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THE INDIVIDUAL MANDATE'S DUE PROCESS LEGALITY: A KANTIAN EXPLANATION, AND WHY IT MATTERS

Peter B Bayer, University of Nevada, Las Vegas

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The Individual Mandate’s Due Process Legality:

A Kantian Explanation, and Why It Matters

by,

Prof. Peter Brandon Bayer*

ABSTRACT

In its recent *National Federation of Independent Business v. Sebelius*, __ U.S. __, 12 Westlaw 242810, one of the most controversial decisions of this young century, an intensely divided Supreme Court upheld under Congress’ power to tax the Patient Protection and Affordable Care Act’s most provocative feature, the Individual Mandate (“IM”). In so doing, the Court rejected what appeared to be the IM’s more applicable constitutional premise, Congress’ authority to regulate interstate commerce. Yet, neither the Constitution’s Taxing Clause nor its Commerce Clause provide the ultimate answer whether Congress may regulate the multi-billion dollar healthcare market by compelling unwilling persons to buy private health insurance. *The final determination of the IM’s constitutionality lies within the profound and pivotal tenets of liberty secured by the due process clauses of the Fifth and Fourteenth Amendments.*

Indeed, the prime criticism against the Individual Mandate is that Government exceeds its legitimate authority -- infringes liberty -- by compelling individuals to purchase unwanted products even for the greater public good. As the popular cliché goes, if today Congress may mandate buying health insurance, tomorrow it could be cars or broccoli.

This article argues that, to the contrary, the Individual Mandate comports fully with vital liberty interests without opening a “floodgate” whereby Congress can force persons to buy any commodity to promote any purported societal benefit. Specifically, after an introduction summarizing the argument, Part II briefly reviews contemporary judicial standards to show that due process liberty principles underlie and animate the Commerce and Taxing Clauses. Thus, the due process clauses hold the answer to the IM’s constitutionality.

Part III explains that due process protects the innate dignity of every person from even well meaning impositions by any level of government. In this crucial regard, although courts do not so acknowledge, modern due process jurisprudence has intuited and applied the “metaphysics of morals” espoused by the highly respected Enlightenment philosopher Immanuel Kant. Kantian morality explains modern substantive and procedural due process of law.

Among his essential tenets, Kant famously argued that although there is no general duty to aid the poor, Government cannot enact laws that create supplicants, meaning persons who, due

* William S. Boyd School of Law, University of Nevada, Las Vegas. I thank the friends and colleagues with whom I have discussed this work, in particular Professors Ian Bartrum, George Mader, Tom McAffee, Ann McGinley, and my research assistant Erica Okerberg.
to dependence on charity for minimal sustenance, become virtual slaves. Kant illustrated his argument by noting that although indispensible to greater society, property and contract law create impoverishment because all available property will be held by less than all of the people. When the law itself causes poverty, Government, as the author of that law, has an absolute duty to restore the poor from quasi-slavery to independence. Kant sensibly suggested a tax for the benefit of the indigent, enabling them to regain liberty sufficient to stop begging.

The Individual Mandate is the very type of tax Kant anticipated, preventing individuals from becoming vagabonds -- effectively slaves -- pleading for the vital healthcare that they cannot afford but eventually will need. Thus, the IM comports with liberty as vouchsafed by due process. Moreover, Congress cannot exercise such power merely to safeguard even significant commercial markets because unlike acquiring health insurance, consumers who now refuse to buy cars and broccoli will not suddenly need those products to survive but be unable to purchase them absent insurance.

### TABLE OF CONTENTS

I. Introduction -- How Kantian Ethics Elucidates the True Constitutional Validity of the Individual Mandate ............................................. PP. 3

II. A Terse Précis of Commerce’s Link with Liberty .......................... PP. 7
   a. Today’s Constitutional Benchmark, the “Economic Effects” Standard . PP. 8
   b. The Four Judicial Phases of Commerce Clause Jurisprudence ......... PP. 12
   c. Commerce, Federalism and Individual Liberty ........................ PP. 17
   d. Why the Individual Mandate Comports with Congress’ Power to Tax, but Not Its Power To Regulate Commerce .......................... PP. 23

III. The Kantian Defense Of The Individual Mandate ......................... PP. 26
   a. Moral Theory Is Deontological, Not Utilitarian/Consequentialist ...... PP. 28
   b. Prof. Barnett’s Quasi-Deontology ..................................... PP. 32
   c. Dignity, Morality, Duty and the Necessity To Form Societies under Due Process of Law ............................................. PP. 37

1. The Rational Capacity of Each Person To Discern a
   “Metaphysics of Morals” .................................................. PP. 38
2. Kant’s Dignity Principle ................................................ PP. 40
3. The Categorical Imperative Formulations One and Two ............... PP. 42
4. The Categorical Imperative’s Third Formulation, the “Kingdom of Ends” .................................................. PP. 46
   A. Perfect and Imperfect Duties ........................................ PP. 49
   B. The Guarantee of Due Process is the Constitution’s “Perfect Duty,” Protecting the Innate Dignity of All Persons Subject to the Jurisdiction of the United States ......................................... PP. 52
   C. Government’s Duty To Aid the Destitute and Its Application to the Individual Mandate ............................................. PP. 55
      i. Property Law and the Enslavement of Poverty ............... PP. 56
      ii. Government’s Perfect Duty To Tax for the Benefit of the Destitute .................................................. PP. 58
I. Introduction -- How Kantian Ethics Elucidates the True Constitutional Validity of the Individual Mandate

Ironically, neither the Constitution’s Commerce Clause\(^1\) nor its Taxing and Spending Clause\(^2\) provides the ultimate answer whether Congress may regulate the multi-billion dollar healthcare market by requiring unwilling adults to purchase private health insurance. True, the Supreme Court’s National Federation of Independent Business v. Sebelius recently upheld the Patient Protection and Affordable Care Act’s\(^3\) most provocative and crucial component, the Individual Mandate (“IM”).\(^4\) Yet, significant as Sebelius may be, the Constitution’s final word will come if and when the Mandate is tested under that charter’s foremost standard: the paradigm of liberty inspiring and impelling the due process clauses of the Fifth and Fourteenth Amendments.\(^5\) Indeed, unlike the Constitution’s Article I, the predominant command of due

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\(^1\) U.S. CONST. art. I, § 8, cl. 3, accords Congress the authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

\(^2\) Congress may “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” U. S. CONST., Art. I, § 8, cl. 1.


\(^4\) 26 U.S.C. § 5000A et seq. Specifically, National Federation of Independent Business v. Sebelius, __ U.S. __, 12 Westlaw 242810 (U.S.), at 24-30 (Roberts, C.J., with Ginberg, Breyer, Sotomayor, and Kagan, JJ., hereafter “Majority Opinion”) held the IM valid and enforceable pursuant to Congress’ taxing powers. Importantly, the Court further ruled that the Mandate is not sustainable under Congress’ authority to regulate interstate commerce. *Id.* at 14-23 (opinion of Roberts, C.J.); *id.* at 72-79 (opinion jointly authored by Scalia, Kennedy, Thomas and Alito, JJ., hereafter “Joint Dissent”).

\(^5\) As four justices correctly noted, the argument against the IM in fact implies a substantive due process matter that has not be pressed except that the parties “now concede that the provisions here at issue do not offend the Due Process Clause.” Sebelius, 12 Westlaw 242810 (U.S.), at 53 (Ginsberg, J., with Breyer, Sotomayor and Kagan, JJ., concurring in the judgment, concurring in
process resolves the IM issue at both the federal and state levels.\textsuperscript{6} This article explains why compelling unwilling persons either to purchase unwanted health insurance or pay a penalty does not offend core principles of substantive due process.\textsuperscript{7}

To so demonstrate, Part II briefly explains that the prime principle animating the commerce and tax precedents upon which Sebelius relies is safeguarding individual liberty, something the justices acknowledged, but did not address. Because the parties never pursued the due process issue,\textsuperscript{8} the Court analyzed relevant commerce and tax jurisprudence outside of the liberty principles that vitalize those branches of American constitutional law. Accordingly, the final chapter regarding the Individual Mandate’s constitutionality, its due process legitimacy, waits to be written.

After showing that commerce and tax constitutional law embraces substantive due process, this article’s Part III explains why the Individual Mandate is consistent with liberty.

\textsuperscript{6} Pursuant to their respective texts, the Fifth Amendment’s due process clause covers federal actions, while the Fourteenth Amendment’s due process clause addresses State and local regulation. Therefore, any due process review of Congress’ Individual Mandate falls under the Fifth Amendment. However, logic dictates that, “The two Clauses should be applied in the same manner when two situations present identical questions differing only in that one involves a proscription against the federal government and the other a proscription against the States.” Morgan v. Woessner, 997 F.2d. 1244, 1255 (9\textsuperscript{th} Cir. 1993), cert. dismissed, Searle v. Morgan, 510 U.S. 1033 (1994) (footnote omitted). After all, “there is only one due process clause.” Id.; cf. McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (noting that while subject to interpretive devices such as “levels of scrutiny,” there is “only one due process clause in the Fourteenth Amendment”). Accordingly, the due process leeway of a State to enact a local individual mandate is identical to Congress’ leeway to pass a national IM.

\textsuperscript{7} “It has been ‘settled’ for well over a century that the Due Process Clause[s] ‘appl[y] to matters of substantive law as well as matters of procedure.’” McDonald v. City of Chicago, 130 S. Ct. 3020, 3091 (2010) (Stevens, J., dissenting) (quoting Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring), overruled by Brandenburg v. Ohio, 395 U.S. 444 (1969)).

\textsuperscript{8} See supra note 5 and accompanying text.
Rather than appealing to such analogous precedent as may be found, this article offers an alternative approach that I urge more compelling and convincing. As I have argued elsewhere, and to which I will refer herein, writing shortly after the American Revolution, the well-regarded Enlightenment philosopher Immanuel Kant offered an enthralling meta-theory of humanity predicated on a fabric of timeless morality and immutable duty. For Kant, every person is imbued with innate, irrevocable dignity emanating not from the acts she actually performs, but rather from her uniquely human capacity to understand transcendent morality and to act morally. This innate dignity generates both a right and a duty: the right to be treated with respect by all persons, at all times, in all places, under all circumstances, and a corresponding duty to so treat all others.

From this “metaphysics of morals,” Kant devised his Categorical Imperative, a set of ethical principles elucidating the nature of morality, the structure of moral duties and the formation of liberal social orders legitimate only if they vouchsafe the dignity of each person. Accordingly, to borrow the terms of the Founders, individuals may “pursue happiness,” but only

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9 For example, Government may compel unwilling persons to be vaccinated against communicable diseases. E.g., Zucht v. King, 260 U.S. 174, 176 (1922); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (individual may not refuse to be vaccinated); Workman v. Mingo County Bd. of Ed., 419 Fed. Appx. 348, 355-56 (4th Cir. 2011) (parents have no substantive due process right to refuse mandatory vaccinations prior to enrolling their children in public or private school). Similarly, Government may quarantine persons exposed to contagious ailments. E.g., Robinson v. California, 370 U.S. 660, 666 (1962); U.S. v. Buchard, 580 F.3d 341, 349 (6th Cir. 2009). Moreover, Government may enforce a draft -- compulsory military conscription. E.g., Selective Draft Law Cases, 245 U.S. 366, 378 (1918). Thus, for urgent public good, Government can force medications into the bodies of the unwilling, confine law-abiding persons to their homes or hospitals, and abrogate individuals’ freedom to choose their own employment and residences by forcing them to engage in military service with its attendant risk to life and limb. In contrast, paying either insurance premiums or a tax penalty, the economic coercion of the IM, seems a trivial burden indeed to end the manifest injuries caused by “free riders” whose refusal or inability to purchase insurance skews the healthcare market. E.g., Sebelius, 2012 WL 2427810 (U.S.) at 40-42 (Ginsberg Opinion) (discussing the economics of medical services in America).
while respecting the dignity of others within a society governed by moral laws that protect “life” and “liberty.” As we will see, although they never cite this philosopher, American courts have discerned a jurisprudence of due process steeped in Kantian principles of dignity and morality. Indeed, *dignity* -- respecting the inherent personhood of all individuals -- is the constitutional paradigm governing due process of law.

Therefore, this article culls the intricate, compelling and elegant structure of Kantian morality to discern whether the Individual Mandate unduly constricts personal liberty.

Interestingly, Kant presaged our national concern for the well being of persons in need, arguing that while there is no individual moral obligation to supply aid, Government itself has a mandatory duty to tax the better off for the benefit of the poor. The fascinating, surprising yet logical basis of this Kantian duty is not that the indigent have a right to charity or that a good and generous society is morally obliged to be charitable. Rather, poverty robs the poor of their dignity -- their ability meaningfully to pursue happiness within a society governed by law. Because, as detailed *infra*, such poverty is the byproduct of indispensable property and contract law, the Government that made those laws must restore to the poor their lost dignity, rendering them at least minimally able to function as independent persons. In sum, Society cannot maintain a class of supplicants, persons in virtual slavery because they lack basic sustenance.

Like hunger, homelessness and nakedness, the inability to afford minimal medical care renders individuals into vagabonds, dependent on the largesse of others. Just as Kant argued that Government assumes an immutable moral duty to tax to help the poor, so too is there a mandatory duty to support access to healthcare. The Individual Mandate is such a tax. So long as it is not confiscatory or otherwise infirm, the IM comports with Kantian moral theory. Because Kant’s “metaphysics of morals” is the manifest yet unacknowledged paradigm of
American due process jurisprudence, it makes sound sense to consider his graceful argument that Society is duty bound to restore persons from beggars to independence. Thus, there is a Kantian defense for the IM; and, in light of what Kant’s theories teach us, the defense provides the integral ideas -- the moral arguments -- that define, establish and enliven American due process of law. Without that paradigm of dignity, decency and morality, all analogous precedents lack meaning. That is why a Kantian defense of the Individual Mandate matters.

