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The Liberty of Free Riders: The Minimum Coverage Provision, Mill's "Harm Principle," and American Social Morality

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> [A] direct requirement for most Americans to purchase any product or service . . . . certainly is an encroachment on individual liberty, but it is no more so than a command that restaurants or hotels are obliged to serve all customers regardless of race, that gravely ill individuals cannot use a substance their doctors described as the only effective palliative for excruciating pain, or that a farmer cannot grow enough wheat to support his own family. The right to be free from federal regulation is not absolute, and yields to the imperative that Congress be free to forge national solutions to national problems, no matter how local—or seemingly passive—their individual origins.[1]

I. INTRODUCTION

The Patient Protection and Affordable Care Act (ACA)[2] requires most lawful residents of the United States to obtain a certain level of health insurance coverage (the minimum coverage provision) or pay a certain amount of money each year (the shared responsibility payment).[3] Opponents of these provisions argue, among other things, that they are beyond the scope of Congress's power to regulate interstate commerce because they regulate inactivity (declining to purchase health insurance), as opposed to regulating economic activity. One of us has argued elsewhere that the constitutionality of the minimum coverage provision does not turn on whether Congress is regulating "inactivity"—that the distinction between inactivity and

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[1] Seven-Sky v. Holder, 661 F.3d 1, 20 (D.C. Cir. 2011) (footnote omitted), *petition for cert. filed*, 80 U.S.L.W. 3359 (Nov. 30, 2011) (No. 11-679).

[2] 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) (to be codified at 42 U.S.C.).

[3] 26 U.S.C. § 5000A (2010).

activity does not even partially define the limits of the Commerce Clause.[4] Rather, as identified by the theory of collective action federalism, a better constitutional distinction is between problems whose solution requires individual action by states and problems whose solution requires collective action by states.[5] This is a structurally sound way to impose some limits on the commerce power while justifying the outcomes in the cases cited by Judge Silberman in the quotation that begins this Article.[6]

One way a collective action problem arises is when people benefit from collective action regardless of whether they contribute to it. In the language of social science, "inactive" individuals who fail to participate in collective action free ride on the contributions of others to collective action. When the effects of such free riding spill over state borders, a collective action problem involving individuals causes a collective action problem involving states.[7]

Applying this framework, the ACA's minimum coverage provision is within the scope of the Commerce Clause, either alone or in combination with the Necessary and Proper Clause.[8] This is because the subject matter it targets is economic in nature,[9] and because it addresses two problems of collective action for the states.[10] The first problem is cost-shifting in excess of forty billion dollars per year from the uninsured to other participants in the healthcare market. The effects of this cost-shifting spill over state borders.[11] The second problem is guaranteeing access to health insurance while avoiding adverse selection, which occurs when healthy people delay the purchase of health insurance until they become ill, thereby undermining the functioning of health insurance markets. Guaranteeing access to insurance regardless of place of residence in the United States facilitates labor mobility and discourages the flight of insurance companies from states that guarantee access to states that do not. Guaranteeing access also dis-incentivizes states from free riding on the more generous healthcare systems of sister states. In a regime of guaranteed access, adverse selection severely undermines the functioning of health insurance markets.[12]

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[4] *See, e.g.*, Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. (forthcoming 2012) (manuscript at 1-8), *available at* http://ssrn.com/abstract=1843228.

[5] *See* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 135-44 (2010).

[6] Judge Silberman was referencing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), *Gonzales v. Raich*, 545 U.S. 1 (2005), and *Wickard v. Filburn*, 317 U.S. 111 (1942).

[7] *See* Siegel, *supra* note 4 (manuscript at 41).

[8] For an argument that the minimum coverage provision and shared responsibility payment are within the scope of the tax power, see generally Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: A Theory of the Tax Power for a Court that Limits the Commerce Power*, 99 VA. L. REV. (forthcoming 2013), *available at* http://ssrn.com/abstract=1989537.

[9] The Court has held that Congress may regulate only "economic" or "commercial" subject matter when using its commerce power in cases involving allegedly substantial effects on interstate commerce. *See, e.g.*, *Raich*, 545 U.S. at 17-19 (stressing the economic/non-economic distinction); United States v. Morrison, 529 U.S. 598, 610-13 (2000) (same); United States v. Lopez, 514 U.S. 549, 559-60 (1995) (same).

[10] *See generally* Siegel, *supra* note 4.

[11] Congress determined that in 2008 alone, the "cost of providing uncompensated care to the uninsured was $43,000,000,000." 42 U.S.C. § 18091(2)(F) (2010). Congress further found that "health care providers pass on the cost to private insurers, which pass on the cost to families. This cost shifting increases family premiums by on average over $1,000 a year." *Id.*

[12] *See* Brief for America's Health Insurance Plans as Amicus Curiae in Support of Neither Party at 3, Virginia *ex rel.* Cuccinelli v. Sebelius, 659 F.3d 253 (4th Cir. 2011) (Nos. 11-1057, 11-1058),

In this Article, we show that these cost-shifting and adverse selection problems link the federalism dimension of the debate over the ACA to the doctrinally separate and suppressed individual rights dimension. As the *scope* of these free-rider problems justifies federal power to require individuals to obtain health insurance coverage, so the very *existence* of the free-rider problems illuminates the difficulty of arguing directly—as opposed to indirectly through the Commerce Clause—that the minimum coverage provision infringes individual liberty. The interdependence between some people's decisions to forgo insurance and the well-being of other people means that refusing insurance is far from being a purely self-regarding action. For reasons rooted in this interdependence, serious obstacles confront anyone who aims to establish that the liberty claims of free riders should be constitutionally or morally decisive.

We identify these obstacles to recognition of the claimed liberty interest with help from law, economics, and philosophy. First, we show that an economic substantive due process objection to the minimum coverage provision is doctrinally unavailable. Indeed, its unavailability explains why opponents of the provision take the less straightforward doctrinal approach of recasting the Commerce Clause in libertarian terms. Second, we invoke the long-standing tradition of argument in economics that market failures justify government regulation.

Finally, we draw from the "harm principle" of John Stuart Mill's *On Liberty*.[13] Mill's deep commitment to libertarianism, which reflects the same anti-authoritarian spirit that moves many libertarians today, does not condemn the minimum coverage provision. This is because Mill's criterion categorically forbids only paternalism in law-making, and the provision is justified on non-paternalistic grounds. When the regulation under consideration is not paternalistic, Mill's libertarianism points explicitly to law and social morality to resolve boundary questions about what members of a society owe one another. In our judgment, these considerations—from federal and state safety net programs to charitable hospital practices—weigh in favor of the permissibility of the minimum coverage provision.

Part II demonstrates that objections to the minimum coverage provision sound overwhelmingly in individual liberty, not constitutional federalism. Part III considers libertarian objections to the minimum coverage provision from the standpoint of legal doctrine. Parts IV and V consider those objections from the standpoint of political morality. The Conclusion summarizes the argument.

II. THE LIBERTARIAN BASIS OF OBJECTIONS TO THE ACA

As is well-recognized now,[14] the language that activists, politicians, and some judges characteristically employ to express their opposition to the minimum

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petition for cert. filed, 80 U.S.L.W. 3221 (U.S. Sept. 30, 2011) (No. 11-420) ("Without an individual mandate requirement, more individuals will make the rational economic decision to wait to purchase coverage until they expect to need health care services. If imposed without an individual mandate provision, the market reform provisions would reinforce this 'wait-and-see' approach by allowing individuals to move in and out of the market as they expect to need coverage, undermining the very purpose of insurance to pool and spread risk."). *See generally* KENNETH J. ARROW, ESSAYS IN THE THEORY OF RISK BEARING (1971).

