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Andre "Truth" McDavid

Brandon A. Robinson

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EXPLORING THE CASE FOR HEALTHCARE AS AN UNENUMERATED, FUNDAMENTAL RIGHT

Andre “Truth” McDavid and Brandon A. Robinson¹

Introduction

The following is the second of a two-part discussion of healthcare as a putative fundamental right under the U.S. Constitution. In last spring’s issue of the *North Carolina Central University Biotechnology and Pharmaceutical Law Review*, the authors published the brief article, “Should Healthcare Be a Fundamental Right?,” in which we posited that a constitutional floor of access to basic, stabilizing care was a desideratum, without which “life, liberty and the pursuit of happiness” could scarcely be maintained in modern society.² Analyzing fundamental rights from the premise that American history can be understood as a gradual expansion of freedom and inclusion, we noted that many fundamental rights today—such as interstate travel, the right to vote, privacy, and reproductive autonomy—were recognized as such only after the U.S. Supreme Court concluded that denying certain classes these rights was effectively denying them citizenship.³ Another way of putting it is that fundamental rights—whether “self evident” at our nation’s founding, or only after decades or centuries of time—essentially center on equal access to the American mainstream.⁴ Since the mid 20th century, any alleged governmental

1. ANDRE “TRUTH” McDAVID is Associate Attorney at Swaim Law, PLLC, in the greater Raleigh, North Carolina area. He earned a J.D. from North Carolina Central University School of Law in 2012, and a B.A. in Philosophy of Law at North Carolina State University in 2008. His professional areas of interest are constitutional law, civil litigation and criminal defense. BRANDON A. ROBINSON is Public Communications Specialist and Legal Analyst at University of North Carolina General Administration in Chapel Hill, North Carolina. He earned a J.D. from North Carolina Central University School of Law in 2013, a M.A. in American history from Western Carolina University in 2010, and a B.A. in European history and philosophy from the same institution in 2005. His professional areas of interest are constitutional law, property and higher education law, American political history, and European intellectual history. The authors would like to thank the Editorial Board and staff editors of the *North Carolina Central University Biotechnology and Pharmaceutical Law Review* for an enriching, mutually edifying collaboration.

2. Andre McDavid and Brandon A. Robinson, *Should Healthcare Be a Fundamental Right?*, 6 N.C. CENT. BIOTECH & PHARM. L. REV. 79 (2013).

3. *Id.* at 79-80.

4. *Id.* at 87.

intrusion on such democratic access has triggered strict scrutiny analysis by the federal courts, either because the right is fundamental, or because the petitioner represents a suspect class.⁵

While our purpose in this second article is harmonious with that of the first, the task in effectuating that purpose is different in the instant case. Here, we explore the case to be made for basic health-care as an unenumerated, fundamental right, using the same interpretive resources and tools the Court has used before in analyzing the constellation of rights in our legal and constitutional systems. In contending previously that basic healthcare *should* be a fundamental right, we examined the fault lines of American history, studying how politically seismic events like the Progressive Movement, the Great Depression and New Deal, and the Civil Rights Movement transformed American history and jurisprudence. As we previously noted, “‘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.”⁶ This is how the Supreme Court could conclude in *Brown v. Board of Education* (1954) that, based on public education’s centrality to American social and civic life *by the mid 20th century*, segregated schools were inherently unconstitutional, even if they *were* truly separate and equal.⁷ If Edmund Burke’s endorsement of history as posterity’s guide⁸ retains any currency, it is proper to say that American history has taught us that fundamental rights are not always immediately apparent, but often become so only with time.⁹ This is

5. See *Korematsu v. United States*, 323 U.S. 214 (1944). See also, e.g., *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Palmore v. Sidoti*, 466 U.S. 429 (1984). (Beginning with *Korematsu*, these cases and other articulate the doctrine of strict scrutiny, and illustrate its application.)

6. Andre McDavid and Brandon A. Robinson, *supra* note 2, at 80.

7. *Brown v. Board of Education*, 347 U.S. 483, 492-493, 495 (1954).

8. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 247, 250 (Conor Cruise O’Brien ed., Penguin Books 1986) (1790). “In history a great volume is unrolled for our instruction, drawing the materials of future wisdom from the past errors and infirmities of mankind. . . History consists, for the greater part, of the miseries brought upon the world by pride, ambition, avarice, revenge, lust, sedition, hypocrisy, ungoverned zeal, and all the train of disorderly appetites. . . history, in the nineteenth century, better understood, and better employed, will, I trust, teach a civilized posterity to abhor the misdeeds of both these barbarous ages.” See also generally JESSE NORMAN, EDMUND BURKE: THE FIRST CONSERVATIVE (2013).

9. LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 128, 131 (2008). Professor Tribe writes: “. . . liberty is more than a series of isolated points. . .”

not a radical view, for no matter what social transformations have defined American history at any critical point, our anchor has consistently been the ideals of the Declaration of Independence and the Constitution. The American Founders who drafted these documents (and risked everything for their ideals) did not aim for equality, but rather equal opportunity among all citizens to thrive in the nation's political, economic, cultural and intellectual mainstream.¹⁰ Since the concept of "citizen" has considerably evolved since the late 18th century, it follows that the political, legal and civic rights necessary to sustain citizenship have evolved, even as the Founders' essential ideals have remained constant.

Following this logic, we previously contended that the 21st century, marked by unprecedented life expectancies, technological advances in healthcare, household bankruptcies due to medical costs, and the culmination of over seventy years of active government involvement in the healthcare marketplace, have revealed to us how integral healthcare is to viable, meaningful citizenship in the United States.¹¹ In effect, healthcare has evolved from a rarefied luxury to a putative fundamental right in a modern age—a desideratum for an American citizen's political, economic and civic existence.¹²

From the outset, proponents of a fundamental right to healthcare must confront the reality that no express constitutional provision exists to that effect. Also significant is that, while European nations and intergovernmental entities have embraced healthcare as a fundamental *human* right, the American political definition of "human rights" is much narrower, implicating only political and civil rights.¹³ Addressing these challenges, we analyze healthcare in the context of the Ninth Amendment and the Bill of Rights, and explore a nexus between healthcare and a citizen's vital political, economic, and civic interests. These are parallel discussions that demonstrate healthcare's necessity as a means of effectuating the Founders' aims in the Declaration of Independence and the Constitution.

10. GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 5-8, 104-109 (1991); JOSEPH J. ELLIS, *AMERICAN CREATION* 15-16 (2007); T. H. BREEN, *THE MARKETPLACE OF REVOLUTION: HOW CONSUMER POLITICS SHAPED AMERICAN INDEPENDENCE* xv-xviii, 76-82 (2004).

11. See Andre McDavid and Brandon A. Robinson, *supra* note 2, at 79, 88-90.

12. *Id.* at 79, 91-92.

13. Anita B. Pereira, Note, *Live and Let Live: Healthcare is a Fundamental Human Right*, 3 *CONN. PUB. INT. L.J.* 414, 419-420 (2004).

The Ninth Amendment, providing that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people,” is the fountain of unenumerated rights jurisprudence.¹⁴ A dormant provision for most of American history, the Ninth Amendment is not a “source” of rights in itself, but a textual justification for the judiciary to protect liberties that do not appear, but are strongly implied, in the Constitution’s text.¹⁵ It attracted renewed interest and scrutiny after *Griswold v. Connecticut* (1965), in which the Court struck down a statute prohibiting contraceptives on the ground that an implied right to privacy existed under the Bill of Rights.¹⁶ Similarly, the Court has engaged in unenumerated rights analyses to protect, inter alia, the right to marry, the right to procreate, the right to rear one’s children, and, within certain bounds, the right of a woman to terminate a pregnancy.¹⁷

Ninth Amendment proponents in 1791 understood that the Bill of Rights would not and could not anticipate every potential encroachment on fundamental liberties.¹⁸ For context, they had no choice but to consult the history of rights in the English constitutional tradition, and their own experience under the British Crown prior to the American Revolution.¹⁹ Whereas some rights, such as the right against self-incrimination, or the right to a jury of one’s peers—had been recognized in England since at least the Magna Carta (1215), other fundamental liberties reflected fears that the new federal government would repeat injustices only recently experienced in the 1760s and 1770s.²⁰ This explains why many of the grievances

14. U.S. CONST. amend. IX; ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 945 (3rd ed. 2009).

15. *Id.*

16. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

17. *See generally* *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 378 (1978); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

18. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815* 70-72 (2009).