II. A Terse Précis of Commerce’s Link with Liberty --

Addressing what it perceived to be a singular crisis of national proportions, Congress enacted the Affordable Care Act to foster societal-wide accessible, affordable, comprehensive, and reliable healthcare. The centerpiece and surely most controversial portion of the ACA is § 1501, commonly referred to as the Individual Mandate. With limited exemptions, the IM directs that by no later than January 1, 2014, all Americans either purchase statutorily compliant health insurance or pay a tax penalty for failing to do so.

10 E.g., Sebelius, 2012 WL 24210 (U.S.) at 9 (Majority Opinion).
11 Because it imposes tax penalties for failure to comply, see infra note 11, the IM is found in subtitle D of the Internal Revenue Code, entitled “Miscellaneous Excise Taxes,” 26 U.S.C. § 5000A et seq.
12 The Act exempts, inter alia, unlawful aliens, prisoners, individuals whose household income falls below the federal income tax filing minimum, members of Indian tribes and persons determined by the Department of Health and Human Services (“HHS”) to suffer “hardships.” 26 U.S.C. § 5000A(d), (e).
13 26 U.S.C. §§ 5000A(a)-(b). Put briefly, the ACA’s regulation of the health insurance market rests on three legs. The first is “guaranteed issue,” meaning private carriers must make health insurance available to all comers regardless of health status and preexisting conditions. Moreover, insurance policies must cover such preexisting conditions. The second leg is “community rating,” that is, carriers must charge identical rates to all purchasers as set by a formula that, with very limited exceptions such as smoking, does not take into account either preexisting conditions or personal habits considered inimical to good health. The third leg is the Individual Mandate which, by requiring substantially all otherwise uninsured adults to purchase healthcare, provides income to carriers to offset the significant business costs of legs one and two. Sebelius, 2012 WL 2427810 (U.S.) at 43-44 (Ginsberg Opinion); at 74-75 (Joint Dissent). The justification is abolishing “free riders,” that is, persons who despite their lack of insurance
Not surprisingly, Congress asserted the Commerce Clause as its primary source of constitutional authority to enact the ACA.\(^{14}\) Because access to and the attendant costs of healthcare undeniably affect economies at all levels -- personal, business, local and national -- the bond between Congress’ Article I authority to “regulate” interstate commerce and the ACA’s direct regulation of the multi-billion dollar health care market seemed obvious. However, as detailed infra, the Supreme Court rejected commerce but accepted the Taxing and Spending Clause as Congress’ legitimate basis to enact the IM.\(^{15}\)

\(^{a}\) Today’s Constitutional Benchmark, the “Economic Effects” Standard --

A brief review of Commerce Clause jurisprudence provides a useful prelude to the Kantian analysis. While certainly “commerce” is definable in its own right, that definition exists within, is informed by and indeed is subservient to the liberty principles of due process\(^{16}\) that will not be refused expensive medical treatment for which they are unable to pay out-of-pocket. E.g., id. slip op. at 40-41 (Ginsberg Opinion).

Additionally, the ACA creates State controlled “Health Benefit Exchanges” allowing individuals, families and small business to form pools for competitive purchasing, and to obtain tax credits and subsidies, penalizes private employers that fail to provide minimum health insurance to employees, and expands Medicaid eligibility and subsidies. E.g. State of Florida by and through Attorney General v. United States Department of Health and Human Resources, 648 F.3d 1235, 1246 (11th Cir. 2011)(“Attorney General”), rev. in part and aff’d in part, National Federation of Independent Business v. Sebelius, ___ U.S. ___, 2012 WL 2427810 (U.S.) (2012). That latter provision was struck by the Supreme Court as contravening the Tenth Amendment insofar as it coerces States to enlarge their Medicaid programs. Sebelius, 2012 WL 2427810 at 31-38 (Roberts, C.J., with Beyer and Kagan, JJ.); id. at 86-96 (Joint Dissent).

\(^{14}\) 42 U.S.C. § 18091(a).

\(^{15}\) See supra, note 4 and infra notes 72-77 and accompany text.

\(^{16}\) While subject to a more detailed definition infra, “liberty” generally is definable as the “ability of individuals to engage in freedom of action within society and free choice regarding most aspects of ... private life.” John E. Nowak & Ronald D. Rotunda, Constitutional Law §13.4(d)(vii), at 669 (8th ed. 2010)(quoted in Katrina Fischer Kuh, When Government Intrudes: Regulating Individual Behaviors That Harm The Environment, 61 DUKE L. J. 1111, 1152, n. 166 (2012)).
vindicate our Constitution\textsuperscript{17} -- the very principles which Kantian morality elucidate. Thus we will find a vibrant tie between the two clauses, Commerce and Due Process, that clarifies why settling the Commerce Clause legitimacy of the Individual Mandate evokes a concomitant “fundamental fairness” inquiry.

Beginning with the rudiments, the Constitution accords Congress ostensibly limited regulatory authority,\textsuperscript{18} enough to fulfill the “necessary and proper” work of a national government\textsuperscript{19} but, very importantly, duly constrained to forestall tyranny at the federal level.\textsuperscript{20} Among its most lively powers, Congress may “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”\textsuperscript{21} At its core, The Commerce Clause accords Congress the discretion, “to prescribe the rule by which commerce is to be governed.”\textsuperscript{22} This power is plenary and “like all others vested in Congress, is complete in itself, …”\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{17}I say “vindicate” because, as I tried to show in earlier work, absent robust enforcement of “due process,” a constitution, the government it structures and the society it governs are immoral and, thus, illegitimate. Peter Brandon Bayer, Sacrifice and Sacred Honor: Why the Constitution Is a Suicide Pact, 20 WM. & MARY BILL OF RTS. J. 287, 335-346, 385-396 (2011).
\item \textsuperscript{18}Elementary federalism informs that, “Congress’ authority is limited to those powers enumerated in the Constitution.” U.S. v. Lopez, 514 U.S. 549, 566 (1995)(discussing, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)(Marshall, C.J.) (“Th[e] [federal] government is acknowledged by all to be one of enumerated powers.”)).
\item \textsuperscript{19}Congress is empowered “[t]o make all Laws which shall be necessary and proper for carrying into Execution,” its enumerated powers. U.S. CONST. art. I, § 8, cl. 18.
\item \textsuperscript{20}As the Supreme Court repeatedly emphasizes, “This constitutionally mandated division of authority [between the federal and State levels] ‘was adopted by the Framers to ensure protection of our fundamental liberties.’” Lopez, 514 U.S. at 552 (quoting, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (internal quotation marks omitted)); see also, e.g., Sebelius, 2012 WL 2427810 (U.S.) at 7 (Opinion of Roberts, J.); id. at 105 (Joint Dissent). This article emphasizes this essential concept infra at notes 51-71 and accompanying text.
\item \textsuperscript{21}U.S. CONST. art. I, § 8, cl. 3 (emphasis added). The Clause’s vivacity reflects its historical necessity: “The Commerce Clause emerged as the Framers’ response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation.” Gonzales v. Raich, 545 U.S. 1, 16 (2005) (footnote omitted).
\item \textsuperscript{22}Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).
\item \textsuperscript{23}Id.; see also, e.g., Champion v. Ames, 188 U.S. 321, 357 (1903).
\end{itemize}
Commerce Clause litigation commonly concerns whether Congress is policing interstate (or international) commerce without impermissibly intruding into intrastate commerce, that is, commerce “completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States.” To resolve that persistent inquiry, a pivotal triumvirate of Supreme Court decisions, *U.S. v. Lopez*, *U.S. v. Morrison*, and *Gonzales v. Raich*, defined “commerce” as “economic activity” of a “commercial character.” In other words, any congressional regulation of purported intrastate commerce must involve actual “economic activity” linked fairly directly to interstate commerce. Thus, the Court understands commerce to demarcate commercial dealings from all other social interactions.

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26 529 U.S. 598 (2002).
28 *Morrison*, 529 U.S. 611, n. 4. “[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” *Id.* at 613; see also, *Lopez*, 514 U.S. at 559-60. The recent *Sebelius* ruling did not change this constitutional threshold.
29 E.g., *Raich*, 545 U.S. at 17. Certainly, this standard emphasizing commerciality complements Chief Justice Marshall’s delineation, the most celebrated of all “commerce” encapsulations: “Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.” *Ogden*, 22 U.S. (9 Wheat.) at 189-190 (Marshall, C.J.) (emphasis added).
For the purposes of this commentary, the controlling question is not whether these recent decisions establish a constitutionally apt standard for enforcing one of Congress’ most forceful powers. Nor is it whether each precedent reached the correct holding. Rather, the inquiries and inquiries into interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.” 529 U.S. at 617-18.

By contrast, *Raich* upheld federal convictions under the Controlled Substances Act, 84 Stat. 1242, 21 U.S.C. § 801 et seq., of individuals who, pursuant to California’s Compassionate Use Act, Cal. Health & Safety Code Ann. § 11362.5-9, cultivated and used marijuana for certain medicinal purposes. The Court concluded that Congress’ commerce authority “includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.” 529 U.S. at 9.


32 Surely, it is not stunningly clear that the “possession” of guns in school zones, and the possible resulting crimes, have but marginal effects on interstate commerce particularly if one were to “aggregate” all instances of such possession throughout the United States. *Lopez*, 514 U.S. at 602-03 (Stevens, J., dissenting). Nor does it take the imagination of Jules Verne to realize that, along with its toll on the human spirit, violent crimes against women engender huge expenditures in medical bills, police and court costs, victims’ lost earnings and other comparable expenses measurable in economic markets. *Morrison*, 529 U.S. at 634 (Souter, J., with Stevens, Ginsberg and Breyer, JJ., dissenting) (citations to legislative history omitted).

Similarly, a high demand price for marijuana might induce some to sell rather than to ingest their State authorized medical marijuana, impeding Congress’ perceived legitimate interest to eliminate the interstate demand for illegal drugs. *Raich*, 525 U.S. at 19-20 and n. 29. Still, if the undisputed market consequences of both firearms in school zones and criminal assaults against women were insufficient to sustain the congressional legislation in *Lopez* and *Morrison*, the purported constitutionally adequate “economic effects” of a “commercial character” in *Raich* -- that possibly *some* gravely ill private growers will sell their cannabis rather than use it to alleviate their severe medical symptoms -- are questionable to say the least. *Raich*, 525 U.S. at 52 (O’Connor, J., with Rehnquist, C.J. and Thomas, J., dissenting).
are: how did the Court come to this “economic activity” paradigm and what, if anything, does that history divulge about why commerce disputes actually concern due process liberty?

b. The Four Judicial Phases of Commerce Clause Jurisprudence --

Indulging comfortable hindsight, the arc of Commerce Clause law over two and a quarter centuries embracing expansive Congressional oversight seems inevitable, or at least historically and societally coherent, considering the advent of immense industrialization, mass communications, easily accessible national and international transit, computerization virtually for all, urbanization and unparalleled growth of knowledge.33 In such a society -- indeed, in such a world -- scant individual or corporate commercial behavior seems remote from business markets spanning States. Thus, while utterly “intrastate” commerce still remains beyond its reach, even under *Lopez-Morrison-Raich*, Congress enjoys substantial discretion to manage interstate commercial activity by manipulating intrastate realms. Those precedents echo the Court’s frequent assertion: Congress’ commerce authority includes “regulat[ing] purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”34

The chronicle of judicial efforts to resolve the vexing dilemma of intrastate commerce’s constitutional connection to interstate commerce reveals roughly four historical phases. During

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33 *E.g.*, *Morrison*, 529 U.S. at 660 (Breyer, J., with Stevens, Souter and Ginsberg, JJ., dissenting). *But see, Lopez*, 514 U.S. at 568 (Kennedy, J., with O’Connor, J., concurring), “The progression of our Commerce Clause cases … was not marked, however, by a coherent or consistent course of interpretation; for neither the course of technological advance nor the foundational principles for the jurisprudence itself were self-evident to the courts that sought to resolve contemporary disputes by enduring principles.”

34 *Raich*, 454 U.S. at 17. Similarly, the Court ruled in *Lopez*, Congress may “regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” *Lopez*, 514 U.S. at 558-59 (emphasis added; citations omitted); accord., *Morrison*, 529 U.S. at 608-09.
the first phase, starting with *Gibbons v. Ogden*\(^{35}\) and continuing until about 1918, courts accepted that Congress’ commerce power comprised thoroughgoing authority to exclude products from the flow of commerce, including those manufactured intrastate. Exemplifying the enduring breadth and depth of its commerce authority then as now, Congress may regulate to promote market efficiencies for their own sake, or to foster moral agendas by barring arguably harmful products and immoral behavior from the flow of interstate commerce.\(^{36}\)

Commencing during the early 1900s, perhaps best exemplified by 1918’s *Hammer v. Dagenhart*,\(^ {37}\) the paradigm shifted to hold “that Congress could not use its power over interstate commerce as a pretext to reach such economic but noncommercial intrastate activities as manufacturing or agriculture, activities which were instead within the police power of states to regulate.”\(^ {38}\) The generally accepted although perhaps sketchy explanation for this second phase is “laissez-faire economics, the point of which was … trying to create a laissez-faire world out of

\(^{35}\) *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

\(^{36}\) Millhiser, *supra* note 31 at 53 (2011) (footnotes omitted; citing, *e.g.*, *Champion v. Ames*, 188 U.S. 321, 357 (1903) (upheld statute proscribing the transportation of lottery tickets in interstate commerce); *Hoke v. United States*, 227 U.S. 308, 322 (1913) (upheld statute banning transportation of prostitutes in interstate commerce); *Clark Distilling Co. v. Western Maryland Railway* 242 U.S. 311, 327 (1917) (upheld statute restricting interstate sale of alcoholic beverages)). As the Court famously ruled almost a century ago, “[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.” *Caminetti v. United States*, 242 U.S. 470, 491 (1917); *also, e.g.*, *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241, 25 (1964); *U.S. v. Patton*, 451 F.3d 615, 621 (10th Cir. 2006); *Groome Resources Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 209 (5th Cir. 2000); *Gibbs v. Babbitt*, 214 F.3d 483, 493, n. 2 (4th Cir. 2000).