[13] JOHN STUART MILL, ON LIBERTY 67-175 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

[14] *See, e.g.*, Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and the Fight over Health Care*, 27 J.L. & POL. 177, 180-81 (2011).

coverage provision suggests that the primary constitutional concern animating such opposition is not limitless federal power. The charge, rather, is that the provision violates individual rights—namely, economic liberty. Even more specifically, the claim is that the minimum coverage provision violates an individual right to refuse to purchase insurance. Any right that could substantiate such a claim would sound in *Lochner*-style freedom of contract rooted in substantive due process, more precisely the *Lochner* Court's commitment to freedom *from* any involuntary contract.[15]

Many examples illustrate this point. Dick Armey and Matt Kibbe of "Freedomworks" wrote in their aptly entitled book, *Give Us Liberty: A Tea Party Manifesto*, that the Tea Party movement was bent on safeguarding "individual freedoms and economic liberty" because "it is all about the rights of the individual over the collective."[16] The "Contract from America" unveiled by Tea Party activists calls for efforts to "[d]efund, repeal and replace the recently passed government-run health care" as part of a more general appeal for advocacy "on behalf of individual liberty, limited government, and economic freedom."[17] The concerns expressed in the Contract regarding limited government concern government at every level—"our government"—not just the federal government.[18]

Virginia enacted its opposition to the ACA with a statute entitled the "Virginia Health Care Freedom Act."[19] The Commonwealth's Attorney General, Ken Cuccinelli, asserted that his objection (and legal challenge) to the ACA is "not about health care" but "about protecting our liberty."[20] Similarly, Attorney General Bill McCollum of Florida, who took credit for filing the first lawsuit challenging the minimum coverage provision while running for governor, characterized the states' lawsuit as defending the "liberty of our citizens."[21] Moreover, forty-nine Republican members of the United States House of Representatives signed an amicus brief declaring that "[u]pholding the individual mandate would . . . place Americans'

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[15] *Cf.* Jack M. Balkin, *Ideology and Counter-Ideology from* Lochner *to* Garcia, 54 U. MO. KAN. CITY L. REV. 175, 187 (1986) (observing that "a private party's right to refuse to enter into contractual relations with any person was considered the essence of liberty of contract").

[16] DICK ARMEY & MATT KIBBE, GIVE US LIBERTY: A TEA PARTY MANIFESTO 66-68 (2010); *see* Dick Armey & Matt Kibbe, Op-Ed., *A Tea Party Manifesto*, WALL ST. J., Aug. 17, 2010, at A19.

[17] THE CONTRACT FROM AMERICA, *available at* http://www.contractfromamerica.com/the-contract-from-america/ (last visited Feb. 21, 2012).

[18] The Contract states:

> The purpose of our government is to exercise only those limited powers that have been relinquished to it by the people, chief among these being the protection of our liberties by administering justice and ensuring our safety from threats arising inside or outside our country's sovereign borders. When our government ventures beyond these functions and attempts to increase its power over the marketplace and the economic decisions of individuals, our liberties are diminished and the probability of corruption, internal strife, economic depression, and poverty increases.

Id.

[19] Virginia Health Care Freedom Act, Act of Mar. 10, 2010, ch. 108, 2010 Va. Acts 102 (codified at VA. CODE ANN. § 38.2-3430.1:1 (Supp. 2011)).

[20] Jim Nolan, *Virginia Argues Against Mandate to Purchase Health Insurance; Judge Promises to Rule on Constitutionality of U.S. Law by Year's End*, RICHMOND TIMES DISPATCH, Oct. 19, 2010, at A-1.

[21] Bill McCollum, Commentary, *Defending Floridians Against Unlawful Mandate*, TAMPA TRIB. (Aug. 8, 2010), http://www2.tbo.com/news/opinion/2010/aug/08/co-defending-floridians-against-unlawful-mandate-ar-41488/.

economic liberty at risk."[22] Tellingly, Mitt Romney is having a very difficult time persuading political conservatives that his support for healthcare reform in Massachusetts is reconcilable with his opposition to the ACA.[23] Romney's opposition to the ACA on grounds of constitutional federalism, not individual liberty, is going nowhere in Republican politics even as Republican politicians and conservative political forces litigate their opposition to the ACA in Romney's terms.[24]

Turning to the judiciary, one federal district court that invalidated the minimum coverage provision ostensibly on federalism grounds nonetheless asserted towards the end of its opinion that "[a]t its core, this dispute is not simply about regulating the business of insurance—or crafting a scheme of universal health insurance coverage—it's about *an individual's right to choose* to participate."[25] Another federal district court that invalidated the minimum coverage provision appeared explicitly and provocatively to adopt Tea Party rhetoric. "It is difficult to imagine," he wrote, "that a nation which began, at least in part, as the result of opposition to a British mandate giving the East India Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place."[26] In the contemporary American constitutional order, appeals to freedom, liberty, rights, choice, and non-coercion share a logic. It is the logic of individual rights, not the logic of limits on federal power.[27] On that logic, the foregoing liberty-based objections to the ACA ought to

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[22] Amici Curiae Brief of the American Center for Law & Justice et al. in Support of Plaintiffs/Appellees at 22, Virginia *ex rel.* Cuccinelli v. Sebelius, 659 F.3d 253 (4th Cir. 2011) (Nos. 11-1057, 11-1058), *petition for cert. filed*, 80 U.S.L.W. 3221 (U.S. Sept. 30, 2011) (No. 11-420).

[23] *See* Jim Rutenberg, *Romney Defends Massachusetts Health Plan, but Concedes Flaws*, N.Y. TIMES, May 13, 2011, at A20. Rutenberg reports:

> But his embrace of the mandate—a policy some Republicans once had favored but nearly all now reject as unwarranted incursion by the government into personal decisions and private markets—seemed to trump his larger states' rights argument for some conservatives. "He was for it when he was governor and now it's clearly something that the broad coalition of conservatives feels is not a good idea at the national level or at the state level," said James C. Capretta, an associate director of health care policy at the Office of Management and Budget during Mr. Bush's first term and now a fellow at the Ethics and Public Policy Center.

Id.

[24] Romney's status as Republican front-runner for the presidency does not detract from the point in the text. Most likely, he has achieved that status *despite* his past support for an individual mandate on the state level, not because of it.

[25] Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010) (emphasis added), *vacated*, 656 F.3d 253 (4th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3221 (U.S. Sept. 30, 2011) (No. 11-420).

[26] Florida *ex rel.* Bondi v. U.S. Dep't Health & Human Servs., 780 F. Supp. 2d 1256, 1286 (N.D. Fla.), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla.), *aff'd in part, rev'd in part*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (2011) (mem.), *and cert. granted*, 132 S. Ct. 604 (2011) (No. 11-398) (mem.) (argued Mar. 26-27, 2012), *and cert. granted in part*, 132 S. Ct. 604 (2011) (No. 11-400) (mem.) (argued Mar. 28, 2012). This appeal overlooks the historically critical distinction between taxation without representation and taxation (or regulation) with representation.

[27] *See, e.g.*, Richard A. Epstein, *Obama's Constitution: The Passive Virtues Writ Large*, 26 CONST. COMMENT. 183, 191 (2010) (stating that "the Commerce Clause argument mistakenly cast the autonomy issue as a federalism issue when it is in fact one about individual entitlements against government, which should be as powerful against state action as against federal action"); Leitch, *supra* note 14, at 180-81 (concluding after "canvassing the oppositional literature" that "the recurrent and unavoidable leitmotif of disagreement with the PPACA is its alleged violation of liberty—and in particular, economic liberty").

apply with equal force to the Massachusetts statute that mandates individual possession of health insurance.[28]

Instead of arguing straightforwardly that all "individual mandates" to obtain health insurance coverage violate substantive due process, opponents of the ACA appear to be enlisting the emotional force of the liberty argument without actually making it. On the one hand, they derive rhetorical power from the "just leave me alone" liberty-inflected criticism of the minimum coverage provision. This criticism has a certain common-sense appeal, particularly if one considers the matter only from the perspective of the individual (as opposed to society), and if one ignores the link between the provision and some very popular provisions of the ACA.[29] These provisions prohibit insurance companies from denying coverage based on pre-existing conditions, canceling insurance absent fraud, charging higher premiums based on medical history, and imposing lifetime limits on benefits.[30] On the other hand, opponents of the ACA do not in fact claim that substantive due process protects a *Lochner*-style freedom from contract. Relying instead on the Commerce Clause, they need not explicitly defend their appeal to individual liberty as a matter of constitutional law.

III. LIBERTARIAN OBJECTIONS AND CONSTITUTIONAL DOCTRINE

The constitutional liberty argument is doctrinally hopeless. Because the Supreme Court long ago abandoned freedom from contract as an independent limit on government power,[31] *Lochner*-style substantive due process challenges to the minimum coverage provision have not survived motions to dismiss.[32] No doubt some who attack the provision on libertarian grounds believe that the *Lochner* Court was right to defy the popular will for as long as it did,[33] and wrong eventually to

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[28] MASS. GEN. LAWS ch. 111M, § 2 (2008).

