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Obligatory Health

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Article

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The Supreme Court will soon rule on the constitutionality of the Patient Protection and Affordable Care Act passed in March 2010. Courts thus far are divided on the question whether Congress had authority under the Commerce Clause to impose the Act's "Individual Mandate" to purchase health insurance. At this moment, the public and legal debate can benefit from a clearer understanding of the underlying rights claims. This Article offers two principal contributions. First, the Article argues that, while the constitutional question technically turns on the interpretation of congressional power under the Commerce Clause, underlying these debates is a tension between liberty and equality. At a time when some scholars are emphasizing the convergence of liberty and equality, the healthcare debates accentuate the friction between these two foundational principles of American jurisprudence. Second, this Article offers a supplement to the rights-based orientation of both liberty and equality claims: the perspective of individual obligation. The Article argues that a society committed to values such as equality may sometimes need to achieve its goals through the recognition of individual obligation. The Act embodies this insight. It is legislation that simultaneously reflects social commitment to equality and the individual obligation of members of society to help others realize their basic human needs.

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INTRODUCTION

Of course, I believe that every child has a right to decent education and shelter, food and medical care . . . . I do believe and affirm the social contract that grounds those rights. But more to the point I also believe that I am commanded – that we are obligated – to realize those rights.

– Robert Cover[1]

Does every U.S. citizen have a right to affordable healthcare? If so, who is responsible for the realization of that right? In enacting the Patient Protection and Affordable Care Act ("PPACA" or "the Act") in March 2010, Congress seems to have answered "yes" to the first question.[2] This Article attempts to answer the second question by suggesting that alongside the *right* of individuals to affordable healthcare, we might also consider an *obligation* of individuals to ensure that all members of society can realize that right. The Article argues that the Patient Protection and Affordable Care Act embodies both the right and the obligation, and should be viewed as responsible and ethical legislation.

The main legal question that has busied courts and scholars is the constitutionality of Section 1501 of the Act, also known as the "Minimum Essential Coverage Provision" or "the Individual Mandate." Section 1501 requires that every U.S. citizen (other than those falling within special exceptions) maintain a monthly minimum level of health insurance coverage beginning in 2014.[3] Those who fail to comply will incur a penalty included with the taxpayer's annual return.[4] To date, two circuit courts and three district courts have upheld this provision,[5] one circuit court and two district courts have invalidated it,[6] and scholars are split on whether or not it is constitutional and how the Supreme Court will eventually rule on this question.[7]

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1. Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 73-74 (1987).

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). Key provisions of the Act will go into force in 2014.

3. "An applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage for such month." Patient Protection and Affordable Care Act § 1501.

4. *See id.*

5. *See* Thomas More Law Ctr. v. Obama, 651 F.3d 529 (6th Cir. 2011); Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011); Mead v. Holder, 766 F. Supp. 2d 16 (D.D.C. 2011); Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882 (E.D. Mich. 2010).

6. *See* Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011) (affirming Florida *ex rel.* Bondi v. U.S. Dep't of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011)); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) (vacated by Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011)).

7. *See, e.g.*, Jack Balkin, *The Constitutionality of the Individual Mandate for Health Insurance*, 362 NEW ENG. J. MED. 482 (2010); Randy E. Barnett, *Commandeering the People: Why the Individual Health Care Mandate is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581 (2010).

This Article is composed of three main Parts. Part I introduces the contrast between rights and obligations as core principles of two different legal systems. In *Obligations: A Jewish Jurisprudence of the Social Order*, a lesser-known Article published shortly before his death, Robert Cover contrasts the American rights-based legal system with the Jewish obligation-based legal system.[8] Cover offers a fascinating account of the founding myths of the two legal systems—Mount Sinai versus the Social Contract—and argues that, for a full realization of human rights and dignities, both myths are necessary. This Part examines these founding myths in order to set the ground for a broader legal and political evaluation of the Individual Mandate.

Part II shows that the Individual Mandate has so far been considered primarily through the prism of rights. The intense legal and political debates about the Individual Mandate have so far turned on a conflict between two rights: liberty and equality. The Article demonstrates that while the validity of the Individual Mandate formally turns on Congressional power under the Commerce Clause, the underlying and more meaningful conflict here is between these two competing rights. Courts upholding the Individual Mandate have relied heavily on equality-based rationales. By contrast, courts striking down the Individual Mandate have promoted liberty-based rationales. Interestingly, whereas some recent scholarship emphasizes the convergences between liberty and equality in the jurisprudence of the Court,[9] the Individual Mandate debates accentuate the tensions between these principles.

Part III proposes that the legal, political, and cultural understanding of the Individual Mandate would greatly benefit from a perspective of individual obligation. The Article argues that a comprehensive consideration of the Individual Mandate should involve a theory of rights *alongside* a theory of obligations. The idea that individuals in society may have some obligation toward the healthcare of others may enrich the legal, cultural, and political assessment of the Individual Mandate.

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8. Cover, *supra* note 1. Writing in another context, William Eskridge has opined that "[a]n understanding of citizenship that considers obligations as well as rights can also enrich our understanding of the Fourteenth Amendment . . . ." Eskridge considers how a theory of obligations might apply to the jurisprudence of race, and the evolving jurisprudence of sexuality, sex, and gender. William Eskridge, *The Relationship Between Obligations and Rights of Citizens*, 69 FORDHAM L. REV. 1721, 1722, 1727 (2001). For other interesting treatments, see Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993); Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look At American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 CATH. U.L. REV. 165 (2007).

9. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748-49 (2011) ("[T]he Court has moved away from group-based equality claims under the guarantees of the Fifth and Fourteenth Amendments to individual liberty claims under the due process guarantees of the Fifth and Fourteenth Amendments. This move reflects what academic commentary has long apprehended—that constitutional equality and liberty claims are often intertwined."); Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897-98 (2004); Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. Rev. 1491, 1541 (2002).

