

**MEDICAL REPATRIATION: A
FOURTEENTH AMENDMENT ANALYSIS OF
THE INTERNATIONAL PATIENT
TRANSFERRING OF ILLEGAL ALIENS**

*Stefanie Vincent**

I. INTRODUCTION.....	96
II. THE CRISIS OF NONEMERGENCY CARE.....	97
A. <i>Health Care in a State of Emergency</i>	97
B. <i>U.S. Health Care for Illegal Aliens</i>	100
C. <i>The Case of Luis Alberto Jiménez</i>	104
D. <i>Between a Rock and a Hard Place, Hospitals Chose Repatriation</i>	108
III. CONSTITUTIONALITY OF MEDICAL REPATRIATION OF ILLEGAL ALIENS	110
A. <i>Fourteenth Amendment</i>	110
B. <i>Due Process</i>	117
C. <i>Equal Protection</i>	129
IV. CONCLUSION	133

* Stefanie Vincent will receive her J.D. from the University of Houston Law Center in May 2011, and she received her B.A. from Louisiana State University in May 2004. She would like to thank Doctor Bruce Patsner for the inspiration to write this comment, Professor Bethany Smith for her invaluable guidance in developing and refining this comment, and the Houston Journal of International Law for all their hard work throughout the publication process. She would also like to thank her parents for their unending love and support and their immeasurable patience, without which nothing would be possible.

I. INTRODUCTION

Looming at the intersection of health care and immigration—two of the most dysfunctional U.S. systems—the constitutional uncertainties surrounding medical repatriation of illegal aliens have grown too big to ignore. Those ambiguities underscore the dilemma hospitals face when treating uninsured illegal aliens who require long-term care.¹ Rising health care costs, greater numbers of uninsured and unqualified patients, and questions about the scope of federal and state entitlement programs have pushed the boundaries of medical ethics and created an unbearable predicament for acute care hospitals.² In an effort to circumvent treacherous financial, ethical, and legal complications, hospitals have been quietly transferring illegal alien patients to medical facilities in their countries of origin.³

The explosive combination of issues and interests at play has left health care providers bereft of legal analysis or regulatory framework to guide their decisions about medical repatriation.⁴ The uncertainty surrounding the practice is an obvious problem that has evaded resolution but desperately needs to be resolved.⁵ This paper examines the constitutional

1. Laura Wides-Munoz, *Did Hospital Have a Right to Deport Illegal Immigrant? Jury to Decide if Facility Erred in Sending Brain-Damaged Patient Home*, HOUS. CHRON., July 26, 2009, at A22.

2. See Svetlana Lebedinski, *EMTALA: Treatment of Undocumented Aliens and the Financial Burden it Places on Hospitals*, 7 J.L. SOC'Y 146, 154–55 (2005) (noting that the rising health care costs and numbers of uninsured patients may have caused acute care facilities to start “patient dumping”); see also Joseph Wolpin, *Medical Repatriation of Alien Patients*, 37 J.L. MED. & ETHICS 152, 152–54 (2009) (noting that the increased costs of uncompensated care for uninsured noncitizens has made ethically and legally questionable policies like “patient dumping” an attractive solution for many hospitals).

3. Deborah Sontag, *Immigrants Facing Deportation by U.S. Hospitals*, N.Y. TIMES, Aug. 3, 2008, <http://www.nytimes.com/2008/08/03/us/03deport.html> [hereinafter *Immigrants Facing Deportation*].

4. See *infra* Part I.C. The story of Luis Alberto Jiménez has resulted in the single court opinion to address medical repatriation but was decided it on other grounds. Legal scholarship on the topic is likewise scarce.

5. See Susan L. Brady, Comment, “Female Troubles”: *The Plight of Foreign Household Workers Pursuing Lawful Permanent Residency through Employment-Based Immigration*, 27 HOUS. J. INT'L L. 609, 628 (2005) (noting the need to find solutions in general to the problems posed by illegal aliens’ growing presence, but that “solutions often elude us—primarily because political solutions are so politically charged”).

and policy implications of the surreptitious practice of medical repatriation.

Part two of this paper gives a brief overview of the current state of the U.S. health care system, with a special focus on how it interacts with illegal aliens. Part two also examines the only court case to address medical repatriation and concludes with a look at the practice from a health care provider's perspective. Part three evaluates potential challenges to medical repatriation under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.⁶ The general absence of congressional guidance, direct U.S. court precedent, and scholarly analysis would make such constitutional challenges questions of first impression for our courts.

II. THE CRISIS OF NONEMERGENCY CARE

A. *Health Care in a State of Emergency*

The U.S. health care system is in a financial crisis.⁷ Staggering costs and the threat of losing insurance coverage has many families struggling to pay their medical bills.⁸ Likewise, hospitals and doctors are grappling with their own version of the financial crisis.⁹ As recently as 2007, hospitals and doctors shouldered approximately \$60 billion in unpaid medical bills annually.¹⁰ In addition, many states are struggling with budget deficits and cutting back on health care funding for hospitals.¹¹

6. The practice is also potentially vulnerable to international human rights challenges and state tort claims. For example, the International Criminal Court may consider deportation a war crime and a crime against humanity. See Cassandra Jeu, *A Successful, Permanent International Criminal Court . . . "Isn't It Pretty to Think So?"*, 26 HOUS. J. INT'L L. 411, 431–32 n.172 (2004). Analysis of those vulnerabilities is beyond the scope of this paper, however.

7. Jessica Bennett, *The Other Credit Crunch: Hospitals and Patients Alike are Struggling with Unpaid Medical Bills*, NEWSWEEK, Nov. 24, 2008, available at <http://www.newsweek.com/id/170701>.

8. See *id.*; *Immigrants Facing Deportation*, *supra* note 3; see also Katharine W. Sands, Comment, *Prescription Drugs: India Values their Compulsory Licensing Provision—Should the United States Follow in India's Footsteps?*, 29 HOUS. J. INT'L L. 191, 226 (2006) (noting that 28% of U.S. consumers pay out-of-pocket for prescription drugs).

9. See Bennett, *supra* note 7.

10. *Id.* This unreimbursed care compounds the other financial strains placed on

With funds drying up, some hospitals have cut back on staffing and services,¹² and some have found it necessary to shut down their facilities entirely.¹³ The overall financial situation has worsened to the point that individual doctors, nurses, and other health care providers are becoming less able and less willing to serve in the communities under the most financial strain.¹⁴ Often, those communities are also home to disproportionately large populations of uninsured patients.¹⁵ Many of those uninsured patients are aliens, both legal and illegal; aliens account for almost 75% of the recent increase in uninsured patients.¹⁶ Illegal aliens are especially likely to be uninsured: They tend to be seasonal or part-time employees, neither of which normally receives employment-based insurance, and they are likewise barred from receiving government insurance and generally cannot afford private insurance.¹⁷

hospitals in recent years. See, e.g. Lauren Grau, *Cutting Off the Building Blocks to Methamphetamine Production: A Global Solution to Methamphetamine Abuse*, 30 HOUS. J. INT'L L. 157, 163 (2007) (noting skyrocketing methamphetamine abuse and the related burden on hospitals).

11. ERIC RUARK & JACK MARTIN, FED'N FOR AM. IMMIGRATION REFORM, THE SINKING LIFEBOAT: UNCONTROLLED IMMIGRATION AND THE U.S. HEALTH CARE SYSTEM IN 2009 4 (2009), http://www.fairus.org/site/DocServer/healthcare_09.pdf?docID=3521.

12. Michael Janofsky, *Burden Grows for Southwest Hospitals: Giving More Illegal Immigrants Care They Need but Can't Pay For*, N.Y. TIMES, Apr. 14, 2003, at A14.

13. Madeleine Pelner Cosman, *Illegal Aliens and American Medicine*, 10 J. AM. PHYSICIANS & SURGEONS 6, 6 (2005).

14. Brietta R. Clark, *The Immigrant Health Care Narrative and What It Tells Us About the U.S. Health Care System*, 17 ANNALS HEALTH L. 229, 249 (2008).

15. *Id.*

16. See Julia Preston, *7-Year Immigration Rate is Highest in U.S. History: Study Focuses on Public Costs of the Influx*, N.Y. TIMES, Nov. 29, 2007, at A20.

17. Michael J. McKeefery, Comment, *A Call to Move Forward: Pushing Past the Unworkable Standard that Governs Undocumented Immigrants' Access to Health Care Under Medicaid*, 10 HEALTH CARE L. & POL'Y 391, 394 (2007). Further, illegal aliens are likely to be paid "under the table," making it even less likely they could obtain employment-based insurance. John Lahad, Comment, *Dreaming a Common Dream, Living a Common Nightmare: Abuses and Rights of Immigrant Workers in the United States, the European Union, and the United Arab Emirates*, 31 HOUS. J. INT'L L. 653, 688 (2009).

Federal law guarantees emergency medical care to all persons, regardless of immigration status,¹⁸ and many uninsured aliens depend on hospital emergency rooms as their primary care providers.¹⁹ As a result, communities with large illegal alien populations bear huge burdens of unreimbursed medical costs.²⁰ Hospitals along the U.S.–Mexico border are pinched especially hard; as much as two-thirds of their operating budgets are consumed by unreimbursed care for illegal aliens.²¹ For example, in 2004, Arizona spent an estimated \$400 million on unreimbursed care for illegal aliens.²²

On top of emergency care, hospitals must face the much larger unreimbursed costs of treating medical conditions that require more extensive treatment than a visit to the emergency room. Hospital expenses rise quickly once a serious health problem is discovered that requires long-term treatment. As one hospital administrator has noted, “The real problem is if we find an underlying problem.”²³ The prominent example of dialysis treatments is illustrative.²⁴ In California, 1,350 of the 61,000 people receiving dialysis treatments in 2007 were illegal aliens.²⁵ Treating those illegal aliens cost California taxpayers \$51 million.²⁶ Kidney dialysis, like the treatment of many other chronic ailments, continues for the duration of the patient’s life,

18. See *infra* Part I.B.3.

19. RUARK & MARTIN, *supra* note 11, at 8.

20. *Id.* at 9.

