

AMERICAN DIGNITY AND HEALTHCARE REFORM

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The concept of human dignity provides a useful reference point for evaluating American exceptionalism in the context of welfare rights. Since World War II, human dignity has emerged as the preeminent value in many modern constitutions and various human rights documents.¹ Particularly in countries that have extensive welfare states, dignity is often about being part of the community, being protected and provided for by the government.² In America, however, political and legal discourse link dignity with individual rights and freedom from

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1. *See, e.g.*, 1994 CONST. art. 23 (Belg.); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 1 (Ger.); 1975 SYNTAGMA [SYN.] [CONSTITUTION] art. 106 (Greece); Art. 3 Costituzione [Cost.] (It.); S. AFR. CONST., 1996, § 10; CONSTITUCIÓN ESPAÑOLA [C.E.], Dec. 29, 1978, art. 10 (Spain); International Covenant on Civil and Political Rights, (ICCPR) Preamble, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, (ICESCR) Preamble, Dec. 16, 1966, 993 U.N.T.S. 33 (using language identical to that of the Preamble to the International Covenant on Civil and Political Rights); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); *see also* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 173–74 (2001) (“With its emphasis on dignity, and its insistence on the link between freedom and solidarity, the [Universal Declaration of Human Rights] epitomized the spirit of the prolific constitution and treaty-making activity that followed World War II.”).

2. *See, e.g.*, REGERINGSFORMEN [RF] [CONSTITUTION] 1:2 (Swed.). The Constitution of Sweden declares:

Public power shall be exercised with respect for the equal worth of all and the liberty and dignity of the private person. The personal, economic and cultural welfare of the private person shall be fundamental aims of public activity. In particular, it shall be incumbent upon the public institutions to secure the right to health, employment, housing and education, and to promote social care and social security.

Id.; *see also* Art. 4 Costituzione [Cost.] (It.) (recognizing the right to work); *id.* at Art. 32 (safeguarding health and guaranteeing free medical care to the indigent); *id.* at Art. 38 (giving workers the right to be provided for in cases of accidents, illness, disability, and old age and guaranteeing welfare assistance to those unfit for work).

interference by the State.³ In this short Essay I explain how different concepts of dignity reflect fundamental disagreements about welfare rights and highlight aspects of American exceptionalism. The traditional American conception of human dignity may resist welfare rights, as can be seen in the current debate about whether and how government should expand healthcare coverage.

I. HUMAN DIGNITY AND WELFARE RIGHTS

There are a number of different conceptions of dignity,⁴ but one understanding of dignity associates this value with social and welfare rights on the grounds that protection and support for human dignity require a certain minimum standard of living, including housing, healthcare, education, and a clean environment. In this view, a person cannot meet the conditions of dignity without certain basic goods. It follows that the community, acting through the State, must provide these essentials for those who are unable or unwilling.⁵

3. The United States Constitution is traditionally characterized as a charter of negative, not positive liberties. As Judge Posner has explained, "The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them." *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983). Recent Supreme Court decisions have confirmed this understanding. *See, e.g., DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) ("[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."); *see also* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2308–10 (1990) (challenging the view of the Constitution as a charter of negative rights but acknowledging the long history and tradition of this concept based in constitutional text and the common law); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864–66, 886–88 (1986) (noting, albeit with minor reservations, that the text and history of the Constitution, as well as Supreme Court precedent, generally support Judge Posner's view).

4. Elsewhere I have developed in greater detail the different conceptions of dignity. To summarize, there is inherent dignity that exists merely by virtue of a person's humanity; substantive forms of dignity that require living in a certain way; and the dignity of recognition and respect in which a person's worth depends on his relationship to society. *See generally* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011).