[29] *See* Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1, 14–15 (2011), http://yalelawjournal.org/2011/04/26/koppelman.html.

[30] 42 U.S.C.A. §§ 300gg(a)(1), 300gg-1(a), 300gg-3(a), 300gg-11, 300gg-12 (West 2012) (respectively prohibiting discriminatory premium rates, discrimination based on health status, pre-existing condition exclusions, lifetime limits on the dollar value of benefits, and rescission except in the case of fraud).

[31] *Compare, e.g.*, Lochner v. New York, 198 U.S. 45, 53 (1905) ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution . . . . The right to purchase or to sell labor is part of the liberty protected by this amendment . . . ."), *with* W. Coast Hotel Co. v. Parish, 300 U.S. 379, 391 (1937) ("What is this freedom [of contract]? The Constitution does not speak of freedom of contract."). *See also* Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 244 (1998) ("*Lochner* is never cited for its legal authority. Although it has never been formally overruled, it is well understood among constitutional lawyers that relying on *Lochner* would be a pointless, if not a self-destructive, endeavor.").

[32] *See, e.g.*, Florida *ex rel.* McCollum v. U.S. Dep't of Health & Human Servs., 716 F. Supp. 2d 1120, 1161-62 (N.D. Fla. 2010) (rejecting argument that "people have 'recognized liberty interests in the freedom to eschew entering into a contract'").

[33] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 45 (1962) ("Serving this value [of laissez-faire] in the most uncompromising fashion, at a time when it was well past its heyday, five Justices, in a series of spectacular cases in the 1920's and 1930's, went to unprecedented lengths to thwart the majority will. The consequence was very nearly the end of the story.").

abandon economic substantive due process under great duress.[34] But few constitutional critics of the minimum coverage provision publicly attack the constitutionality of the Massachusetts mandate.

Moreover, even if the Court had not abandoned economic substantive due process, an individual rights challenge to the minimum coverage provision might still fail. *Lochner*-era jurisprudence itself recognized that the states' police power limits the realm of individual liberty in significant respects.[35] For example, Charles Fried has directed attention to the Court's unanimous and still governing decision in *Jacobson v. Commonwealth of Massachusetts*,[36] which upheld a mandatory vaccination law.[37] Decided the same year as *Lochner v. New York*,[38] *Jacobson* is highly relevant to the question whether the minimum coverage provision violates constitutional liberty. Purchasing health insurance or paying a yearly fee[39] seems a much less severe interference with personal liberty than submitting to a state-mandated smallpox vaccination or paying a fine.[40] Mandatory vaccination implicates the constitutional right to bodily integrity, which triggers heightened judicial scrutiny.[41] Mandatory possession of insurance does not implicate this right.[42] From the standpoint of individual rights, there is a similarly enormous difference between the mandatory purchase of a product and the mandatory consumption of that product.[43] The ACA does not require anyone even to use his health insurance coverage, let alone ingest anything.

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[34] For a recent account of the political fight over President Franklin Delano Roosevelt's "court-packing" plan, see JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (2010). *See also* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 3-8, 202, 214, 217-36 (2009).

[35] *See, e.g.*, Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63 (1985). Urofsky observes that "[r]ecent studies of the United States Supreme Court have led to a revision of that institution's image as a thoroughgoing enemy of reform" during the Progressive Era. *Id.* He argues that such a revision is also warranted with respect to state courts:

> In surveying state court decisions prior to World War I involving the basic elements of the Progressive program to protect workers—laws involving child labor, maximum hours, employer liability, and workmen's compensation—one finds that, with only a few exceptions, state courts moved consistently toward approval of a wide range of reform legislation. In attempting to enact their program, Progressives, although occasionally delayed in the courts, were not blocked there.

Id. at 64. Urofsky suggests that "*Lochner* . . . ought to be seen as an aberration," one that "had only a limited impact on state courts." *Id.* at 79.

[36] *The Constitutionality of the Affordable Care Act: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 4 (2011) (testimony of Charles Fried, Beneficial Professor of Law, Harvard Law School).

[37] 197 U.S. 11 (1905).

[38] 198 U.S. 45 (1905).

[39] For an argument that the ACA exaction for being uninsured is a tax for purposes of Congress's tax power, notwithstanding that Congress called it a "penalty," see generally Cooter & Siegel, *supra* note 8.

[40] *See Jacobson*, 197 U.S. 11.

[41] *See, e.g.*, Cruzan v. Mo. Dep't of Health, 497 U.S. 261 (1990) (recognizing the right of a competent adult to refuse unwanted medical treatment).

[42] For a discussion of the right to bodily integrity, see Neil S. Siegel, *Four Constitutional Limits that the Minimum Coverage Provision Respects*, 27 CONST. COMMENT. 591, 599-601 (2011).

[43] *Cf.* Florida *ex rel.* Bondi v. U.S. Dep't Health & Human Servs., 780 F. Supp. 2d 1256, 1289 (N.D. Fla.), *order clarified*, 780 F. Supp. 2d 1307 (N.D. Fla.), *aff'd in part, rev'd in part*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted sub nom.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 603 (2011) (mem.), *and cert. granted*, 132 S. Ct. 604 (2011) (No. 11-398) (mem.) (argued Mar. 26-27,

Notably, Mr. Jacobson, the petitioner in the aforementioned vaccination case, was endangering not only himself, but others as well, by refusing to get vaccinated. Moreover, he was free riding on the contributions to collective action of others who submitted to vaccination: every person who received the vaccine made Mr. Jacobson that much safer. The Court presumably had these facts in mind when it rejected Mr. Jacobson's insistence "that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best."[44] Registering that important interests of many others were at stake, the Court instead accepted the government's framing of the case, which stressed "[t]he good and welfare of the Commonwealth," the very "basis on which the police power rests in Massachusetts."[45]

IV. LIBERTARIAN OBJECTIONS AND POLITICAL MORALITY

Even putting aside substantive due process doctrine and considering political morality, the argument that the minimum coverage provision violates individual liberty faces a steep uphill battle. In view of the free-rider problems of uncompensated care and adverse selection that undermine healthcare and health insurance markets,[46] it is difficult to establish that no government in America should be able to require financially able individuals to obtain health insurance.

A. MARKETS AND MARKET FAILURES

People disagree in ideologically predictable ways about the appropriate size and power of the government relative to other institutions, particularly the market. Those who believe in limited government argue that, beyond military defense and police protection, public goods are few in number. They also articulate a narrow understanding of externalities and contend that markets are largely self-regulating. By contrast, those who believe in robust government argue that public goods are numerous, including education, research, poverty relief, the arts, and the environment. They also articulate a broad understanding of externalities and maintain that markets often fail without government regulation.

Despite their many disagreements, participants in such debates typically agree that collective action problems can justify state intervention into the market. As noted in the Introduction, one kind of collective action problem is a free-rider problem. A free-rider problem, in turn, is a type of externality problem.[47] And a negative externality is one of the standard forms of market failure, one widely

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2012), *and cert. granted in part*, 132 S. Ct. 604 (2011) (No. 11-400) (mem.) (argued Mar. 28, 2012) ("Congress could require that people buy and consume broccoli at regular intervals, not only because the required purchases will positively impact interstate commerce, but also because people who eat healthier tend to be healthier, and are thus more productive and put less of a strain on the health care system.").

[44] *Jacobson*, 197 U.S. at 26.

[45] *Id.* at 27.

[46] *See supra* notes 11-12 and accompanying text (discussing the cost shifting and adverse selection problems).

[47] In general, "externalities" refer to unpriced benefits and costs. They are external to the market.

agreed to justify government regulation.[48] Accordingly, an argument that no government may impose an individual mandate to combat free riding, no matter how effective it would be relative to the regulatory alternatives, would be hard to justify under most accounts of what is included among the basic purposes of the government, as opposed to the market.

Anyone wanting to make an individual rights argument to justify the "inactivity" of free riders must face the long tradition of argument, formalized in economics, that the government is properly granted the authority to solve collective action problems because markets cannot.[49] Just as it makes little sense to argue that only the states may address problems that the states are separately incompetent to address,[50] so it makes little sense to argue that only markets may address problems that markets are incompetent to address. Because markets cannot solve market failures, it is not clear what the Tea Party activists who issued the "Contract from America" have in mind when they call for replacing the ACA "with a system that actually makes health care and health insurance more affordable by enabling a competitive, open, and transparent free-market health care and health insurance system that isn't restricted by state boundaries."[51]

To be sure, the cost-shifting and adverse selection problems targeted by the minimum coverage provision are not classic market failures in that they are caused in part by governments that mandate treatment in medical emergencies and prohibit insurance companies from denying coverage to people for various reasons. As we discuss in Part V, however, private behavior also plays a substantial role in causing these problems. Many hospitals have long-standing charitable practices that require stabilizing treatment in an emergency, and the problem of adverse selection in insurance markets long predates the ACA.