\(^{38}\) Barnett, *supra* note 31 at 589 (footnote omitted); *see also, e.g.*, *Morrison*, 529 U.S. at 642-43 (Souter, J., with Stevens, Ginsberg and Breyer, JJ., dissenting)(citations omitted).
the 20th-century economy, and formalistic commercial distinctions were thought to be useful instruments in achieving that object."39

The third Commerce Clause phase began in 1937 when the Court renounced its former ostensible laissez-faire economic paradigm in favor of deference to congressional and State economic regulation, thereby addressing critics who claimed that the Third Branch had indulged an illegitimate quasi-legislative posture to impose its social policy preferences as constitutional

39 Morrison, 529 U.S. at 643-44 (Souter, J., with Stevens, Ginsberg and Breyer, JJ., dissenting) (footnote omitted). Concurrent with restricting Congress’ commerce powers ostensibly to protect States’ authority to regulate manufacturing, the Court entered the discreditable epoch familiarly known as Lochnerism, taking its name from Lochner v. New York, 198 U.S. 45 (1905). Therein, the Court controversially ruled, “The general right to make a contract in relation to his business is part of the [substantive] liberty of the individual protected by the [due process clause of the] 14th Amendment … The right to purchase or to sell labor is part of the liberty protected by this amendment.” Id. at 53 (striking New York law setting maximum hours for bakery workers). In sum, under Lochnerism, the Court struck as violating substantive due process State laws regulating business and industry -- the same types of laws the Court held Congress could not enact because such regulation of manufacturing was the exclusive province of State governments. E.g., Attorney General, 648 F.3d at 1362, (Murphy, J., dissenting in part) (citations omitted), rev. in part., aff’d. in part, Sebelius, 2012 WL 242810 (U.S.) (2012).

Although substantially repudiated at the same time the judiciary entered the third phase of its commerce jurisprudence, Lochner’s mistake was not its philosophy that the due process clauses contain implicit substantive as well procedural meanings, although for many years the courts were highly skeptical of arguments urging unenumerated substantive due process rights. As the Court rhetorically inquired in 1937, “What is this freedom [of contract]? The Constitution does not speak of freedom of contract.” W. Coast Hotel Co. v. Parish, 300 U.S. 379, 391 (1937).

Rather, Lochner’s foundational premise remains the Constitution’s prevailing paradigm: the due process clauses invalidate all arbitrary or unreasonable federal, state and local governmental conduct. Lochner, 198 U.S. at 56; also, id. at 67 (Harlan, J., dissenting); id. at 76 (Holmes, J., dissenting). Pursuant to that standard, contemporary constitutional theory recognizes a small core of substantive due process rights, predominately involving personal privacy and all considered essential to “ordered liberty.” Specific rights include, “the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion,” Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citations omitted). In addition, through substantive due process, the courts discerned an equal protection command applicable to the Federal level under the Fifth Amendment and “incorporated,” that is, applied to the States, almost all of the Bill of Rights. E.g., Bayer, supra note 17 at 393-96.

Thus, Lochner’s error was averring that included within substantive due process is a specific, private right of contract, or, as the cliché would have it, the Lochner Court entered the “right church,” but chose the “wrong pew.”
law. Adopting the “substantial effects test,” the Court held that intrastate activities evincing, “such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions are within Congress’ power to regulate.”\(^{40}\) Underscoring its new understanding, the Court asserted, “While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce.”\(^{41}\)

Surely the most prominent incarnation of “post-1937” commerce theory is *Wickard v. Filburn*\(^{42}\) in which the Court augmented the already generous “substantial effects” test with the “aggregation” principle. *Wickard* held that applying the Agricultural Adjustment Act of 1938’s (“AAA”) wheat production quotas to farmer Roscoe Philburn’s “home-grown and home-consumed wheat” falls within Congress’ Commerce Clause power.\(^{43}\) Because home-consumed wheat “constitute[d] the most variable factor in the disappearance of the wheat crop,”\(^{44}\) the *Wickard* Court concluded that Filburn's home-consumed wheat “compete[d]” with wheat he

\(^{40}\) NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (upholding the Fair Labor Standards Act); accord., e.g., United States v. Darby, 312 U.S. 100, 118 (1941).

\(^{41}\) Darby, 312 U.S. at 113. Applying the familiar “rational basis” approach, the Court subsequently explained, so long as the effects on commerce are more than “trivial,” Congress’ legislation affecting even intrastate commerce is lawful. Maryland v. Wirtz, 392 U.S. 183, 197 (1968) (discussing the substantial effects standard).

\(^{42}\) 317 U.S. 111 (1942).

\(^{43}\) Attorney General, 648 F.3d at 1269 (discussing *Wickard*), rev. in part, aff’d in part, Sebelius, 2012 WL 24210 (U.S.). As the Supreme Court explained, the AAA’s applicable schema, “fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty or except it is stored as required by the Act or delivered to the Secretary of Agriculture.” *Wickard*, 317 U.S. at 119. Philburn exceeded his AAA allotted 11.1 acres of wheat by 11.9 acres that, the Court accepted, were used exclusively for home-consumption and not commercial farming. *Id.* at 125-27.

\(^{44}\) *Id.* at 127.
otherwise would have had to purchase on “the open market.”45 Thus rejecting his argument that his excess wheat’s production and use were effectively “local,” the Court held that Philburn’s slight impact on the interstate wheat market, when aggregated with other such seemingly insular uses, resulted in significant interstate consequences.46 Because Congress’ commerce power includes authority to affect markets by regulating the price and supply of commodities, “it can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions.”47

Whatever practical economic rationality underpins Wickard’s commerce analysis, its logical ending point is no mystery: modernity hurls the Commerce Clause’s “substantial effects” cum aggregation methodology directly into intrastate commerce’s heart. Six decades after Wickard, Justice Breyer well stated the palpable, central fact: “We live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State -- at least when considered in the aggregate.”48 If Roscoe Philburn’s growing and personally consuming a bit of wheat is subject to congressional commerce regulation, seemingly any behavior incurring any economic impact no matter how local or private is federally governable.

There are two possible resolutions of this dilemma. The first is that, consistent with Wickard, contemporary commercialism has begot a practical federal power to regulate all

\[\text{Id. at 128.}\]
\[\text{Id. at 125-27.}\]
\[\text{Id. at 128.}\]
\[\text{Morrison, 529 U.S. at 660 (Breyer, J., with Stevens, Souter and Ginsberg, JJ., dissenting). Justices Kennedy and O’Connor offered the same sentiment, “In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, …” }\]
\[\text{Lopez, 514 U.S. at 580 (Kennedy, J., with O’Connor, J., concurring).}\]
commerce in America because intrastate commerce virtually is extinct. The second is that economic actuality be damned if its consequence is annulling any meaningful role intrastate commerce has under the Constitution. Answering this delicate constitutional predicament opened the fourth phase of Commerce Clause history, one that purports to salvage the viability of intrastate commerce. The effort to bridle Wickard straddles the three earlier explicated Supreme Court decisions, U.S. v. Lopez, U.S. v. Morrison, and Gonzales v. Raich, adopting the “economic activity” of a “commercial character” standard. As previously discussed, any congressional regulation of intrastate commerce must concern actual “economic activity” linked fairly directly to interstate commerce.

c. Commerce, Federalism and Individual Liberty --

Whether this latest governing test actually vouchsafes intrastate commerce begs the pivotal question: why should we care about intrastate commerce at all? If modernity has killed intrastate commerce, thus manifestly demarcating our era from the experiences of the Framers, reasonable persons should wonder, for what legitimate purpose would the Constitution resurrect that which today’s economics renders superfluous. The answer must be: something other than

49 See supra notes 24-34 and accompanying text. As Morrison summarized, “in every case where we have sustained federal regulation under the aggregation principle in Wickard v. Filburn, … the regulated activity was of an apparent commercial character.” 529 U.S. 611, n. 4; also, id. at 613; Lopez, 514 U.S. at 559-60; see generally, Leslie Meltzer Henry and Maxwell L. Stearns, Commerce Games and the Individual Mandate, 100 Geo. L. J. 1117, 1129 (2012) (discussing how Lopez arguably reinterpreted Wickard).

50 E.g., Raich, 545 U.S. at 17. Sebelius has added one important corollary: Congress cannot “compel individuals not engaged in commerce to purchase an unwanted product.” Id. 2012 WL 24210 (U.S.) at 15 (Opinion of Roberts, C.J.); id. at 75-78 (Joint Dissent); see also, infra notes 72-84 and accompanying text.

51 Prof. Barnett observed, “In the wake of [U.S. v.] Morrison, law professors started to believe that the Court just might be serious about drawing a line between what is national and what is local, … [After Raich,] law professors breathed a sigh of relief that they had been right all along. They reverted to their pre-Lopez understanding that Congress can do pretty much whatever it wants under its commerce power.” Barnett, supra note 31 at 588.
“commerce,” defined innately, actually animates the Commerce Clause. Not unexpectedly, that something else is individual liberty, which indeed has commanded commerce jurisprudence for roughly two centuries.

Granted, courts commonly describe Congress’ commerce power as grounded in expediency rather than originating from some pristine a priori quintessence. As the celebrated judicial rationalist Oliver Wendell Holmes wrote, “commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.”52 To a considerable extent, Holmesian pragmatism has guided Commerce Clause philosophy throughout the Twentieth Century and into the new millennium.53

Nonetheless, practical commercial reality is not and correctly never has been sufficient to explicate entirely Congress’ commerce regulating authority. As Chief Justice Marshall explained in Gibbons v. Ogden nearly 200 years ago, “This power, like all others vested in Congress, … acknowledges no limitations, other than are prescribed in the constitution.”54 Accordingly, the Commerce Clause is restrained to the extent its exercise conflicts with other constitutional requisites. Indeed, at the turn of the last century, the Supreme Court elucidated Gibbons precisely in terms of liberty: “the power of Congress to regulate commerce among the states, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or

53 E.g., Lopez, 514 U.S. at 573-74 (Kennedy, J., with O’Connor, J., concurring) (discussing, “the fair ambit of the Court’s practical conception of commercial regulation”); N. Am. Co. v. SEC, 327 U.S. 686, 705 (1946) (“Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. To deal with it effectively, Congress must be able to act in terms of economic and financial realities.”) (citation omitted); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41–42 (1937) (“interstate commerce itself is a practical conception”).
54 Gibbons, 22 U.S. (9 Wheat.) at 196 (emphasis added).
restrictions as are prescribed by the Constitution. *This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument.*”

The judiciary has fulfilled *Champion v. Ames*’ elegant imperative by affirming that, despite the Clause’s substantial scope, Congress cannot distort its commerce license by adopting a general “federal police power” to regulate what it will, when it will, as it will. Such would transgress crucial constitutional Federalism by tapping the domain of the Tenth Amendment which reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” That amendment recognizes an enveloping realm of State “police power,” meaning comprehensive regulatory authority. Thus, albeit limited by both the enumerated powers at the Federal level and individual rights emanating from, *inter alia*, the Bill of Rights and the post-Civil War Amendments, “the States possess sovereignty concurrent with that of the Federal Government, …”

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56 As the Court recently reiterated, “With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate.” *Morrison*, 529 U.S. at 617, n. 8 (citations omitted); also, e.g., *Sebelius*, 2012 WL 2427810 (U.S.) at 7 (Opinion of Roberts, C.J.); *Lopez*, 514 U.S. at 564-65.
57 U.S. CONST. 10th Amendment.
58 E.g., *Morrison*, 529 U.S. at 618.
59 *Taffin v. Levitt*, 493 U.S. 455, 458 (1990); accord, *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The courts acknowledge that due to the Supremacy Clause, U.S. CONST. Art. VI, cl. 2, “The Federal Government holds a decided advantage in this delicate balance … As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States.” *Id.* at 460. Still, as James Madison explained, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite …. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” The Federalist No. 45, pp. 292-293 (C. Rossiter ed.1961)(J. Madison); see also, e.g., *New York v. U.S.*, 505 U.S. 144, 156 (1992).
The necessity to harmonize the state and federal domains reveals a truth critical to understanding the Individual Mandate, commerce, tax, and, indeed, the exercise of any congressional power: Federalism cannot be appreciated, much less correctly achieved, through pure constitutional formalism. That Congress’ power ends somewhere in favor of States’ rights is not true simply because the Tenth Amendment’s declares, and thus supposes, a zone of undivided State legal authority. Precedent rightly rejects the formalistic argument that as part of the Constitution, and thus presumed to have some functional meaning, the Tenth Amendment embodies domains of State regulatory exclusivity, even if only to endow titular enforcement by giving that Amendment something to do.\textsuperscript{60} In other words, limits on Congress’ “practical” exercise of its commerce authority are not proved under a theory that economic pragmatism cannot obviate the Tenth Amendment. Rather, as documented next, the uneasy armistice between Article I and the Tenth Amendment is based on the predominant political theory premising our Constitution: a rule of law that governs without tyranny. In this pivotal regard, judges can discern the harmony of the Commerce Clause and the Tenth Amendment -- where one ends and others begin -- only by enforcing the principles of liberty, which is the Constitution’s greatest duty.

Certainly, the Supreme Court’s current commerce jurisprudence hastens to so remind us: “As we have repeatedly noted, the Framers crafted the federal system of Government so that the

\textsuperscript{60} In fact, the Supreme Court has emphasized that because its language is circular, a plain meaning or textual construction of the Tenth Amendment to discern the elaborate equilibrium of Federalism is impossible. That the Tenth Amendment, “restrains the power of Congress … is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.” \textit{New York,} 505 U.S. at 156-57.
people's rights would be secured by the division of power.” The Court very recently reaffirmed unambiguously, “Federalism secures the freedom of the individual,” smartly linking this integral thesis to the Constitution’s entire structure of American government: “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” Just a few days ago as of this writing, Justices Scalia, Kennedy, Thomas and Alito expressed the point with telling yet quiet passion:

Structural protections—notably, the restraints imposed by federalism and separation of powers—are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most

61 Morrison, 529 U.S. at 616, n. 7 (citations omitted); also, e.g., Lopez, 514 U.S. at 552, 564.  
62 Bond v. United States, 131 S.Ct. 2355, 2363 (2011); see also, e.g., Stern v. Marshall, 131 S. Ct. 2594, 2609 (2011) (quoting Bond); New York, 505 U.S. at 181 (“The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities. ... To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.”); Sebelius, 2012 WL 2427810 (U.S.) at 7 (opinion of Roberts, C.J.).  