5. *See id.* at 235; *see also* Clifford Orwin, *Welfare and the New Dignity*, 71 NAT'L AFF. 85 (Spring 1983) ("Dignity is a good part of what the welfare state is about these days. It is not only that we are admonished to treat all of its clients with dignity. Leading social theorists also tell us that the cause of dignity itself requires

Dignity as a positive or substantive entitlement to certain goods has been elevated to a constitutional principle or even a right in many countries.⁶ Courts have sometimes sought to enforce these welfare and dignity rights, with mixed practical results. As the South African Supreme Court noted, “[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.”⁷ Similarly, the Hungarian Constitutional Court explained that the constitutional guarantee of social security “entails the obligation of the State to secure a minimum livelihood through all of the welfare benefits necessary for the realisation of the right to human dignity.”⁸ These decisions are representative of a widespread understanding that welfare goods are a basic right in part because they are a prerequisite for dignity.

These constitutional (not policy) decisions hold that freedom, equality, and human dignity require removing the conditions of poverty and ensuring a certain social welfare minimum. Second-generation economic and cultural rights are distinct from basic political freedoms and pertain to the alleviation of poverty and greater equality of social conditions. These rights reflect a strongly communitarian conception of human dignity as being cared for and protected by the government.⁹ A person’s dignity depends on being recognized as part of the political and social community and membership in the community in-

a vast expansion of the welfare state, viewed as the source of our sense of dignity.”).

6. See, e.g., INDIA CONST. pmb. (declaring India a “SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC” and referencing “the dignity of the individual”); *id.* at art. 39 (ordering the State to direct its policy towards securing “the right to an adequate means of livelihood” and “that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity . . .”); *id.* at art. 41 (“The State shall . . . make effective provision for securing the right to work, to education and to public assistance in cases of unemployment . . .”); S. AFR. CONST., 1996, §§ 26–29 (guaranteeing, *inter alia*, the rights to adequate housing, healthcare services, sufficient food and water, social security, and welfare, and directing the state to “take reasonable legislative and other measures . . . to achieve the progressive realisation” of these rights).

7. *South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) at 45–46 para. 23 (S. Afr.).

8. Alkotmánybíróság (AB) [Constitutional Court] BH.1998.32 (Hung.), quoted in Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 693 & n.270 (2008).

9. See Rao, *supra* note 4, at 235.

cludes enjoying a certain standard of living, with state assistance if necessary.

II. AMERICAN DIGNITY

The positive, communitarian dignity at the heart of the welfare state is not the prevailing one in the United States. In American political and legal discourse, dignity is primarily associated with individual rights, a classical liberal understanding of freedom from interference. As John Stuart Mill said, this is the freedom of “pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs”¹⁰ From this liberal perspective, the inherent dignity of each individual requires being left alone by the State as much as possible. This inherent dignity emphasizes human agency and overlaps with familiar values of liberty and autonomy.

As a matter of constitutional law, the U.S. Supreme Court sometimes refers to human dignity, usually alongside negative rights, in part because our Constitution is a charter of negative rights and liberties.¹¹ The Court has consistently, though not exclusively, treated dignity as a component of individual rights—suggesting that a wide sphere for personal autonomy best respects individual dignity.

Some examples demonstrate the predominantly American association between dignity and freedom from interference. In the context of the Fourth Amendment, the Court has treated privacy as freedom from government intrusion.¹² Similarly, the Supreme Court has interpreted the First Amendment as protecting the dignity of individuals to speak freely, even when the language

10. JOHN STUART MILL, ON LIBERTY 14 (David Spitz ed., 1975) (1859).

11. See Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 859 (2001) (“The political appeal of positive rights, even in the 1960s, has failed to find its way into judicial interpretations of the Bill of Rights.”); Currie, *supra* note 3, at 872–73.