I. TWO MYTHS OF ORIGINS

Just as the myth of social contract is essentially a myth of autonomy, so the myth of Sinai is essentially a myth of heteronomy.
—Robert Cover[10]

"Every legal Culture has its fundamental words," writes Cover.[11] The fundamental word in the American legal system is "rights," and it is based on the story of social contract.[12] This myth assumes "free and independent if highly vulnerable beings who voluntarily trade a portion of their autonomy for a measure of collective security."[13] The myth of social contract makes the state the product of individual choice (and therefore secondary to it). The individual metaphorically chooses the state by choosing to enter the social contract. As Cover explains, "'Rights' are the fundamental category because it is the normative category which most nearly approximates that which is the source of the legitimacy of everything else."[14] Individuals, under this myth, "trade in" some of their rights in exchange for collective security. The fundamental unit here is the individual, and the possession of rights locates the individual "separate and apart from every other individual."[15]

Not all theories that are founded upon rights are individualistic. As Cover explains, "Collective solutions as well as individualistic ones are possible, but it is the case that even the collective solutions are solutions that arrive at their destination by way of a theory that derives the authority of the collective from the individual."[16] Cover importantly reminds us that even what we think of as egalitarian collective solutions are usually based on theories of individual rights that extract the authority of the state from the rights of the individual. In that sense, both egalitarian and libertarian theories are children of the social contract story because they both trace the authority of the community back to individual rights.

In Jewish law, the equivalent term to "right" is "mitzvah." The literal interpretation of the word "mitzvah" is commandment, but in the Hebrew language it generally means obligation.[17] The word "mitzvah" is also "intrinsically bound up in a myth—the myth of Sinai."[18] Sinai is an experience of a collective, of all of the people of Israel who were led by Moses out of Egypt. Together, as a group, they received the written law, the

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10. Cover, *supra* note 1, at 66.
11. *Id.* at 65.
12. *Id.* at 66.
13. *Id.*
14. *Id.*
15. *Id.*
16. Cover, *supra* note 1, at 66.
17. In Hebrew the word duty (*chova*) corresponds to right (*zchut*) and has a different meaning from the word *mitzvah*. The word *chova* (duty) does not carry with it a moral-ethical-religious weight that the word *mitzvah* does.
18. Cover, *supra* note 1, at 66.

Torah. According to rabbinical authorities, alongside the Torah, in Sinai the "Oral Law" was given to Moses.[19]

The myth of the social contract is one of *autonomy* whereas the myth of Sinai is one of *heteronomy.*[20] At the core of the myth of the social contract stands the individual; and in the myth of Mount Sinai, the community. Cover contrasts two key features of the myths: (1) the number of imagined participants; and (2) choice or lack thereof.

First, Cover invites us to consider the imagined participants in these two mythic lawmaking moments. It might seem silly to ask how many people attended a mythical event. But this turns out to be one of the critical aspects of both myths. What gives force to the Sinai myth is that *all Jews attended it.* According to Jewish tradition, "[a]ll law was given at Sinai and therefore all law is related back to the ultimate heteronomous event."[21] Thus all Jews are bound by *mitzvot.* It is a myth of a heteronomous event.

A key aspect of the myth of Mount Sinai is that all *future* generations were present there, and are thus bound by obligation.[22] Another way of putting this is that the myth of Mount Sinai is not exactly a myth of a past event. As Franz Rosenzweig writes, "for us too, above all the miracle of Sinai, the gift of the Torah, and not even the Exodus from Egypt, signifies the Revelation which accompanies us constantly as present."[23] It is interesting that the Exodus from slavery in Egypt, as Rosenzweig emphasizes, must be remembered (in the holiday of Passover) but the Torah and Mount Sinai do not need to be remembered; they are present.[24] Hence liberty must be taught and remembered, whereas obligation is simply present.

By contrast, a shared community experience is not part of the social contract myth. Yes, theoretically we could have all been there together. But the myth does not turn on that—or even posit that. We might imagine thousands of people calling out "I do" in an ancient stadium, but we could just as well imagine a one-by-one march of individuals into the executive boardroom to sign the Social Contract. The point is that the source of state authority and the justification for obedience to law does not turn on how many people attended the event of the social contract. In that sense, the social contract is a myth about autonomy whereas Sinai is a myth about heteronomy.

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19. *See* MENACHEM ELON, JEWISH LAW: HISTORY, SOURCES, PRINCIPLES 192-94 (Bernard Auerbach & Melvin J. Sykes trans., 1994). The Oral Law included all of the "subtleties of Biblical exegesis, and the new interpretations of the *soferim* (scribes) and everything that the *soferim* would later establish." *Id.*

20. Cover, *supra* note 1, at 66

21. *Id.*

22. JONATHAN SACKS, A LETTER IN THE SCROLL: UNDERSTANDING OUR JEWISH IDENTITY AND EXPLORING THE LEGACY OF THE WORLD'S OLDEST RELIGION 14 (2004).

23. FRANZ ROSENZWEIG, THE STAR OF REDEMPTION, 387 (2005). The Christian analogy to the constant presence of Mount Sinai, according to Rosenzweig, is the cross. *Id.* ("So for the Christian it is not the manger, but the Cross that is always present; he holds the latter and not the former before his eyes; as is said by us of the Torah, so could be said by him of the Cross, it must be 'in his heart so that his steps do not slip.'").