Indeed, not a decade after the Constitution’s ratification, Justice Cushing explained the constitutional quintessence that after 220 years remains the foundation of American law, “The rights of individuals and the justice due to them, are as dear and precious as those of States. Indeed the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is Government.” Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471 (1793) (opinion of Cushing, J.) (citizen of one State may sue a different State in federal court for breach of contract), overruled U.S. CONST. Eleventh Amendment. Chief Justice Jay concurred, “[T]he sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State. ... [A]t the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country.” Id. at 471 (opinion of Jay, C.J.) (Chisholm discussed and quoted in Barnett, supra note 31, at 627).  

Similarly, James Madison and Alexander Hamilton touted Federalism as one of the yet-to-be-ratified Constitution’s prime bulwarks against governmental subjugation. The Federalist, No. 51 (James Madison), p. 323 (C. Rossiter, ed. 1961); likewise, id., No. 20 (Alexander Hamilton), pp. 180-81.  
63 Gregory, 501 U.S. at 558 (emphasis added; citations omitted).
important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril.\textsuperscript{64}

The foregoing theory of dual sovereignty portends its own controlling principle: to effectuate its emphasis on liberty, both Federalism and the Commerce Clause it encompasses are tamed, indeed civilized by the Constitution’s greatest liberty protection, “due process of law,”\textsuperscript{65} which noted constitutional scholar Justice Felix Frankfurter rightly identified as “ultimate decency in a civilized society.”\textsuperscript{66} Indeed, because they are the Constitution’s principal arbiters of “fundamental fairness,”\textsuperscript{67} the Due Process Clauses of the Fifth and Fourteenth Amendments are the repository of America's “deepest notions of what is fair and right and just.”\textsuperscript{68} Thus, “[N]ot even resort to the Commerce Clause can defy the standards of due process,”\textsuperscript{69} which is a logical subset of the dominant premise of constitutional law, “The fundamental guarantee of due process

\textsuperscript{64} Sebelius, 2012 WL 2427810 (U.S.) at 105 (Joint Dissent). I leave for another article the argument that because due process under the Fifth and Fourteenth Amendments actually is the Constitution’s true and decisive safeguard against governmental subjugation, e.g., Bayer, supra note 17, at Part IV, states’ sovereignty under the Tenth Amendment is unnecessary insofar as that sovereignty is considered essential to preserving liberty. I accept for this discussion the judicial avowal that absent Federalism, individual liberty is in jeopardy even though determining whether Congress’ enactments contravene the Tenth Amendment requires an assessment of the threat to individual liberty that, of course, is the exclusive realm of due process.


\textsuperscript{69} Cent. Roig Ref. Co., 338 U.S. at 616; see also, e.g., Currin v. Wallace, 306 U.S. 1, 14 (1939); U.S. v. Clark, 435 F.3d 1100, 1108 (9th Cir. 2006); U.S. v. Hawes, 529 F.2d 472, 477 (5th Cir. 1976).
is absolute and not merely relative. . . . [T]he constitutional safeguard as to due process [is] at all
times dominant and controlling where the Constitution is applicable.”

Because commerce litigation is not, and never was simply a matter of defining
“commerce” apart from the greater constitutional precepts in which it lives, only the strictures of
due process can verify the Individual Mandate’s Commerce Clause compliance vel non. Indeed,
the core argument against it the Mandate is that it unconstitutionally intrudes into both individual
liberty and the liberty of the States.71

d. Why the Individual Mandate Comports with Congress’ Power to Tax, but Not Its Power To
Regulate Commerce --

Despite the undeniable adverse economic effects the willingly uninsured inflict on the
healthcare market,72 the Supreme Court ruled that pursuant to the Framers’ original
understanding of the nature of commerce, Congress has no authority under the Commerce Clause

70 Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350 (1909); see also, United States v. Smith, 480 F.2d 664, 668-69 n.9 (5th Cir. 1973).
71 Justices Ginsberg, Breyer, Sotomayor and Kagan agreed that the challengers’ position implies
a substantive due process matter that has not be pressed except that the parties “now concede that
the provisions here at issue do not offend the Due Process Clause.” Sebelius, 12 Westlaw
242810 (U.S.) at 53 (Ginsberg Opinion). Justices Scalia, Kennedy, Thomas and Alito likewise
recognized the liberty aspect, invoking the startling specter of liberty’s greatest foe, involuntary
servitude, “Here, however, Congress has impressed into service third parties, healthy individuals
who could be but are not customers of the relevant industry, to offset the undesirable
consequences of the regulation.” Id., at 75 (Joint Dissent) (emphasis added). Indeed, those
justices cited Hamilton’s horrific metaphor that such power would transform Government into a
“hideous monster whose devouring jaws ... spare neither sex nor age, nor high nor low, nor
sacred nor profane.’ The Federalist No. 33, p. 202 (C. Rossiter ed. 1961).” Id.
72 As the Eleventh Circuit summarized the Government’s data-laden legal theory, “Given the 50
million uninsured, $43 billion in uncompensated costs [cost shifting, that is, costs borne by
medical providers, often passed to medical consumers, due to treating those who lack any or
sufficient insurance coverage], and $90 billion in underwriting costs, Congress determined these
problems affect the national economy and interstate commerce. [42 U.S.C.] § 18091(a)(2).”
Attorney General, 648 F.3d at 1246, rev. in part, aff’d. in part, Sebelius, 2102 WL 242810
(U.S.). According to Congress, “the mandate will reduce the number of the uninsured and the
$43 billion cost-shifting and thereby ‘lower health insurance premiums.’ [42 U.S.C.] §
18091(a)(2)(F).” Id. at 1298.
to enact the Individual Mandate.\textsuperscript{73} Briefly put, “The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated.”\textsuperscript{74} Accordingly, Congress has no authority to create a sphere of regulable commerce by inventing the commerce itself. Rather, Congress can only regulate extant markets.\textsuperscript{75} Based on this arguably formalistic standard emanating from the perceived definition of “commerce” at the Founding, Congress cannot force individuals to purchase products from markets in which they are not otherwise engaged.\textsuperscript{76} Holding that it does exactly that, the Court concluded that the IM is unsupportable under the Commerce Clause.\textsuperscript{77}

\textsuperscript{73} Arguably, that ruling is \textit{dictum} in that, by upholding the IM on Congress’ power to tax, it is unclear whether the Court needed to reach the commerce issue at all. That the Mandate might be beyond Congress’ commerce authority does not render it any less lawful under Congress’ taxing power. \textit{E.g.}, \textit{Did Chief Justice Roberts Craft a New, More Limited Commerce Clause?}, Constitutional Law Prof Blog, http://lawprofessors.typepad.com/conlaw/2012/06/did-chief-justice-roberts-craft-a-new-more-limited-commerce-clause.html, accessed June 20, 2012.

\textsuperscript{74} \textit{Sebelius}, 2012 WL 24210 (U.S.) at 16 (opinion of Roberts, C.J.).

\textsuperscript{75} \textit{Id.}, at 73 (Joint Dissent) (citations, \textit{inter alia}, to dictionaries at the time of the ratification, omitted).

\textsuperscript{76} \textit{Id.}, at 15 (opinion of Roberts, C.J.); \textit{id.}, at 75-79 (Joint Dissent).

\textsuperscript{77} In addition to averring that such is the original understanding, the Court offered a liberty inspired corollary, arguing that despite its apparent effects on economic markets, if inactivity legally is commerce, there is no ending point constraining Congress’ power to control virtually all human conduct. “Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things.” \textit{Id.}, slip op. at 20 (opinion of Roberts, C.J.); \textit{see also, e.g.}, \textit{id.}, slip op. at 8-10 (Joint Dissent). Indeed, the Court accepted the much publicized horrible that Congress could force people to buy virtually anything, epitomized by a mandate to purchase broccoli if that market’s viability were in jeopardy. \textit{Id.}, slip op. at 22-23 (opinion of Roberts, C.J.); \textit{id}, slip op. at 16 (Joint Dissent).

The slippery slope argument, of course, is unavailing when divorced from the text of the Commerce Clause and viewed, instead, from the perspective of the Constitution as an entirety. If political expediency fails to quench Congress’ thirst to impose imprudent laws, the Fifth Amendment will, at least in so far as it requires the Federal level to govern within the limits of due process. Therefore, should commanding unwilling consumers to purchase broccoli not constitute a liberty violation, there is no constitutional reason why Congress cannot so mandate and let the political process determine if such a law will stand. \textit{Id.}, slip op. at 28-30 (Ginsberg Opinion). Indeed, the Joint Dissent implicitly so acknowledged, noting that during oral
Despite judicial fears of untrammeled commerce authority, *Sebelius* upheld seemingly comparable congressional discretion, ruling the Individual Mandate valid under Congress’ power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” As the Chief Justice explained the proposition, “Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control.” According to the *Sebelius* Majority, the IM presents taxpayers with a lawful “option:” buy health insurance or pay a tax penalty to the Treasury. Granted, taxpayers are compelled to make that choice, and either decision will cost them money that they otherwise might have spent differently. Nonetheless, the Court accented the familiar precept that Congress may tax not only to raise revenue, but also to encourage laudable behavior, such as purchasing health insurance.

*Sebelius* evinces that Congress has an extraordinary reach to affect individual conduct pursuant to its taxing powers that it lacks under the Commerce Clause. To offer an evident example, *Sebelius* apparently recognizes Congress’ power to require persons to pay a tax if they refuse to buy broccoli. There is an explanation why the Court may be unbothered by that argument the Government was unable to articulate a limiting principle, “other than those explicitly prohibited by the Bill of Rights or other constitutional controls.” *Id.*, slip op. at 10 (Joint Dissent).


79 *Sebelius*, 2012 WL 2427810 (U.S.) at 9 (opinion of Roberts, C.J.) (citation omitted).

80 *Id.*, slip op. at 32, 41-44 (Majority Opinion). For the argument that the Mandate’s tax “penalty” indeed is a tax under the Constitution, see *id.* at 24-30 (Majority Opinion).

81 *Id.* (Majority Opinion).

82 Unlike the Commerce Clause, there apparently is little jurisprudence addressing Federalism limits on Congress’ power to tax. *See*, Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975 (2011) (arguing Federalism should constrain Congress’ power to tax to the same
breadth of authority, when it rejected as profoundly dangerous such latitude under the Commerce Clause. The due process clauses prevent federal or state taxation that is so excessive, punitive, unequal or otherwise arbitrary that it offends the principle of liberty. No less than commerce, governmental authority at any level to tax is constrained by due process. Accordingly, despite the IM’s legitimacy under the Taxing and Spending Clause, and despite each state’s presumptive authority under the Tenth Amendment to enact its own individual mandate, should the IM violate due process liberty principles, such legislation would be irredeemably unconstitutional. That is why this article next addresses the matter of liberty under due process of law.

III. The Kantian Defense Of The Individual Mandate --

As I observed in an article addressing due process theory generally, “Few philosophers have provoked the imagination and engendered the respect of modern legal theorists as has Immanuel Kant. Perhaps more than any other post-Hellenistic thinker before him, Kant provided a workable articulation of [ethical theory --] the abstract moral base below which human
behavior and the laws regulating human behavior cannot go.” As explicated next, because enforcing due process of law is the prime imperative of any legitimate government, and because the United States explicitly has accepted that truly moral responsibility pursuant to the due process clauses of the Constitution, Kantian theory provides the discrete concepts to understand whether the Individual Mandate offends the liberty interests protected by due process.

Before explaining Kant’s specific philosophy and how it applies to law, first I must address briefly why, as Kant believed, morality, thus due process of law, is deontological rather than consequentialist. That is, due process is not concerned with generating the most pleasant or popular outcome. Rather, because it is based on a priori, transcendent principles of moral rightness derived from reason, due process must be obeyed regardless of the ensuing consequences, no matter how terrible.

The second stage, of course, is establishing what due process deontology actually is. Believing that Kantian ethics offers the soundest moral philosophy yet expressed, I review Kant’s liberal theory explaining why individuals’ compulsory moral duties require the formation of societies governed by, yes, due process of law. We will see that such governance is necessary if persons are to exercise liberty -- seek self-fulfillment by pursuing happiness -- in an ethical manner. This places us at the third juncture, from the necessity to build ethically governed social orders, Kant reasonably derived not a personal task, but rather a governmental, non-delegable duty to aid those who are so poor that, absent relief, they are merely beggars, unable to function

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85 Bayer, supra note 17, at 346 (emphasis added; citing, David Gray Carlson, Hart avec Kant: On the Inseparability of Law and Morality, 1 WASH. U. JUR. REV. 21, 33 (2009) (“Kant's project was to render morality undogmatic -- to ground it in the fact of reason.”)).

86 Utilitarianism is the most well known form of Consequentialism. Bayer, supra note 17, at 294 (citations omitted). For our purposes, the specific elaborations the former offers the latter are immaterial; therefore, I use the two terms interchangeably.

Similarly, I use the terms morality and ethically, and morals and ethics as essentially synonymous.
with human dignity, and thus are not free to pursue happiness within the strictures of morality. Based on that theory, I implore that lack of access to meaningful health care is an entirely consistent contemporary form of destitution, validating governmental intervention including an Individual Mandate.

a. Moral Theory Is Deontological, Not Utilitarian/Consequentialist --

Commentaries defending the IM typically exploit consequentialist policy arguments. To illustrate with one prominent example, Professors Jedediah Purdy and Neil Siegel recently pronounced, “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.”