21. *Id.* This is only partially because the U.S.–Mexico border is “ground zero” for illegal immigration; illegal aliens near the border are also frequent targets for violence. Benjamin Kai Miller, *Fueling Violence Along the Southwest Border: What More Can Be Done to Protect the Citizens of the United States and Mexico from Firearms Trafficking*, 32 HOUS. J. INT’L L. 163, 171, 173 (2009).

22. RUARK & MARTIN, *supra* note 11, at 10.

23. *Immigrants Facing Deportation*, *supra* note 3. Alan Kelly, Vice President of Scottsdale Healthcare in Arizona, reported the same conclusion, stating, “[t]he costs run up after [illegal alien patients are] moved out of the trauma unit [and] into a regular bed.” Deborah Sontag, *Deported in a Coma, Saved Back in U.S.*, N.Y. TIMES, Nov. 8, 2008, <http://www.nytimes.com/2008/11/09/us/09deport.html>.

24. See Alan Zarembo and Anna Gorman, *Dialysis Dilemma: Who Gets Free Care?: In California, Officials Say not Treating Illegal Migrants Has High Cost*, LOS ANGELES TIMES, Oct. 29, 2008, <http://articles.latimes.com/2008/oct/29/local/me-dialysis29>.

25. *Id.*

26. *Id.*

the cumulative cost of which can easily top \$1 million per patient.²⁷

Already pinched by tighter budgets, hospitals are struggling to strike a balance between concerns for their own viability and the ethical duties they owe patients.²⁸ This balancing act has brought the threat of insolvency to the fore, and hospitals are placing a premium on financial efficiency as they work to avoid having to close their doors to everyone. To better manage their limited resources, hospitals are prioritizing claims and making tough choices.²⁹

B. U.S. Health Care for Illegal Aliens

The federal government's general policy has been that illegal aliens are ineligible for federal or state public benefits, including health care.³⁰ Three federal regulations play an important role in determining access to—and the extent of—health care available to illegal aliens: Medicaid, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), and the Emergency Medical Treatment and Active Labor Act (EMTALA). This section provides a brief overview of each of the three regulations and how they affect health care for illegal aliens.

1. Medicaid

Medicaid is a national health care program that was established as part of the Social Security Act of 1965 and sets broad federal guidelines within which each state can define its own regulatory structure.³¹ The program allows states to use federal money to defer state health care costs, if the state complies with federal requirements, and to pay for services the

27. *Id.*

28. Bennett, *supra* note 7.

29. Clark, *supra* note 14, at 248.

30. See 8 U.S.C. §§ 1611, 1621 (2006).

31. 42 U.S.C. §§ 1396–96(v) (2000); see Jennifer R. Weinman, Comment, *A Deterioration of Health: A Critical Analysis of Health Care Systems, Medical Malpractice, and No-Fault Insurance in Great Britain, and the United States*, 14 HOUS. J. INT'L L. 425, 445–47 (1992).

state may not be able to cover on its own.³² Medicaid's purpose is to "furnish medical assistance to persons whose income and resources are insufficient to meet the costs of necessary medical care and services."³³ To that end, though illegal aliens are generally barred from receiving Medicaid benefits, a narrow exception has been established for emergency medical care.³⁴ Therefore, illegal aliens can benefit under Medicaid, but only in the specific case of stabilizing treatments for an emergency medical condition.³⁵

2. *Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)*

Passed in 1996, PRWORA announced Congress's new position on the nexus between welfare and immigration,³⁶ and swiftly "end[ed] welfare as we know it."³⁷ The legislation

32. See 42 U.S.C. § 1396a(a)(10) (2009). Medicaid has various classifications for patients, some of which categorically must be covered under a state Medicaid plan, while for others coverage is optional. MGT OF AM., INC., MEDICAL EMERGENCY: COSTS OF UNCOMPENSATED CARE IN SOUTHWEST BORDER COUNTIES 12 (2002), <http://www.bordercounties.org/> (follow "Report on Uncompensated Emergency Health Care Costs" hyperlink; then follow "Full Report (PDF)" hyperlink).

33. DeJesus v. Perales, 770 F.2d 316, 318 (2d Cir. 1985).

34. Victoria Slater, Comment, "To Govern is to Populate": Argentine Immigration Law and What It Can Suggest for the United States, 31 HOUS. J. INT'L L. 693, 722-23 (2009). Known as "Emergency Medicaid," this exception allows for reimbursement of emergency medical care and childbirth care provided to illegal aliens, but only if they would be eligible for coverage if not for their immigration status. MGT OF AM., INC., *supra* note 32, at 8.

35. Most courts have understood Emergency Medicaid to cover the initial stabilizing treatment required when an illegal alien arrives at the hospital with an emergency medical condition. See, e.g., Luna *ex rel.* Johnson v. Div. of Soc. Servs., 589 S.E.2d 917, 920 (N.C. Ct. App. 2004). Courts have not reached a consensus as to how long the emergency medical condition exists or how far Emergency Medicaid extends. Compare Greenery Rehab. Group, Inc. v. Hammon, 150 F.3d 226 (2d Cir. 1998) (holding that treatment of illegal aliens' chronic symptoms after stabilization of acute symptoms does not qualify for Medicaid coverage), with Scottsdale Healthcare Inc. v. Ariz. Health Care Cost Containment Sys. Admin., 75 P.3d 91 (Ariz. 2003) (holding that Medicaid coverage does not necessarily terminate immediately after the initial emergency condition is stabilized).

36. 8 U.S.C. § 1601 (2008).

37. Anthony Walton, *Welfare as We Knew It*, N.Y. TIMES, Sept. 26, 2004, at A16. In the 1992 presidential campaign, former President Bill Clinton promised to revolutionize welfare, and PRWORA was the culmination of that promise. *Id.*

severely restricted aliens' access to health care by narrowly defining the specific subsets of aliens eligible for Medicaid.³⁸ Those aliens who do not fit into the Act's narrow definition of "qualified" are "not eligible for any State or local public benefits."³⁹

PRWORA segregates the alien population into two categories: "qualified" and "unqualified."⁴⁰ The definition of a "qualified" alien is very narrow; it excludes aliens permanently residing under color of law, recent immigrants, and illegal aliens.⁴¹ Though illegal aliens had never been eligible for Medicaid benefits in the past, PRWORA nonetheless affected their access to health care.⁴² Before PRWORA, it was customary for publicly funded health care providers to treat aliens regardless of immigration status.⁴³ This custom changed when PRWORA specifically prohibited using Medicaid funds to provide nonemergency health care to illegal aliens.⁴⁴

More recently, Congress moved to provide limited benefits to certain groups of aliens.⁴⁵ Illegal aliens, however, remain barred from virtually all access to health care unless they are able to finance it privately.⁴⁶

3. *Emergency Medical Treatment and Active Labor Act (EMTALA)*

In 1985, Congress passed EMTALA to stop the widespread practice of "patient dumping," by which hospitals denied emergency health care to poor or uninsured patients, often without giving them so much as a cursory examination.⁴⁷

38. See 8 U.S.C. § 1611(a) (2006).

39. *Id.* § 1621 (2006).

40. *Id.* § 1611(a) (2006).

41. *Id.* § 1641(b) (2006).

42. Elizabeth R. Chesler, *Denying Undocumented Immigrants Access to Medicaid: A Denial of Their Equal Protection Rights?*, 17 B.U. PUB. INT. L.J. 255, 259 (2008).

43. *Id.*

44. *Id.*

45. These groups include children, the elderly, and the disabled. Kristalee Guerra, Comment, *The Policy and Politics of Illegal Immigrant Health Care in Texas*, 3 HOUS. J. HEALTH L. & POL'Y 113, 117 (2002).

46. See Chesler, *supra* note 42, at 256–57.

47. DAVID ORENTLICHER, MARY ANNE BOBINSKI & MARK A. HALL, *BIOETHICS AND*

EMTALA applies to any hospital that has an emergency room and receives federal funding.⁴⁸

EMTALA imposes two distinct duties on hospitals affected by the statute.⁴⁹ First, the arrival of a patient at the hospital triggers a duty to appropriately screen for an emergency medical condition.⁵⁰ In the event that no emergency medical condition is found, the hospital's duty is terminated.⁵¹ If an emergency medical condition exists, the second duty is triggered: The hospital is obligated to stabilize the condition and provide any treatment "necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual . . ."⁵²

Once a patient is stabilized, EMTALA allows him to be transferred to an appropriate medical facility.⁵³ An appropriate facility is any facility that can meet the patient's needs.⁵⁴ A transferring hospital must provide medical treatment within its capacity to minimize risks to the patient's health during the transfer.⁵⁵ It must transfer the medical records related to the emergency condition, facilitate qualified personnel and transportation equipment, and obtain consent from the receiving facility to transfer the patient there.⁵⁶

In sum, EMTALA gives everyone the right to emergency medical care if screening proves an emergency medical condition

PUBLIC HEALTH LAW 111 (2d ed. 2008); Elizabeth Weeks, *After the Catastrophe: Disaster Relief for Hospitals*, 85 N.C. L. REV. 223, 234 (2006).

48. ORENTLICHER, BOBINSKI & HALL, *supra* note 47, at 111.

49. *Id.* at 112.

50. 42 U.S.C. § 1395dd(a) (2006).

51. An "emergency" is defined by the statute as a medical condition manifesting itself by acute symptoms of sufficient severity such that without immediate medical treatment it could place the patient's health in serious jeopardy, cause serious impairment to bodily functions, or serious dysfunction of any organ or body part. *Id.* § 1395dd(e).