19. *Id.* at 65-66; *See also generally*, EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988).

20. *See generally* DANNY DANZIGER AND JOHN GILLINGHAM, 1215: THE YEAR OF THE MAGNA CARTA (2003); JOHN FERLING, A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN REPUBLIC 53-58, 70-79 (2003); ROGER WILKINS, *JEFFERSON’S PILLOW: THE FOUNDING FATHERS AND THE DILEMMA OF BLACK PATRIOTISM* 64-66 (2001).

Thomas Jefferson listed in the Declaration of Independence (1776) appear again in the Bill of Rights (1791): thus, both state papers emphasize access to judicial process, freedom of movement and association, freedom of conscience, freedom from torture and freedom over private property, because these were the liberties that the king had often threatened, either in English history or in the Founders' own time as colonists.²¹ As a general rule, if the British monarchy did not threaten a right at the time, it was not expressly mentioned in the Constitution.²² Our forward-looking founders, therefore, included the Ninth Amendment as a means to address future, unforeseen abuses by the new government, especially if they arbitrarily abridged life, liberty, or property interests.²³

Based on these considerations, we invite a 21st-century Supreme Court to recognize healthcare as a 21st-century fundamental right, relying on unenumerated rights precedent since *Griswold v. Connecticut*. In tendering that invitation, we draw upon law professor Erwin Chemerinsky's four-part framework for analyzing fundamental rights: (1) Does a fundamental right exist?; (2) Is the fundamental right infringed?; (3) Is the infringement upon the fundamental right justified?; and (4) Is the government's means sufficiently related to the ends?²⁴ We shall examine each question in turn.

Does a Fundamental Right Exist?

Determining whether a fundamental right exists in the first place is the most difficult of the four questions, especially because there is no bright-line test that the Supreme Court follows in answering it.²⁵ In making that determination, the Court has utilized various theories of constitutional interpretation, which we briefly list and explain. *Originalism*, perhaps the most recognizable theory, expounds the view that only those liberties expressly mentioned in the Constitution's text are "fundamental."²⁶ *Moderate originalism* is similar to originalism, but promotes consideration of the Framers' general in-

21. See generally THE BILL OF RIGHTS; THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 24-27 (Adrienne Koch and William Peden, eds., 1993).

22. See WOOD, *supra* note 18, at 65-66.

23. *Id.* at 70; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 542-43 (1969).

24. See CHEMERINSKY, *supra* note 14, at 946-949.

25. *Id.* at 946.

26. *Id.* at 946-947.

tent behind the Constitution, rather than exclusively those views expressly reflected in the text.²⁷ Then there are those who say that fundamental rights can be gleaned from what is “deeply rooted in this Nation’s history and tradition”—a term of art in unenumerated rights jurisprudence, as we shall soon see.²⁸ To a lesser degree of influence, some scholars have argued that *natural law principles* should inform our view of fundamental rights, or that the Court’s interpretation of such rights should reflect the *moral consensus* of society, expressed through the democratic process.²⁹ Finally, there is the view that the Court should ensure the Constitution’s *harmonizing* role in our political society.³⁰ Other modes of interpretation exist, but what all these theories have in common is that they raise questions about the role an unelected judiciary should play in determining fundamental rights in a constitutional republic.³¹

We believe that basic healthcare is “deeply rooted in this Nation’s history and tradition,” and harmonizes with moderate originalist views. We find moderate originalism to be a clarifying mediator between the “pure” originalism most often associated with Justice Antonin Scalia, and the “living, breathing Constitution” view of Justice Stephen Breyer.³² In applying this theory, we avail ourselves not only of the Bill of Rights’ express provisions, but also the Preamble to the Constitution, the Declaration of Independence, and implicit goals that often and consistently appear throughout the Constitution.