Purdy and Siegel base their conclusion on famed utilitarian John Stuart Mill’s “harm principle,” espousing that “society may interfere with an individual’s decision to do or not do as he or she wishes … [when such] individuals act or decline to act in ways that cause harm to important interests of others.”

Fully consistent with consequentialist theory, Mill’s “harm principle” is predicated on the utilitarian practice of enforcing, using Purdy and Siegel’s term, “contemporary social morality,” chiefly through law. Those authors accent the arguably immoral behavior of free riders: persons who could afford but refuse to buy insurance, eventually will need, and eagerly will consume high-priced healthcare, the costs of which they are unable to cover due to their

88 Id. at 382 (discussing JOHN STUART MILL, ON LIBERTY 139 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859)).
89 Id. at 385, 388.
uninsured status.\textsuperscript{90} By failing to pay for the services they received, the free riders raise the overall price of healthcare that hospitals charge insured patients, leading to increased premiums and costs imposed on the very persons who responsibly have purchased health insurance.\textsuperscript{91} Because the free riders unethically enjoy their free ride while the insured are penalized for their prudence, maturity and conscientiousness, Purdy and Siegel conclude that the IM is lawful under Mill’s “harm principle.” Such is classic Consequentialism: the belief that the right answer derives from “contemporary social morality” reflecting the purported best overall outcome measured by some quantum of societal satisfaction.\textsuperscript{92}

But, “best outcomes” is neither an appropriate nor accurate basis to evaluate the very morality -- the liberty implications of the IM -- that Purdy and Siegel extol. Even assuming the Individual Mandate accomplishes its presumably beneficent purpose, if it unduly constrains personal liberty -- if it violates due process of law -- it is unlawful nonetheless. As do all fundamental rights, liberty protects individuals from “contemporary social morality,” that is, a majority’s -- even an overwhelming majority’s -- well meaning but misguided will. To raise the classic exemplar, due process will not sustain the unconstitutional conviction of a guilty person even if everybody else would be happier, and Society would be safer from violence if that

\textsuperscript{90} Indeed, hospitals that provide emergency treatment may not refuse to treat uninsured persons who otherwise are unable to pay for medical services. \textit{See}, Emergency Medical Treatment and Active Labor Act (“EMTALA”), 42 U.S.C. § 1395dd.

\textsuperscript{91} \textit{Purdy and Siegel, supra} note 87, at 386 (footnote omitted).

\textsuperscript{92} “As Professor Blum summarizes, ‘Consequentialists maintain that choices are not morally ‘good’ or ‘bad’ in themselves, but should instead be assessed solely by virtue of the outcomes they bring about, that is, by their consequences.’ Accordingly, consequentialists aver that the proper consequence -- outcome -- of any morally uncertain instance is the one that promotes the greatest \textit{good}, meaning the greatest \textit{happiness}.” \textit{Bayer, supra} note 17, at 294 (emphasis supplied; quoting, Gabriella Blum, \textit{The Laws of War and the “Lesser Evil,”} 35 YALE J. INT’L L. 1, 38, n.166 (2010) and citing Allen W. Wood, \textit{KANTIAN ETHICS} 262 (2008)).
individual were incarcerated. Thus, aggregate happiness identified as “prevailing social morality” is precisely what due process does not protect.

This understanding brings us to Consequentialism’s palpable problem: the fact that persons agree on any particular moral point proves only the level of accord -- that such is what some, most or all people want their world to be. Consensus provides no independent basis to verify that such consensus indeed is the correct moral answer unless one simply wishes to declare that morality is defined by popular fiat.93 Under such theory racism, slavery, genocide and comparable abominations are immoral only if enough members of a given social order so agree.94 Regarding the issue at hand, if a majority of Americans decide that tyranny includes impelling unwilling persons into undesired commercial markets, or if the prevailing morality shifts so that any impetus to help the unhealthy poor inures purely to the private sector, Consequentialism would require Purdy and Siegel to declare that the IM is unconstitutional, which, based on the tenor of their article, is not the position they want to take.

Utilitarians such as Professors Purdy and Siegel frequently attempt to escape this dilemma by incorporating humanizing controls.95 Their tactics are unavailing because, put coarsely, reformed Consequentialism -- defining morality as what makes the largest number of persons happy excluding Society’s unenlightened wretches -- still erroneously defines morality based on popular sentiments, instead of impartial precepts. Thus, to prevent its own abuses,

93 WOOD, supra note 92, at 295-96 (citations omitted).
94 Bayer, supra note 17, at 322 (citing, Jeffrie G. Murphy, KANT: THE PHILOSOPHY OF RIGHT 91, n. 1 (1994)).
95 For example, Mill tempered his utilitarianism with “Romanticism, the discovery … of the depth and intensity, the opacity and beauty, of individual experience and identity.” Purdy and Siegel, supra note 87, at 384; see generally, Bayer, supra note 17, at 322-28 (discussing futile attempts to salvage Consequentialism by incorporating, inter alia, ideas concerning “the right ways” to do things or some overarching “sense of fitness”).
reformed Consequentialism wants *a priori* ethics, but cannot bring itself to so admit publically.

Indeed, Purdy and Siegel deride at the idea of applicable transcendent ethics,

No doubt many [persons] 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, … these principles cannot count as public reason-giving in the United States today.  

The above-quoted proposition evinces Utilitarianism’s basic mistake. Doubtless, Purdy and Siegel correctly conclude that people often disagree about what moral rubrics exist and how they apply in given instances. Moreover, it may be impossible to know with absolute certainty whether one actually has discerned a *bona fide* ethical precept or has applied it properly to a particular dilemma. Those arguable realities, however, cannot prove that *a priori* morality does not exist. Rather, at most they reaffirm human fallibility, at worst they allow us to camouflage our selfish preferences as genuinely moral.  

“Thus, a consequentialist definition of morality is both unremittingly circular and distressingly self-indulgent.”

The only alternative is Deontology, the proposition

that morality exists outside of a humanly created social context of adopted preferred outcomes. … If it is not a creature of human partiality, then morality must be transcendent: that is, based on immutable, timeless, universally applicable principles, derivable through impartial reason, greater than the wants and desires of any given persons, groups, organizations, or social orders.

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96 Purdy and Siegel, *supra* note 87, at 388 (citing, JOHN RAWLS, POLITICAL LIBERALISM 223-27 (1993)).
98 *Id.* at 296
99 *Id.* at 295, 296; see also, *id.* at 299-303 (explaining why morality is knowable only through impartial reason). For an explanation of how human beings are able to reason with at least sufficient accuracy, see *id.* at 305-11.
It is worth accenting that despite many theorists’ avowed preference for utilitarian solutions, transcendent morality really is much more comfortable. By freeing morals from politics, Consequentialism’s true realm, Deontology liberates the individual from enslavement to both her own inappropriate preferences and the flawed predilections of others.

To offer, perhaps, too easy examples, if killing Jews because they are Jews is immoral, such killing is not evil exclusively within liberal cultures accepting that moral precept. It simply is evil. If husbands act immorally by violently forcing sex on unwilling spouses, such rape is not wicked only for societies that recognize the personhood of wives. Rather, spousal sexual assault is morally wrong even if a particular society believes that a husband has a societal or religious right to ravage his wife. And, if torturing a terrorist suspect is immoral, then no noble motive, such as saving thousands of lives, renders torture ethical. In sum, if X is immoral, it is always immoral, no matter how much a given person or group believes, teaches and wants it to be otherwise.  

The task, then, is to find a deontological theory applicable to the Individual Mandate.

b. Prof. Barnett’s Quasi-Deontology --

I turn briefly to Prof. Randy Barnett’s provocative and significant article Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional because he attempts a constitutional deontology from the phrase “or to the people” in the Tenth Amendment to prove the Individual Mandate is unconstitutional. Barnett’s reasoning, however, is too doctrinal to acknowledge the actual and unsurprising basis of his conclusion: due process of law.

Prof. Barnett urges that the IM is unlawful pursuant to the Supreme Court’s “anti-commandeering” doctrine: “Congress may not simply ‘commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”

100 Id. at 302-03 (citing, Christine M. Korsgaard, The Right to Lie: Kant on Dealing with Evil, 15 PHIL. & PUB. AFF. 322, 328-30 (1986) (describing universalization of moral maxims)).
101 See, supra note 31.
Clearly, “anti-commandeering” is part of the Constitution’s earlier discussed basic Federalism, the essential balance of power between the federal and state government. However, as Barnett rightly notes, the Constitution’s signpost of Federalism, the Tenth Amendment, instructs that the remainder of governmental authority not expressly delegated to the federal level belongs to “the States respectively, or to the people.” If, as that Amendment’s text implies, a domain of “sovereignty” belongs exclusively to “the people,” the same anti-commandeering standards that constrain Federal intervention into State arenas logically forestall like Congressional intrusions into individuals’ personal affairs.

It seems that Prof. Barnett’s “anti-commandeering” approach restates the basic, earlier discussed principle that Congress is prohibited from unduly constraining individual liberty. His argument is that Congress cannot take from “the people” what exclusively belongs to “the people” any more than Congress can take from “the States” what exclusively belongs to “the States.” Because due process, and the specific fundamental rights emanating therefrom, are what “the people” retain -- what the offices of American government at any level and of any branch cannot violate -- “anti-commandeering” must find its content within the due process clauses.

919 (1996) (Act of Congress requiring local sheriffs to run background checks on gun buyers is unconstitutional “commandeering”).

103 Id. at 623. See, supra notes 51-71 and accompanying text for discussion of Federalism.

104 “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. Tenth Amendment.


106 Id. at 629.

107 E.g., Bayer, supra note 17, at 391-96.

108 Along similar lines, as earlier explained, Federalism itself exists predominately to vouchsafe individual liberty. See, supra notes 51-71 and accompanying text. It seems, then, the “anti-commandeering” concept as applied to persons is subsumed by the Constitution’s due process
This realization is important because, lacking a due process liberty theory, Prof. Barnett’s Tenth Amendment “anti-commandeering” argument cannot elucidate why the IM purportedly is unconstitutional. Granted, Prof. Barnett contrasts the draft, jury service, paying taxes and completing census forms as examples of constitutionally appropriate, non-commandeering governmentally mandated duties.\textsuperscript{109} Finding those obligations are acceptable governmental coercion, Prof. Barnett concluded,

\begin{quote}
None of these duties are imposed via Congress's power to regulate economic behavior. Instead, all have traditionally been considered fundamental duties that each person owes to the government by virtue of American citizenship or residency. \textit{Each of these duties can be considered essential to the very existence of the government, not merely convenient to the regulation of commerce.}\textsuperscript{110}
\end{quote}

This assertion reveals the limits of the “anti-commandeering” argument. Doubtless, Congress cannot violate due process liberty -- cannot “commandeer” -- to attain, in Barnett’s words, the “convenient … regulation of commerce,” nor, for that matter, to foster even an unusually urgent regulation of commerce. Due process trumps commerce, as indeed it does any exercise of governmental power, federal or State.\textsuperscript{111} That being said, we know, to borrow another of Prof. Barnett’s phases, that “Congress’ power to regulate economic behavior” includes manipulating markets both for purely financial purposes and to preclude immoral conduct, a principle fully settled by the Supreme Court.\textsuperscript{112} Indeed, Congress famously uses its commerce power to premise civil rights enforcement, prohibiting private persons from violating clauses. Because those clauses are the conclusive and ultimate exemplars of constitutional liberty, Bayer, \textit{supra} note 17, at 383-403, there is nothing “anti-commandeering” under the Tenth Amendment could add that due process does not already provide.

\textsuperscript{109} Barnett, \textit{supra} note 31, at 630.

\textsuperscript{110} Id. (emphasis added).

\textsuperscript{111} Supra notes 65-70 and accompanying text.

\textsuperscript{112} Supra note 36 and accompanying text.
the rights of other private persons. In sum, the use of economic regulation to mandate principles of American decency is more prevalent than Prof. Barnett’s analysis allows.

This takes us to a final important observation, Prof. Barnett does not detail the Individual Mandate’s actual defect from the perspective of individual liberty, the seeming heart of “anti-commandeering.” Rather, he appeals to the “slippery slope”

If a power to impose an economic mandate because it is “convenient” to the regulation of commerce is upheld here, then Congress could mandate any behavior so long as it is cast as part of a broad regulatory scheme. Today it is buying government approved health insurance. Tomorrow it could be having an annual physical or mandating what you eat. What sounds farfetched now can change with the political winds.”

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114 One might respond that Prof. Barnett accented “positive” rather than “negative” responsibilities; that is, “positive duties” such as jury service, paying taxes and conscription require affected parties to do something they otherwise would not do. Likewise, the IM obliges the unwilling to purchase health insurance. By contrast, “negative” duties mandate that persons refrain from certain behaviors they wish to perform, such as racially or sexually discriminating. Cf., Van de Kamp v. Goldstein, 555 U.S. 335, 343 (2009) (contrasting “a positive duty (the [prosecution’s] duty to supply ‘information relevant to the defense’)” with “a negative duty (the [prosecution’s] duty not to “use ... perjured testimony ...’”)”). But, negative versus positive essentially is a distinction without a difference because negative duties naturally take on positive aspects and vice-verse. Id. (“After all, a plaintiff can often transform a positive into a negative duty simply by reframing the pleadings; ...’) (citation omitted).

For instance, the arguably negative duty not to discriminate means that bigoted employers, labor unions, workers, hotel managers, restaurateurs, merchants, and customers, among many others, will have to hire, serve, work alongside of, deal with and otherwise associate with persons whom, absent mandating legislation, such bigots would disregard. The positive-negative duties distinction, then, offers little regarding the legitimacy of the Individual Mandate.

