvement in social welfare issues created hopes among African-American communities that would inspire the Civil Rights Movement two decades later.)

29. HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES, 1492-PRESENT* 393-406 (2003). (While there are many well-written histories of the Great Depression, Zinn's work is one of the most illuminating because of its focus on ordinary, average Americans, rather than governing elites. In the above-cited pages, the reader will see examples of how *individuals*—women, evicted tenant farmers, racial minorities, textile workers—reacted to the panic in their lives

For better or worse, Roosevelt's response—in the form of executive agencies and programs like the Civilian Conservation Corps (CCC), the Agricultural Adjustment Act (AAA), the Securities and Exchange Commission (SEC), the Tennessee Valley Authority (TVA) and perhaps more notably the Social Security Administration (SSA)—signaled an unprecedented centralization of economic policy in the executive branch of the federal government.³⁰ Roosevelt's objective was to end the Depression.³¹ In attempting to buoy the economy and save capitalism, he also raised popular expectations that the federal government would safeguard the American Dream and that marginalized demographics—notably women, African Americans and urban laborers—would be assured a fairer, more just America in which to pursue life, liberty and the pursuit of happiness.³²

Due to the pressure of evolving expectations, a “Constitutional Revolution” emerged at the Supreme Court in 1937, thus beginning the era of dynamic jurisprudence in earnest.³³ With the landmark cases of *NLRB v. Jones & Laughlin Steel Corp.* (1937),³⁴ *U.S. v. Darby* (1941)³⁵ and *Wickard v. Filburn* (1942),³⁶ the Supreme Court considerably expanded the federal commerce power, enabling its reach to virtually every corner of the United States.³⁷ From 1937

caused by the economic crash, and their desperation to do something—anything—that would restore some semblance of normalcy to their lives. As Zinn points out, this included the willingness to experiment with Communism or other forms of social order if that resulted in economic sustenance.)

30. ADAM COHEN, *NOTHING TO FEAR: FDR'S INNER CIRCLE AND THE HUNDRED DAYS THAT CREATED MODERN AMERICA* 136, 144-145, 148-149, 151-154, 284-289 (2009).

31. MARC LANDY & SIDNEY M. MILKIS, *PRESIDENTIAL GREATNESS* 161 (2000).

32. JONATHAN ALTER, *THE DEFINING MOMENT: FDR'S HUNDRED DAYS AND THE TRIUMPH OF HOPE* 329-330, 332 (2006). (Calling the New Deal as a whole “the most successful single social program in American history,” Alter aptly summarized Franklin D. Roosevelt's greatest achievement: “The result of FDR's efforts was a new social contract that has informally bound his successors to confront major domestic and international problems, rather than leave them entirely to the marketplace or to other nations.”).

33. POWE, *supra* note 25, at 213.

34. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

35. *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).

36. *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942).

37. POWE, *supra* note 25, at 213-216; *see also* CHEMERINSKY, *supra* note 3, at 160.

until *U.S. v. Lopez*³⁸ in 1995, the Court did not strike down a single federal law as exceeding Congress' power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."³⁹ This era of dynamic jurisprudence unambiguously endorsed a broader view of federal power to address national economic concerns, giving future presidents and Congresses the legal justification to build upon Roosevelt's legacy of centralized power. Moreover, it reflected a pivotal shift among the American people: regardless of political affiliation, the citizenry now generally expected that when the world drastically changed, law and government would keep apace. No longer was it acceptable for the American government to stand idly by while its people suffered, watching the American Dream evaporate before their eyes. Dynamism required new energy.