An optimal starting place for the Framers’ general intent can be found in the Preamble, for it was explicitly conceived as the readers’ introduction to the Articles and Amendments that follow, and describes the general aims for which the Constitution was created in the first place. The Preamble expresses only five goals: “justice,” “domestic Tranquility,” “common defence [sic],” “general welfare,” and

27. *Id.* at 947.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. For perspective on how these competing views characterize the current Supreme Court, see generally JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT (2007); JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT (2007); JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA (2007).

“Blessings of Liberty.”³³ All five goals serve the super arching purpose of forming “a more perfect Union,”³⁴ and it is highly significant that “general welfare” and liberty made the shortlist; the Framers’ general treatment of these as equal to justice and national defense signals their belief that a citizen’s basic well being was just as important to them as national security, and that protecting such general well being was essential to a “more perfect Union” under the Constitution.

Such an elevated view of a citizen’s well being is entirely consistent with the spirit of the Bill of Rights. Channeling John Locke’s emphasis on “life, liberty and Estate,” from the *Second Treatise on Government* (1689),³⁵ the Framers treated these three ideas as equally significant to a citizen’s civic existence, and drafted the Bill of Rights in such a way as to treat them as symbiotic and interconnected.³⁶ The First, Third, Fourth, Fifth, and Eighth Amendments each protect citizens’ bodily dignity in some way, whether by protecting their freedom of movement or association; their security in their own persons and effects; their physical space at home; their rights once they are haled into court on criminal charges; or their bodies from torture.³⁷ The Bill of Rights makes clear that sovereign power must not interfere with a citizen’s body or things closely associated with that body (e.g., personal effects, the home) but for exceptional circumstances, and that “life, liberty and property” cannot be divested without “due process of law.”³⁸

The Eighth Amendment links the Bill of Rights’ protections of bodily dignity to healthcare concerns. The Court has interpreted that Amendment’s prohibition of “cruel and unusual punishments” to mean that incarcerated Americans *must* receive basic, stabilizing healthcare.³⁹ Even before incorporating healthcare into its Eighth Amendment analysis in 1976, the Court had long viewed the Amendment as both a testament to the Founders’ enlightened views on the dignity of human life, and the juxtaposition of capital punishment

33. U.S. CONST. Preamble. (In this and all other references to 17th and 18th century documents, we retain the punctuation of the pertinent era.)

34. *Id.*

35. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 323-324 (Peter Laslett ed., Cambridge Univ. Press 1988) (1689).

36. *See generally*, RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS (2006).

37. U.S. CONST. amends. I, III, IV, V, VIII.

38. *Id.*

39. *See generally* Estelle v. Gamble, 429 U.S. 97 (1976).

within “the evolving standards of decency that mark the progress of maturing society.”⁴⁰ Federal and state prisons cannot take this lightly, for as Justice Powell has warned:

[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.⁴¹

In *Estelle v. Gamble* (1976), the Court carried almost a century of Eight Amendment jurisprudence to its logical conclusion, setting a constitutional floor of healthcare for incarcerated Americans:

. . . deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ *Gregg v. Georgia*, *supra*, at 173 (joint opinion), proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prison’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.⁴²

These cases should be read together as the Court’s unambiguous enforcement of the Eighth Amendment’s prohibition of inhumane treatment of prisoners; however, they also reveal the Founders’ general desire to ensure a basic threshold of life and dignity under the Constitution. No one put this better than Chief Justice Earl Warren: “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”⁴³

If a basic, constitutional threshold of life and dignity exists for incarcerated Americans, it syllogistically follows that one exists also for free citizens. However, whereas the former’s *loss* of liberty makes plain the need for explicit protections, the latter’s *possession* of liberty makes such protections more subtle. These are further revealed by examining whether healthcare is “deeply rooted in the Nation’s history and tradition.”⁴⁴ This concept grows from Justice Arthur Goldberg’s concurring opinion in *Griswold v. Connecticut*, which stresses that a right is fundamental, if it “‘is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and

40. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

41. *Procunier v. Martinez*, 416 U.S. 396, 405-406 (1974).