12. See, e.g., *Schmerber v. California*, 384 U.S. 757, 767 (1966) (stating in the context of drug and alcohol testing that the “overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State”); see also James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L. J. 1151, 1161 (2004) (explaining that American privacy culture is “oriented toward values of liberty, and especially liberty against the state”).

used may be offensive or insulting.¹³ By contrast, many other countries impose hate speech regulations or other rules governing civility in speech.¹⁴ Such regulations attempt to further the dignity of social recognition by protecting individuals from insults. Hate speech restrictions focus on the harm to the listener and the community, rather than the rights of the individual speaker.¹⁵ The American conception of individual dignity with respect to free speech often stands in sharp contrast to other conceptions that focus on norms of social equality or community membership.¹⁶

The Court has associated the Sixth Amendment right to self-representation with individual dignity and choice. Dissenting in *Indiana v. Edwards*,¹⁷ Justice Antonin Scalia forcefully articulated a conception of individual agency at the heart of the constitutional right:

[T]he loss of “dignity” the [Sixth Amendment] right is designed to prevent is *not* the defendant’s making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one’s fate rather than a ward of the State—the dignity of individual choice. . . . [I]f the Court is to honor the particular conception of “dignity” that underlies the self-representation right, it should respect the auton-

13. See, e.g., *Cohen v. California*, 403 U.S. 15, 24 (1971) (upholding the right of an individual to wear a jacket printed with “Fuck the draft”). The Court based its holding in part on the “premise of individual dignity and choice upon which our political system rests.” *Id.*

14. Jurisdictions with hate speech laws include Canada, Croatia, Denmark, England, Finland, Germany, Hungary, Iceland, New Zealand, Norway, Serbia, South Africa, and Sweden. See Tanya Kateri Hernández, *Hate Speech and the Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models*, 32 U. PA. J. INT’L L. 805, 807–08 n.5 (2011) (compiling foreign hate speech laws). By contrast, in the United States, hate speech in the absence of fighting words is considered a protected category under the First Amendment. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992).

15. See Rao, *supra* note 4, at 212–14.

16. See Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 45 (Michael Ignatieff ed., 2005) (“On a large number of other issues in which the preferences of individuals may be in tension with the needs of the collective, the United States, increasingly alone, stands as a symbol for a certain kind of preference for liberty even when it conflicts with values of equality and even when it conflicts with important community values.”).

17. 554 U.S. 164, 167 (2008) (holding that a person with some mental incapacity may be prevented from representing himself without running afoul of the Sixth Amendment). The Court opined that “given [the] defendant’s uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling.” *Id.* at 176.

omy of the individual by honoring his choices knowingly and voluntarily made.¹⁸

In cases about racial equality the Court has focused on the individual when interpreting the Equal Protection Clause, particularly in the context of affirmative action cases.¹⁹ Justice Anthony Kennedy has often linked individual equality with dignity, explaining, “[t]o be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society.”²⁰ In another context he noted, “[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”²¹ In this view, the government respects dignity when it treats citizens equally, not when it gives special preferences based on race or gender.²²

These are just a few examples of American constitutional decisions that emphasize the dignity of individual agency and choice. Such emphasis should not be surprising. Human dignity in the context of individual rights appeared in Supreme Court decisions only in the 1940s.²³ The concept has been grafted onto our historical understanding of rights and reflects the traditional liberal understanding of the relationship between the individual and the government that underlies our constitutional system.

When American judges and politicians emphasize the dignity of individual agency and autonomy, they advance an ex-

18. *Id.* at 186–187 (Scalia, J., dissenting).

19. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 402 (1991) (stating “racial discrimination in the qualification or selection of jurors offends the dignity of persons”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their ‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.”).

20. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

21. *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

22. Although contested, this is the dominant conception of dignity that runs through American Supreme Court decisions. *See Rao, supra* note 4, at 214–17, 262–65.

23. Before the 1940s, the Supreme Court referenced dignity primarily in connection with the sovereignty of state and federal governments. *See generally* Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1 (2003) (explaining the historical and doctrinal origins of state sovereign immunity and dignity).

ceptional American perspective that is found only dimly in other countries where individual, negative liberties are often only one part of a positive, communitarian understanding of rights.²⁴ In many parts of the world, negative liberal rights are seen as insufficient for human flourishing. Rather a full realization of the individual requires association with and recognition by the broader social and political community.²⁵ Disputes over the meaning of dignity reflect this difference and often highlight America's distinctive constitutional culture.