24. *Id.*

Second, Cover's distinction between the two myths also turns on an idea of free choice. The gist of the social contract myth is that co-signers are bound by state law because they freely *chose* to enter a contract wherein each individual waived some rights. In that sense individuals who entered (or would rationally enter) a social contract are bound by law based on a theory of autonomy—a freedom to contract.[25] In contrast, the myth of Mount Sinai reflects no such choice. Moses told the people to come to the mountain. They obeyed and received the Torah.[26]

Cover characterizes the acceptance of the Torah in Mount Sinai as "passive,"[27] though we need not read it in this way. The radical acceptance of the Torah, though very different from the signing of a contract, should not be conflated with passive or childish obedience. In a famous and puzzling passage in the book of Exodus, Moses reads to the people of Israel what he had just heard from God. The crowd responds, "all that the Lord has spoken *we shall do and we shall hear.*"[28] Interpreters of the text have long wondered why the doing precedes the hearing. Would it not make more sense for the Israelites to hear what the Lord has said before obeying?

What does it mean to say "we shall do" before "we shall hear"? Martin Buber has attempted to resolve this paradox by interpreting the text: "we shall do *in order to* understand."[29] But perhaps the reversal of reason and deed should not be "resolved" or dismissed. Perhaps this reversal illuminates the Mount Sinai experience. Emmanuel Levinas suggests that reversing the doing and the hearing captures the uniqueness of the event of Mount Sinai because it is an undertaking of an individual and communal obligation that is not deducted from any reason or prior norm.[30]

Mount Sinai and the Social Contract are two powerful and differently structured myths of legal origins—of moments when it all began. In the myth of Mount Sinai, a group of former slaves stands together at the heel of a mountain in the desert and declare a commitment to a system of obligation. In the myth of the Social Contract, a group of rational individuals decides to form a society in which they will give away some of their rights in exchange for security and other goods. These two myths do not necessarily contradict each other, and each has in fact greatly influenced the culture and law of liberal democracies. The Individual Mandate, as this Article will explain, can be understood to reflect a unique and

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25. JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 23-25 (G. D. H. Cole trans., 2008).

26. *Exodus* 19:10-19:17 (King James).

27. Cover, *supra* note 1, at 66 ("The experience at Sinai is not chosen...All law was given at Sinai and therefore all law is related back to the ultimate heteronomous event in which we were chosen-passive voice.").

28. *Exodus* 24:7 (my translation from Hebrew). The King James translation reads: ". . . and they said, All that the Lord hath said will we do, and be obedient." Interestingly, the King James version better fits Cover's characterization of passive voice.

29. *See* EMMANUEL LEVINAS, NINE TALMUDIC READINGS 42 (Annette Aronowicz trans., 1990).

30. *Id* at 47-49 ("The Torah is given in the Light of a face. The epiphany of the other person is *ipso facto* my responsibility toward him: seeing the other is already an obligation toward him. A direct optics—without the mediation of any idea—can only be accomplished as ethics.").

commendable hybrid of the myths.

II. RIGHTS AND THE INDIVIDUAL MANDATE

Equality and social justice are the primary legislative goals behind the Patient Protection and Affordable Care Act. As evident from its title, the Act seeks to protect current and future patients by making health insurance affordable and available to all U.S. citizens. As of 2009, almost seventeen percent of the non-elderly adult population did not have any form of health insurance.[31] The Act seeks to cure this problem. The "Minimum Essential Coverage Provision" ("the Individual Mandate") requires that, beginning in 2014, most U.S. citizens maintain monthly "minimum essential coverage" for healthcare.[32] Congress determined that the Individual Mandate is necessary because in its absence the Act might increase individual incentives *not* to purchase health insurance until one needs care, and this would significantly increase the price of healthcare.[33] Thus, obliging each individual to buy healthcare is necessary in order to establish a system that provides access to healthcare for all its citizens.[34]

But the Individual Mandate's promotion of equality and social justice is not costless. For those who wish to be uninsured (the "willfully uninsured"), the Individual Mandate is an imperative to purchase insurance—a direct impingement on individual liberty. Thus, even before its enactment, the Individual Mandate became a site of contestation: its supporters have presented it as a necessary measure to promote equality

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31. Carmen DeNavas-Walt et al., U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2009*, 22 (September 2010).

32. The Act imposes a penalty for failure to comply that is included with an individual's tax return. Notably, the Individual Mandate does not apply to those who fall within a specified exception. Philip Hamburger has pointed out that another serious constitutional question that the statute creates is one of waivers. *See* Philip Hamburger, *Are Health-care Waivers Unconstitutional?*, NATIONAL REVIEW ONLINE (Feb. 8, 2011) http://www.nationalreview.com/articles/259101/are-health-care-waivers-unconstitutional-philip-hamburger. According to Hamburger, the waivers granted by the statute raise "questions about whether we live under a government of laws. Congress can pass statutes that apply to some businesses and not others, but once a law has passed—and therefore is binding—how can the executive branch relieve some Americans of their obligation to obey it?" *Id.* Hamburger concludes that "the current administration is claiming such a power to decide that some people do not have to follow the law. This is dangerous, above the law, and unauthorized by the Constitution." *Id.*

33. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1501(a)(2)(I), 124 Stat. 119 (2010). Those incentives might be the result of the following other aspects of the Act: the Act prohibits private insurance companies from denying coverage to those with pre-existing medical conditions, and from setting eligibility rules based on medical factors or claims experience, or from rescinding coverage other than for fraud or misrepresentation; provides incentives for expanded group plans through employers; provides tax credits for low-income individuals and families; and provides increased federal subsidies to state-run programs. *See id.* §§ 1001, 1201, 1401-1402, 1421, 1513, 2001(a)(3)(B).