Opponents of universal healthcare might ask whether mere heightened expectation of government action translates into healthcare being a fundamental right: it is a fair question, and the answer is no. However, these heightened expectations—raised by the New Deal, Fair Deal and Great Society legislation, and later by the Emergency Medical Treatment and Active Labor Act (EMTALA)—persist among the people because they realize that healthcare is now essential to meaningfully partaking in the modern American mainstream. Congress passed Social Security, Medicare, Medicaid and related programs in order to facilitate sustained participation in the cultural mainstream of the nation.⁴⁰ The critical connection between such access and fundamental rights was anticipated by Chief Justice Earl Warren on the issue of healthcare and is witnessed in his dynamic analysis on the issue of education found in the unanimous opinion of *Brown v. Board of Education* (1954).⁴¹

In *Brown*, Warren employed a dynamic analysis to reach the conclusion that racially segregated public education was not only un-

38. *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).

39. CHEMERINSKY, *supra* note 3, at 160; *see also* U.S. CONST. art. I, § 8, cl. 3.

40. ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 12-15, 77-78, 141-142 (2001).

41. SUSAN LOW BLOCH, VICKI C. JACKSON & THOMAS G. KRATTENMAKER, INSIDE THE SUPREME COURT: THE INSTITUTION AND ITS PROCEDURES 708-709 (2nd ed. 2008).

constitutional, but *fundamentally un-American*.⁴² His frame of reference was one that Adams, Pound and Llewellyn would have fully understood and applauded:

In approaching this problem, we cannot turn the clock back to 1868 when the [14th] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.⁴³

Warren keenly understood that between 1896 and 1954, something about America had fundamentally changed: it had grown from a rural, agrarian republic where education was not essential to upward social mobility, to a modern, urban society in which education had become the “principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”⁴⁴ Not every American would optimize this opportunity, but for certain, those who were originally denied it, were almost guaranteed to fail. It therefore logically followed that, “such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”⁴⁵ The threshold here was the same as it has generally been throughout American history: once equal access to a privilege or right is essential to meaningful participation in civic life and the American mainstream, it becomes more than a dispensable luxury and tends more to a fundamental right.

Though healthcare and public education are different issues, both essentially revolve around democratic access and equal opportunity. Warren’s line of reasoning is, therefore, relevant to the question before us. Looking at America today, three things are clear: first, the federal government has undertaken strenuous, comprehensive efforts since the 1930s to make healthcare accessible to every citizen; second, healthcare occupies a central place in the cultural mainstream of the nation; and third, the burden of providing healthcare to as many citizens as possible has become one of the most costly of national expenditures. Millions of Americans rely on Social Security, Medicare and Medicaid benefits and government-sponsored insurance for

42. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

43. *Id.* at 492-93.

44. *Id.* at 493.

45. *Id.*

children.⁴⁶ As of 2008, total healthcare spending in the United States reached \$2.4 trillion per year, averaging \$7,868 per person; for perspective, this expenditure accounted for 16.6 percent of the U.S. gross domestic product (GDP) in 2008, compared to 7.2 percent in 1970.⁴⁷ Currently, at least 45 million Americans remain uninsured, and even among the insured, almost twenty-five percent reported serious difficulties in paying for health insurance or health related costs.⁴⁸ For American families, the yearly rise in healthcare premiums is a daunting challenge: the average annual premium for family coverage rose from \$5,791 in 1999 to \$12,680 in 2008.⁴⁹

Growing in tandem with these programs is a robust, multi-billion dollar private healthcare sector, underwritten by an American public that lives longer (if not always healthier) than its grandparents and great-grandparents did at the dawn of the Twentieth Century. Servicing this industry is a sea of newly-minted doctors, physician assistants, nurses, medical technicians and other allied health professionals. According to the U.S. Department of Labor, 90,000 physicians and surgeons will be added to the American economy between 2006 and 2016 (14 percent growth); 587,000 registered nurses (23 percent); 43,000 clinical laboratory technicians (23 percent); 50,000 dental hygienists (30 percent); 39,000 emergency medical technicians and paramedics (19 percent); 91,000 pharmacy technicians (32 percent) and 148,000 medical assistants (35 percent).⁵⁰ In each of these spheres of the healthcare sector, there is a substantial expectation of additions to what is already a well-populated profession; healthcare is dynamic in character, and there is plenty of room at the top.