B. MILL'S ANTI-PATERNALISM PRINCIPLE

Turning from economics to philosophy, the question of what the state may and may not legitimately require of individuals is the problem that John Stuart Mill intended his "harm principle" to solve. Mill devoted one of the most important tracts in political philosophy to defending the liberty of the individual from unwarranted restriction. His subject in *On Liberty* was the "limit to the legitimate interference of collective opinion with individual independence:" he sought to discern "how to make the fitting adjustment between individual independence and social control."[52] In drawing the line, Mill focused on harms that individuals cause others. "The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection."[53]

Specifically, Mill proposed the "harm principle" to limit the circumstances in which society may interfere with an individual's decision to do or not do as he or she wishes. According to the "harm principle," individual choice is properly curtailed in

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[48] The other standard forms of market failures are monopoly and asymmetric information. *See, e.g.*, ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 105-08 (2000) (analyzing the technical characteristics of goods that can cause markets to fail).

[49] *Id.* at 105 ("Market failure provides the conventional economic justification for state supply and regulation of goods.").

[50] *See generally* Cooter & Siegel, *supra* note 5.

[51] THE CONTRACT FROM AMERICA, *supra* note 17.

[52] MILL, *supra* note 13, at 76.

[53] *Id.* at 80. "His own good, either physical or moral, is not a sufficient warrant." *Id.*

situations in which individuals act or decline to act in ways that cause harm to important interests of others. "As soon as any part of a person's conduct affects prejudicially the interests of others," Mill wrote, "society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion."[54]

By the same token, Mill rejected paternalistic justifications for the exercise of coercive power, which seek to prevent individuals from harming themselves. "[T]here is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like."[55] "In all such cases," Mill concluded, "there should be perfect freedom, legal and social, to do the action and stand the consequences.[56]

Mill's harm principle is pertinent to evaluation of libertarian objections to the minimum coverage provision for several reasons that go beyond or, better, substantiate its canonical status. One is the principled radicalism of his libertarian position. In Mill's view, people owe nothing to others' moral convictions about good conduct, no matter how deep, widespread, or reasonable those convictions are. Consistent application of his nineteenth-century doctrine would, for instance, straightforwardly condemn the holding of *Bowers v. Hardwick*,[57] upholding anti-sodomy laws on grounds of traditional moral condemnation, and embrace that of *Lawrence v. Texas*,[58] invalidating such a law as a violation of constitutionally protected liberty. Mill's doctrine would require acknowledging the liberty interest in assisted suicide that the Court declined to find in *Washington v. Glucksberg*,[59] and invalidating bans on it unless the practice somehow harmed others in a material way. Quite aside from the federalism question in *Gonzales v. Raich*,[60] his principle would require protection of medical marijuana use on grounds of personal liberty, at least if the only objection to the practice were moral. Whether or not one likes all of these conclusions, there is no denying that Mill's position was genuinely and deeply libertarian.

Mill is also relevant to the ACA debate because of his situation in the development of modern ideas of freedom. He was motivated by the same anti-authoritarian spirit as many of today's libertarians. He spent his life as a reformer of a specific kind: one dedicated to stripping away arbitrary, unnecessary, and self-serving regulation of individuals. He stood between, and worked mightily to combine, two great emancipating movements that sought to vindicate the primacy of the individual. The first was utilitarianism, the doctrine and movement in which Mill

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[54] *Id.* at 139.

[55] *Id.*

[56] *Id.* Mill reiterated both parts of his distinction in part V:

> The maxims are, first, that the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself. Advice, instruction, persuasion, and avoidance by other people if thought necessary by them for their own good, are the only measures by which society can justifiably express its dislike or disapprobation of his conduct. Secondly, that for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or to legal punishment, if society is of opinion that the one or the other is requisite for its protection.

Id. at 156.

[57] Bowers v. Hardwick, 478 U.S. 186 (1986).

[58] Lawrence v. Texas, 539 U.S. 558 (2003).

[59] Washington v. Glucksberg, 521 U.S. 702 (1997).

[60] Gonzales v. Raich, 545 U.S. 1 (2005).

was raised by his father, the reformer James Mill, and by his father's patron and intellectual guide, Jeremy Bentham.[61] Utilitarianism is often styled today as a school with insufficient respect for the individual, partly because of the important and influential arguments of John Rawls in *A Theory of Justice*.[62] For nineteenth-century reformers, though, utilitarianism was a weapon aimed at all laws that explicitly or implicitly treated the interests of some—usually laborers or the middle class—as less important than those of the wealthy and prominent. Its cardinal principle was that each individual was to count for exactly the same as any other, and that the many forms of legally enshrined privilege must give way to this moral equality. Mill followed through on this principle in his abhorrence of sex discrimination and his commitment to the moral and legal equality of women and men.[63]

The second great emancipation that actuated Mill was Romanticism, the discovery—if that is the word—of the depth and intensity, the opacity and beauty, of individual experience and identity. Romantics made these qualities their watchword, and they came to form the other half of the younger Mill's position—the necessary counterpoint to his utilitarianism. "Necessary" seems the right term because Mill himself famously concluded that even the total success of utilitarian reform would leave life flat and dull, not even worth living, without this flame of passionate individuality.[64] *On Liberty* is a vindication of this value. Mill's defense of liberty rested on two basic ideas: that there were no good utilitarian grounds for regulating self-regarding action, and that such regulation was horrible because it sought to extinguish the qualities that gave life its worth.[65]

Mill's motivation and historical situation highlight the integrity of his libertarianism. Mill abhorred intrusion on individual freedom as much as he abhorred anything, and for the same reasons as today's libertarians. In *On Liberty*, he was not engaged in some half-hearted enterprise along the lines of giving individuality its due in the modern state. His commitment to personal freedom was axiomatic and whole-hearted. For these reasons, it is significant that Mill's libertarianism does not imply a rejection of the ACA's minimum coverage provision, as we will show.

Nor, to be clear, does Mill's harm principle, taken as a bare abstraction, imply embrace of the minimum coverage provision. Rather, it explains how such questions should be resolved. Mill contended that there was a large swath of questions about the scope of personal liberty that could be decided only by reference to a *prior* decision, grounded in law or social norms, about what members of a given polity owed one another. These questions did not involve purely self-regarding behavior, as to which only moral condemnation could furnish objections. Rather, these were areas of practical interdependence where relevant externalities were defined in part

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[61] *See* David Bromwich, *A Note on the Life and Thought of John Stuart Mill*, *in* ON LIBERTY, *supra* note 13, at 1-5, 18-25 (on Mill's relation to his father, the family's bond with Bentham, and Mill's mature view of Bentham's thought).

[62] *See* JOHN RAWLS, A THEORY OF JUSTICE 27 (1971) ("Utilitarianism does not take seriously the distinction among persons.").

[63] *See generally* JOHN STUART MILL, THE SUBJECTION OF WOMEN (M.I.T. Press 1970) (1869). *See also* Bromwich, *supra* note 61, at 7, 17-18 (discussing Mill's view of sexual equality).

[64] *See* Bromwich, *supra* note 61, at 5-10 (discussing Mill's relation to Romanticism and his conclusion that utilitarian achievement alone could not be reason to live).

[65] *See* MILL, *supra* note 13, at 83 ("The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not deprive others of theirs, or impede their efforts to obtain it.").

by legal or social definitions of interests and duties. Whether these externalities rose to the level of justifying regulation was itself a social judgment that found expression in law and norms. In contrast to his position on purely self-regarding behavior, which gave him a vantage point outside law and convention from which to assess law and convention, Mill accepted that there was no getting outside the web of legal and other normative judgments—no sword to cut the Gordian knot—when regulation addressed interdependence.