52. *Id.* § 1395dd(e)(3)(A).

53. *Id.* § 1395dd(c).

54. *Id.* § 1395dd(c)(2)(B).

55. *Id.* § 1395dd(c)(2)(A).

56. *Id.* § 1395dd(c)(2).

exists.⁵⁷ When deemed appropriate, however, discharge or transfer to an appropriate medical facility, in accordance with certain procedures, is permitted.⁵⁸

Scholars have noted that EMTALA raises a number of concerns; chief among them is the enormous financial burden it places on hospitals that receive federal funding.⁵⁹ As it stands, hospitals are compensated for only about half of the emergency care they are required to provide.⁶⁰ So, EMTALA has simultaneously opened access to health care for illegal aliens and exacerbated the already strained financial situation of many health care providers.⁶¹

Medical repatriation emerges against this backdrop of financial crisis and restrictive federal legislation.

C. *The Case of Luis Alberto Jiménez*

Luis Alberto Jiménez has become a symbol of the unanswered questions arising out of the zone where the U.S. immigration and health care systems sloppily overlap. His case is the first to address the widespread but, until recently, quiet practice of medical repatriation by American hospitals.⁶²

Jiménez, a Guatemalan national, entered the United States illegally, and worked as a gardener in Stuart, Florida.⁶³ On February 28, 2000, Jiménez was involved in a car crash and suffered severe physical injuries and traumatic brain damage.⁶⁴

57. *Id.* § 1395dd(a).

58. *Id.* § 1395dd(c).

59. Lebedinski, *supra* note 2, at 154; see also J. Kelly Barnes, *Telemedicine: A Conflict of Laws Problem Waiting to Happen—How Will Interstate and International Claims Be Decided?*, 28 HOUS. J. INT'L L. 491, 503 (2006) (noting that EMTALA's requirements may be imposed where "the treating physician's telemedicine consult is being conducted in her hospital's emergency department").

60. American College of Emergency Physicians, *Cost of Emergency Care*, <http://www3.acep.org/printfriendly.aspx?id=25902> (last visited Oct. 3, 2010).

61. See Lebedinski, *supra* note 2, at 154.

62. See *Hospital Defends Secretly Deporting Patient*, MSNBC, July 23, 2009, <http://www.msnbc.msn.com/id/32108119/>. "Medical repatriation" is a term used to describe the returning of an injured or ill person to their country of origin. *Immigrants Facing Deportation*, *supra* note 3.

63. *Id.*

64. Azmina Aboobaker, *The Hippocratic Oath and the Repatriation of Uninsured*

He was rushed to the emergency center at Martin Memorial Medical Center (“Martin Memorial”), a not-for-profit hospital.⁶⁵ As required by federal legislation, Martin Memorial provided stabilizing emergency care, saving Jiménez’s life.⁶⁶ Martin Memorial continued to provide the nonemergency medical care that kept Jiménez alive until he was transferred to a nursing home in June 2000.⁶⁷ As a result of his injuries, Jiménez was left with the cognitive ability of a fourth-grader.⁶⁸ The court therefore appointed Jiménez’s cousin’s husband as his guardian.⁶⁹ On January 26, 2001, Jiménez was rushed back to Martin Memorial for emergency treatment;⁷⁰ he was readmitted and treated for severe ulcerous bedsores.⁷¹ The hospital again saved Jiménez’s life, and Jiménez remained hospitalized at Martin Memorial in a vegetative state for several subsequent years.⁷²

In November 2001, following Jiménez’s readmission, his guardian filed a guardianship plan asserting that Jiménez required 24/7 nursing care for the next twelve months.⁷³ With the cost this nonemergency care mounting, Martin Memorial applied for financial assistance and tried to find a rehabilitation center willing and able to accept Jiménez through a transfer; Jiménez’s status as an illegal alien complicated the process.⁷⁴ Martin Memorial searched extensively for an appropriate medical facility, but rehabilitation programs and nursing homes

Noncitizens, <http://www.lexisnexis.com/Community/emergingissues/blogs/emergingissuescommentary/archive/2009/10/07/The-Hippocratic-Oath-and-the-Repatriation-of-Uninsured-Noncitizens.aspx> (last visited Oct. 3, 2010).

65. *Immigrants Facing Deportation*, *supra* note 3.

66. *Immigrants Facing Deportation*, *supra* note 3; see 42 U.S.C. § 1395dd (2003).

67. *Montejo v. Martin Mem’l Med. Ctr., Inc. (Montejo I)*, 874 So. 2d 654, 656 (Fla. Dist. Ct. App. 2004).

68. Aboobaker, *supra* note 64.

69. *Montejo I*, 874 So. 2d at 656.

70. *Id.*

71. *Immigrants Facing Deportation*, *supra* note 3.

72. See *Montejo I*, 874 So. 2d at 656 (noting that after being readmitted, Jiménez remained at Martin Memorial until the time of his legal proceedings which occurred in the spring of 2004).

73. *Id.*

74. *Id.*

refused to take Jiménez with the same short message: “Unable to take patient.”⁷⁵

By that time Jiménez’s care had already accumulated to more than \$1 million.⁷⁶ Of that sum, \$80,000 had been reimbursed to Martin Memorial through Medicaid for the initial emergency care, but Jiménez’s status as an illegal alien left Martin Memorial to absorb the cost of all other prior and future care.⁷⁷ Without alternatives, Martin Memorial was faced with the prospect of providing expensive care to Jiménez for the remainder of his life.

Under these circumstances, Martin Memorial sought a court order authorizing it to discharge the stabilized Jiménez and transfer him to a hospital in his native country, Guatemala.⁷⁸ On June 27, 2003, following an evidentiary hearing, the probate court authorized the transfer.⁷⁹ Jiménez’s guardian’s motion for rehearing was denied on July 9, 2003.⁸⁰ His guardian also appealed the order and simultaneously filed a motion to stay the order.⁸¹ The following morning, before the court ruled on the guardian’s motion to stay, Martin Memorial brought Jiménez to the airport via ambulance.⁸² A private air ambulance, leased by Martin Memorial for \$30,000, was waiting at the airport,⁸³ and it transported Jiménez to the National Hospital for Orthopedics and Rehabilitation in Guatemala.⁸⁴

Notwithstanding the fact that Jiménez had already been transferred to Guatemala, his guardian appealed the circuit court’s authorization of Jiménez’s transfer. The court of appeals decided the issue was not moot, despite Jiménez already being

75. *Immigrants Facing Deportation*, *supra* note 3.

76. *Montejo I*, 874 So. 2d at 656.

77. *See id.*

78. *Id.*

79. *Montejo v. Martin Mem’l Med. Ctr., Inc. (Montejo II)*, 935 So. 2d 1266, 1267 (Fla. Dist. Ct. App. 2006).

80. *Id.*

81. *Id.* at 1267–68.

82. According to Jiménez’s guardian, Martin Memorial was ordered to file a response to the Motion to Stay by 10 a.m. on July 10, 2003, but sometime before 7 a.m. that day it discharged Jiménez and transported him back to Guatemala. *Id.* at 1268.

83. *Immigrants Facing Deportation*, *supra* note 3.

84. *Id.*

in Guatemala⁸⁵ and further noted that even if it were moot, it was an important issue with a high potential of repetition.⁸⁶

The court ultimately reversed the circuit court's authorization of the transfer, holding instead that there had been insufficient evidence to accurately determine that Jiménez would be transferred to an "appropriate facility" under EMTALA⁸⁷ In addition, the circuit court stated, without explanation or elaboration, that the "trial court lacked subject matter jurisdiction to authorize the transportation (deportation) of Jiménez to Guatemala."⁸⁸

Approximately four months after the court of appeals reversed the circuit court, Jiménez's guardian filed a state tort claim against Martin Memorial claiming the hospital's confining of Jiménez in an ambulance and private plane constituted false imprisonment.⁸⁹ To prove a claim for false imprisonment in Florida, a plaintiff must demonstrate: (1) an unlawful detention and deprivation of liberty of a person, (2) against the person's will, (3) without legal authority or taken under "color of law," and (4) unreasonable and unwarranted under the circumstances.⁹⁰ Martin Memorial argued that the alleged detention was not unreasonable and unwarranted because the transfer was pursuant to a then-valid court order, which should grant Martin Memorial immunity.⁹¹ The trial court dismissed the claim with prejudice, and the guardian appealed.⁹² On appeal, the court of appeals held that reliance on a later-

85. See *Montejo I*, 874 So. 2d at 656–57.

86. *Id.* at 657.

87. An "appropriate facility" is one that can meet the patient's needs. *Id.* at 658. In an effort to satisfy its obligation of to transfer patients only to appropriate facilities, Martin Memorial offered a letter from the Vice Minister of Public Health in Guatemala asserting that Guatemala would find an appropriate facility for Jiménez's treatment. *Id.* at 657. The court of appeals found this letter to be inadmissible hearsay. *Id.* at 658. Notably, the Court side-stepped the question of whether the transfer was an appropriate alternative for the hospital. *Id.* at 657–58.

88. *Id.* The court parenthetically notes that the trial court's subject-matter jurisdiction was determined by preemption. *Id.*

89. *Montejo II*, 935 So. 2d at 1268.

90. *Id.*

91. *Id.*

92. *Id.*

invalidated court order does not grant immunity from a false imprisonment claim,⁹³ and consequently reversed and remanded the trial court's dismissal.⁹⁴ On remand, a jury found the hospital's actions were not "unreasonable and unwarranted under the circumstances"; therefore, the false imprisonment elements were not met, and Martin Memorial did not owe Jiménez monetary damages.⁹⁵ There have been no further appeals to date.