Yet it would be incorrect to suggest that a liberal, individualistic understanding of dignity is the only one in American jurisprudence or political discourse. Rather, there are competing understandings. In the First Amendment context, the Supreme Court often protects a wide degree of speech; however, the Court has upheld the constitutionality of defamation and libel suits in part because they protect the reputational dignity of individuals.²⁶ Here dignity pertains not to the self-expression of the speaker, but rather to recognition of the subject's "reputation and standing in the community."²⁷ Justice Scalia's forceful defense of the dignity of individual choice with respect to self-representation was a dissenting opinion.²⁸ The individualistic view of the Equal Protection Clause has prevailed only narrowly in Supreme Court decisions, particularly those dealing with racial preferences.²⁹ Justices, politicians, and Americans disagree

24. See, e.g., EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES* 256–57 (2002) (contrasting German and American constitutional values of dignity and liberty).

25. See Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 215–22 (2008) (surveying modern constitutions and contrasting the European communitarian conception of dignity with the American individualistic conception of dignity).

26. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 402 (1974) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966))); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 711 (1986) ("The dignity that defamation law protects is thus the respect (and self-respect) that arises from full membership in society. Rules of civility are the means by which society defines and maintains this dignity.").

27. *Gertz*, 418 U.S. at 350.

28. *Indiana v. Edwards*, 554 U.S. 164, 186–87 (2008) (Scalia, J., dissenting).

29. See Rao, *supra* note 4, 262–64 (discussing Supreme Court decisions that emphasize removing social stigma in the context of equal protection challenges).

about whether dignity is promoted by equality of opportunity or by racial preferences aimed at greater equality of results.³⁰

Dignity as a type of positive right also had a brief appearance in American constitutional law,³¹ and it has been a recurring theme in political debates. Even in the United States, dignity has been linked to certain minimum standards of living. For example, President Franklin Roosevelt set forth a “Second Bill of Rights” that presaged many of the constitutions written after World War II.³² Roosevelt stated that our traditional political rights had “proved inadequate to assure us equality in the pursuit of happiness.”³³ In describing this inadequacy, he stated, “We have come to a clearer realization of the fact . . . that true individual freedom cannot exist without economic security and independence.”³⁴

Roosevelt treated traditional negative liberties as insufficient because the successful pursuit of happiness required minimum standards of living. He often spoke of human dignity in connection with economic security. Indeed, it was under his watch and in light of these foundational principles that much of the modern welfare state was created.³⁵ Following a similar theme, President Lyndon Johnson’s “Great Society” speech referred to human dignity in connection with ensuring that each child would be schooled and that every worker had a job.³⁶

A more modern example of linking human dignity to economic welfare can be found in President Obama’s discussion of the im-

30. See generally Neomi Rao, *Gender, Race, and Individual Dignity: Evaluating Justice Ginsburg’s Equality Jurisprudence*, 70 OHIO ST. L. J. 1053 (2009) (discussing the difference between individualistic and group-based conceptions of equality).

31. The Supreme Court in *Goldberg v. Kelly* suggested that welfare entitlements implicate “important rights” and may be more realistically regarded as “property.” 397 U.S. 254, 262 & n.8 (1970). The Court also explained that historically “the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.” *Id.* at 264–65. *Goldberg* was quickly limited to its procedural holding. See *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

32. See President Franklin Delano Roosevelt, Message to Congress (Jan. 11, 1944), in *FDR’S FIRESIDE CHATS* 282–93 (Russel D. Buhite & David W. Levy eds., 1992).

33. *Id.* at 292 n.22.

34. *Id.* at 292.

35. See RICHARD D. POLENBERG, *THE ERA OF FRANKLIN D. ROOSEVELT 1933–1945: A BRIEF HISTORY WITH DOCUMENTS* 2 (2000) (“[Roosevelt] founded the modern welfare state based on the concept that the federal government has a responsibility to guarantee a minimum standard of living . . .”).