34. The Sixth Circuit in *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011) affirmed this equal access rationale by asserting that the minimum coverage provision is necessary because it helps Congress lower the cost of health insurance premiums, and it prevents exclusion from coverage based on pre-existing conditions.

and social justice; and its opponents, as an illegitimate intrusion on liberty. This tension between liberty and equality has been manifested in court decisions and scholarly debates regarding whether Congress exceeded its authority under the Commerce Clause when it enacted the Individual Mandate.

A. The Liberty-Driven View

At the heart of current objections to the Individual Mandate is a claim for liberty.[35] Challengers of the Individual Mandate champion the liberty of individuals not to enter unwilled transactions. This view is perhaps best captured by Randy Barnett's critical characterization of the Individual Mandate as an unconstitutional "commandeering of the people."[36] He predicts that the Supreme Court will strike down the statute on this basis.[37]

The theory of "commandeering the people" is based on a principle that developed in the Court's jurisprudence in the 1990s. In *New York v. United States*, the Court held that requiring states that refuse entry into agreements to dispose of nuclear waste to become title holders of that waste constitutes unconstitutional commandeering of state legislatures.[38] Justice O'Connor explained that Congress does not have the constitutional authority "to require the States to govern according to Congress' instructions."[39] This would be an unconstitutional "commandeering" of states.[40] Next, in *Printz v. United States*, the Court held that Congress exceeded its powers under the Commerce Clause when it required that local sheriffs run background

35. Some have framed this legal discussion around the distinction between activity and inactivity. *See, e.g.*, Virginia ex *rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 781 (E.D. Va. 2010) ("Every application of Commerce Clause power found to be constitutionally sound by the Supreme Court involved some form of action, transaction, or deed placed in motion by an individual or legal entity."); Barnett, *supra* note 7. However, most courts and scholars have either dismissed the activity/inactivity distinction or rejected the characterization of not purchasing health insurance as "inactivity." *See* Thomas More 652 F.3d at 547 ("the text of the Commerce Clause does not acknowledge a constitutional distinction between activity and inactivity, and neither does the Supreme Court. Furthermore, far from regulating inactivity, the provision regulates active participation in the health care market."); Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1286 (11th Cir. 2011) ("we are not persuaded that the formalistic dichotomy of activity and inactivity provides a workable or persuasive enough answer in this case . . . . [t]he Court has never expressly held that activity is a precondition for Congress's ability to regulate commerce. . ."); Mead v. Holder, 766 F. Supp. 2d 16, 37 (D.D.C. 2011) (characterizing the regulated behavior as a decision rather than inactivity); Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 633 (W.D. Va. 2010) ("The conduct regulated by the individual coverage provision—individuals' decisions to forego purchasing health insurance coverage—is economic in nature . . . .").

36. Barnett, *supra* note 7.

37. *See id.*

38. New York v. United States, 505 U.S. 144 (1992).

39. *Id.* at 162.

40. *Id.* at 176 ("the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program, an outcome that has never been understood to lie within the authority conferred upon Congress by the Constitution.") (citation omitted).

checks on gun buyers.[41] According to the Court, per Justice Scalia, the requirement improperly commandeered state executive branch officials.[42]

Although the principle of anti-commandeering has so far been applied to states and not to individuals, Barnett argues that courts should forbid the commandeering of individuals as well.[43] The Individual Mandate constitutes "the commandeering of the people as a means of regulating interstate commerce."[44] By forcing citizens to enter into contracts with private insurers, the Individual Mandate may have the undesired effect of turning "citizens into subjects."[45] Through rhetoric of regression from "citizens" to "subjects" Barnett marks what he views as a serious threat to individual liberty. Citizens possess liberty. Subjects do not.

A similar view of individual liberty is also at the core of the Eleventh Circuit's invalidation of the Individual Mandate in Florida v. U.S. Dep't of Health and Human Services, currently before the Supreme Court.[46] The Eleventh Circuit clarified that the ultimate goal of the constitutional structure is "the protection of individual liberty."[47] Like Barnett, the court framed the question raised by the Individual Mandate as "whether the federal government can *issue a mandate that Americans purchase* and maintain health insurance from a private company for the entirety of their lives."[48] By characterizing the Individual Mandate as a "mandate to purchase" (as opposed to a requirement to self-insure) the court revealed its liberty-oriented view.

In a three-step analysis the court struck down the Individual Mandate. The first two steps are primarily concerned with protecting the liberty interests of the willfully uninsured; the third with state sovereignty. First, the court underscored the unprecedented threat of the Individual Mandate to individual liberty by announcing that "what the Court has never done is interpret the Commerce Clause to allow Congress to dictate the financial decisions of Americans through an economic mandate."[49] Mandating purchases by individuals is a novelty that no Congress had attempted before, and no court has validated before.[50]

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41. Printz v. United States, 521 U.S. 898 (1997).

42. *Id.* at 914.

43. Barnett, *supra* note 7, at 636 ("The minimalist character of this theory is likely to appeal to Chief Justice Roberts, as well as Justices Kennedy, Alito and Scalia . . . extending its anti-commandeering doctrine from the states to the people would be novel, but this is due entirely to the novelty of the individual mandate itself.").

44. *Id.*

45. *Id.* at 637.

46. Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir. 2011), *cert. granted in part*, 132 S. Ct. 604 (2011). *See also* Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768 (E.D. Va. 2010) (vacated by Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011)) ("Neither the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual to involuntarily enter the stream of commerce by purchasing a commodity in the private market. In doing so, enactment of [Section 1501] exceeds the Commerce Clause powers vested in Congress under Article I.").

47. *U.S. Dep't of Health & Human Servs.* 648 F.3d at 1284.

48. *Id.* at 1287 (emphasis added).

49. *Id.* at 1288.