42. *See Estelle v. Gamble*, *supra* note 39, at 104-105.

43. *See Trop v. Dulles*, *supra* note 40, at 100.

44. *See CHEMERINSKY*, *supra* note 14, at 947.

political institutions' . . ."⁴⁵ Justice Goldberg noted that jurists should not look to their "personal and private notions," but rather the "traditions and [collective] conscience of our people."⁴⁶

In the Founders' writings, America's state papers, the Founders' reference materials, and the American imagination, "life" and "liberty" are closely conjoined, if not inseparable. In the Declaration of Independence, Thomas Jefferson paraphrased John Locke's "life, liberty and Estate,"⁴⁷ to include "life, liberty, and the pursuit of happiness."⁴⁸ Listing the colonists' grievances, he accused King George III of "wag[ing] cruel war against human nature itself, violating its most gained rights of life and liberty. . ."⁴⁹ He famously ended America's birth certificate with the Founders' pledge of their "lives, [their] fortunes, and [their] sacred honor."⁵⁰ Moreover, just two years before the Declaration, Jefferson won continental fame for declaring in his "Summary View of the Rights of British America" (1774) that "[t]he God who gave us *life*, gave us *liberty* at the same time: the hand of force may *destroy* but *cannot disjoin them*" (emphasis added).⁵¹ Furthermore, Jefferson's fellow lawyer and Virginian, the orator Patrick Henry, stirred revolutionary ire with his "Give Me Liberty, or Give Me Death!" address, and other anti-colonial orations.⁵²

The Founding Generation did not articulate their life and liberty ideas in a vacuum, but drew from over a thousand years of English, Greek and Roman, and modern continental history.⁵³ Plato, Thucydides, Aristotle, Cicero, Livy and Tacitus shaped the Founders' ideas on various forms of government;⁵⁴ and since the Founders as late as

45. See *Griswold v. Connecticut*, *supra* note 16, at 493 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

46. *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

47. See JOHN LOCKE, *supra* note 35, at 323-324.

48. See THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, *supra* note 21 at 24.

49. *Id.* at 26.

50. *Id.* at 28-29.

51. *Id.* at 289.

52. CARL BRIDENBAUGH, SEAT OF EMPIRE: THE POLITICAL ROLE OF EIGHTEENTH-CENTURY WILLIAMSBURG 55-57, 59-62 (1958). Also see generally, RHYS ISAAC, THE TRANSFORMATION OF VIRGINIA, 1740-1790 (1982).

53. See generally BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

54. See generally FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985); see also FORREST McDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY (1994).

the 1770s saw themselves as Englishmen,⁵⁵ they also drew heavily on John Locke and other 17th and 18th-century English political theorists, such as Sir James Harrington, John Trenchard, Algernon Sidney, and Henry St. John, Viscount Bolingbroke.⁵⁶ Steeped in a common law tradition of privileges and liberties going back to King Henry II,⁵⁷ the Founders saw King George III's encroachments on liberty, and Parliament's "taxation without representation," as parts of "a deliberate, systematical plan of reducing us to slavery."⁵⁸ Without a guarantee that loyalty to the Crown would preserve a basic threshold of both *life* and *liberty*, the Founders believed that they would one day suffer the indignity of being less than human, similar perhaps to the slaves that many of them owned.⁵⁹ The great irony of the American Revolution is that its leaders are often viewed today as radicals, although many of them considered themselves classical *conservatives*; they created a new government, but did so in order to *preserve* a life-and-liberty symbiosis that they saw as "deeply rooted"

55. See e.g., THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, *supra* note 21, at 273-274: "To remind [the king] that our ancestors, before their emigration to America, were the free inhabitants of the British dominions in Europe, and possessed a right, which nature has given to all men, of departing from the country in which chance, not choice, has placed them, of going in quest of new habitations, and of there establishing new societies, under such laws and regulations as, to them, shall seem most likely to promote public happiness. That their Saxon ancestors had, under this universal law, in like manner, left their native wilds and woods in the North of Europe, had possessed themselves of the Island of Britain, then less charged with inhabitants, and had established there that system of laws which has so long been the glory and protection of that country."