Mill got this right, and understanding his argument helps one to appreciate why there is no decisive libertarian objection to the minimum coverage provision. Instead, the debate unavoidably has recourse to a further argument about what we owe one another—that is, how far social obligation can legitimately override personal autonomy given the respective weight of these values in our system of law and social morality. Federal laws that guarantee access to emergency care, similar state statutes, and charitable hospital practices give us important information about the state of that argument.[66]

The key to this aspect of Mill's thought comes in a characteristically dense and precise passage at the beginning of his discussion of "the limits to the authority of society over the individual."[67] Here he defined the harm principle by reference to "certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights."[68] These are the interests that cannot be "harmed" under the harm principle. In identifying the "line of conduct" that "each should be bound to observe," Mill argued for unrestricted personal autonomy in choosing self-regarding acts, that is, those where "a person's conduct affects the *interests* of no person besides himself, or needs not affect them unless they like."[69] This is the area of paternalism, which Mill rejected as a legitimate basis for regulation.

The zone of interdependence, by contrast, is the area where others' interests are in fact implicated in one's action or inaction. It is here that "express legal provision" and "tacit understanding" are necessary to distinguish between those interests of others that one may legitimately burden by one's actions and those interests in which others are protected by regulation of one's conduct. In this area, the content of a libertarian principle is inseparable from legal and social judgments about the line between personal liberty and social obligation.

Having set out Mill's essential distinction between regulations based on paternalism and those based on interdependence, we now examine more precisely what his thinking suggests about the permissibility of the minimum coverage provision. In theorizing the boundary between individual liberty and the general welfare, Mill did not emphasize a distinction between action and inaction. "A person may cause evil to others not only by his actions but by his inaction," Mill wrote, "and in either case he is justly accountable to them for the injury."[70] According to Mill, the individual "may rightfully be compelled to perform . . . many positive acts for the benefit of others."[71] For example, society may require a person "to give evidence in a court of justice" and "to bear his fair share in the common defense or in any other joint work necessary to the interest of the society of which he enjoys the

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[66] For a discussion of these laws and practices, see *infra* Part V.
[67] MILL, *supra* note 13, at 139.
[68] *Id.*
[69] *Id.* (emphasis added).
[70] *Id.* at 82.
[71] *Id.* at 81.

protection."[72] Similarly, in Mill's usage, the term "conduct" included both "not injuring the interests of one another" and "each person's bearing his share (to be fixed on some equitable principle) of the labors and sacrifices incurred for defending the society or its members from injury and molestation."[73] Likewise, in rejecting paternalistic justifications for social compulsion, he wrote that the individual "cannot rightfully be *compelled to do or forbear* because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right."[74]

This is quite consistent with the general cast of Mill's thought. His concern is with which kinds of *interests* can justify regulation of individuals, and who gets to identify such interests. His commitment to liberty in no way depends on an abstract contrast between action and non-action, let alone a privileging of non-action.

What, then, about government compulsion (or, more precisely, incentivizing)[75] of financially able individuals who do not wish to obtain health insurance coverage? To the extent that libertarian critics of the minimum coverage provision embrace Mill's harm principle, they must show that the provision is paternalistic legislation—that going without insurance causes no significant harm to important interests of others. This would be difficult to do. To the contrary, individual insurance coverage falls squarely into the zone of interdependence where legal and social judgments inevitably decide which interests qualify for libertarian protection, rather than into the area of self-regarding actions where only paternalistic interests are present.

Financially able individuals who lack health insurance, whether their conduct is characterized as "inactive" or "active,"[76] cause significant harm to others' interests in several ways.[77] They do so when they consume healthcare without paying for it, thereby shifting costs to other actors in the interstate healthcare market. They harm others' interests when they raise health insurance premiums for everyone in the risk pool by staying out of the pool, secure in the knowledge that they will have access to expensive emergency care (made possible by the healthcare infrastructure) if they are grievously injured or fall ill. They cause harm to others when they wait to obtain health insurance coverage until they become sick, and then consume a disproportionate share of healthcare services that must be paid for by healthier individuals in the risk pool (who did not wait until they were sick to procure insurance).[78]

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[72] *Id.*

[73] *Id.* at 139.

[74] *Id.* at 80 (emphasis added).

[75] For most people, the ACA's exaction for going without insurance is relatively modest. In 2014, the annual exaction for noncompliance will be the greater of ninety-five dollars or one percent of income. 26 U.S.C. § 5000A(c) (2010). By 2016, the annual exaction will be the greater of $695 or 2.5 percent of income. *Id.* When a tax rate gets very high, it prevents people from engaging in the taxed conduct, which coerces them much like a penalty. The minimum coverage provision is too low to have this effect. This exaction increases with income until it hits a cap at "the national average premium for qualified health plans which have a bronze level of coverage," the lowest level of health insurance coverage that satisfies the minimum coverage provision. *Id.* § 5000A(c)(1)(B), 5000A(b)(1). The exaction costs less than insurance for many people, so people who are determined to remain uninsured will do so. For an analysis of the incentive effects and predicted consequences of the ACA's exaction, see generally Cooter & Siegel, *supra* note 8.

[76] Such individuals are inactive in the insurance market for the time being but often are active in the healthcare market. *See generally* Siegel, *supra* note 4.

[77] For a discussion, see generally *id.*

[78] *See* Brief Amici Curiae of the Am. Hospital Ass'n et al. in Support of Defendant-Appellant and Reversal at 12, Virginia *ex rel.* Cuccinelli v. Sebelius, 659 F.3d 253 (4th Cir. 2011) (Nos. 11-

In all of these ways, a financially able individual's decision to remain uninsured harms the interests of those around her. Indeed, her decision burdens others' liberty interest in not funding her imprudence. As then-Governor Romney wrote in 2006, defending his state's decision to impose an insurance mandate, "Some of my libertarian friends balk at what looks like an individual mandate. But remember, someone has to pay for the health care that must, by law, be provided: Either the individual pays or the taxpayers pay. A free ride on the government is not libertarian."[79]

In sum, Mill's harm principle contains two branches: a categorical rejection of paternalism as a basis for regulation and a conditional rejection—which is also, perforce, a conditional embrace—of interdependence as a basis for legal compulsion of individuals. There is no creditable basis for classifying the minimum coverage provision as an instance of paternalism, rather than a legal and social judgment about which interdependent interests justify regulation. Therefore, joining Mill in categorically rejecting paternalism provides no libertarian warrant for a categorical rejection of the minimum coverage provision.

To be clear, we are not arguing against paternalism as a justification for the exercise of either federal or state regulatory power. Our point is more modest: even if one rejects paternalism as providing sufficient cause to restrict individual liberty, that commitment gives no basis for rejecting the minimum coverage provision in light of the harms to others that the provision targets.

C. BUT WHY SHOULD AMERICANS CARE ABOUT MILL?

We have already offered two reasons why Mill's harm principle is pertinent to the present debate over the minimum coverage provision. First, his libertarianism was heartfelt and rooted in both commitment to individuality and rejection of paternalism. Second, his harm principle is a philosophical touchstone in the history of libertarian thought.

One might nonetheless object that we are wrongly conflating libertarianism with Mill, a long-ago and far-away subject of a foreign sovereign whose substantive views on economic and social policy put him to the left of most contemporary American libertarians. "What's Mill to me?" today's libertarian voter might ask.

There are additional reasons for looking to Mill. For one thing, the harm principle captures with precision the basic libertarian formula: it holds that my interests, projects, and commitments are my own to define, and are no concern of yours unless and until they impinge on your symmetrical self-regarding concerns. In other words, mind your own business and leave other people to theirs.

1057, 11-1058), *petition for cert. filed*, 80 U.S.L.W. 3221 (U.S. Sept. 30, 2011) (No. 11-420) (citing numerous studies finding that "[t]he decision of some uninsured individuals to put off regular preventive care actually *increases* their activity in the health care market in the long run"). This last harm, moreover, cannot be addressed fully through actuarially appropriate pricing of insurance policies. This is because of the adverse selection problem that undermines the operation of health insurance markets even absent the ACA's prohibitions on the restrictive practices of insurance companies. *See* Siegel, *supra* note 4 (observing that the market for health insurance attracts adverse selection, even absent the ACA's prohibitions on underwriting, because individuals know much more about their health status than insurers do).

[79] Mitt Romney, *Health Care for Everyone? We Found a Way*, WALL ST. J., Apr. 11, 2006, at A16; *see also id.* (reporting that forty percent of the state's uninsured population "were earning enough to buy insurance but had chosen not to do so" because insurance "is expensive, and because they know that if they become seriously ill, they will get free or subsidized treatment at the hospital").