The Jiménez case is an illustration of the conflicting interests involved in medical repatriation. The case exposed a dirty little secret of American hospitals and brought media attention to the topic.⁹⁶ However, it remains unclear what, if any, effect the Florida state court decisions will have. As the first legal consideration of medical repatriation, the decision sends mixed messages about hospital liability. On the one hand, the appellate court found the repatriation by the hospital was unlawful on both federal preemption and state law grounds.⁹⁷ On the other hand, a jury found that the hospital's actions were not unreasonable and unwarranted under the circumstances; thus, Jiménez was not entitled to any damages.⁹⁸

D. Between a Rock and a Hard Place, Hospitals Chose Repatriation

Patients who need long-term care—not patients who need only emergency care—put hospitals in an impossible quandary.⁹⁹ In order to transfer any patient to another facility, a hospital must comply with certain requirements relating to patient discharge.¹⁰⁰ Chief among these requirements is that the hospital must identify an "appropriate facility," which is

93. *Id.* at 1268.

94. The case was remanded in order for a jury to determine if the hospital's actions were "unreasonable and unwarranted." *Id.* at 1272.

95. Deborah Sontag, *Jury Rules for Hospital that Deported Patient*, N.Y. TIMES, July 28, 2009, at A3 [hereinafter *Jury Rules for Hospital*].

96. *Immigrants Facing Deportation*, *supra* note 3.

97. *Montejo I*, 874 So. 2d at 658.

98. *Jury Rules for Hospital*, *supra* note 95.

99. *See Immigrants Facing Deportation*, *supra* note 3.

100. Wolpin, *supra* note 2, at 154.

described as one “that can meet the patient’s medical needs on a post-discharge basis,” before the patient can be discharged.¹⁰¹

Unlike emergency medical care, however, there is no federal legislation obliging long-term care facilities or nursing homes to accept the transfer of a stabilized uninsured alien.¹⁰² Without the ability to transfer the patient to an “appropriate facility” in the United States, the alien effectively becomes a ward of the initial acute care hospital.¹⁰³ By default, the hospital is left to find a way to cope with the patient indefinitely.¹⁰⁴ Essentially, this makes it possible for uninsured aliens to receive free health care for life, something the U.S. government has not granted to its own citizens.

Through EMTALA, uninsured illegal aliens can enter the health care system.¹⁰⁵ The hospitals, however, are not provided with a discharge option for patients that require extended care beyond stabilization of their emergency condition.¹⁰⁶ Consequently, hospitals’ limited resources are being hemorrhaged, and there are no laws or regulations guiding them on how to stop it.

Hospitals are currently operating in a de facto regulatory framework produced by contemporary immigration and health care systems.¹⁰⁷ The lack of governmental oversight regarding the discharge of uninsured aliens has left hospitals to patch together their own alternatives to care for illegal aliens patient indefinitely.¹⁰⁸ Several hospitals have turned to medical repatriation as the best solution.¹⁰⁹

Medical repatriations are not tracked or recorded by a government agency or other advocacy group, so statistics are

101. *Id.*

102. Medicaid and PRWORA deny medical coverage to illegal aliens, but emergency medical care is afforded to all persons inside U.S. borders through EMTALA. *See supra* Part I.B.

103. *See Immigrants Facing Deportation, supra* note 3.

104. *See id.*

105. *See* 42 U.S.C. § 1395dd (2003).

106. *See id.*

107. Wolpin, *supra* note 2, at 152.

108. *See Immigrants Facing Deportation, supra* note 3.

109. *Id.*

spotty at best.¹¹⁰ However, some disclosures have been made that provide a grainy snapshot of the practices' current state: In Phoenix, Arizona, St. Joseph's Hospital repatriates almost 100 patients each year.¹¹¹ In Florida, the Broward General Medical Center repatriates between six and eight patients a year.¹¹² Chicago hospitals have returned ten patients to Honduras since 2007.¹¹³ Also in 2007, the Mexican Consulate in San Diego handled eighty-seven medical cases involving Mexican immigrants—many ending in repatriation.¹¹⁴

III. CONSTITUTIONALITY OF MEDICAL REPATRIATION OF ILLEGAL ALIENS

A. Fourteenth Amendment

The Fourteenth Amendment of the United States Constitution states in relevant part that

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹¹⁵

The Fourteenth Amendment and other civil rights amendments were enacted to protect individuals from certain state actions.¹¹⁶ To that end, Congress has created a cause of action for individuals wronged by state governments in violation of the Fourteenth Amendment: Section 1983.¹¹⁷ There are two elements to a Section 1983 claim: (1) The conduct alleged was committed by a person who falls within the definition of acting

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. U.S. CONST. amend. XIV, § 1.

116. *See* U.S. CONST. amend. XIV, § 1.

117. 42 U.S.C. § 1983 (2006).

“under color of”¹¹⁸ state law,¹¹⁹ and (2) the actions resulted in a deprivation of constitutionally or federally protected rights, privileges, or immunities.¹²⁰ Therefore, to pursue a claim alleging that medical repatriation by hospitals violates the Fourteenth Amendment, the plaintiff must first establish that hospitals are state actors.¹²¹ Without state action, the Section 1983 claim fails before a court can consider whether medical repatriation violates the Fourteenth Amendment.¹²²

1. *Hospitals as State Actors*

The requirement that the defendant be acting “under color of” state law is a jurisdictional requirement for all Section 1983 claims.¹²³ Most rights secured by the Constitution, including those of the Fourteenth Amendment, are protected from government intrusion, which means that no claims can be made against purely private actors on constitutional grounds.¹²⁴ Private actors who act closely with the government, however, can be subject to liability under Section 1983 if their actions were taken “under color of law.”¹²⁵ Such a determination is

118. “Under color of” is a cliché used in place of the longer phrase “under color of any statute, ordinance, regulation custom, or usage” contained in Section 1983. Richard H.W. Maloy, “*Under Color of*”—*What Does It Mean*, 56 MERCER L. REV. 565, 587 (2005).

119. The Supreme Court has traditionally defined “under color of” state law as actions that are exercised by the defendant by “power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

120. 42 U.S.C. § 1983 (2006) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”).

121. *Carlos v. Santos*, 123 F.3d 61, 65 (2d Cir. 1997).

122. *Crowder v. Conlan*, 740 F.2d 447, 449 (6th Cir. 1984) (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)).

123. See *Jojola v. Chavez*, 55 F.3d 488, 492 (10th Cir. 1995) (citing *Polk County v. Dodson*, 454 U.S. 312, 315 (1981)).

124. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974)).

125. See *id.* at 924.

necessarily fact-intensive,¹²⁶ and formulating a universal test would be an “impossible task.”¹²⁷ To succeed under Section 1983, a plaintiff must show not only that the private entity became a state actor in general, but also that it was acting for the state when the alleged constitutional violation occurred.¹²⁸ Despite the lack of a bright-line rule, the Supreme Court has recognized various tests that provide a framework in which to conduct the factually intensive inquiry.¹²⁹

Some courts have determined public-trust, state, and local-government hospitals to be state actors under Section 1983.¹³⁰ Conversely, other courts have held that the actions of private hospitals normally do not constitute state action required for a Section 1983 claim.¹³¹ Notwithstanding this general principle, the fact-intensive nature of “state actor” determinations does not preclude the possibility that a private hospital’s actions are “so approximate [to] state action that they may be fairly attributed to the state,” and thus be considered state actions.¹³² The Supreme Court has used three tests to help determine whether state action exists: (1) the public function

126. *Id.* at 939

127. *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967).

128. *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996).

129. These tests are the “public function” test, the “state compulsion” test, the “nexus” test and the “joint action” test. *See Lugar*, 457 U.S. at 939.

130. *See McKeesport Hosp. v. Accreditation Council for Graduate Med. Educ.*, 24 F.3d 519, 528 (3d Cir. 1994) (“Courts commonly hold that a state agency, like a county hospital district, for example, is a state actor even though it is not engaged in actions that are traditionally the exclusive province of the state.”); *see also Beedle v. Wilson*, 422 F.3d 1059, 1070 (10th Cir. 2005) (“Subsequent cases from our court have held, with relative little fanfare, that public trust and county hospitals are properly deemed state actors for § 1983 purposes.”); *Bradley v. Health Midwest, Inc.*, 203 F. Supp. 2d 1254, 1257 (D. Kan. 2002) (noting that unlike public hospitals, private hospital actions are typically not found to be state actions).

131. *See, e.g., Blum v. Yaretsky*, 457 U.S. 991, 1008 (1982) (holding that day-to-day decision making in the administration of a nursing home does not constitute state action); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974) (stating that state regulation, even if it is “extensive and detailed,” of a private entity is insufficient to convert private action to state action); *Kia P. v. McIntyre*, 235 F.3d 749, 755–56 (2d Cir. 2000) (holding that actions taken by a private hospital insofar as it is providing medical care do not constitute state actions).

132. *Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000).

test, (2) the state compulsion test, and (3) the nexus/joint action test.¹³³

a. Public Function Test

The public function test limits state action by private actors to instances where the private actor is exercising powers that are “traditionally the exclusive prerogative of the State.”¹³⁴ Applying this standard, the Supreme Court has found that a private entity running an election for a government office was performing a public function and, thus, was a state actor that must act in accordance with the Constitution.¹³⁵

The test, however, does not imply that any function traditionally performed by the government will give rise to state action.¹³⁶ It is specifically applicable to functions that have been “exclusively reserved to the state,”¹³⁷ a very rigorous standard that courts rarely find is met.¹³⁸ In fact, “an extraordinarily low number of . . . functions have been held to be . . . public.”¹³⁹ The Supreme Court has construed the requirement to be very narrow. In *Rendell-Baker v. Kohn*, the Court held that a private school providing state-funded special education for certain students was performing a “public function,” but not one that “has been ‘traditionally the *exclusive* prerogative of the State.’”¹⁴⁰ Therefore, the plaintiff had not stated an actionable claim under Section 1983.¹⁴¹

Medical repatriation is the transferring of a patient from one hospital to another; it just happens that the receiving hospital is in another country.¹⁴² Transferring of patients is not a public

133. *Nat'l Broad. Co. v. Comm'n Workers*, 860 F.2d 1022, 1026 (11th Cir. 1988).