36. President Lyndon B. Johnson, Remarks at the University of Michigan (May 22, 1964), in *1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON, 1963–64*, at 704–07 (1965).

portance of dignity with regard to regulatory reform. In January 2011, he announced an executive order to subject all regulations to cost-benefit analysis.³⁷ As part of weighing costs and benefits, agencies may consider “values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.”³⁸ President Obama did not define what he meant by human dignity, but its meaning might be taken from the surrounding concepts of “equity . . . fairness, and distributive impacts.” Similarly, President Obama, particularly before becoming president, pressed for “dignity promotion” in foreign policy, which he defined as being foremost about providing food and protection against thugs, not democracy or civil liberties.³⁹ This type of dignity emphasizes basic needs before political ones as a method of combating terrorism and instability.

American politics has, from time to time, embraced a concept of dignity as freedom from want, but this brand of dignity has never entirely prevailed as it has in other democracies. Historically, communitarian government-supported dignity has been met with other political principles that emphasize the dignity of liberal individualism and smaller government. Ronald Reagan frequently expressed these themes: “I’m convinced that today the majority of Americans want what those first Americans wanted: A better life for themselves and their children; a minimum of government authority. Very simply, they want to be left alone in peace and safety to take care of the family by earning an honest dollar and putting away some savings.”⁴⁰

37. See President Barack Obama, *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011, at A17.

38. Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

39. See Spencer Ackerman, *The Obama Doctrine*, AM. PROSPECT, Mar. 19, 2008, http://prospect.org/cs/articles?article=the_obama_doctrine (observing that Obama’s foreign policy advisors “envision a doctrine that first ends the politics of fear and then moves beyond a hollow, sloganeering ‘democracy promotion’ agenda in favor of ‘dignity promotion,’ to fix the conditions of misery that breed anti-Americanism and prevent liberty, justice, and prosperity from taking root”).

40. See Ronald Reagan, *Nationally Televised Address* (July 6, 1976):

“This may not sound too exciting, but there is something magnificent about it. On the farm, on the street corner, in the factory and in the kitchen, millions of us ask nothing more, but certainly nothing less than to live our own lives according to our values—at peace with ourselves, our neighbors and the world.”

See also Shmuley Boteach, *Opinion, What Tea Party Critics Don’t Get*, AOL NEWS, Nov. 12, 2010, <http://www.aolnews.com/2010/11/12/opinion-what-tea-party->

Like President Reagan, President George W. Bush also supported the dignity of political liberty, particularly in connection with American foreign policy. He observed:

Our nation's cause has always been larger than our nation's defense. We fight, as always, for a just peace—a peace that favors human liberty. . . . The twentieth century ended with a single surviving model of human progress, based on non-negotiable demands of human dignity, the rule of law, limits on the power of the state, respect for women and private property and free speech and equal justice and religious tolerance.⁴¹

President Bush's demands of dignity were foremost about individual liberty and traditional political freedoms. President Obama campaigned on dignity promotion through humanitarian aid, but once in office pursued policies closer to President Bush's focus on freedom and self-determination. As President Obama noted in the context of the Libya intervention, the "pursuit of human dignity is far stronger than any dictator."⁴²

Our political discourse has shifted between different conceptions of dignity, balancing claims of social welfare with individual rights. American exceptionalism persists at least to the extent that this discourse continues and expansion of government programs can be checked by a commitment to private ordering and individual rights.

III. CONFLICTING DIGNITIES AND HEALTHCARE

The dignity of welfare and the dignity of individual choice often conflict and the legal and political debate over healthcare reform reflects these fundamental differences. As explained above, in the context of welfare rights dignity generally appears on the side of more government programs and responsibilities. In many socialist or quasi-socialist democracies, healthcare is treated as a right and a basic component of the State's

critics-dont-get/ ("The effort to recapture the dignity that springs from self-reliance is what the tea party, at its core, should be all about.").

41. President George W. Bush, West Point Commencement Address (June 1, 2002), available at www.usma.edu/class/2002/2002_graduation_speech.html.