50. *Id.* at 1289 ("Even in the face of a Great Depression, a World War, a Cold War,

Second, the court considered whether the Individual Mandate can be legitimized by the substantial effects doctrine.[51] The court concluded that it cannot.[52] The Individual Mandate, according to the court, is simply too expansive in scope,[53] and its legitimation by the substantial effects doctrine would mean that "the mere fact of an individual's existence substantially affects interstate commerce, and therefore Congress may regulate them at every point of their life."[54]

Finally, the court raised the concern that healthcare is an area that is traditionally a concern of states and not of the federal government. This, combined with the other constitutional obstacles, led the court to conclude that Congress exceeded its power by enacting the Individual Mandate.[55] The court declared that "what Congress cannot do under the *Commerce Clause* is mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die."[56]

B. The Equality-Driven View

In contrast with the liberty-driven view that underscores the Individual Mandate's cost to individual liberty, the equality-driven view elaborates its potential benefits to equality and social justice. The Individual Mandate is understood as a necessary component of an Act "designed to improve access to the healthcare and health insurance markets, reduce the escalating costs of healthcare, and minimize cost-shifting."[57] Although equality and

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recessions, oil shocks, inflation, and unemployment, Congress never sought to require the purchase of wheat or war bonds, force a higher savings rate or greater consumption of American goods, or require every American to purchase a more fuel efficient vehicle.").

51. *Id.* at 1292. The Supreme Court has developed a three-pronged test to determine whether a federal statute falls within Congress's authority under the Commerce Clause. U.S. v. Lopez, 514 U.S. 549, 558-59 (1995). First, Congress can regulate "the use of the channels of interstate commerce." *Id.* at 558. Second, Congress can protect "the instrumentalities of interstate commerce, or persons or things in interstate commerce." *Id.* Third, Congress can regulate "those activities having a substantial relation to interstate commerce." *Id.* at 558-59. The discussion of the Individual Mandate turns on whether it falls under the third category, known as the substantial effects doctrine.

52. *U.S. Dep't of Health & Human Servs.* 648 F.3d at 1292.

53. The court dismissed the application of the aggregation doctrine, which authorizes Congress "to apply an otherwise valid regulation to a class of intrastate activity it might not be able to reach in isolation . . . [since] any person's decision not to purchase a good would, when aggregated, substantially affect interstate commerce in that good." *Id.* In rejecting the application of this doctrine the court noted that "[a]lthough any decision not to purchase a good or service entails commercial consequences, this does not warrant the facile conclusion that Congress may therefore regulate these decisions pursuant to the Commerce Clause." Id. at 1292-93.

54. *Id.* at 1295 ("This theory affords no limiting principles in which to confine Congress's enumerated power.").

55. *Id.* at 1305.

56. *Id.* at 1311. In addition, the court held that that the Individual Mandate is a civil penalty and not a tax, and as such, it must be justified in a different enumerated power than the power to tax. *Id.* at 1314.

57. Thomas More Law Ctr. v. Obama, 651 F.3d 529, 532 (6th Cir. 2011).

social justice are not always explicitly mentioned by courts and scholars who support the Individual Mandate, they are its underlying rationales. If one were to interrogate why Congress seeks to improve access to healthcare at the national level and reduce its escalating costs, the answer would most likely involve some version of the aspiration that participants in a liberal-democracy have access basic health coverage. This aspiration is based in equality.[58]

The Individual Mandate attempts to solve an acute phenomenon of social injustice. As mentioned above, as of 2009, almost seventeen percent of the non-elderly adult population does not have any form of health insurance.[59] The Individual Mandate requires that everyone participate in the health insurance markets so the entire population can afford coverage.[60] According to Congressional findings, the Individual Mandate and the other provisions of the Act will "add millions of new consumers to the health insurance market, increasing the supply of, and demand for, health care services."[61] This should result in the desired goal of "near-universal coverage by building upon and strengthening the private employer based health insurance system, which covers 176,000,000 Americans nationwide."[62] Thus President Obama declared at the signing of the bill that this is the type of social reform that "generations of Americans have fought for and marched for and hungered to see."[63]

These goals of equality and social justice have been validated by the courts that have so far upheld the Individual Mandate. For example, in *Thomas More v. Obama*,[64] the Sixth Circuit, in upholding the Act under the Commerce Clause, praised the two key policy goals embodied by the

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58. Notably, the justification for the Act could also be grounded in a broader set of ideas about democracy or in positive liberty (as opposed to negative). *See, e.g.*, Isaiah Berlin, *Two Concepts of Liberty* in FOUR ESSAYS ON LIBERTY (1969). The term "equality" is used in this Article as a short-hand for these types of approaches to social justice. I thank Andrew Lund for discussing this point with me.

59. U.S. Census Bureau, *supra* note 31, at 22.

60. 42 U.S.C. § 18091 (2006). *See also* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1501, 124 Stat. 1029 (2010).

61. 42 U.S.C. § 18091 (2006).

62. *Id. See also* Patient Protection and Affordable Care Act, §1557(a) ("Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.").

63. Sheryl Gray Stolberg & Robert Pear, *Obama Signs Health Care Overhaul Bill, With a Flourish*, N.Y. TIMES, Mar. 24, 2010, at A19.

64. 651 F.3d 529 (6th Cir. 2011).

Individual Mandate: (1) lowering health insurance premiums;[65] and (2) preventing exclusion from coverage of patients based on pre-existing conditions.[66] The court recited the legislative intent behind the Individual Mandate: it is "an essential cog" in a scheme to "reform the national markets in health care delivery and health insurance."[67] The court agreed with the government that the activity of the uninsured substantially affects interstate commerce,[68] and that the Individual Mandate is constitutional because it aims to make healthcare attainable for the entire population.[69]

C. Equality v. Liberty

Although the equality-based view and the liberty-based view reach different conclusions about the main legal question—the constitutional validity of the Individual Mandate—both approaches reflect deep commitments to theories of individual rights. The liberty-based view challenges the Individual Mandate primarily because it impinges on individual liberty by requiring individuals to purchase health insurance policies. The equality-based view embraces the Individual Mandate primarily because it seeks to rectify acute and discriminatory inequities in individual access to healthcare.