134. *Id.*

135. *Smith v. Allwright*, 321 U.S. 649, 664 (1944).

136. *Robert S. v. Stetson Sch., Inc.*, 256 F.3d 159, 165–66 (3d Cir. 2001).

137. *See Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 158 (1978).

138. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1142 (3d Cir. 1995).

139. *Doe v. Harrison*, 254 F. Supp. 2d 338, 343 (S.D.N.Y. 2003) (quotations omitted).

140. 457 U.S. 830, 842 (1982) (quoting *Jackson*, 419 U.S. at 353).

141. *Id.* at 843.

142. *See Caitlin O'Connell, Return to Sender: Evaluating the Medical Repatriations of Uninsured Immigrant*, 87 WASH. U. L. REV. 1429, 1447 (2010).

function, let alone one that is traditionally and exclusively the prerogative of the state.¹⁴³ Public functions that are traditionally exclusive to the state are things like elections, which are fundamentally different from medical decision-making.¹⁴⁴ Thus, it is highly unlikely hospitals will be deemed state actors through the public function test for medical repatriation.¹⁴⁵

b. State Compulsion Test

The state compulsion test “limits state action to instances in which the government has coerced or at least significantly encouraged the action alleged to violate the Constitution.”¹⁴⁶ Actions clearly compelled or encouraged by state law generally do not satisfy the state compulsion test.¹⁴⁷

For example, in the case of civil commitment by hospitals, courts have concluded that, notwithstanding the existence of legal standards, physicians use the standards of the medical community to determine whether to civilly commit a patient.¹⁴⁸ The distinction between using medical judgment and legal standards is sufficient to show the action does not meet the state compulsion test.¹⁴⁹ Therefore, the existence of laws that provide a mechanism through which private parties can, at their discretion, pursue the challenged action does not support a finding of state action.¹⁵⁰

In 2000 the Second Circuit, in *Kia P. v. McIntyre*, found that a private hospital can be a state actor under the state

143. *Id.* at 1457.

144. *Smith v. Allwright*, 321 U.S. 649, 664 (1944).

145. If medical repatriation were framed as a deportation instead of a medical transfer in accordance with the appropriate regulations, it would still not satisfy the public function test. Deportation, like all immigration issues, is not a power reserved to the state but rather exclusively reserved to the federal government.

146. *Nat'l Broad. Co. v. Comm'n Workers*, 860 F.2d 1022, 1026 (11th Cir. 1988).

147. *See, e.g., Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 258 (1st Cir. 1994); *see also Okunieff v. Rosenberg*, 996 F. Supp. 343, 349 (S.D.N.Y. 1998), *aff'd*, 166 F.3d 507 (2d Cir. 1999).

148. *Okunieff*, 996 F. Supp. at 349.

149. *Id.* at 351–52.

150. *Estades-Negrone v. CPC Hosp. San Juan Capestrano*, 412 F.3d 1, 6 (1st Cir. 2005).

compulsion test when the hospital acts as a “reporting and enforcement machinery for . . . a government agency.”¹⁵¹ In *Kia*, a hospital social worker, under a state law mandate to report suspected child abuse, notified Child Welfare Services (CWA) of an infant’s positive test for methadone after being born at the hospital.¹⁵² The hospital continued to hold the infant after he was medically cleared for release until CWA notified the hospital that it would not seek custody of the infant.¹⁵³ The court held that the hospital, in acting as a reporting and enforcing agent for CWA, was a state actor.¹⁵⁴ The hospital, however, did not become a state actor until the moment it decided to continue to hold the child after he had been medically cleared for release.¹⁵⁵ Until that point the hospital, guided by medical judgment, was solely providing medical care.¹⁵⁶

Medical repatriations, like the actions taken in *Kia*, are guided by medical judgment grounded in independent medical standards.¹⁵⁷ A significant difference is that there is no law compelling hospitals to act as an arm of a state agency. Their actions in medically repatriating a patient remain supported by medical judgments and specific hospital procedures.¹⁵⁸ The complete lack of compulsion to be enforcers of state law in a medical repatriation case eliminates the possibility of finding a private hospital to be a state actor under the state compulsion test.

c. Nexus/Joint Action Test

The nexus/joint action test finds state action within the scope of the Fourteenth Amendment only in situations where “the state has so far insinuated itself into a position of

151. 235 F.3d 749, 756 (2d Cir. 2000), *cert. denied*, *Kia P. ex rel. Mora P. v. New York City*, 534 U.S. 820 (2001).

152. *Kia P.*, 235 F.3d at 756.

153. *Id.*

154. *Id.*

155. *Id.* at 757.

156. *Id.*

157. See also Laura Wides-Munoz, *Florida Hospital Wins Ruling in Deportation Case*, HOUS. CHRON., July 27, 2009, at 3.

158. *Id.*

interdependence with [the private actor] that it must be recognized as a joint participant in the challenged activity”¹⁵⁹ Merely subjecting an entity to state regulations does not alone convert the entity’s actions into state action.¹⁶⁰ The standard is much more rigorous; it must be demonstrated that the state is so intimately involved in the challenged action that the private actor’s conduct can actually be attributed to the state.¹⁶¹

Specifically, courts have found that acting pursuant to state statutes,¹⁶² acting in accordance with government regulations,¹⁶³ receiving public funds,¹⁶⁴ and invoking the assistance of the courts are not sufficient to establish a nexus between the private actor and the state that satisfies the joint action test.¹⁶⁵

The Supreme Court has held that a private nursing home’s decision to transfer a patient is not a state action despite the nursing home’s receipt of Medicaid funds.¹⁶⁶ Even though the state, through Medicaid, paid more than 90% of the medical expenses of the patients at the facility, that funding alone was not enough to consider a patient transfer to be undertaken jointly with the state.¹⁶⁷ Neither extensive regulation nor the amount of government funding intimately involved is enough to form a basis for finding state action.¹⁶⁸ One scholar has noted that the Court is unlikely to find that government funding is sufficient to find state action unless there is evidence that the government intends such funding to undermine the protections of the Constitution.¹⁶⁹

159. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

160. *Jackson*, 419 U.S. at 350.

161. *Bier v. Fleming*, 717 F.2d 308, 311 (6th Cir. 1983).

162. *Spencer v. Lee*, 864 F.2d 1376, 1381 (7th Cir. 1989).

163. *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 258 (1st Cir. 1994).

164. *Id.*

165. *Bass v. Parkwood Hosp.*, 180 F.3d 234, 242 (5th Cir. 1999).

166. *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982).

167. *See id.* at 1011.

168. *Id.*

169. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 515 (2d ed. 2002).

In *Blum v. Yaretsky*, the Supreme Court unequivocally stated that although the state provides forms and procedures that nursing homes are required to complete and follow, the decision to discharge or transfer a patient is not determined by those forms and procedures.¹⁷⁰ The nursing home's decision to transfer or discharge a patient turns on medical judgments made by health care professionals according to health care standards.¹⁷¹ Medical repatriation is an analogous decision by a health care facility to transfer a patient. Medical decisions are made to determine whether a transfer is medically appropriate, and the decision is carried out according to hospital discharge procedures.¹⁷² Medical repatriation cases are easily analogized to *Blum*, and accordingly, hospitals performing medical repatriations are probably not state actors for purposes of a Section 1983 claim.

An overview of past court cases demonstrates the evasiveness of a stable definition of "under color of law."¹⁷³ Coupled with the fact-based inquiry required to determine whether a challenged action is state action, that elusive definition makes it highly unlikely a court will determine a private hospital to be a state actor when it engages in medical repatriation. Despite those difficulties, such a determination remains possible for private hospitals, and public hospitals are likely to be seen as state actors without such detailed analysis.¹⁷⁴ Because there are certain fact situations in which a hospital will likely be considered a state actor, the analysis proceeds to examine whether medical repatriation violates any of the protection afforded by the Fourteenth Amendment.

B. Due Process

The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law."¹⁷⁵

170. *Blum*, 457 U.S. at 1008.

171. *Id.*

172. See *Kia P. v. McIntyre*, 235 F.3d 749, 756 (2d Cir. 2000).

173. See CHEMERINSKY, *supra* note 169, at 496.

174. See *Lugar*, 457 U.S. at 939.

175. U.S. CONST. amend XIV, § 1.

The clause protects individuals from state oppression in three important ways: (1) it applies the safeguards of the Federal Bill of Rights to each of the state governments, (2) it prohibits certain arbitrary state actions entirely (“substantive due process”), and (3) it requires some type of fair procedure before the state deprives individual people of life, liberty, or property (“procedural due process”).¹⁷⁶ All persons, including illegal aliens, enjoy the protections of the Due Process Clause.¹⁷⁷ However, the Supreme Court has acknowledged that illegal aliens within the U.S. territory are not entitled to all of the benefits guaranteed to U.S. citizens.¹⁷⁸

The focus of a substantive due process analysis is whether the government has an appropriate reason, depending on the level of scrutiny applied, to deprive a person of a life, liberty, or property interest.¹⁷⁹ Procedural due process concerns the procedures the government must follow when it deprives a person of a life, liberty, or property interest.¹⁸⁰ The primary issues in procedural due process are proper notice and the type of hearing the person must be afforded before deprivation.¹⁸¹

Of central importance in both substantive and procedural due process analyses is the specific definition of the interest involved.¹⁸² The protections of the Due Process Clause apply only if there is a deprivation or infringement of the interest defined at the outset.¹⁸³

176. *Daniels v. Williams*, 474 U.S. 327, 337 (1986) (Stevens, J., concurring).