42. President Barack Obama, Speech on Libya: The Future is in the Hands of its People (Aug. 22, 2011), available at m.whitehouse.gov/blog/2011/08/22/president-obama-libya-future-hands-its-people.

protection and promotion of human dignity.⁴³ From this baseline, the polity does not debate whether the State must provide healthcare, but what should be included and to what extent. For example, in England there are debates about whether certain groups, such as the elderly, are being treated with due respect and dignity,⁴⁴ and in Canada about whether abortion must be included as part of the national health program.⁴⁵

In America, however, dignity refers primarily to individual rights and agency. Relief from poverty or provision of healthcare may be considered an aspect of dignity, but the scope remains contested and there is no widespread agreement that the government should provide healthcare. Attempts to provide universal coverage have failed,⁴⁶ and the debate over how to control costs and increase coverage has continued. Most recently, the Patient Protection and Affordable Care Act (also known as “Obamacare”) seeks to address these problems by, among other things, mandating that individuals purchase their own health insurance and fining those who fail to do so.⁴⁷ Lawsuits alleging that the individual mandate exceeds Congress’s enumerated powers continue to work their way through the federal courts, with the Supreme Court agreeing to decide the issue.⁴⁸

43. See, e.g., REGERINGSFORMEN [RF] [CONSTITUTION] 1:2 (Swed.); Art. 32 Costituzione [Cost.] (It.) (safeguarding health and guaranteeing free medical care to the indigent).

44. See, e.g., Mark Nicholls, *Dignity for elderly put on hold*, HC2D.CO.UK, Mar. 31, 2010, <http://www.hc2d.co.uk/content.php?contentId=14537> (asserting that the dignity of elderly British citizens is not protected when they must sell their homes to pay for medical care); Ken Thomas, *Why Respect and Dignity Must Be at the Heart of Healthcare*, WALESONLINE, Feb. 28, 2011 (discussing the need for improving England’s healthcare services for the elderly).

45. See Joanna N. Erdman, *In the Back Alleys of Health Care: Abortion, Equality, and Community in Canada*, 56 EMORY L.J. 1093, 1098–1100 (2006) (arguing that the denial of public funding for abortions in Canada demeans human dignity, which under Canadian equality rights “encompasses a sense of community; a mutual commitment to treat individuals and groups as capable, deserving, and worthy of full and equal membership in Canadian society”).

46. In 1994, President Clinton failed to pass healthcare reform. See generally W. John Thomas, *The Clinton Health Care Reform Plan: A Failed Dramatic Presentation*, 7 STAN. L. & POL’Y REV. 83 (1996).

47. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). The PPACA imposed the individual mandate at Pub. L. No. 111-148, 124 Stat. 119 § 10106(b)(1).

48. See, e.g., *Florida ex rel. Bondi v. HHS*, 780 F. Supp. 2d 1256, 1265 (N.D. Fla. 2011) (striking down the entire PPACA), *order clarified*, 780 F. Supp. 2d 1307 (N.D.

That our Constitution creates a federal government of limited and enumerated powers is another part of American exceptionalism. The political branches have limited authority, and, when they overstep, courts can enforce constitutional limits. The basic structure of our government—federalism and separation of powers—is designed to protect individual liberty and promote political accountability.⁴⁹

Thus, it is possible to bring serious legal challenges to the constitutional authority for enacting a program such as the individual mandate.⁵⁰ Even if Congress could, under existing Supreme Court precedent, tax and spend to provide universal healthcare or health insurance, Congress might lack the constitutional authority to require everyone to purchase health insurance.⁵¹ Not every choice of means will be found necessary and proper to an exercise of Congress's authority to regulate interstate commerce.⁵² By design, the constitutions of most other western democracies do not have the same type of limits on centralized regulation, and many affirmatively recognize an obligation to provide healthcare.⁵³

Fla. 2011) and *aff'd in part, rev'd in part sub nom. Florida ex rel. Atty. Gen. v. HHS*, 648 F.3d 1235 (11th Cir. 2011) *cert. granted*, 11-393, 2011 WL 5515162 (U.S. Nov. 14, 2011) and *cert. granted*, 11-398, 2011 WL 5515164 (U.S. Nov. 14, 2011) and *cert. granted in part*, 11-400, 2011 WL 5515165 (U.S. Nov. 14, 2011); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010) (striking down the individual mandate), *vacated*, 656 F.3d 253 (4th Cir. 2011); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882, 895 (E.D. Mich. 2010) (upholding the individual mandate), *aff'd*, 651 F.3d 529 (6th Cir. 2011).

49. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 181 (1992) ("The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals."); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was to diffus[e] power the better to secure liberty." (internal quotation marks omitted)).

50. *See generally* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010).

51. *See Cuccinelli*, 728 F. Supp. 2d at 782 (holding that the individual mandate exceeds Congress's powers under the Commerce Clause and Necessary and Proper Clause); *Bondi*, 780 F. Supp. 2d at 1307 (same).

52. *See United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) ("We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.").

53. *See* sources cited *supra* notes 2, 6, and 43.

Alongside the ongoing constitutional challenges, the political branches continue to debate this issue. The Obama Administration championed broader healthcare coverage through government regulation, but Republicans took control of the House of Representatives in 2010 in part by campaigning against the overreaching of Obamacare and the individual mandate. Republican presidential hopefuls for 2012 have all committed to repealing all or parts of Obamacare. Claims from dignity arise on both sides of the issue. The Obama Administration expresses the imperative for government to address the indignity and needs felt by those who lack healthcare. Critics contend that requiring the purchase of healthcare insurance intrudes on the individual dignity that comes from making one's own choices with minimal interference by the State.⁵⁴

The different understandings of dignity reflect constitutional principles about what government can do, as well as political and cultural disagreements about what the government *should* do, with respect to healthcare regulation. What type of human dignity do the American people envision? Is it a dignity promoted and supported by the government? Or rather is it an individualistic dignity that leaves people largely free to pursue their ends without government interference? How will the President, Congress, and Supreme Court exercise their authority in enacting and reviewing legislation under constitutional constraints?

Dignity provides one angle on the different values implicated by the debate about government-regulated or government-sponsored healthcare. Invoking dignity does not determine the type of regulation that we should have; rather, it serves as a starting point for a political debate about our fundamental values and the basic relationship between the individual and the state. In America, one important, perhaps even historically predominant, conception of dignity relates to liberal individualism and a society with a minimum of govern-

54. In addition, a number of groups have argued that the Act does not protect human dignity because it provides funding for abortions and does not provide adequate respect for those at the end of life. See, e.g., Donald P. Condit, *Obamacare and the Threat to Human Dignity*, ACTON INST., Jan. 5, 2011, <http://www.acton.org/pub/commentary/2011/01/05/obamacare-threat-human-dignity> ("Perceived threats to the sanctity of life have been at the heart of moral objections to the [PPACA].").

ment interference.⁵⁵ This is not the only conception we have of dignity. Yet the strength of our legal and political commitment to this form of dignity and our willingness to protect this dignity from intrusions by the State is part of what makes us exceptional. Although in America we have a social welfare system, its expansion and growth remain subject to political and constitutional challenges in part because of our robust understanding of individual liberty and freedom.

Some would have us jettison this aspect of American exceptionalism, or perhaps they would say supplement it, with more government protections. Yet it is a fallacy that government welfare merely supplements individual dignity. Policies such as the individual mandate make a trade-off between dignities—promoting communitarian and protective dignity while diminishing the dignity of individual choice. The Supreme Court will decide whether this particular trade-off is constitutional, but in the course of debating welfare policy the American people must ultimately determine the balance between these values.

55. Minimal government interference should not suggest unconcern for poverty. Rather in America, alongside a tradition of individualism has been a strong tradition of private charitable giving to promote the welfare of the less fortunate. *See, e.g.*, HUDSON INST., CTR. FOR GLOBAL PROSPERITY, THE INDEX OF GLOBAL PHILANTHROPY AND REMITTANCES 2011, *available at* <http://www.hudson.org/files/documents/2011%20Index%20of%20Global%20Philanthropy%20and%20Remittances%20downloadable%20version.pdf> (detailing the sources and magnitude of private and public giving).