Despite the Great Recession of 2008, the healthcare industry is likely to continue to grow due to the increased life expectancy of Americans. In 1900, the average life expectancy was 47.3 years; to-

46. *5 Important Numbers on Health Reform*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/issues/health-care> (last visited Dec. 26, 2012); *Seniors & Social Security*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/issues/seniors-and-social-security> (last visited Dec. 26, 2012).

47. Kaiser Family Foundation, *Healthcare and the 2008 Elections*, KFF.ORG 1-2 (Oct. 2008), <http://www.kff.org/insurance/upload/7828.pdf>.

48. *Id.* at 1.

49. *Id.* at 2.

50. ELAINE L. CHAO & PHILIP L. RONES, OCCUPATIONAL OUTLOOK HANDBOOK 371,383, 399, 403, 408, 423, 437 (2008-09 Library ed. 2008). (It is customary for such data to be rounded.)

day it is almost 80 years.⁵¹ These statistics—unprecedented in the recorded history of life and death—have deep implications for personal finances and government expenditures in the Twenty-First Century. One recent newspaper article summarized the data results from an August 2011 AARP⁵² Public Policy Institute Survey: it found that fifty-seven percent of Americans older than fifty reported diminished confidence that they will have enough money to live on in their later years.⁵³ Sixty-one percent of the same population said that their savings had declined by fifty percent since the late recession.⁵⁴ Adding insult to injury, more private companies are abandoning the generous pension model of the 1950s era, leaving senior citizens to rely more heavily upon 401(k) plans and personal savings.⁵⁵ As a result, millions of septuagenarians are reentering the workforce after unsuccessful attempts at full retirement.⁵⁶

Related to this dilemma is a mixed blessing revealed by the 2010 Census that nearly two million Americans are ninety or older and that this trend will likely increase in the near future.⁵⁷ Current estimates are that the oldest Americans will increase from 1.9 million to 8.7 million by 2050, at which time they will be two percent of the nation's population and ten percent of older Americans.⁵⁸ By contrast, less than 100,000 Americans reached 90 in 1900, when Henry Adams first pondered his dynamic theory of history.⁵⁹ While demographers attribute this rise to better nutrition and more sophisticated healthcare, it is well understood that reaching 90 years of age will entail greater risks and healthcare needs—translating into even higher costs for these aged individuals, their families, and the public, the

51. U.S. Census Bureau, *U.S. Census Bureau, Statistical Abstract of the United States: 2012*, 77 (2012), <http://www.census.gov/compendia/statab/2012/tables/12s0104.pdf>. (See specifically, Table 104. Expectation of Life at Birth, 1970 to 2008, and Projections, 2010 to 2020).

52. American Association of Retired Persons.

53. Peter Whoriskey, *More Older Americans Working than Ever Before*, THE NEWS & OBSERVER (Raleigh), Jan. 13, 2012, at 12A.

54. *Id.*

55. *Id.*

56. *Id.*

57. Hope Yen, *Census Finds Reaching—or Passing—Age 90 is More Likely*, THE NEWS & OBSERVER (Raleigh), Nov. 18, 2011, <http://www.newsobserver.com/2011/11/18/v-print/1652596/census-finds-reaching-or-passing.html>.

58. *Id.*

59. *Id.*

latter of whom will pick up the bill when patients receive treatment without the ability to pay for it.⁶⁰

Finally, the Emergency Medical Treatment and Active Labor Act (EMTALA), mandating that hospitals offer stabilizing emergency treatment regardless of citizenship or ability to pay, is indirectly setting citizens up for bankruptcy. Congress passed EMTALA for the most humane of reasons—to prevent hospitals from “dumping” patients on the streets because they lack health insurance—but since the federal government does not absorb the cost of treating these patients, the law is essentially an unfunded mandate.⁶¹ Examining EMTALA’s interplay with our economy, we fall between two extremes: on the one hand, Congress could repeal the hospital mandate, allowing hospitals nationwide to refuse emergency care to indigent patients. This means that thousands of Americans each year would literally die in the streets: hospitals could refuse service, even to heart attack and stroke victims, if they could not produce a health insurance card. On the other hand, Congress could leave the mandate in place but continue refusal to fund it, meaning that hospitals and insurance companies would continue shifting the costs to insured individuals and their employers. Each time a hospital treats an uninsured patient, the insured’s premiums will have an annual increase.⁶² Neither of these courses seems equitable or just.