The Supreme Court will soon decide whether the Individual Mandate is constitutional. How will the Court balance the equality arguments of one side with the liberty arguments of the other? In recent years scholars have traced a convergence of the right to liberty and the right to equality in the Court's jurisprudence. Kenji Yoshino, for example, has recently argued that the Supreme Court has shifted from its traditional equal protection jurisprudence to a "liberty-based dignity jurisprudence."[70] According to Yoshino, this approach "synthesizes both equality and liberty claims, but leads with the latter to quiet pluralism anxiety in an increasingly diverse

65. *Id.* at 535 (citing 42 U.S.C. § 18091(2)(F)).

66. *Id.* (citing 42 U.S.C. § 18091(2)(I)).

67. *Id.* at 534.

68. *Id.* at 544 ("Congress had a rational basis to believe that the practice of self-insuring for the cost of health care, in the aggregate, substantially affects interstate commerce. An estimated 18.8% of the non-elderly United States population (about 50 million people) had no form of health insurance for 2009. Virtually everyone requires health care services at some point, and unlike nearly all other industries, the health care market is governed by federal and state laws requiring institutions to provide services regardless of a patient's ability to pay. The uninsured cannot avoid the need for health care, and they consume over $100 billion in health care services annually.") (citations omitted).

69. Similarly, in *Liberty University*, a Virginia district court viewed the Individual Mandate as essential, primarily because leaving the willfully uninsured unregulated would drive up prices of insurance policies and shift the costs of healthcare to other market participants. Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611, 634 (W.D. Va. 2010) ("[W]ithout it, individuals would postpone health insurance until they need substantial care, at which point the Act would obligate insurers to cover them at the same cost as everyone else."). The court also rejected the plaintiffs' contention that the penalty provisions of the Act are unconstitutional capitation or direct taxes. *Id.* at 648.

70. Yoshino, *supra* note 9, at 799.

society."[71]

Under what has been called the "new equal protection" framework, the Court is understood to prefer rights claims grounded in liberty over those grounded in equality. If the Court in the healthcare context follows this preference, we may see a surprising articulation of a right to health under a theory of liberty.[72] But regardless of how the Court frames a right to health, it is important to see that unlike cases such as *Lawrence v. Texas*[73] or *Perry v. Schwarzenegger*[74]—in which there is no real tension between liberty and equality for the protected groups—in the healthcare debates there is a strong tension between the liberty and equality arguments. In fact, at least some versions of equality and liberty are irreconcilable here, and the Court will have to choose one over the other. And while the right to health could also be framed as a "liberty-based dignity claim," this right would inevitably compete with another liberty—the liberty not to be coerced into forming a contract. Interestingly, in light of the claims of a "new equal protection" or "legal double helix,"[75] the Court might have to end up balancing two different liberty claims: liberty *from* coerced contracting and liberty *to* have healthcare.[76]

In sum, the primary legal issue triggered by the Individual Mandate, its constitutionality under the Commerce Clause, has elicited two strands of rights-based rationales: one based in liberty, the other in equality. Under the former, the Individual Mandate is an unconstitutional imperative to enter involuntary contracts with private insurers; under the latter, it is a constitutional, equality-driven regulation of irresponsible participants in healthcare markets. The leading value under the former view is liberty *from* contracts; and under the latter view, equal access to healthcare. The Supreme Court will soon resolve the conflict between liberty and equality in the context of the Individual Mandate. The next Part argues that in moving towards this resolution, the legal and cultural conversation about individual rights would be enhanced by a notion of individual obligation.

III. INTEGRATING A THEORY OF OBLIGATION

Debates about the Individual Mandate, as we have seen, reflect competing approaches to individual rights. But the understanding of this legislation is incomplete without a notion of individual obligation. The

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71. *Id.* at 802.

72. Yoshino's theory seems to support this prediction both on a descriptive and a normative level. *Id.* at 794 ("As the polity becomes more diverse, such 'rights talk' can be a ground on which to create coalitions that embody broader, more inclusive forms of 'we.' For instance, movements for a 'right to education,' a 'right to health care,' a 'right to welfare,' or a 'right to vote' that cut across traditional identity politics groups might helpfully erode the traditional group-based distinctions among them.").

73. Lawrence v. Texas, 539 U.S. 558 (2003).

74. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

75. Tribe, *supra* note 9, at 1897-98.

76. *See supra* note 58.

Individual Mandate places an *explicit obligation* on individuals to participate in a plan that strives to guarantee healthcare for all. Unlike some welfare states that provide direct state funding of health for all citizens,[77] the Individual Mandate places at least some of this funding burden on individuals. In doing so, the Individual Mandate seems to recognize an individual right to health at the same time that it declares an individual obligation to contribute to the health of others.