115 Barnett, supra note 31, at 634.
Of course, theorists arguing a “parade of horribles” must prove either that the given object, herein the IM, shares the “horrible” characteristic or that, although not itself “horrible,” distinguishing the problematic object is so difficult that allowing it to continue prevents legitimately invalidating all the actually “horrible” objects within that class. The “floodgate,” then, is an inelegant and unreliable device that thwarts the essential principle of reasoning: elucidating with particularity so that, within the applicable context, even highly similar things may be differentiated and assessed individually. As Justice Frankfurter summarized, “The task of scrutinizing is a task of drawing lines.”

Applying “the task of drawing lines” to one of Prof. Barnett’s specific examples of lawful commandeering, we would reject as patently illogical the claim that if Government can draft individuals to serve in the military, it can conscript them as well into prescribed civilian occupations. Likewise, Prof. Barnett must explicate why government compulsion to aid greater society by purchasing health insurance is more akin to his example of unconstitutionality


117 Freeman v. Hewitt, 329 U.S. 249, 253 (1946), substantive legal holding overruled, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). Indeed, the capacity to “draw lines” -- to make meaningful, appropriate distinctions even among nearly equivalent things and ideas -- is the hallmark of legal decision-making. E.g., Armour v. City of Indianapolis, Ind., 132 S. Ct. 2073, 2083 (2012); Perry v. Perez, 132 U.S. 934, 941 (2012) (discussing some relevant considerations to enable line drawing); Pollard v. Hagan, 44 U.S. 212, 220 (1845). Writing for the Court, Justice Holmes explained the necessity, “As in other cases where a broad distinction is admitted, it ultimately becomes necessary to draw a line, and the determination of the precise place of that line in nice cases always seems somewhat technical, but still the line must be drawn.” Ellis v. U.S., 206 U.S. 246, 260 (1907).

118 Almost needless to say, the legitimate national defense considerations regarding raising and maintaining an effective armed forces are not inherently implicated in some governmental scheme to enlarge the ranks of certain employment sectors. Of course, if national security truly required increasing the number of workers in defense-sensitive private sectors, possibly some sort of conscription might be justifiable.

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-- government “mandating what you eat”\(^{119}\) -- and less like his example of constitutionality -- compulsory military service. In sum, while the specter of unbridled governmental authority forcing unwilling persons to divert their money into designated commercial markets certainly seems totalitarian, “anti-commandeering” only informs us there are limits to Congress’ (and presumably the States’) powers. Unless one adds thorough due process analysis, anti-commandeering lacks the concepts necessary to discern when government can compel obedience and when it cannot. For an answer, I turn to Immanuel Kant’s philosophies of morality and society to provide the deontology Prof. Barnett seems to want.

c. Dignity, Morality, Duty and the Necessity To Form Societies under Due Process of Law --

Liberal Enlightenment theory describing the “social contract” -- the ascent of humankind from the viciousness of the state of nature to the elegance of social orders governed by law\(^{120}\) -- is comfortably familiar. The account of the transition from incivility to civility typically concerns the perfectly understandable quest for security of one’s person and one’s possessions from the ravages of those who would take without proper justification.\(^{121}\) For Immanuel Kant, by contrast, that chronicle transcends Utilitarianism. Kant saw beyond an account of societies, governments, and laws as simply devices for a more efficient and peaceful coexistence among persons who unavoidably bump into each other while vying for scarce resources to fulfill chosen pursuits. “Kant’s pivotal enrichment of the prevailing metaphor is that the ‘social contract’ does

\(^{119}\) Assuming arguendo such would be beyond Congress’ legislative authority.

\(^{120}\) “In the state of nature, where there is no controlling, official governmental authority, persons may pursue their happiness by any means.” Bayer, supra note at 361, n. 418; see also Philip Hamburger, Beyond Protection, 109 COLUM. L. REV. 1823, 1835-36 (2009) (noting that individuals in the state of nature had to form civil governments to preserve the liberty enjoyed under natural law).

\(^{121}\) “[I]ndividuals fight in the state of nature, and the consequent war of all against all can only cease when people submit to a unitary sovereign.” Jeremy Waldron, Kant’s Legal Positivism, 109 HARV. L. REV. 1535, 1545 (1996) (discussing Thomas Hobbes, LEVIATHAN 86-90, 117-21 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651))
not symbolize a discretionary arrangement of expediency, but rather a moral requisite without which [human] dignity … cannot be achieved.”122 We immediately perceive an intrinsic nobility and true beauty in Kant’s theory of society, exceeding any derived from a consequentialist framework.123 Kant grasped the moral vigor required of the social contract: Government’s unremittingly devoted to due process of law. Such is the fitting source to discern the legality vel non of the Individual Mandate.124

1. The Rational Capacity of Each Person To Discern a “Metaphysics of Morals” --

Kant’s theories are rich and complex; however, at the risk of précising too much, I offer the following encapsulation. The bedrock upon which applicable Kantian philosophy rests is his “dignity principle” which both reveals the intrinsic value of every person and premises a system of moral duties that every person, group, organization and indeed government must observe. Kant urged that the innate worth of all persons is equal, and such worth is immeasurable.125 The inestimable worth of human beings does not stem from the good and decent acts that may be

122 Bayer, supra note 17, at 361.
123 “Kant's overarching emphasis on the pursuit of moral decency accords the social contract nobility and virtue exceeding Lockean concepts of pure security and the protection of possessions (although those latter considerations surely are relevant to liberty).” Id.
124 Importantly, concerning his ethical theory, commentators aptly accept “Kantian ethics” while rebuking “Kant's ethics,” as one might embrace the paradigms of the Constitution’s Framers, but reject many of their actual applications of their own political theory. WOOD, supra note 92, at xii; Bayer, supra note at 347. “Kant's ethics are his specific moral applications and discrete moral conclusions. ‘Kantian ethics, on the other hand, is an ethical theory formulated in the basic spirit of Kant . . . .’” Id. (quoting, WOOD at 1). Most modern theorists find Kant’s specific ethics steeped in racial, sex-based and similar appalling bigotry. E.g., WOOD at 7-11. By contrast, proponents of Kantian ethics adapt Kant's broad principles to discern both appropriate meta-theories and their applications to discrete circumstances. Thus, mindful that strained contortions of a philosopher’s premises are intellectually dishonest, even if one can “make[] no claim to have arrived at the understanding that Kant intended . . . . [a justifiable] goal is to construct a useful understanding of Kant's formula . . . rather than one that would have met with Kant's approval.” R. George Wright, Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle, 36 U. RICH. L. REV. 271, 274 (2002).
125 WOOD, supra note 92, at 3.
attributable to persons, groups or Society. Rather, the native value of every person simply is -- it springs from innate “dignity,” meaning persons’ rational capacities to surpass their sensibilities - - to escape the grip of their desires and preferences -- thereby employing reason\textsuperscript{126} to discern and to apply \textit{a priori} moral precepts.\textsuperscript{127}

Due to their rational capacities, human beings are “purposive,”\textsuperscript{128} specifically, they can identify their desires, then, through thoughtful deliberation, determine whether to pursue those desires and, if they choose to do so, select among possible courses of attainment.\textsuperscript{129} Importantly, such purposiveness is not strictly consequentialist; that is, persons can divorce themselves from their predilections to decide whether considerations other than their own satisfaction should dictate their actions. Such is Kant’s pivotal concept of “practical reason,” the “capacity to follow determinate laws given by the faculty of reason . . . the capacity to act for reasons, rather than only on the basis of feelings, impulses, or desires that might occur independently of reasons.”\textsuperscript{130}

Practical reason allows persons to “think as deontologists, not as consequentialists, so that they may embrace standards applicable to all and not simply to the self to promote the self’s own well

\textsuperscript{126} Kant “formulated reason as the ability of humans to appreciate the implications or ‘universality’ of their actions.” John D. Castiglione, Human Dignity Under the Fourth Amendment, 2008 Wis. L. Rev. 655, 678 (2008); see also, e.g., Thomas E. Hill, Jr., DIGNITY AND PRACTICAL REASON IN KANT’S MORAL THOERY 40-41, 207-08 (1992) (noting that humans' rationality enables them to plan for and consider future consequences). Reason enables universality by “order[ing] concepts so as to give them the greatest possible unity combined with the widest possible application.” Ernest J. Weinrib, Law as a Kantian Idea of Reason, 87 COLUM. L. REV. 472, 479 (1987) (citing IMMANUEL KANT, CRITIQUE OF PURE REASON *A644/B672).

\textsuperscript{127} E.g., Wright, supra note 124, at 274.

\textsuperscript{128} Peter Benson, External Freedom According to Kant, 87 COLUM. L. REV. 559, 569 (1987) (footnote omitted).

\textsuperscript{129} WOOD, supra note 92, at 67.

\textsuperscript{130} Id. at 127 (referring to the concept as “practical freedom”); see also, e.g., Weinrib, supra note 126, at 481 (citing Kant, supra note 126, at *A800/B828-A802/B830) (referring to the concept as “practical reason”).
being.”¹³¹ The ability to be “purposive” by exercising “practical reason” verifies Kant’s “one supreme principle, autonomy of the will” enabling individuals to discover the “metaphysics of morals.”¹³²

2. Kant’s Dignity Principle --

The unique, one might even say blessed capacity to understand morality and to act morally ennobles what America’s Founders called “the pursuit of happiness,”¹³³ what Kant titled the “universal principle of justice” permitting, “individuals freedom to form and pursue their own life plans subject only to the constraint that others be allowed a similar freedom.”¹³⁴ Prof. Arthur Ripstein identified this as Kant’s “innate right of humanity,” meaning, “the right to be free, where freedom is understood in terms of independence from another person's choice. The

¹³¹ Bayer, supra note 17, at 349, n. 335 (citing, Weinrib, supra note 126, at 483). Practical reason, in turn, allows “practical judgment,” that is, “the capacity to descend correctly from a universal principle to particular instances that conform to it.” WOOD, supra note 92, at 152; see also, e.g., Wright, supra note 124, at 278. “Through ‘practical judgment’ individuals can both derive [all levels of] moral precepts … and discern how to apply such precepts to discrete scenarios.” Bayer, supra note 17, at 349, n. 335.

For a discussion explaining that individuals are capable of making at least reasonably correct rational, unbiased moral judgment, see id. at 306-11.

¹³² Benson, supra note 128, at 575.

It is true that persons often falter by deliberately acting immorally or by misapprehending proper moral tenets and their applications. Indeed, despairing of human frailty, Kant lamented, “[o]ut of the crooked timber of humanity no straight thing was ever made.” Immanuel Kant, IDEA FOR A UNIVERSAL HISTORY FROM A COSMOPOLITAN POINT OF VIEW, REPRINTED IN KANT ON HISTORY 17-18 (Lewis White Beck, ed., MacMillan, 1963) (1784). Yet, needless to argue, human imperfection cannot be the justification for knowingly rebuffing the quest for morality, thus indulging every form of depravity. Our duty is to try to understand morality and to act from that understanding.

¹³³ See, e.g., Bayer, supra note 17, at 335-46 (discussing the Declaration of Independence as an expression of deontological political and moral theory).

¹³⁴ HILL, supra note 126, at 54; see also, e.g., Arthur Ripstein, FORCE AND FREEDOM 288 (2009); Thomas C. Grey, Serpents and Doves: A Note on Kantian Legal Theory, 87 COLUM. L. REV. 580, 582 (1987) (explaining that the state of external freedom is based on Kant's universal principle of justice).
power to set and pursue your own conception of the good is Kant's right to independence: you, rather than any other person, are the one who determines which purposes you will pursue.”

Of course, the pursuit of happiness engenders social interactions of all kinds as we use the skills, talents and products of others to help us attain, in Prof. Hill’s words, our “own life plans.” Regarding such common and integral interrelations, the capacity -- not the actuality -- for rational thought giving rise to intentionally moral behavior accords every individual “an intrinsic … dignity that every other person must respect.” Accordingly, persons are “ends in themselves,” that is, they are not and may not be degenerated into objects -- may not be treated as one might use and discard equipment, furniture, tools or other things that have neither consciousness nor the capacity to discern morality through reason. To do otherwise would deprive persons of that which is theirs by birthright, their very humanity.

The human status as an “end” mandates that every person must respect the dignity of every other person at all times, under all circumstances. Of course, the inverse is true: at all times, in all circumstances every person may demand to be treated by every other person as an end in oneself not due to any good works such individual may perform, but due to one’s innate

136 See supra note 134, at 54.
137 Bayer, supra note 17, at 350 (citing, WOOD, supra note 92, at 94). “Because the capacity for rational thought is presumed among all persons, the dignity owed to each person is not a function of whether she has actually acted in a dignified manner -- rationally, humanely and morally.” Id. at 351 (citing, Leslie Arthur Mulholland, KANT’S SYSTEM OF RIGHTS 94, 314 (1990) and Wright, supra note 124, at 275).
138 See discussion of Kant’s “Categorical Imperative” second formulation, infra notes 147-157 and accompanying text.
139 Wright, supra note 124, at 275; also, e.g., WOOD, supra note 92, at 94.
rational capacity.\textsuperscript{140} “Accordingly, innate dignity allows individuals to demand moral treatment from others while simultaneously requiring those individuals to treat others morally.”\textsuperscript{141}

3. The Categorical Imperative Formulations One and Two --

From the dignity principle -- the inestimable worth of each person due to her capacity for rational thought leading to moral conduct -- Kant offered rubrics for human interaction. Because socialization is necessary and inevitable as individuals enjoy the “universal principle of justice,” that is, pursue personal happiness,\textsuperscript{142} the pivotal question becomes: How do actors choose and pursue goals in a moral fashion, meaning, without offending the innate dignity of those with whom they deal?