56. See BAILYN, *supra* note 53, at 34-36, 39, 51-53; JOSEPH J. ELLIS, PASSIONATE SAFE: THE CHARACTER AND LEGACY OF JOHN ADAMS 89-90 (1993); see also generally, JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS (J.G.A. Pocock, ed., Cambridge Univ. Press 1992) (1656).

57. John Gillingham, *The Early Middle Ages, 1066-1290*, in THE OXFORD HISTORY OF BRITAIN 173-176 (Kenneth O. Morgan, ed., 1999).

58. See THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, *supra* note 21, at 278.

59. EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIA VIRGINIA 4 (1975). ("The men who came together to found the independent United States, dedicated to freedom and equality, either held slaves or were willing to join hands with those who did. None of them felt entirely comfortable about the fact, but neither did they feel responsible for it. Most of them had inherited both their slaves and their attachment to freedom from an earlier generation, and they knew that the two were not unconnected. The rise of liberty and the equality in America had been accompanied by the rise of slavery.") (emphasis added).

in the traditions they inherited.⁶⁰ In adopting English common law and codifying many of its precedents into constitutions and statutes, our first American generation bequeathed this life-and-liberty tradition to all succeeding generations, down to this day.

Is the Fundamental Right Infringed?

As we have seen, the great thrust of Anglo-American legal and political precedent tends strongly towards basic healthcare as a fundamental right. If it were recognized as such, how would we know if that fundamental right was infringed? Except for involuntary servitude, all Constitutional analysis centers on state action.⁶¹ Therefore, a respondent-institution in a fundamental rights case would likely be a federal or state-operated healthcare facility; a research hospital that receives federal or state grants; and, more likely than not, a healthcare facility, public or private, that receives Medicare, Medicaid, or other social safety-net-related reimbursements. In sum, the depriving institution in such a case must either be a state actor itself, or an entity whose actions fall under the two main exceptions to the state action doctrine: (1) entanglement with a local, state, or federal government;⁶² and/or (2) public function, by which a private entity performs a traditionally governmental responsibility.⁶³

As to what would constitute an undue governmental interference with a fundamental right to healthcare, we limit ourselves to considering basic, stabilizing care in life-threatening or exigent situations that could substantially impair a citizen's daily conduct of life. Although many possible scenarios exist, the most likely one would involve a hospital's refusal to stabilize a patient because of inability to pay. Most hospitals in America are prohibited from discriminating on such a basis under the Emergency Medical Treatment and Active Labor Act (EMTALA), an unfunded mandate to hospitals enacted in

60. See Wood, *supra* note 10, at 3-6.

61. The Civil Rights Cases: *United States v. Stanley*, 109 U.S. 3, 11, 20-21 (1883).

62. See generally *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Norwood v. Harrison*, 413 U.S. 455 (1973).

63. See generally *Marsh v. Alabama*, 326 U.S. 501 (1946); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). (Please note that the Court's interpretation of *Marsh v. Alabama* has been subsequently narrowed by *Lloyd v. Tanner*, 407 U.S. 551, 570 (1972), to privately owned towns, as opposed to the privately-owned shopping center that was at issue in *Lloyd v. Tanner*.)

1986, and currently the only impediment to hospitals denying critical care to indigent patients.⁶⁴ This protection, so taken for granted by most Americans that it is often mistaken as fundamental, is purely statutory; Congress enacted it, but could repeal it at any time, for any reason. The Constitution does not suggest, and we do not here contend, that citizens are entitled to optimal care in all situations; however, the basic life-sustaining, life-supporting needs of patients is closely enough connected to citizens' economic, political and civic existence that they should not hang on merely the legislative whim, or fleeting political pressures of any era.