The dominant tradition of liberal rights in the United States has long existed in tension with a tradition of obligations. This tension, as William Eskridge has pointed out, was already apparent in nineteenth-century political philosopher Francis Lieber's *Manual of Political Ethics*, where Lieber observed that a polity where men "claim, maintain, or establish rights" cannot be a lawful or ordered society "without acknowledging corresponding and parallel obligations."[78]

The notion of individual obligation offers another perspective in the evaluation of the Individual Mandate. As we saw in Part I, Cover traces the current rights-based U.S. constitutional jurisprudence to the myth of the social contract. He counters this with an obligation-based Jewish jurisprudence that can be traced to the myth of Mount Sinai. Cover's text does not advocate replacing a theory of rights with a theory of obligations. Instead, he seeks to complement rights with obligations, explaining that to achieve greater human rights and dignities, "[t]here is no question that we can use as many good myths . . . as we can find."[79]

A. Individual Obligation

Obligation is the principal word in Jewish legal culture. One of the unique aspects of Jewish Law is that although it combines rules that are purely religious (such as fasting on *Yom Kippur*) with rules that are purely legal (such as business, labor, and tort rules) its entirety is born out of *religious obligation*.[80] Namely, the obligation to fast on *Yom Kippur* and the obligation to deal in good faith come from the same source: religious obligation. Jewish Law has existed for more than three thousand years

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77. Vassilis Hatzopoulos, *Financing National Health Care in a Transnational Environment: The Impact of the European Community Internal Market*, 26 WIS. INT'L L.J. 761, 767-69 (2008) (listing European states, including the United Kingdom, Ireland, Denmark, Finland, Sweden, Spain, Portugal, Italy, and Greece).

78. Eskridge, *supra* note 8, at 1722-23 (quoting Francis Lieber, MANUAL OF POLITICAL ETHICS 383-411 (Theodore D. Woolsey ed., 2d ed. rev. 1911) (1838)). Lieber further writes: "It is natural, therefore, that wherever there exists a greater knowledge of right, or a more intense attention to it, than to concurrent and proportionate obligation, evil ensues. . . The very condition of right is obligation; the only reasonableness of obligations consists in rights. Since, therefore, a greater degree of civil liberty implies the enjoyment of more extended acknowledged rights, man's obligations increase with man's liberty. Let us, then, call that freedom of action which is determined and limited by the acknowledgment of obligation, Liberty; freedom of action without limitation by obligation, Licentiousness. The greater the liberty, the more the duty."). *Id.* at 1723.

79. Cover, *supra* note 1, at 73.

80. ELON, *supra* note 19, at 4-5

during most of which Jews enjoyed no state or political independence.[81] However, the lack of political independence and the exile from the homeland, as Menachem Elon writes, "did not result in the abrogation of judicial autonomy."[82] In fact, the Jewish legal system not only survived, "but its most vigorous development occurred when the people were widely scattered throughout the diaspora."[83] For most of these years, the leaders of the Jewish communities successfully negotiated for relative legal independence within the countries in which they resided.[84] The legal rules that flourished reflected the obligations and responsibilities of a community with a separate social, economic, and essentially Jewish public life, in which only a few formal legal sanctions were actually available.[85] Consequently, an obligation-based legal system flourished.

As Cover argues, a system of obligation is equipped to overcome some of the problems that may arise in a system of rights. In particular, "the jurisprudence of rights has proved singularly weak in providing for the material guarantees of life and dignity flowing from the community to the individual."[86] The point is not that rights cannot theoretically achieve the full guarantees of life and dignity, but that American rights jurisprudence, in its primary focus on negative rights and on non-interference, has proved weak in doing so. "While we may talk of the right to medical care, the right to subsistence, the right to an education," writes Cover, "we are constantly met by the realization that such rhetorical tropes are empty in a way that the right to freedom of expression or the right to due process are not."[87] Cover draws a distinction here between two types of rights: those that have been successfully realized in U.S. constitutional jurisprudence (free speech, due process), and those that have not (health, education).

There is a difference between restraining state power and granting rights to education or health. In restraining state power, "the intelligibility of the principle remains because it is always clear who is being addressed—whoever it is that acts to threaten the right in question."[88] If the state takes something from you, such as property, speech, or the right to make private intimate decisions, then the state is the addressee of the rights claim. One makes a claim against the state to recover for whatever the state has wrongfully taken or prohibited. But a right to health or education is "not even an intelligible principle unless we know to whom it is addressed."[89] In other words, the state can recognize or declare general rights to health or

81. *Id.* at 1.
82. *Id.* at 2.
83. *Id.*
84. *Id.* at 7-8. Thus religious Jewish law applied to private law (property, acquisitions, obligations, family matters, succession), as well as to some aspects of public law. *Id.* at 10.
85. *See id.* at 11. *See also* Neil W. Netanel & David Nimmer, *Is Copyright Property? The Debate in Jewish Law*, 12 THEORETICAL INQUIRIES IN L. 217, 241 (2011) (describing the use of excommunication as a sanction for those who violated an exclusive printing privilege).
86. Cover, *supra* note 1, at 71.
87. *Id.*
88. *Id.*
89. *Id.*

education (such as "no child left behind"[90]), but unless it is clear who will pay for it, the declared right will be mostly rhetorical.[91] This is so because, even when something like a right to education is recognized, "a distributional premise is missing which can only be supplied through a principle of 'obligation.'"[92]

No such problem exists under the Jewish legal system of obligations.[93] For example, an important principle in Jewish law is the guarantee of education—but this is achieved through a regime of obligations rather than a regime of rights. "[I]t is striking," writes Cover, "that the Jewish legal materials never speak of the right or entitlement of the child to an education."[94] Instead, "they speak of the obligation incumbent upon various providers to make the education available."[95] Instead of declaring a right to education, the Jewish legal system allocates the relevant responsibilities:

> It is a mitzvah for a father to educate his son, or grandson. It is a mitzvah for a teacher under certain circumstances to teach even without remuneration. It is a mitzvah for the community to make certain provision for education and its institutions. It is a mitzvah for householders to board poor scholars and support them, etc.[96]

The difference between the right to *education* (a nominalization that emphasizes the recipient) and the obligation to *educate* (an active verb that allocates responsibility) is that the right to education might be empty of content if there is no clear allocation of responsibility—if there is no pointing finger as to who is obligated to realize the right. In a jurisprudence of obligations, "the loaded, evocative edge is at the assignment of responsibility. It is to the parent paying tuition, the householder paying his assessment that the law speaks eloquently and persuasively."[97] In a similar way, through its specific and direct assignment of individual responsibility, the Individual Mandate fills with content what would have otherwise been an empty right.