Kant’s expedient to abide by the dignity principle is the hugely important Categorical Imperative (CI), Kant's “supreme principle of morality” deduced from “pure practical reason” and expressed as “a universal law that all rational beings can make and act upon for themselves as free, self-determining agents whose actions are morally good.” Kant's CI is his understanding of … how people should live in a world of others.\textsuperscript{143}

\begin{itemize}
\item \textsuperscript{140} HILL, supra note 92, at 204; Bayer, supra note 17, at 350-51 (citations omitted).
\item \textsuperscript{141} Id. at 351. From this, Kant derived perhaps his noblest, if not his most shocking proposition: “humankind's innate dignity is priceless, indeed greater than life itself because ‘[t]he value of the end . . . must have existed already prior to [one's] rational choice.’” Id. (quoting, WOOD, supra note 92, at 92). It could not be otherwise because morality is deontological, that is, morality must be obeyed regardless of its consequences. If it is immoral to disregard the innate dignity -- to objectify -- a human being, such objectification must be avoided at all costs, including the cost of human life. Id. at 351-52. Thus, we find not reckless extremism, but inspiring regard for Humanity’s depth in Kant’s famous declaration, “Let justice be done even if the world should perish.” Immanuel Kant, Toward Perpetual Peace and Other Writings on Politics, Peace, and History, 102 n.16 (Pauline Kleingeld ed., David L. Colclasure trans., Yale Univ. Press 2006).
\item \textsuperscript{142} E.g., Wright, supra note 124, at 277; see also, infra notes 158-85, 196-200 and accompanying text.
\item \textsuperscript{143} Bayer, supra note 17, at 353-54 (quoting, Fernando R. Téson, The Kantian Theory of International Law, 92 COLUM. L. REV. 53, 63 and n. 49 (1992) (citing Immanuel Kant, Groundwork of the Metaphysic of Morals 98-103 (Harper Torchbooks ed., H.J. Paton trans. 1964)); see also, e.g., WOOD, supra note 92, at 68 (The CI is Kant’s “supreme principle of morality [that] admits of no conditions or exceptions, of course, because there is nothing higher by reference to which conditions or exceptions could be justified.”).
\end{itemize}
The first of Kant’s three variants of the CI states, “Act only on that maxim through which you can at the same time will that it should become a universal law.”144 “Put perhaps too easily, formulation one appears to be Kant's restatement of the Golden Rule, do unto others as you would have them do unto you. … Thus, one ought not do X unless one believes that all other persons under like circumstances may morally do X.”145 However the Golden Rule analogy cannot be taken too far. Formulation One is not concerned with the moral substance of any particular act; rather it is an essential step to freeing oneself from the enslavement of personal preferences -- “abstract[ing] oneself from one's desire and inclinations … concentrate[ing] one's mind on the law-like nature of one's action that creates the possibility of acting out of ‘pure duty.’”146

As essential as it may be, Formulation One is inadequate to fulfill the dignity principle because it lacks a means to convert “universalization into … human behavior without the setting of ends.”147 As we know, setting ends is a sensuous, consequentialist endeavor based on pursuing preferred outcomes rather than on rational morality. Accordingly, “That persons might, in perfect conscience, will some behavior as a ‘universal maxim,’ and be prepared not only to apply that maxim to others but also to themselves does not necessarily prevent individuals from mistaking their personal preferences for moral principles.”148

144 Téson, supra note 143, at 63 (quoting KANT, supra note 143, at 88). “[T]he test is whether you could will it to be permissible (under the moral law) for everyone to act on the maxim.” WOOD, supra note 92, at 70.
147 Id.
148 Bayer, supra note 17, at 354. Put just a bit differently, “Zupancic challenges the Kantian test of universalizability in light of its tautological nature, demonstrating that every maxim could be construed in a manner which allows it to pass the test of universalizability.” Talia Fisher, Force and Freedom: Can They Co-Exist?, 24 CAN. J. L. & JURIS. 387, 395 (2011) (discussing,
To answer this problem, Kant offered the celebrated Formulation Two, “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”¹⁴⁹ That is, all persons at all times must be considered “ends in themselves”¹⁵⁰ thereby respecting their individual dignity. Quite sensibly, Kant’s Formulation Two accents treating persons not “simply as a means,” which, of course, recognizes that actors may in perfect morality attempt to pursue happiness -- to attain chosen ends -- by using other persons.¹⁵¹ We all use, indeed depend on, the skills, products, resources and talents of others regarding every goal we pursue, grand or trivial, unique or commonplace, complex or simple. And, of course, as we use others they correspondingly use us for our skills, products, resources, talents, or simply to obtain payment for services. So long as we respect the dignity of those we use, our use is moral.

By contrast, consistent with persons’ innate dignity, “you treat someone as a mere means whenever you treat him in a way to which he could not possibly [rationally] consent.”¹⁵² To avoid such mistreatment, to be sure that when we use others we treat them as “ends in themselves,” we must follow the principle that “persons are not inanimate objects, meaning things that may be used purely at the whim of and for the benefit of the user.”¹⁵³ To prevent objectification, we must use other persons in ways that they rationally would will both themselves and all others to be used, consistent with the dignity of human beings. Therefore, tactics such as coercion, deception, intimidation and confounding are classically unethical because, under such conditions, person cannot give meaningful consent. Either

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¹⁴⁹ Téson, supra note 143, at 64 (quoting KANT, supra note 143, at 96).
¹⁵⁰ Id.
¹⁵¹ E.g., WOOD, supra note 92, at 87, Wright, supra note 124, at 277.
¹⁵² CHRISTINE M. KORSGAARD, Creating the Kingdom of Ends 295 (1996).
¹⁵³ Bayer, supra note 17, at 355; also, e.g., Téson, supra note , at 64.
they do not really know to what they are consenting or their informed consent is the product of extortion.\footnote{KORSGAARD, supra note 152, at 295; also, e.g., Bayer, supra note 17, at 355-58. It is important to recall that using others in ways that they rationally would will themselves and all others to be used does not necessarily mean that such use will make persons happy. The project is not consequentialist to maximize contentment; rather the goal is moral comportment. For example, Smith, a rational person, would will a system of due process of law allowing meaningful participation of suspects in any criminal process brought against them. Such meaningful participation assures that if Smith is investigated, arrested, tried, convicted, and sentenced, the State at each phase respected her as an end. Although unhappy to have been so treated, Smith can have no moral objections to the process and its outcome, even if she is innocent. By allowing a meaningful defense, the State did not use Smith only as a means to obtain some State goal related to imprisoning her. E.g., Id. at 367-68 (footnotes omitted).}

Based on the foregoing, Formulation Two asserts a corollary integral to understanding the due process \textit{bona fides} of the Individual Mandate. The “duty of rightful honor” states, “Do not make yourself a mere means for others but be at the same time an end for them.”\footnote{Ernest J. Weinrib, Poverty and Property In Kant’s System Of Rights, 78 NOTRE DAME L. REV. 795, 811 (2003) (quoting, I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS *392 [6:236] (L. Beck trans. 1969)). A person must be her “own master,” that is, safeguard her “non-dependence on anyone with whom [s]he might interact.” Id. at 812 (discussing, Kant, Metaphysics at 394 [6:238]). Of course, to obtain products and services, we depend habitually on the unique knowledge, experience and expertise of others. Kant certainly is not cautioning that it is immoral to depend on the learning of physicians, lawyers, artisans and others who, in our markets of highly diverse division of labor, provide goods and services that we have neither the time, nor the ability, nor the inclination to provide for ourselves. Rather, Kant’s admonition is that our choice to obtain such products must not be coerced. This seems to imply that the Individual Mandate is immoral; however, as we will see, the Mandate is not figurative bondage. To the contrary, the IM forestalls metaphorical enslavement. See, infra notes 218-XX and accompanying text.} In sum, just a one may not use another solely as a means, neither may one deliberately sacrifice one’s dignity by allowing oneself to be used exclusively as a means. Those who allow themselves to be literally or figuratively enslaved act as immorally as those who do the enslaving.\footnote{A person must be her “own master,” that is, safeguard her “non-dependence on anyone with whom [s]he might interact.” Id. at 812 (discussing, Kant, Metaphysics at 394 [6:238]). Of course, to obtain products and services, we depend habitually on the unique knowledge, experience and expertise of others. Kant certainly is not cautioning that it is immoral to depend on the learning of physicians, lawyers, artisans and others who, in our markets of highly diverse division of labor, provide goods and services that we have neither the time, nor the ability, nor the inclination to provide for ourselves. Rather, Kant’s admonition is that our choice to obtain such products must not be coerced. This seems to imply that the Individual Mandate is immoral; however, as we will see, the Mandate is not figurative bondage. To the contrary, the IM forestalls metaphorical enslavement. See, infra notes 218-XX and accompanying text.} Thus, there is an affirmative duty -- a moral
imperative -- not to allow oneself to be “subordinated” by “surrendering control of [personal freedom] to others.” ¹⁵⁷

4. The Categorical Imperative’s Third Formulation, the “Kingdom of Ends” --

The question becomes, how can one manage the ethical pursuit of happiness in a world of others, some of whom may not understand their moral duties, others of whom may understand but deliberately disobey? Indeed, to assure that we and others properly understand ethical obligations, we must accept some overarching structure legitimately empowered to prescribe and to enforce a uniform system of laws vouchsafing dignity among social actors. One of Kant’s greatest contributions to liberal political theory is explaining why government is morally mandatory, yet not coercive upon its citizens and guests even though the government is the only establishment rightfully empowered to use violence to compel compliance with, and to punish disobedience of the law. ¹⁵⁸

To so prove, Kant stated the Categorical Imperative’s Formulation Three, known popularly as the Kingdom of Ends: “Not to choose otherwise than so that the maxims of one's choice are at the same time comprehended with it in the same volition as universal law.” ¹⁵⁹ This rather obscure phrasing describes operationalizing -- putting into practice -- Formulations One and Two to found a “kingdom” of persons who always are treated as “ends,” never “merely as means.” ¹⁶⁰

As we know,

even if personal preferences and inclinations impel otherwise, a person must be guided instead by her unbiased rationality. If her rational capacity understands that a particular action or standard rightfully may be willed as a universal maxim and does not objectify

¹⁵⁷ Id. (discussing KANT, METAPHYSICS at 427 [6:278]) see also, e.g., Ripstein, supra note 135, at 1430-31(discussing poverty).
¹⁵⁸ E.g., Ripstein, supra note 135, at 1417.
¹⁶⁰ The idea of the State, then, is “a systemic union of different rational beings through common laws.” HILL, supra note 126, at 58.
persons, but instead treats persons as ends in themselves, then she must accept the action or standard as moral no matter how much she might like it to be otherwise. Such moral behavior, then, may become a rational imposition; that is, imposed against all unwilling others. So long as the actor's challenged behavior or standard does not offend dignity, unwilling others must accept the impositions imposed by that moral, albeit disliked, conduct, even if they have been used for the advantage of the actor.  

For that reason, there must be a process through which all can come to an accord -- the formation of a united rational will -- resulting in codification of rational impositions and implementing a system of societal-wide enforcement. Thus, departing the state of nature to form a society under law is a moral imperative; it is neither a convenience nor a matter of consent, if one is to interact properly in a world of others. Accordingly, forming a society under law is not coercive because, “every rational

161 Bayer, supra note 17, at 359 (citing, HILL, supra note 126, at 45).
162 The prime example is a regime of property law allowing individuals to exercise exclusive control over things even when those things are not actually held in their owners’ hands. See, infra notes 196-200 and accompanying text.

True, “The requirement for omnilateral will has been challenged on various grounds. According to Rawls, rational agents exercising collective, rational reason are unlikely to reach an identical conclusion or form a common will. Human individuals differ in their perspectives, life experiences, and social positions.” Fisher, supra note 148, at 395 (discussing, John Rawls, POLITICAL LIBERALISM 55 (New York: Columbia University Press, 1993)). However, there can be no honest dispute that persons must faithfully perform their moral duties. The fact that we may be incapable of actually knowing beyond all doubt whether we correctly understand any given aspect of a priori morality is not a moral basis to abandon the quest, substituting raw Consequentialism for the Categorical Imperative. Therefore, the metaphorical collective rational will must be our guide and goal lest morality have no role, much less the lead role in social intercourse. See supra notes 87-100 and accompanying text.
163 See supra notes 120-24 and accompanying text.
164 MULHOLLAND, supra note 137, at 278-81 (discussing specifically Kant’s view of property); see also id. at 289-90 (discussing why Kant was not really a “social contractualist”). As Prof. Ripstein explained it, Locke believed private persons could transfer their rights to the State to enhance efficient and effective enforcement of those rights. By contrast, “The core of Kant’s argument is that the right to enforce rights cannot be enjoyed in the state of nature. The right that Locke imagines people trading away is one that can only be enjoyed through the rule of law.” Ripstein, supra note 135, at 1417
165 “Kant’s pivotal enrichment of the prevailing metaphor is that the ‘social contract’ does not symbolize a discretionary arrangement of expediency, but rather a moral requisite without which the dignity principle cannot be achieved.” Bayer, supra note 17, at 361. As Prof. Wood précised, “[T]he idea of a state” is “derived” from “the universal principle of right.” WOOD
will, equally our own and that of other rational beings, . . . in obeying the objectively valid moral law, [may] regard[] itself as at the same time giving that law.”166 In other words, Society and its laws are legitimate only when consistent with the dignity principle, the product of a universalized will -- something to which all rational persons would consent -- that respects innate dignity by treating each person as an end, never “merely as means.”167

Because human interaction is both necessary and inevitable if we are to pursue happiness further than living in a cave and scavenging for food, and because even persons of good will may be unable to agree on what is right and just, we derive legitimate government to “‘put[] an end to this conflict by replacing individual judgments with the authoritative determinations of positive law.’ It is through the rational edicts of the officers of the state that individuals know the reciprocal laws that bind and manage interpersonal relations.”168 The function of government, then, is to preserve the pursuit of happiness -- Kant’s “universal principle of justice” -- in a manner consistent with the dignity principle. Consequently, law, including “private law” such as contracts and property,
insure[s] the exercise of external freedom [the moral pursuit of happiness], [thus,] the law may be defined as the “set of conditions under which the choices of each person can be united with the choices of others under a universal law of freedom” … [so] that I may pursue my ends and others, theirs — all within the framework of rules securing our external liberty.169

Law, therefore, is not strictly utilitarian, but instead, determines if a right -- a moral duty -- is applicable, whether that right has been violated and, if so, how to bring the parties to status quo ante. Only that conception of law promotes the universal law of freedom and the Categorical Imperative.170

As shortly we will understand, the surrendering of individual capacity to dictate social terms in favor of a universal will explains the legal viability of the Individual Mandate.