Congress crossed the Rubicon in enacting this measure, for EMTALA permanently cemented the path of progressive healthcare legislation since 1937, making basic universal healthcare the next and final logical step. Once Americans were guaranteed a statutory right to a floor of stabilizing care, it only made sense to keep that right intact. Yet, as of now, Congress could theoretically remove that statutory right today, leaving the health of millions at stake. As one of our greatest living legal scholars has said, the ability to take care of oneself is as fundamental to liberty as freedom of conscience, freedom to earn a living, freedom to have a family and freedom to con-

60. *Id.*

61. William M. McDonnell, *Will EMTALA Changes Leave Emergency Patients Dying On the Hospital Doorstep?* 38 J. HEALTH L. 77, 78 (Winter, 2005).

62. The Early Show: Medical Debt Huge Bankruptcy Culprit (CBS television broadcast Jul. 23, 2009), <http://www.cbsnews.com/stories/2009/06/05/earlyshow/health/main5064981.shtml?tag=mncol;lst;1>. (As recently as 2009, 62 percent of personal bankruptcies filed in the United States involved some illness or medical cost, even when the party had health insurance.).

duct one's sexual life.⁶³ The only way to complete healthcare's incorporation into the matrix of rights is for the Supreme Court to recognize healthcare as a fundamental right of the American people and for Congress to attach the duty of paying into the national healthcare system to avoid collective insolvency.

I must study politics and war [so] that my sons may have liberty to study mathematics and philosophy. My sons ought to study mathematics and philosophy, geography, natural history, naval architecture, navigation, commerce, and agriculture in order to give their children a right to study paintings, poetry, music, architecture, statuary, tapestry, and porcelain.⁶⁴

Written in 1780, these words of John Adams encompass the promises his generation sought to bequeath to America's posterity, forevermore. Similar sentiments echo through the Declaration of Independence; the Articles of Confederation; the Constitution; *McCulloch v. Maryland*;⁶⁵ James Madison's "Advice to My Countrymen"; the Gettysburg Address; and Dr. Martin Luther King, Jr.'s "I Have a Dream" speech. Each of these American treasures speak to our yearning for life, liberty and the pursuit of happiness and the capacity of a dynamic nation to evolve with historical developments. Mere longevity does not translate into greatness among nations. Many empires and republics have endured long and contributed little to the improvement of the human condition, whereas others, like America, have existed for a comparatively brief time and have furnished, at least in some ways, an enviable model for the world. This universally applicable model of hope and progress, more than anything else, is what distinguishes America from all other great civilizations that preceded it.

Without a dynamic perspective on fundamental rights, millions of Americans would have forfeited the right to partake in such a civilization on the day they were born. Over more than two centuries, "We the People" have decided that race, religion, gender, national origin, creed and sexual orientation do not dictate enjoyment of American citizenship. At the dawn of the Twenty-First century, lack of access to healthcare should not dictate that enjoyment either. This right must not be trusted to the mere legislative whim of Congress, but should be enshrined among the most precious of American rights.

63. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 127 (2000).

64. DAVID McCULLOUGH, JOHN ADAMS 236-37 (2001).

65. *McCulloch v. State*, 17 U.S. 316, 4 L. Ed. 579 (1819).

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After more than 200 years, healthcare has finally ripened into a desideratum in our collective striving toward a “more perfect Union.”