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90. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.)

91. Cover gives as examples campaigns for the rights of children or people with mental disability, which gravitate to the rhetoric of rights, but he argues that "the evocative force of the rights rhetoric having done its work, we leave to the technicians the allocation of fiscal responsibility." Cover, *supra* note 1, at 72.

92. *Id.* at 71.

93. There are, however, areas that Jewish law has serious problems with, especially in the realm of equal participation. *Id.*; *see also* Stone, *supra* note 8, at 814 (arguing that "the counter-model presented so far is often more wishful than accurate and, even when accurate, has limited applicability in a secular legal society").

94. Cover, *supra* note 1, at 71.

95. *Id.*

96. *Id.*

97. *Id.* at 72.

Assigning responsibility to individuals by way of obligation (as in the Individual Mandate) is different from assigning the duty directly to the government. In the realm of jurisprudence and political science, arguments for the right to health often assign the primary responsibility to the government. These discussions turn on equality, social justice, and positive liberties.[98] In the distinction between negative liberty and positive liberty, negative liberty generally refers to freedom from government intrusion, whereas positive liberty refers to affirmative government action that facilitates an individual's pursuit of freedom.[99] Some have argued that liberal democracies have a duty—and individuals have a corresponding right—not only to be free of state intrusion, but also to receive meaningful medical care, education, and the satisfaction of other basic human needs.[100] As Isaiah Berlin has emphasized, without a comprehensive theory of positive liberties, negative liberties might be meaningless for many.[101]

Such theories of governmental duties towards citizens complement but nonetheless differ from Cover's theory of obligation. An individual who seeks to enjoy a positive liberty typically makes a claim on the state. But in a theory of obligation there is a *community obligation to act* regardless of whether a specific individual or a group of individuals has initiated a legal claim. The focus here is on the responsibility of the community rather than on the right of the recipient.

Cover's example of the dress of litigants before a tribunal is illuminating on this point. In *Estelle v. Williams*,[102] the Supreme Court held that a defendant has the right to appear in civilian clothes during the trial, and that he does not have to appear dressed in a convict garb. However, the Court also ruled that in the absence of timely objection, the right to wear civilian clothes was waived.[103] In contrast, under a system of obligation in Jewish law, there is a positive commandment that "enjoins upon the judge the duty to judge righteously"—and therefore if one party to a suit is dressed well, and the other is not, *the judge has to say* to the well dressed party, "either dress him like yourself before the trial is held or dress like

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98. *See, e.g.*, RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2002); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH-CENTURY TRAGEDIES (1995); Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221 (2006).

99. For an early distinction between negative and positive liberty, see generally Berlin, *supra* note 58. Many different accounts of both positive and negative liberty have been proposed since Berlin's essay was first published in 1969. *See generally* Charles Taylor, *What's Wrong with Negative Liberty*, *in* THE IDEA OF FREEDOM: ESSAYS IN HONOUR OF ISAIAH BERLIN 175 (Alan Ryan ed., 1979) (arguing that decisions and actions which result from certain uncontrolled motivations are not really free). In addition, the meaning of "coercion" within the definition of negative liberty is itself open to various interpretations. *See, e.g.*, ROBERT NOZICK, SOCRATIC PUZZLES 15-45 (1997); JOSEPH RAZ, THE MORALITY OF FREEDOM 148-57 (1986) (discussing the various ways in which coercion interferes with human autonomy).

100. *See supra* note 99.

101. *See* Berlin, *supra* note 58.

102. 425 U.S. 501 (1976).

103. *See id.* at 512-13.

him, then the trial will take place."[104]

The distinction between the right of the defendant to wear civilian clothes in *Estelle* and the obligation of the judge to make sure a litigant is properly dressed is not mere semantics. By assigning responsibility to the judge, the legal system makes the realization of the social value at stake more likely. This is precisely what the Individual Mandate does: it does not merely declare a right to medical care. It also points a finger at the responsible agents to realize this right: the citizens of the United States.

B. The Obligatory Individual Mandate

The Patient Protection and Affordable Care Act established an individual right to healthcare. This legislation reflects Congress's belief that principles of justice and equality require that all Americans should have access to affordable healthcare. But it was also necessary to allocate a responsible agent for these rights to materialize: the American public. The goal of equal access to healthcare cannot be attained if uninsured individuals are allowed to delay their entrance to the health insurance market. Therefore, Congress implemented an individual obligation for the realization of an important right: the right of all members of society to equal access to healthcare. From this perspective, the Individual Mandate can be viewed not as a necessary evil—financially necessary but substantively unfortunate—but instead as a vital component of a scheme of individual as well as governmental obligation to all members of society.

CONCLUSION

This moment offers an occasion to consider two founding myths of legal origins: the Social Contract and Mount Sinai. Individual rights will undoubtedly play a vital role as the Court and the public consider the fate of the Individual Mandate. In particular, the Court will have to decide between the liberty-based objection to the Individual Mandate and its equality-based rationale. This decision can be enriched by a notion of individual obligation. As Cover taught us, the recognition of a right can be merely rhetorical if no one is directly responsible for its realization. A society committed to equality may sometimes need to achieve its goals through the recognition of an individual obligation of its members for the minimal well-being of others. Alongside the individual rights to healthcare, liberty, and equality, the public and judicial discussion of the Individual Mandate should include the individual obligation to help others realize those rights.

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104. Cover, *supra* note 1, at 72 (internal citation omitted).