For another thing, Mill addressed his argument specifically to the question that animates the libertarian position in the debate over the ACA: the appropriate basis of government regulation, rather than, for instance, the scope of moral reasons and responsibility generally. Mill proposed operational—political and legal—conceptions of freedom and harm, rather than general philosophical conceptions of them.

In sum, we have offered four good reasons for libertarians to take Mill seriously. Mill's libertarianism is sincerely anti-authoritarian and freedom-protecting. It has stood the test of time, achieving deserved canonical status. It captures libertarian commitments in a clear and forceful way. And it addresses the question at issue in the minimum coverage debate.

There is another, more conceptual reason for embracing the harm principle as an appropriate libertarian standard against which to assess contemporary libertarian objections to the minimum coverage provision. It is no quirk of Mill's thinking that, when paternalism is not at issue, he refers the line between personal autonomy and legitimate regulation to the social morality of the specific time and place. In conditions of practical interdependence, where many acts redound to the harm or benefit of others, what it means to protect liberty is not self-evident as an abstract matter. Any substantive conception of liberty requires both specification—the line shall be there and not here—and some account of the reasons for placing it there, which always means disregarding certain interdependent interests of others in order to protect personal autonomy.

There are two ways to justify such a line: by appeal beyond social convention, and by appeal to social convention. The first kind of appeal is to some principle that is independent of the time and place where the argument happens, such as a religious or natural-law foundation. Such reasons may be powerful for those who hold them. No doubt many libertarians today believe that the moral and philosophical truth of their commitments is independent of current social morality. But there is deep and extensive disagreement over the basis and content of any such reasons and, indeed, whether they exist at all. Absent some means of persuasion that can bridge these gaps, we agree with John Rawls that appeals to these principles cannot count as public reason-giving in the United States today.[80]

That leaves arguments over the content of libertarian freedom with just one line of appeal: to contemporary social morality. To defend a specific version of libertarianism as giving reasons that other citizens ought to respect, one cannot avoid arguing that this libertarian vision best expresses the values of the political community. Of course, one can adopt and advocate whatever version of libertarianism one likes. But defending it as potentially authoritative for others requires appeal to values that one holds in common with them, or at least to values that the contending parties jointly recognize as central to a shared political culture.[81] In short, we draw from Mill not because we (incorrectly) think that most libertarians in America today subscribe to the harm principle, but because his libertarianism directs attention to arguments that ought to count as public reason-giving in the United States.

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[80] *See* JOHN RAWLS, POLITICAL LIBERALISM 223-27 (1993) (on the content of public reasons and their independence from more specific substantive "comprehensive doctrines"). We are thus philosophically committed to the position that liberty is not self-defining—that one must go outside the concept to understand its content and scope.

[81] *See id.*

Recall that these considerations apply not to all libertarianism, but to libertarianism that asserts personal autonomy against social regulation outside the domain of paternalism. The rejection of paternalistic bases for regulation is categorical. We give libertarianism its due—indeed, we arguably give it more than its due—by assuming for purposes of analysis that the minimum coverage provision may not be defended on paternalistic grounds, notwithstanding instances of paternalism in American law and life. Regardless, once practical interdependence is present, others' interests *are* implicated in one's own actions, and the harm principle can no longer be a razor to distinguish legitimate from illegitimate regulation.[82] Instead, it must serve as a signpost, directing discussion to the content of social morality.

V. CONTEMPORARY SOCIAL MORALITY AND REGULATORY ALTERNATIVES

Because many libertarians reject the minimum coverage provision despite its status as non-paternalistic legislation,[83] we now consider libertarian reasons for doing so. We see two lines of libertarian argument for rejecting the provision even though it does not fall afoul of Mill's categorical anti-paternalism principle. First, maybe the interests of others affected by an individual choice to forgo insurance are not among those "which, either by express legal provision or by tacit understanding, ought to be considered as rights."[84] Because Mill deliberately wrote at a high level of abstraction at a time and place far removed from modern America, his principle cannot answer the question of what contemporary Americans owe one another.[85] He is more useful in framing the problem of social harm than in resolving it. To resolve the question, we must ask into the balance that law and social attitudes have placed between autonomy and the inevitable burdens of interdependence. We think it uncontroversial that contemporary social morality permits *some* solution to the problems of cost-shifting and adverse selection in healthcare and health insurance markets; ours is not a society in which people are generally entitled to impose significant material harms on others, whether financial or otherwise. For example,

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[82] Some have argued that, because we are all psychologically affected by knowledge of one another's conduct, much of what Mill seems to have regarded as self-regarding conduct in fact has meaningful effects on others. This argument in effect denies the coherence of much libertarian thinking. *See, e.g.*, Cooter & Siegel, *supra* note 5, at 152-54 (discussing psychological externalities); William W. Fisher, *When Should We Permit Differential Pricing of Information?*, 55 U.C.L.A. L. REV. 1, 26 (2007) (same). We do not take sides on this question here because our purpose is not to defend a libertarian position, and because the minimum coverage provision targets material externalities. For our purposes, it suffices to assume that there is a defensible line between paternalistic and non-paternalistic reasons, at least in principle.

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

[84] MILL, *supra* note 13, at 139.

[85] At bottom, the issue is what Americans owe one another, not what individuals owe "the state." The ACA, like Social Security, Medicare, and Medicaid, seeks to expand the social safety net in the United States. The ACA does so for the benefit of those who do or may need the social safety net, not for the benefit of the state itself. *Compare* Barnett, *supra* note 83, at 631-32 ("What separates the United States from other countries is the minimal and fundamental nature of the duties its citizens owe the state."). For a different view of the circumstances in which the federal government may mandate private behavior, see generally Siegel, *supra* note 4.

federal and state quarantine authority strongly suggests otherwise.[86] But granting this much, some solutions to free-rider problems may be more consistent with social morality than others.

Second, even if one accepts that free-rider problems justify regulation in this area, there may be ways of addressing them that are less coercive than the minimum coverage provision. This point departs from the letter of Mill's thought, but in an appropriate fashion. If one gives special status to liberty interests, as all libertarians do, then it seems fitting to apply something like a "less restrictive means" test to the social and legal debate over how far regulation is justified.

It is appropriate, then, to assess libertarian alternatives to the minimum coverage provision as solutions to the cost-shifting and adverse selection problems. We do this in two ways. First, we examine the alternatives' fit with the duties to one another established by law and social morality in the contemporary United States. Second, we analyze their viability as alternative measures that would burden individual liberty less than the minimum coverage provision does.

A. THE CONTENT OF AMERICAN SOCIAL MORALITY

Begin with the question of whether libertarian alternatives comport with social morality. Denying emergency room care to uninsured individuals would solve the cost-shifting problem without requiring anyone to obtain health insurance coverage. This would represent a legal judgment that present social morality does not include the principle that Americans owe one another medical care in times of immediate and pressing need.

This alternative to the minimum coverage provision, however, does not seem plausible from the standpoint of contemporary social morality. The national political community has long been committed to providing stabilizing care to individuals regardless of their ability to pay for this care or their insurance status. Federal law requires hospitals that participate in Medicare and offer emergency services—in other words, almost every hospital in America—to stabilize patients who go to their emergency rooms during medical emergencies regardless of their ability to pay.[87] State legislation and tort law impose similar requirements,[88] as do most hospitals themselves.[89]

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[86] *See, e.g.*, KATHLEEN S. SWENDIMAN & JENNIFER K. ELSEA, FEDERAL AND STATE QUARANTINE AND ISOLATION AUTHORITY, CRS REPORT FOR CONGRESS (Jan. 23, 2007), *available at* www.fas.org/sgp/crs/misc/RL33201.pdf (discussing the quarantine and isolation laws of individuals and the potential constitutional and separation of powers issues). This report begins by quoting Mill's harm principle. *See id.* at CRS-1.

[87] Emergency Medical Treatment and Active Labor Act of 1986 (EMTALA), 42 U.S.C. § 1395dd (2006).

[88] *See, e.g.*, Brief for Appellant at 42, Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011) (Nos. 11-1057, 11-1058), *petition for cert. filed*, 80 U.S.L.W. 3221 (U.S. Sept. 30, 2011) (No. 11-420) (discussing state tort law creating liability for failure to provide emergency care).