Is the Infringement Upon the Fundamental Right Justified?

Should a state actor encroach upon a fundamental right to healthcare, the government would have to prove a compelling justification for that infringement.⁶⁵ This is a nebulous concept, for the Court has never precisely indicated what justifications are "compelling."⁶⁶ However, we know that this standard is a high one for the government to meet, and that the Court does not find compelling justifications lightly.⁶⁷ Two rare exceptions are *Korematsu v. United States* (1944),⁶⁸ in which the Court found winning a war to be a compelling governmental interest, and *Zablocki v. Redhail* (1978),⁶⁹ in which the Court similarly found the protection of children's well being to be compelling. In a healthcare-as-fundamental-right analysis, we cannot state for certain what would be a compelling enough justification for denying citizens stabilizing care, but we do know that the reason would have to outweigh the deprivation of services that would preserve or greatly improve a patient's essential life functions.

64. 42 U.S.C. 1395; William M. McDonnell, *Will EMTALA Changes Leave Emergency Patients Dying on the Doorstep?* 38 J. HEALTH L. 77, 78 (Winter, 2005).

65. CHEMERINSKY, *supra* note 14, at 948.

66. *Id.*

67. *Id.*

68. 323 U.S. 214. *See also* note 5.

69. 434 U.S. 374. *See also* note 17.

Is the Government's Means Sufficiently Related to Its Ends?

Even assuming that the government successfully proved a compelling interest in a healthcare-fundamental rights case, it must also prove that the means it chose were *necessary* to effectuate the compelling government interest: this signifies that the means the government chose admitted no other alternative less intrusive of the fundamental right.⁷⁰ In a healthcare context, the Court would therefore inquire into whether a state actor could have achieved its critical purpose without going to the ultimate step of denying a patient stabilizing care, possibly in a life-or-death situation, or exigent circumstance. If the Court finds an alternative means that would both achieve the same compelling ends, *and* burden the fundamental right less intrusively, the government is most unlikely to prevail.⁷¹

Conclusion

For the foregoing reasons, we believe that a tenable case can be made for basic healthcare as an unenumerated, fundamental right under the Constitution. In a nation expressly consecrated to “life, liberty, and the pursuit of happiness,” the denial of basic, life-sustaining care seems to offend the principles of the Bill of Rights, as well as the Founders’ general aims in creating and ratifying the Constitution. Despite being among the freest peoples in the world during the late 18th century, American colonists waged revolution against a mighty king, in part because they feared that that king’s edicts threatened a basic threshold of life and liberty—the very lifeblood of freedom in Western civilization as they understood it. They could not have foreseen the close nexus between healthcare and the government they founded, but the life-liberty symbiosis that healthcare implicates would be quite familiar to them. A basic threshold of access to life-sustaining care makes everything else that citizens do—attaining an education, earning a livelihood, raising a family, and building a career—viable and possible.

70. CHEMERINSKY, *supra* note 14, at 949. To see how the Court has applied the “necessary to achieve a compelling interest” test, *see* *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989); *also* *Grutter v. Bollinger*, 539 U.S. 306, 326-327 (2003).

71. *Id.*

It is possible that the 21st century will witness a national health-care dialogue that raises questions similar to those we raised in our two-part discussion. This will depend largely on whether the Patient Protection and Affordable Care Act (2010) succeeds in its aim of insuring the greatest possible number of Americans, and also whether poverty becomes the primary civil rights issue in our century. In previous epochs, education, economic development and the ballot box filtered those who achieved the American Dream from those who did not; in our own time, the ability to take care of one's self, or to avoid a preventable, unnecessary death might become equally definitive as a barrier to meaningful citizenship. Reaching the ceiling of one's own American Dream has always been up to the individual, and this will remain so. However, thanks to a dynamic interpretation of the Constitution, that document has guaranteed to millions of Americans who were not "citizens" in 1789, a floor of protections in expression, religion, civil and criminal procedure, due process of law, and equal protection of the laws. As to healthcare, we too ask for a floor—nothing more, and nothing less.