177. *Plyler v. Doe*, 457 U.S. 202, 211–12 (1982) (stating that the protections afforded by the Fourteenth Amendment are “universal in their application, to all persons within the territorial jurisdiction . . .”) (internal quotation marks omitted).

178. *Mathews v. Diaz*, 426 U.S. 67, 78 n.12 (1976) (noting that the Constitution treats U.S. citizens and aliens differently in several places and that “[t]he whole of Title 8 of the United States Code, regulating aliens and nationality, is founded on the legitimacy of distinguishing between citizens and aliens”).

179. *CHEMERINSKY*, *supra* note 169, at 523–24.

180. *Id.* at 523.

181. *Id.*

182. *See id.* at 524–25.

183. *Id.* at 525.

1. *Substantive Due Process*

Substantive due process prohibits the infringement of certain fundamental rights of individuals by state action, regardless of the fairness of the procedure, unless the act is narrowly tailored to serve a compelling governmental interest.¹⁸⁴

a. *Finding the Interest*

The Supreme Court requires two elements before it finds an interest is fundamental: (1) the interest must be “deeply rooted in this Nation’s history and tradition,” and “‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed,’”¹⁸⁵ and (2) the interest must be carefully described.¹⁸⁶ In the event a fundamental interest is infringed upon, the Court will apply a strict scrutiny level of review to the challenged action.¹⁸⁷ The strict scrutiny test states that the challenged action will be allowed only if it is “narrowly tailored to serve a compelling state interest.”¹⁸⁸

Alternatively, where the Court determines that no fundamental interest is implicated or that the challenged action does not unduly infringe upon a recognized fundamental interest, the Court applies the rational basis test.¹⁸⁹ The

184. *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Fundamental rights are those rights that are “explicitly or implicitly guaranteed by the Constitution.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

185. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

186. *Id.* at 721.

187. One legal scholar, after extensive analysis of Supreme Court cases, concluded that since the *Lochner* era, the Court has confined its application of heightened scrutiny in substantive due process analysis to only two fundamental rights: pregnancy decisions and decisions on family living arrangements. Jennifer L. Greenblatt, *Putting the Government to the (Heightened, Intermediate, or Strict) Scrutiny Test: Disparate Application Shows Not All Rights and Powers are Created Equal*, 10 FLA. COASTAL L. REV. 421, 455–56 (2009).

188. *Washington*, 521 U.S. at 721.

189. William P. Gunnar, *The Fundamental Law That Shapes the United States Health Care System: Is Universal Health Care Realistic Within the Established Paradigm?*, 15 ANNALS HEALTH L. 151, 159 (2006).

rational basis test merely requires the challenged action to bear *some* rational relation to *any* legitimate state interest.¹⁹⁰

By and large, the Court has been reluctant to expand the scope of substantive due process.¹⁹¹ This is principally because there are few guideposts to aid responsible decision-making in the amorphous area of substantive due process.¹⁹² The Court repeatedly emphasizes that the utmost care must be taken when considering new areas of protection.¹⁹³ For instance, in considering new areas of protection, the Court must focus on the allegations in the complaint, the precise description of the constitutional right at stake, and the specific action that caused the alleged deprivation.¹⁹⁴ Because of this, the Court is apt to carefully—and narrowly—formulate the interest at stake in a substantive due process claim.¹⁹⁵

The Supreme Court has held that the fundamental interests protected by substantive due process include the right to marry,¹⁹⁶ the right to procreate,¹⁹⁷ the right to direct the education and rearing of one's children,¹⁹⁸ the right to marital privacy,¹⁹⁹ the right to use contraception,²⁰⁰ the right to bodily integrity,²⁰¹ and the right to access to abortion services.²⁰² The Court has therefore applied the strict scrutiny standard to cases involving state action that infringed on one of those fundamental rights.

190. *Rodriguez*, 411 U.S. at 40.

191. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225–26 (1985) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 543–44 (1977) (White, J., dissenting)).

192. *See id.* at 226.

193. *See, e.g.*, *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

194. *Id.*

195. For example, the *Cruzan* case is often said to be a “right to die” case; however, the Court specifically stated that the interest at issue was a “constitutionally protected right to refuse lifesaving hydration and nutrition.” *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 279 (1990).

196. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

197. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

198. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

199. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

200. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

201. *Rochin v. California*, 342 U.S. 165, 172 (1952).

202. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

However, the Court has held that welfare benefits,²⁰³ housing,²⁰⁴ federal employment,²⁰⁵ and pregnancy-related nonemergency medical care,²⁰⁶ including medically necessary abortions,²⁰⁷ are not fundamental rights. Thus, the Court applied the rational basis test in each of those cases.²⁰⁸

b. Challenging Medical Repatriation

The first step in challenging medical repatriation is to determine what interests are implicated by the hospital's action.²⁰⁹ The second step is to determine if the interest is fundamental by analyzing whether the interest is deeply rooted in our nation's history and is implicit in the concept of ordered liberty.²¹⁰ The latter determination will establish the level of review used to analyze medical repatriations.

i. Defining the Interest Affected

There are several interests that could be implicated by medical repatriation.²¹¹ Because the courts have not addressed the constitutional issues of repatriating illegal aliens, there is no guidance concerning what interest the courts will find.²¹² In my view, challenging a hospital's repatriation of a patient is essentially asserting that the patient has a right to long-term or indefinite health care in the United States. Therefore, in order to merit strict scrutiny level review, a patient must prove that

203. *Jefferson v. Hackney*, 406 U.S. 535, 546–48 (1972).

204. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

205. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976).

206. *Maher v. Roe*, 432 U.S. 464, 469 (1977).

207. *Harris v. McRae*, 448 U.S. 297, 231 (1980).

208. *Gunnar*, *supra* note 189, at 160.

209. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

210. *Id.*

211. For example, the right implicated by medical repatriation could be characterized as the right to continue life-supporting care, the right to potential life saving medication and care, the right to be free from possible life-threatening situations, or even the right to continuous medical care in the United States after suffering an emergency condition.

212. The *Montejo* court focused on the hospital's decision-making process and did not analyze the constitutionality of the hospital's actions. *See Montejo I*, 874 So.2d at 658.

long-term or indefinite health care in the United States is a fundamental right, and that medical repatriation infringes upon that right. Otherwise, the action will be analyzed under the rational basis test.

ii. Is the Interest Fundamental?

Currently, the Supreme Court does not recognize a positive right to health care, nor does it acknowledge that the government has an obligation to provide health care to anyone, including U.S. citizens.²¹³ Additionally, the Court has said that the Constitution imposes no obligation on the states to pay for people's health care costs.²¹⁴

One difficulty with arguing that substantive due process protects a fundamental right to health care is that it would be contrary to the underlying protections afforded by the clause.²¹⁵ The Due Process Clause has traditionally been interpreted as protecting negative liberties, as opposed to creating positive liberties.²¹⁶ In other words, the clause is applied to ensure that the government does not infringe upon fundamental interests, but does not create a positive right to government assistance.²¹⁷ Therefore, the Due Process Clause becomes relevant when the government restricts access or forces certain medical treatments, not when it declines to provide a desired treatment.²¹⁸

In the context of medical repatriation, by framing the interest infringed upon as the right to long-term or indefinite health care in the United States, the patient is asserting a positive liberty; he is asking that the government be forced to provide the needed long-term care. The Supreme Court has

213. Raj Aujla, Comment, *The Impending Health Care Crisis in Texas: The Status of Health Care for Impoverished Texans*, 10 SCHOLAR 397, 420–21 (2008). However, the Court has acknowledged that a person under government control, such as a prisoner or one who is institutionalized, is constitutionally guaranteed at least minimally adequate medical care while in custody. Gunnar, *supra* note 189, at 164–65.

214. See *Maher v. Roe*, 432 U.S. 464, 469 (1977).

215. ORENTLICHER, BOBINSKI & HALL, *supra* note 46, at 105.

216. *Id.*

217. See *id.*

218. *Id.*

expressly and repeatedly stated “the Due Process Clause[] generally confer[s] 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.”²¹⁹

As an exception to the general rule, the Supreme Court and various circuit courts have indicated that a constitutional duty may be imposed on the state to provide certain medical services if a “special custodial” relationship between the individual and the state exists.²²⁰ The duty is limited to situations where the state or municipality exercises significant control over the person, placing them in a worse situation than they would have been in without government action.²²¹ Most commonly, this exception applies to incarcerated and institutionalized persons.²²² However, it has also been applied to other persons, including pretrial detainees and persons injured while being apprehended.²²³ Where a positive duty is imposed on the states, the key concept is the “exercise of coercion, dominion, or restraint by the state.”²²⁴

The exception to the Due Process Clause’s general function, protecting negative liberties, is inherently inapplicable to medical repatriations because of its own key requirement: dominion or control by the state.²²⁵ The illegal aliens subject to medical repatriation have not been apprehended or confined to the hospital by the state. They are in the hospital voluntarily, albeit due to a medical necessity; the state has not forced them to be hospitalized. A patient seeking to have the Due Process Clause grant him a positive liberty because he falls within the limited “special custodial” relationship exception is unlikely to succeed.

219. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Serv.*, 489 U.S. 189, 196 (1989).

220. *Wideman v. Shallowford Cmty. Hosp., Inc.*, 826 F.2d 1030, 1034 (11th Cir. 1987).

221. *Id.* at 1035.

222. *See Gunnar, supra* note 189, at 162–65.

223. *Wideman*, 826 F.2d at 1034–35.

224. *Id.* at 1035–36.

225. *See id.*

iii. Applying the Proper Level of Scrutiny

Because the right to long-term or indefinite health care in the United States is not deeply rooted in our nation's history or implicit in the concept of ordered liberty, it is not a fundamental interest.²²⁶ Thus, the appropriate level of review is the rational basis test.