[89] *See, e.g.*, CHARLES E. ROSENBERG, THE CARE OF STRANGERS: THE RISE OF AMERICA'S HOSPITAL SYSTEM 347 (1995) (observing that "the hospital never assumed the guise of rational and rationalized economic actor during the first three-quarters of the twentieth century;" that it "continued into the twentieth century, as it had begun in the eighteenth, to be clothed with public interest in a way that challenged categorical distinctions between public and private;" and that "[p]rivate hospitals had always been assumed to serve the community at large— treating the needy"); *id*. at 352 (seeing "little prospect of hospitals in general becoming monolithic cost minimizers and profit maximizers," and predicting that American society "will feel uncomfortable with a medical system that does not provide a plausible (if not exactly equal) level of care to the poor and socially isolated").

Judging from these laws and charitable practices, most Americans reject the libertarian morality that would deny the uninsured stabilizing care in a medical emergency. Ours is not a country that lets people die in the street just outside a hospital entrance for lack of financial means or health insurance. Whatever might be said about certain Republican primaries at this time, what serious candidate for President would run on such a platform in a general election?

Another libertarian alternative would be to pursue any of several ways of addressing the adverse selection problem in health insurance markets. For example, Congress could have permitted insurance companies to continue their exclusionary practices, rather than make the adverse selection problem worse by requiring the companies to insure willing purchasers regardless of pre-existing conditions.[90] These ACA provisions, however, are as popular as the minimum coverage provision appears unpopular.[91] It therefore seems difficult to argue that libertarian objections to these provisions capture the contemporary American ethos.[92] The opposite seems true. The popularity of these federal regulations—like the popularity of Social Security, Medicare, and Medicaid—suggests the conclusion that most Americans are not libertarian.

One might object that we misread American social morality. Specifically, one might argue that, in light of the unpopularity of the minimum coverage provision as determined by polling, contemporary morality is substantially more libertarian than we acknowledge. We are not so sure.

First, the relevant poll questions are written in a loaded fashion. For example, the AP-National Constitution Center Poll of August 2011 asked about the minimum coverage provision in this way:

> Do you think the Federal Government should have the power to require all Americans to buy health insurance, and to pay a fine if they don't or do you think the Federal Government should not have that power?[93]

The minimum coverage provision does not apply to "all Americans;" it includes several exemptions, particularly for individuals in difficult financial circumstances.[94] Moreover, labeling the exaction for going without insurance a "fine" sounds in punishment; a more neutral approach would be to call the exaction for non-insurance a "fee" or a "certain amount of money." In addition, the poll question does not identify the benefits that the minimum coverage provisions helps to make possible: a

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[90] *See supra* note 30 and accompanying text (discussing the ACA provisions that restrict the underwriting practices of insurers).

[91] *See supra* note 29 and accompanying text (discussing the popularity of these ACA provisions).

[92] We invoke the idea of the American ethos in the same sense as Hanna Pitkin when she writes of "our fundamental nature as a people." Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL. EDUC. 167, 167 (1987).

[93] THE AP-NATIONAL CONSTITUTION CENTER POLL 6 (2011), *available at* http://surveys.ap.org/data/GfK/AP-GfK%20Poll%20Aug%202011%20FINAL%20Topline_NCC_1st%20story.pdf.

[94] The ACA's exaction for non-insurance is inapplicable to people who need not file a federal income tax return because their household incomes are too low, to people whose premium payments would be greater than eight percent of their household income, to individuals who are uninsured for short periods of time, to members of Native American tribes, and to people who show that compliance with the requirement would impose a hardship. 26 U.S.C. § 5000A(e) (2010). Moreover, the minimum coverage provision itself does not apply to undocumented aliens, people in prison, and people with certain religious objections. *Id.* § 5000A.

healthcare regime in which individuals and families cannot be denied coverage based on pre-existing conditions.

Rather than asking Americans how they feel about being forced to do something by the federal government or else being punished by the federal government, the poll question might ask the following:

> Do you support the federal government's requiring you to choose between obtaining a minimum level of health insurance or paying roughly $700 each year, given that your choosing between these options enables the federal government to prevent health insurance companies from denying you coverage based on pre-existing conditions and charging you higher premiums based on your medical history?[95]

If Americans were asked that question, we suspect that the minimum coverage provision would seem less unpopular.

Second, as mentioned above, other parts of the ACA are very popular, suggesting that Americans may not understand the connection between the minimum coverage provision and the parts of the law they like.[96] Third, Americans may also misunderstand the extent to which individuals who choose to remain uninsured end up imposing costs on others, including themselves.[97]

Fourth, even if people had full information and still opposed the minimum coverage provision, such a state of affairs would not necessarily be evidence of libertarian commitments. It might equally well reflect an all-too-human desire to want valuable things without having to pay for them.[98] The minimum coverage provision would likely be more popular if Congress amended the ACA to provide that the exaction for going without insurance would be paid out of the proceeds of a tax on individuals and corporations earning more than $1,000,000 per year. Such a redistributive arrangement, however, hardly qualifies as libertarian.

All that said, we would be over-claiming if we asserted that American social morality compels the minimum coverage provision. As advocates of "American exceptionalism" accurately point out, American social morality is more libertarian than that of many other democracies. But given (1) the long-standing political legitimacy of Social Security, Medicare, Medicaid, EMTALA, unemployment insurance, and a variety of other safety net laws and programs, (2) the fact that the ACA was enacted into law (which required sixty votes in the Senate), and (3) the political origins of the minimum coverage provision in conservative political thought,[99] we conclude that the provision is defensible as a matter of contemporary social morality. All these laws, like charitable hospital practices and federal and state quarantine authority, impose non-trivial burdens on some of us in order to make the lives of millions of potentially vulnerable Americans less insecure. A different conclusion might be warranted if efforts to privatize Social Security and Medicare were to succeed; if EMTALA and related state laws and charitable practices did not exist, and if all provisions of the ACA were persistently unpopular.

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[95] *See supra* note 74 (noting that the annual exaction for non-insurance by 2016 will be the greater of $695 or 2.5 percent of income).

[96] *See* Koppelman, *supra* note 29 (suggesting this possibility).

[97] *See supra* note 11 (citing congressional findings on these costs).

[98] See, for example, the Budget Deficit or the National Debt.

[99] *See, e.g.*, Michael Cooper, *Conservatives Sowed Idea of Health Care Mandate, Only to Spurn It Later*, N.Y. TIMES, Feb. 15, 2012, at A15.

Debate over the content of American social morality is important evidence that Mill properly treated libertarian objections to non-paternalistic regulation as a matter of contextual convention rather than abstract principle. Such disagreement is not just for or against personal liberty, but is more fundamentally about the content of personal liberty as Americans understand and have understood it.[100] The debate over the ACA is a contest over both the interpretation of that liberty as it has existed until now and the shaping of that liberty as it will be in the future. Social morality changes. It has changed before, and it can change again. It is permissible for opponents of the ACA to attempt such change, including by advocating for repeal of the law. But the strong claim that present social morality condemns the minimum coverage provision—that it is not within the realm of permissibility—is best understood as a proposal to change the center of social morality in the United States, not to invoke it. It is an attempt to move the goalposts, not to kick through them. There is nothing fundamentally un-American about the minimum coverage provision.

B. LESS LIBERTY-INFRINGING ALTERNATIVES?

Once Congress decided to end the exclusionary practices of insurance companies, it could have tried alternatives to a purchase mandate that would have infringed individual liberty less substantially. For example, Congress could have provided higher subsidies to tempt healthier individuals into the insurance pool.[101] Or it could have automatically enrolled individuals in insurance as a default but allowed them to opt out if they did not want coverage.[102] Congress also could have imposed limited open-enrollment periods and penalties for late enrollment.[103]

Each of these alternatives is problematic for one reason or another. Congress can always elect to spend more money on a problem, which requires either tax increases or deficit spending. Spending more taxpayer money does not seem obviously preferable from a libertarian perspective.

The other alternatives to the minimum coverage provision mentioned above (auto-enrollment as a default and limited open-enrollment periods with penalties for late enrollment) are unlikely to be as effective.[104] The President embraced the

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[100] *See* JEDEDIAH PURDY, A TOLERABLE ANARCHY: REBELS, REACTIONARIES, AND THE MAKING OF AMERICAN FREEDOM 204-28 (2009) (analyzing competing American conceptions of personal freedom in economic life).

[101] *See, e.g.*, Amitabh Chandra, Jonathan Gruber & Robin McKnight, *The Importance of the Individual Mandate—Evidence from Massachusetts*, 364 NEW ENG. J. MED. 293, 293-95 (2011) (analyzing the approaches of mandates and subsidies and concluding that "the higher the subsidies, the smaller the role for an individual mandate").