Rational basis is a deferential level of scrutiny under which the state's action will be upheld if it "rationally advance[s] a reasonable and identifiable governmental objective."²²⁷ The challenged action need not be logically consistent with the government's stated goal to be upheld as constitutional; it will be upheld as long as there is a reasonable state objective and the particular action taken was a rational way to achieve it.²²⁸

A hospital's decision to repatriate a patient will undoubtedly pass the rational basis test. EMTALA, the same piece of legislation that mandated acceptance of the patient in the first place, outlines a procedure for discharge.²²⁹ Considering the financial crisis in health care and the subsequent diminishing number of quality health care providers, the hospital's choice to medically repatriate will almost certainly pass the reasonable basis test.²³⁰

Because medical repatriation of illegal aliens does not implicate a fundamental right, the objectives behind medical repatriation must be merely rationally related to the action. Conserving extremely limited resources is a legitimate objective to which medical repatriation is rationally related. Additionally, transferring a patient to his home country may rationally be in the best interest of the patient, since he would be reunited with family and surrounded by a familiar culture.²³¹ In sum, a challenge to medical repatriation under substantive due process

226. See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

227. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 439 (1982) (Blackmun, J., concurring) (internal quotation marks omitted).

228. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955).

229. 42 U.S.C. § 1395dd(C)(2) (2003).

230. See *supra* Part I.A.

231. See *Immigrants Facing Deportation*, *supra* note 3 (reporting that Jiménez became depressed while living in the United States and was sad because he missed his family and his wife).

will probably be unsuccessful because no fundamental right is being deprived and medical repatriation bears a rational relation to a governmental interest in keeping hospitals operational.

2. *Procedural Due Process*

A patient must establish three elements for a valid procedural due process claim: (1) He has a life, liberty, or property interest protected by the Due Process Clause, (2) he was deprived of these protected interests within the meaning of the Due Process Clause, and (3) the state did not afford him adequate procedural rights before depriving him of those interests.²³² The Due Process Clause does not prohibit arbitrary or unfair procedures by the government per se, only government action unfairly or arbitrarily taking life, liberty, or property.²³³ In those instances, proper procedure must be followed prior to the deprivation.²³⁴

Procedural due process has rarely been used to litigate deprivations of “life.”²³⁵ Cases that would seem to implicate the deprivation of “life” have generally been characterized as deprivations of liberty interests.²³⁶ Medical repatriation may, however, be argued as a deprivation of a property interest in a governmental benefit. In the alternative, if a court could be convinced that medical repatriation is in fact a deportation, medical repatriation may be characterized as a deprivation of a liberty interest.

a. *Deprivation of Property Interest*

The property interests protected by the Due Process Clause are not created by the Constitution. Instead, state law or some other independent source of law defines such interests.²³⁷ Several cases addressing deprivation of property without

232. See, e.g., *Zinermon v. Burch*, 494 U.S. 113, 125–26 (1990).

233. See *id.*

234. See *id.*

235. *CHEMERINSKY*, *supra* note 169, at 555.

236. *Id.*

237. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985).

adequate procedural due process involve governmental benefits.²³⁸

In the landmark procedural due process case, *Goldberg v. Kelly*, the Supreme Court held that welfare recipients had a property interest in welfare benefits.²³⁹ Welfare benefits are “not mere charity,” but are a “matter of statutory entitlement for persons qualified to receive them”²⁴⁰ As such, state action that terminates welfare benefits affects an important right, and the restraints of the Due Process Clause apply.²⁴¹ Furthermore, where receipt of welfare benefits is discontinued, the requirements of procedural due process will only be met by a pre-termination evidentiary hearing.²⁴²

Though there is no fundamental right to health care, EMTALA has created a right to a very limited and specific type of medical care for all persons.²⁴³ Under EMTALA, all people, regardless of their indigency, citizenship, or immigration status, are guaranteed emergency medical treatment.²⁴⁴ According to the Supreme Court, these are property interests, the deprivation of which must comply with constitutional procedural due process.²⁴⁵

Medical repatriation does not deprive the patient of the property interest granted by EMTALA because the governmental benefit EMTALA establishes is a guarantee of emergency medical care.²⁴⁶ Medical repatriations occur after the patient’s emergency medical condition has been stabilized and the patient is medically cleared for transfer.²⁴⁷ Thus, for procedural due process to apply, the patient would need to prove

238. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) (welfare); *Goss v. Lopez*, 419 U.S. 565, 573 (1975) (education); *Am. Mfr. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (workers’ compensation).

239. *Goldberg*, 397 U.S. at 262.

240. *Id.* at 262, 265.

241. *Id.*

242. *Id.* at 264.

243. See 42 U.S.C. § 1395dd (2003).

244. *Id.*

245. See *Goldberg*, 397 U.S. at 261–62.

246. See 42 U.S.C. § 1395dd (2003).

247. See *Montejo I*, 874 So.2d at 657.

that the “emergency medical care” guaranteed by EMTALA encompasses post-stabilization, nonemergency care.

To understand the scope of an “emergency medical condition” as it is used in section 1395dd(e)(1) of EMTALA, the section should be read in conjunction with sections 1395dd(a)(2) and 1395dd(c)(1).²⁴⁸ By reading the three sections together, an “emergency medical condition” is defined as “a condition that requires stabilizing treatment in order to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result” from the patient’s transfer or discharge.²⁴⁹ Thus, treatment or care used to treat chronic, debilitating conditions would not be covered under EMTALA.²⁵⁰ Accordingly, depriving someone of such treatment would not deprive them of a property interest protected under procedural due process.

If the property interest allotted by the government benefit of access to “emergency medical care” were expanded to include post-stabilization chronic care, some form of procedure would be required to medically repatriate a patient. At a minimum, deprivation of a property interest must be preceded by notice and the opportunity for a meaningful hearing in front of an impartial decision maker.²⁵¹ As evinced by the *Montejo* case, medical repatriations occur following the procedures set out by hospital discharge rules and the rules for discharge under EMTALA.²⁵² Though there is not evidence for every medical repatriation, *Montejo* is typical of most repatriation cases. In *Montejo*, Martin Memorial complied with EMTALA.²⁵³ The hospital sought and secured a receiving facility, obtained its consent, stabilized the patient’s emergency medical condition, medically cleared the patient for transfer, obtained a court order authorizing the transfer,²⁵⁴ provided appropriate medical

248. See *Szewczyk v. Dep’t of Soc. Servs.*, 881 A.2d 259, 280–81 (Conn. 2005) (Sullivan, C.J., dissenting).

249. *Id.* at 284.

250. See *id.*

251. CHEMERINSKY, *supra* note 169, at 557.

252. *Montejo I*, 874 So.2d at 657.

253. See *id.* at 657–58.

254. See *id.* Although the court of appeals later held the authorization to be invalid

transportation and medical staff to accompany the patient during transfer, and handed over the patient's medical records.²⁵⁵ A member of Martin Memorial's health care staff even stayed at the receiving facilities to ensure that the patient would be appropriately taken care of.²⁵⁶ The case shows that if a hospital complies with EMTALA's discharge requirements before medically repatriating a patient, a property interest would not be withdrawn without appropriate procedure, and therefore, a Procedural Due Process claim would fail.

b. Deprivation of Liberty Interest

If medical repatriations of illegal aliens were characterized as deportations, instead of medical transfers, the protections of procedural due process could be applied. The Supreme Court has recognized that a loss of liberty occurs when an alien is deported.²⁵⁷ Because there is a deprivation of a liberty interest, proper procedure must be followed which includes providing notice to the alien before a deportation proceeding.²⁵⁸ The proper procedures are laid out by the Department of Homeland Security and include a hearing before an immigration judge, government proof that is "clear, unequivocal, and convincing" that the aliens can be deported, notice of the right to appeal, and seeking discretionary relief of removal.²⁵⁹

Because medical repatriations do not turn on a patient's immigration status, but rather rest upon medical judgments made by health care professionals, it is not reasonable to

due in part to insufficient evidence of an appropriate facility, this does not render the steps taken inadequate to satisfy procedural due process. *Id.* Had the evidence been sufficient, it is clear that the patient was afforded more than adequate process before being transferred.

255. *Immigrants Facing Deportation*, *supra* note 3.

256. *Id.*

257. *Chew v. Colding*, 344 U.S. 590, 596–99 (1953).

258. *See Hirsh v. INS*, 308 F.2d 562, 566 (9th Cir. 1962); *see also* Rebecca B. Chen, Comment, *Closing the Gaps in the U.S. and International Quarantine Systems: Legal Implications of the 2007 Tuberculosis Scare*, 31 HOUS. J. INT'L L. 83, 100–04 (2008) (discussing the deprivation of a liberty inherent related to involuntary quarantine or medical isolation and the associated due process implications).

259. *See* 8 U.S.C. § 1229a (2005).

consider them deportations.²⁶⁰ Nevertheless, if a court were to find medical repatriations to be deportations, a hospital would need to follow all the procedures for a deportation hearing or risk having the process deemed unconstitutional under procedural due process.

C. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment promulgates that no state may “deny to any person within its jurisdiction the equal protection of the laws.”²⁶¹

This does not guarantee that all persons are treated equally, but rather that similarly situated people are treated equally.²⁶² The goal of the Equal Protection Clause is to protect people from invidious discrimination by the government and to protect their fundamental rights.²⁶³ By virtue of the term “any person,” the Equal Protection Clause explicitly extends its protection beyond U.S. citizens to encompass noncitizens as well.²⁶⁴ The Supreme Court has, on numerous occasions, established that aliens within the U.S. are persons under the Equal Protection Clause.²⁶⁵

The Equal Protection Clause can be employed to analyze government actions that draw distinctions among people as to their ability to exercise a fundamental right.²⁶⁶ If the right

260. See *Montejo I*, 874 So.2d at 657.

261. U.S. CONST. amend. XIV, § 1.

262. *City of Cleburne v. Cleburne Living Cent.*, 473 U.S. 432, 439 (1985).

263. CHEMERINSKY, *supra* note 169, 648–49 (“Usually equal protection is used to analyze government actions that draw a distinction among people based on specific characteristics . . . [but] equal protection is [also] used if the government discriminates among people as to the exercise of a fundamental right.”).

264. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that a city ordinance that discriminated against Chinese laundry operators violated the Fourteenth Amendment); see also *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (holding that denying access to public education from the children of illegal aliens unconstitutional); *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (holding that a state law conditioning a person’s eligibility for welfare benefits on citizenship status or a fifteen year residence requirement a violation of the Equal Protection Clause).

265. See, e.g., *Yick Wo*, 118 U.S. at 369 (declaring that the provisions of the Fourteenth Amendment are “universal in their application, to all persons within the territorial jurisdiction”).

266. CHEMERINSKY, *supra* note 169, at 648–49.

infringed on by the government action is deemed a fundamental one, strict scrutiny is generally applied.²⁶⁷ Conversely, if the right is not fundamental, the courts will generally apply the rational basis test.²⁶⁸

The clause is more commonly used to analyze government actions that differentiate among people based on certain characteristics.²⁶⁹ The characteristics used by the government to make classifications will determine the appropriate level of scrutiny for the Court to apply in its analysis of the government action.²⁷⁰

1. *Is a Fundamental Right Implicated?*

As previously discussed, medical repatriation does not involve a fundamental right.²⁷¹ Thus, if equal protection were used to challenge medical repatriation as infringing upon a fundamental right, the courts would apply a rational basis test.²⁷² The test is the same under the Equal Protection Clause as under substantive due process—the action will be upheld so long as there is a legitimate government interest that is rationally related to the action.²⁷³ Here, just as with a due process claim, the maintenance of hospital solvency by eliminating the cause of exponentially accruing unreimbursed medical costs is a legitimate state interest that is more than rationally related to the medical repatriation of an illegal alien patient.

2. *Equal Protection and Alien Status*

In *Graham v. Richardson*, the Supreme Court deemed “alienage” a suspect classification and thus established the general rule that cases of classification based on alienage are reviewed under strict scrutiny.²⁷⁴ The Supreme Court has,

267. *Id.* at 763.

268. *Id.* at 764.

269. *Id.* at 642.

270. *See id.* at 645–46, 647.

271. *See supra* Part II.B.1.b.ii.

272. CHEMERINSKY, *supra* note 169, at 764.

273. *Id.* at 646.

274. *Graham*, 403 U.S. at 375.

however, drawn an important distinction bearing directly upon the level of scrutiny to be applied in alienage cases.²⁷⁵ “Alienage” and “alien status” are not synonymous. “Alien status” is a result of “conscious, indeed unlawful, action.”²⁷⁶ As such, classifications based on alien status, as opposed to alienage, do not merit strict scrutiny.²⁷⁷

In *Plyler v. Doe*, a leading case on illegal aliens and Equal Protection, the Court refused to apply strict scrutiny to a Texas statute that denied free public education to illegal alien, school-aged children.²⁷⁸ Neither did the Court apply a mere rational basis test. It instead applied, without articulating a specific level, a heightened level of scrutiny.²⁷⁹

The primary reason for using heightened intermediate scrutiny was because the affected persons were illegal alien children who, in the Court’s view, would be punished for the illegal actions of their parents.²⁸⁰ Additionally, however, the Court explained that education, though not a fundamental right, was also not merely “some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”²⁸¹ Education was important enough to merit the creation of a “quasi-fundamental right”²⁸² because it is related to the maintenance of basic U.S. institutions and its denial would have a lasting impact on the life of the denied recipient. Applying intermediate scrutiny, the Court concluded that a state’s desire to conserve limited educational resources, alone, was insufficient to justify the denial of education to illegal alien children.²⁸³

Medical repatriation, at a minimum, implicates the right to nonemergency health care. Health care is not a fundamental right but it is arguably more than some mere governmental

275. *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

276. *Id.*

277. *Id.* at 223 (noting that illegal aliens should not be treated as a suspect class).

278. *See id.* at 223–24.

279. *Id.* at 238 (Powell, J., concurring).

280. *See id.* at 220 (majority opinion).

281. *Id.* at 221.

282. *Id.* at 244 (Burger, C.J., dissenting).

283. *See id.* at 227–29 (majority opinion).

benefit, similar to education in *Plyler*.²⁸⁴ Governmental health care benefits are not, however, integral to the maintenance of any basic U.S. institutions.²⁸⁵ Despite not satisfying the first of the *Plyler* conditions for finding a quasi-fundamental right, nonemergency health care does have a lasting impact on the person being denied the care.²⁸⁶ Depriving someone of nonemergency care could inhibit that person's attainment of gainful employment and self-sufficient participation in their community.²⁸⁷ Indeed, the Supreme Court has stated that medical care is a "basic necessity of life."²⁸⁸ It follows that nonemergency health care would satisfy the second *Plyler* condition. Thus, based on the right infringed by medical repatriation of illegal aliens and the potential classification used, it is likely that an equal protection challenge would trigger intermediate scrutiny level of review.

3. *Intermediate Scrutiny Level of Review*

Under intermediate scrutiny an action will be upheld if the state can prove that the action is substantially related to an important governmental purpose.²⁸⁹ In part, medical repatriation is concerned with preserving limited financial resources and medical services for those who federally qualify to receive them.²⁹⁰ This is more than an interest in preserving the fiscal integrity of a welfare program, which the Court has indicated is a valid state interest.²⁹¹ At the same time, the Court has also shown an inclination to find such interests are not "important" for purposes of intermediate scrutiny when the

284. Sarah E. Mullen-Dominguez, Comment, *Alienating the Unalienable: Equal Protection and Valley, Missouri's Illegal Immigration Ordinance*, 52 ST. LOUIS U. L.J. 1317, 1340 (2008).

285. Mitchell Kurfis, Note, *The Constitutionality of California's Proposition 187: An Equal Protection Analysis*, 32 CAL. W. L. REV. 129, 145 (1995).

286. *Id.*

287. *Id.*

288. *Memorial Hosp. v. Maricopa Cty.*, 415 U.S. 250, 259 (1974) (internal quotation marks omitted).

289. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

290. *See Montejo I*, 874 So.2d at 656.

291. *Graham*, 403 U.S. at 374-75.

actions contain invidious discrimination.²⁹² Medical repatriation decisions, however, are not invidiously discriminatory because they are not made based on alien status.²⁹³ It follows that without finding invidious discrimination, seeking to maintain the financial viability of its hospitals is an important state interest.

Further, unreimbursed long-term health care is a substantial cause of financial trouble for hospitals.²⁹⁴ Transferring the patients whose unreimbursed care is costing U.S. acute care hospitals millions of dollars logically alleviates the impact of such debilitating costs. Thus, medical repatriation is substantially related to the important state interest of maintaining operational hospitals. Medical repatriations will therefore likely be upheld even under heightened intermediate scrutiny.

IV. CONCLUSION

Under a Fourteenth Amendment analysis, medical repatriation of illegal aliens should be permissible because under both the Due Process Clause and the Equal Protection Clause, the practice passes the applicable levels of scrutiny. As can be inferred from the foregoing analysis, the courts have not yet declared anything resembling a bright-line rule for any of the elements involved in analyzing access (or the denial) of health care benefits to illegal aliens under the Fourteenth Amendment.

An elemental aspect of any Fourteenth Amendment analysis is framing the interest or right that the challenged action implicates.²⁹⁵ To the extent that medical repatriation of illegal aliens affects the right to indefinite nonemergency health care, so long as rational basis is met, which I argue that it is, medical repatriation of illegal aliens will not be deemed unconstitutional.

292. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 227 (1982).

293. See *Montejo I*, 874 So.2d at 657 (indicating that the decision to transfer was based on medical reasons).

294. See *supra* Part I.A.

295. See CHEMERINSKY, *supra* note 169, at 643–44.

Alternatively, an equal protection analysis could focus on the characteristics used to distinguish between groups of people.²⁹⁶ Medical repatriation of illegal aliens inherently implicates an alienage classification, which gives rise to strict scrutiny level of review.²⁹⁷ The Court however has made clear that alien status, as opposed to alienage, is not a sub-suspect class and does not merit the protections of strict scrutiny.²⁹⁸ The important implications of health care may allow it to follow in the vein of education and be classified as a quasi-fundamental right and thus receive intermediate scrutiny level of review.

A state's interest in maintaining the solvency of its hospitals is, standing alone, an important state interest.²⁹⁹ This is even clearer when the public health implications of not having such hospitals are considered. Taking into account the crippling effect the unreimbursed medical expenses of the chronic care provided to illegal aliens has on hospitals, hospital decisions to medically repatriate illegal aliens are substantially related to meeting the state interest. Thus, whether under mere rational relation or heightened intermediate scrutiny, medical repatriations should pass constitutional muster.

The Court's determination of this issue would have a profound, far reaching effect on subsequent constitutional challenges to actions involving illegal aliens and the access to government benefits, especially health care. Notwithstanding those effects, I believe that the issues created by medical repatriation call for legislative, not judicial, resolution. Federal legislative guidance would provide a uniform framework in which to navigate the issues presented by medical repatriation. Because immigration and health care are national issues, a patchwork of state laws and court decisions would merely result in increased confusion and inconsistencies.

296. *See id.* at 645.

297. *Id.*

298. *Plyler v. Doe*, 457 U.S. 202, 219–20 (1982).

299. *Graham*, 403 U.S. at 375.