[102] *See* JONATHAN GRUBER, HEALTH CARE REFORM WITHOUT THE INDIVIDUAL MANDATE: REPLACING THE INDIVIDUAL MANDATE WOULD SIGNIFICANTLY ERODE COVERAGE GAINS AND RAISE PREMIUMS FOR HEALTH CARE CUSTOMERS 3-5 (2011), *available at* http://www.americanprogress.org/issues/2011/02/pdf/gruber_mandate.pdf.

[103] *See id.* at 5-7.

[104] Economist Jonathan Gruber of the Massachusetts Institute of Technology, a defender of the minimum coverage provision in the ACA, examined auto-enrollment and late enrollment penalties, finding that "both alternatives significantly erode the gains in public health and insurance affordability made possible by the Affordable Care Act." *Id.* at 1. Specifically, Gruber found that "no alternative to the individual mandate can cover more than two-thirds as many uninsured as the Affordable Care Act does;" that "no alternative to the mandate saves much money;" and that "any alternative imposes much higher costs on those buying insurance in the new health insurance exchanges as the healthiest opt out and the less healthy face increased premiums." *Id.* at 7.

minimum coverage provision only after the internal modeling of his top aides "showed that a mandate would extend coverage to 32 million uninsured people. Without such a requirement, . . . the administration estimated it could cover 16 million people at three-fourths the costs of covering the 32 million."[105] There do not appear to be alternatives to the minimum coverage provision that would be about as effective and less coercive.[106] To our knowledge, critics of the minimum coverage provision have not identified any.

Of course, a government-run, single-payer system of national healthcare would be at least as effective as the minimum coverage provision. But the single-payer system is also arguably more coercive in its restriction of market-mediated individual decisions. The ACA preserves private health insurance markets and allows individuals to choose among various health insurance options. If there are libertarians who prefer a single-payer system on the ground that it would be a lesser burden on individual freedom, we invite them to come forward. The case might be made, but almost certainly not on the negative-liberty basis that founds contemporary libertarianism in the United States.

Moreover, arguing over alternatives involves the libertarian position in contradiction and compounding difficulties. It makes little sense to object to the minimum coverage provision on libertarian grounds but to accept a regime of Medicare for all on libertarian grounds. And if one rejects Medicare for all on libertarian grounds, then one seems committed to rejecting Medicare as it now stands and other federal programs that constitute the social safety net. The more consistent the libertarian position, the less politically plausible it becomes.

To sum up our discussion of libertarian alternatives to the minimum coverage provision, the most straightforward libertarian solution to the cost-shifting problem—end universal access to emergency care—is not based on a plausible reading of the state of duties in contemporary American law and social morality. In addition, the most straightforward libertarian solution to the adverse selection problem that the ACA itself causes—allow insurance companies to exclude people—would be very unpopular. Finally, less coercive alternatives to the minimum coverage provision would be either objectionable on libertarian grounds or less effective in combating adverse selection.

C. A FINAL OBJECTION

One might nonetheless reject all of the above on the ground that government may not regulate so as to solve problems that government itself plays a role in creating.[107] Cost-shifting arises not just from the behavior of the uninsured, but from laws such as EMTALA. Adverse selection arises not just from imperfect information in insurance markets but from the ACA provisions that require coverage regardless of pre-existing conditions. May government contribute to the very problem that it then asserts the power to solve? Does it offend American social morality for government to create an unintended incentive to harm others while pursuing worthy

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[105] Sheryl Gay Stolberg, *Obama's Shift on Mandate May Be Health Law's Undoing*, N.Y. TIMES, Nov. 16, 2011, at A22.

[106] For development (without endorsement) of an appropriately deferential balancing inquiry in the context of a Commerce Clause challenge, which would reject the minimum coverage provision only if Congress unreasonably rejected regulatory alternatives that were about as effective and less coercive, see Siegel, *supra* note 42, at 611-16.

[107] *See, e.g.*, Barnett, *supra* note 83.

objectives, and then to invoke that harm as justification for further infringing individual liberty? The answer must be "no" as long as the initial law that created the perverse incentive was itself justified by social morality. In law as in medicine, socially beneficial interventions often have unfortunate side effects. Given this unavoidable fact of living in an imperfect world, government may both make the intervention and ameliorate the side effects. There is no neutral baseline independent of pre-existing law against which to measure the permissibility of a government regulation. So much new law presupposes the existence of older law that a contrary conclusion would radically shrink the scope of government power in America, thereby earning the condemnation of social morality.[108]

Even accepting the bootstrapping objection for purposes of argument, the minimum coverage provision still ameliorates harms that individuals impose on others and that government regulations play no role in causing: the adverse selection problem in insurance markets that long pre-dated the ACA. The market for health insurance attracts adverse selection, even absent the ACA's prohibitions on underwriting, because individuals know much more about their health status than insurance companies do.[109] This information asymmetry creates an incentive for individuals to free ride by entering the market only when they expect to require expensive medical care. In other words, the problem cannot be solved only through actuarially appropriate pricing of insurance policies because insurance companies do not possess enough information to price policies appropriately.[110]

The minimum coverage provision is an effective solution to this problem. It prevents people from waiting to purchase insurance until they already suffer from health problems, thereby free riding on individuals who purchased insurance while they were healthy. Libertarians do not appear to have a persuasive answer to the question of how markets can solve this market failure.

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The principle of individual liberty that Mill enduringly articulated cannot undergird a decisive libertarian objection to the minimum coverage provision. Instead, Mill's own libertarian formulation directs us to an inevitable higher-level debate about which burdens of practical interdependence justify legal regulation of individuals. In assessing that debate, Mill draws our attention to existing legal designations of protected interests as evidence of the state of our social morality, and to the more disputable "tacit judgments" of that morality itself. Existing law and social practices suggest that the minimum coverage provision is consistent with American social morality.

The libertarian argument against the provision is couched as an appeal to an objective principle of liberty, but upon examination it is more a proposal to depart from presently established ideas about what we owe one another as Americans. We

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[108] For a refutation of the bootstrapping objection from the perspective of constitutional law, see Siegel, *supra* note 4, and Stuart M. Benjamin, *Bootstrapping*, 75 LAW & CONTEMP. PROBS. (forthcoming 2012).

[109] *See* CHARLES E. PHELPS, HEALTH ECONOMICS 318 (4th ed. 2010) (noting the "risk . . . that insurance companies will put an insurance plan into the market that uses one set of actuarial projections about the costs of insured people but ends up attracting a special subset of the population with unusually high health care costs").

[110] *See supra* note 78 (discussing the point that the adverse selection problem cannot be solved through pricing alone).

believe that proposal is inhumane, but that is an argument for another day. For the moment, it is enough to say that the burden of persuasion lies with the libertarian objector, and that such persuasion must appeal to legal arrangements and social practices. The terms of persuasion cannot be an appeal to a freedom-protecting, anti-regulatory trump card that misdescribes American society as it has developed since at least the economic and constitutional crises of the Great Depression and the New Deal.[111]

VI. CONCLUSION

This analysis suggests that proper resolution of the Commerce Clause question in the constitutional debate over the ACA is conceptually connected to proper resolution of the individual rights question. Just as the interstate scope of the problems of cost-shifting and adverse selection justifies federal power to require individuals to obtain health insurance coverage, so the existence of these free-rider problems illuminates the difficulties with recognizing individual rights claims that sound in liberty. To be sure, American constitutional law and culture recognize, or decline to recognize, assertions of individual rights for a richly over-determined, historically contingent, and right-specific set of reasons. But it is difficult to come up with many instances in which legally competent and financially able individuals are deemed to possess a right—whether as a matter of constitutional law or political morality—to obtain the benefits of collective action without in any way contributing to it.

Everyone agrees, however reluctantly, that the minimum coverage provision does not violate substantive due process. The provision is also defensible as a matter of contemporary social morality. In helping to address two significant sources of harm to others, the provision does not run afoul of Mill's anti-paternalism principle. And in internalizing the externalities that individuals generate by forgoing health insurance for the time being, the minimum coverage provision falls within the range of what the contemporary national ethos suggests that Americans may legitimately demand of one another.

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[111] *Cf., e.g.*, *supra* note 33 (quoting Alexander Bickel's interpretation of this period of American history).