A. Perfect and Imperfect Duties --

Of course, to forestall tyranny and to preserve the legitimacy of government, the same morality that limits individual behavior constrains the State. Therefore, government must obey Formulations One and Two of the CI.171 Not surprisingly, Kant recognized separation of powers and due process of law as

169 Fletcher, supra note 146, at 535 ((discussing, Translation by the author of 8 I. Kant, Werke in Zwölf Bänden 337 (Suhrkamp ed. 1956)); also, e.g., MULHOLLAND, supra note 137, at 318; Weinrib, supra note 155, at 797. As Prof. Ripstein put it, “the use of force needs to be rendered consistent with the independence of each person from others. Mandatory forms of social cooperation -- notably the state -- are justified only if they serve to create and sustain conditions of equal freedom in which ordinary forms of social cooperation are fully voluntary.” Ripstein, supra note 135, at 1437.

170 Id. at 1424-27. Regarding American law, the Supreme Court implicitly embraced this framework, “The result may appear ‘formalistic’ in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location [thereby endangering liberty] as an expedient solution to the crisis of the day.” New York v. United States, 505 U.S. 144, 187 (1992) (emphasis added); also, e.g., Printz v. U.S., 521 U.S. 898, 933 (1997); Veterans for Common Sense v. Shinseki, 678 F.3d 1013, __ (9th Cir. 2012).

171 Generally, Bayer, supra note 17, at 297-99, 362-63 (discussing why groups, organizations and governments are subject to moral principles). There is some disagreement whether Kant actually conceived the State as enforcing moral duties. Although acknowledging that legislators are required to adhere to the Categorical Imperative so that enacted laws are legitimate, Fletcher, supra note 146, at 552, Prof. Fletcher argued that “While the prevailing view today treats law
the overarching concepts to constrain governmental acts into conformance with the Categorical Imperative. Consistent with the limits of due process, the law may only address what Kant termed “perfect” or “juridical” duties, rather than compelling individuals to obey “imperfect” duties or “duties of virtue.”

Imperfect duties, or duties of virtue, encourage us to maximize “our own perfection and the happiness of others”; but, doing so is not obligatory under Kantian morality. Accordingly, “A duty is imperfect if no one is in a position to demand by right that it be complied with.” For instance, we may pursue happiness by leading selfless lives, depriving ourselves for the sake of charity and dedicating our waking hours to worthy pursuits. From a consequentialist perspective such would be leading a good life. But, one could not rationally will an immutable duty to ensure the happiness of

and morality as intersecting sets of rules and rights, the Kantian view treats the two as distinct and nonintersecting.” Id. at 542-43, 534. In this regard, Fletcher accuses commentators of “conflating” the two in that Kant did not believe that a person has a “right” to enforce another person’s moral “duty.” Id. at 544-45; 553-58.

But Prof. Benson, among others, strongly disagrees, highlighting as particularly illustrative Kant’s avowal that the moral duty to keep promises properly is enforceable under contract law. As we know, to be legitimate, law, herein contract law, must be the product of the common will, not simply the ad hoc wills of the particular contracting parties whose dispute happens to be under judicial review. Benson, supra note 128, at 565-67 (discussing, I. Kant, PHILOSOPHY OF LAW 101-04 (W. Hastie trans.1881) (Rechtslehre) and I. Kant, THE METAPHYSICAL ELEMENTS OF JUSTICE *215, 221-22 (J. Ladd trans. 1965) (Rechtslehre)). Just as individual free will is constrained by “practical reason,” -- the capacity to understand a priori morality -- and must be exercised pursuant to the Categorical Imperative, so too must the collective will -- the law -- be bound. Id. at 568-577. As Benson summarized, “According to Kant, there is a metaphysics of morals because both law and morality are grounded in one supreme principle, autonomy of the will.” Id. at 575.

See, Bayer, supra note 17, at 365-68. For a discussion of how American due process jurisprudence tacitly has embraced Kantian ethics, particularly the dignity principle, see id. at 396-403 and infra notes 186-92 and accompanying text. Writing for the Court, the first Justice John Marshall Harlan aptly summarized this principle 110 years ago, “Even liberty itself, the greatest of all rights, is not an unrestricted license to act according to one’s own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.” Jacobson v. Mass., 197 U.S. 11, 26-27 (1905) (upholding mandatory vaccination program).

172 See, Bayer, supra note 17, at 365-68. For a discussion of how American due process jurisprudence tacitly has embraced Kantian ethics, particularly the dignity principle, see id. at 396-403 and infra notes 186-92 and accompanying text. Writing for the Court, the first Justice John Marshall Harlan aptly summarized this principle 110 years ago, “Even liberty itself, the greatest of all rights, is not an unrestricted license to act according to one’s own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law.” Jacobson v. Mass., 197 U.S. 11, 26-27 (1905) (upholding mandatory vaccination program).

173 WOOD, supra note 92, at 166-67; see also KORSGAARD, supra note 152, at 20.

174 MURPHY, supra note 93, at 34-35 (emphasis supplied).
others because such violates the “duty of rightful honor.” An immutable duty to make others happy essentially enslaves us to the personal wills of those others who, in turn, are virtual slaves to our personal wills, as we would have to do whatever others want and they would have to do whatever we want. Thus, there is no moral duty either to perfect ourselves (such a duty would be self-enslavement) or to maximize another’s happiness.175 “Accordingly, we may live selfish lives, acquiring for ourselves as much as we can with no thought of sharing … so long as … the pursuit of happiness as selfishness [does] not denigrate anyone's innate dignity.”176

Because imperfect duties are noncompulsory and, thus, create no rights, they cannot be coercively imposed, but, rather, “are to be fulfilled through inner rational constraint.”177 Compelling a person to fulfill an imperfect duty betrays her innate dignity because she is not morally required to do what she is being forced to do.178 Imperfect duties, then, are not “juridical duties,” that is, enforceable by the rightful coercion of Government because Society cannot compel you to do that which makes others happy. Rather, Society can only mandate that you do not treat others merely as means, that is, you may not immorally intrude into their “innate right of freedom.”179

175 WOOD, supra note 92, at 167; MURPHY, supra note 93, at 35 (“[N]o one can demand by right that I make him happy, can regard himself wronged if I fail to make him happy.”); RIPSTEIN, supra note 134, at 288. As Prof. Ripstein explained, “people are required to forbear from interfering with each other. … You are free to enter into cooperative arrangements with others, but nobody can compel you to cooperate with them … [lest you lose your innate freedom] to set and pursue your own conception of the good. … Nobody can impose an affirmative private obligation on you as a result of their need, no matter how pressing it may be. … You never need to make your means or powers available to another person, even in the rare case in which life itself is at issue.” Ripstein, supra note 135, at 1407-08.
176 Bayer, supra note 17, at 364 (footnote omitted).
177 WOOD, supra note 92, at 220.
178 MURPHY, supra note 93, at 36.
179 WOOD, supra note 92, at 220. As Prof. Murphy clarified, “The [person] who is simply unhappy has no … claim against me. I have not violated his freedom. I have merely exercised my right to leave him alone.” MURPHY, supra note , at 37.
Perfect duties, by contrast, are moral imperatives, they must be fulfilled because they, “spring from the very idea of external freedom: a world in which everyone’s rights are respected is a world in which complete external freedom is achieved.”\(^{180}\) A perfect duty arises, then, to avoid violating the Categorical Imperative. For example, one may not fraudulently enter into a contract because doing so treats the promisee purely as a means; having been duped, the promisee cannot know either the promisor’s true goals or the actual nature of the bargain.\(^{181}\) Given the non-volitional character of such duties, individuals may demand -- have an enforceable right -- that others perform their perfect duties.\(^{182}\)

**B. The Guarantee of Due Process is the Constitution’s “Perfect Duty,” Protecting the Innate Dignity of All Persons Subject to the Jurisdiction of the United States --**

Because perfect duties are duties of right, they are “juridical duties,” that is, proper subject for State enforcement.\(^{183}\) In American law, Government’s core perfect duty -- the integral obligation from which virtually all others flow -- the United State’s formal enforcement of the Categorical Imperative -- is due process of law, as I have tried to prove in earlier work.\(^{184}\) Indeed, as previously discussed herein, “The fundamental guarantee of due process is absolute and not merely relative. . . . [T]he constitutional safeguard as to due process [is] at all times dominant and controlling where the Constitution is applicable.”\(^{185}\)

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\(^{180}\) KORSGAARD, supra note 152, at 21.

\(^{181}\) E.g., MURPHY, supra note 93, at 35 (discussing the general duty to keep promises).

\(^{182}\) Id. at 34-35. Logically, one volitionally could convert an imperfect duty into a perfect duty. For example, while enhancing the happiness of others is a duty of virtue, promising to make someone happy engenders the perfect duty to keep one’s promises. Id. at 35.

\(^{183}\) Id. at 35, 123 (“Only if I unjustly limit another [person’s] freedom is the State justified in restraining me through the coercive machinery of its force.” Id. at 36); WOOD, supra note 92, at 161-62, 220.

\(^{184}\) Bayer, supra note 17, at 383-403 (arguing, inter alia, that, pursuant to the Framers’ intent as inspired by the Declaration of Independence, due process under the Constitution is America’s deontological morality enforceable by law; and the judiciary so recognizes).

\(^{185}\) Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350 (1909); see also, United States v. Smith, 480 F.2d 664, 668-69 n.9 (5th Cir. 1973); see generally, supra notes 65-70 and accompanying text.
Even a cursory review confirms that American liberty theory has intuited Kant’s integral thesis: due process enforces Government’s integral obligation that all official acts of any kind uphold the inherent dignity of those who are regulated.\footnote{186 Bayer, supra note 17, at 398-403.} Indeed, the Supreme Court unequivocally highlighted “dignity” as due process’ core meaning and impetus: “[C]hoices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”\footnote{187 Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992); see also, e.g. Lawrence v. Texas, 539 U.S. 558, 574 (2003); Chavez v. Martinez, 538 U.S. 760, 774 (2003) (Government may not employ tactics “so offensive to human dignity’ that they ‘shoc[k] the conscience”’) (emphasis added; quoting Rochin v. California, 342 U.S. 165, 172-74 (1952)); United States v. Brantley, 342 Fed. Appx. 762, 769 (3d Cir. 2009) (noting, “the court's solemn obligation of ensuring that those who come before it are treated with appropriate dignity and afforded due process.”), cert. denied, 130 S. Ct. 1106 (2010); Kennedy v. Town of Billerica, 617 F.3d 520, 540 (1st Cir. 2010); Lombardi v. Whitman, 485 F.3d 73, 81 (2d Cir. 2007); see generally, Maxine D. Goodman, Human Dignity in Supreme Court Constitutional Jurisprudence, 84 NEB. L. REV. 740 (2006).} To offer but one prominent example, \textit{Lawrence v. Texas} ruled that Government has no authority to criminalize homosexual sodomy performed in private between consenting adults.\footnote{188 Lawrence v. Texas, 539 U.S. 558 (2003).} The Court’s due process analysis stressed, “It suffices for us to acknowledge that adults may choose to enter upon [an intimate personal] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”\footnote{189 Id. at 567.} Appealing to sentiments identical to Kant’s admonition under the Categorical Imperative’s Formulation Two against objectifying human beings, \textit{Lawrence} declared that “[t]he petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”\footnote{190 Id. at 578. See, Bayer, supra note 17, at 400-03 for additional judicial examples enforcing due process as innate dignity.} Thus, regarding constitutional jurisprudence, Professor Maxine Goodman correctly concluded that the Supreme Court
“has repeatedly treated human dignity as a value underlying, or giving meaning to, existing constitutional rights and guarantees.”

Accordingly, while the name Immanuel Kant is unlikely to be cited, the Judiciary’s conception of due process could not comport more agreeably with Kantian moral philosophy if the courts footnoted GROUNDWORK OF THE METAPHYSICS OF MORALS in every opinion addressing Constitutional rights. Kant, therefore, provides the right paradigm to review the Individual Mandate’s true legal concern, whether it comports with the Fifth and, if enacted by a State, Fourteenth Amendments.


192 A Westlaw search conducted on July 1, 2012, revealed but 41 state and federal judicial citations to Kant, none by the Supreme Court, and most referencing Kant lightly in passing. Very few offer Kant his due as in U.S. v. Barker, 71 F.2d 1362, 1368-69 (9th Cir. 985), “Central to our system of values and implicit in the requirement of individualized sentencing is the categorical imperative that no person may be used merely as an instrument of social policy, that human beings are to be treated not simply as means to a social end like deterrence, but also and always as ends in themselves. See, e.g., I. Kant, Groundwork of the Metaphysic of Morals 66-67 (H.J. Paton trans. 2d ed. 1964)” (internal quotation and footnote omitted). Ironically, Barker cited Kant in a decision upholding use of criminal sentencing for deterrent purposes, a proposition seemingly in defiance of Kant’s admonition that the only legitimate criterion for sentencing is the nature of the felon’s crime. Any enhancement to a sentence for the purpose of “sending a message” exceeds punishment commensurate with the actual harm of the crime, thus using the felon purely as a means to promote the admittedly useful policy of deterrence. E.g., WOOD, supra note 92, at 210-212.

Among other interesting references, People v. Schmeck, 37 Cal. 4th 240, 300 (2005), abrogated on other grounds, People v. McKinnon, 52 Cal. 4th 610 (2011), rejected the defendant’s contention that “the prosecutor ‘minimized the magnitude’ of the penalty decision by referring to a statement by the philosopher Immanuel Kant that ‘The last murderer on earth has to be punished, the last, otherwise there is no justice.’”

In a federal decision, the Middle District of Pennsylvania hoisted plaintiffs on their own Kantian petard. The plaintiffs cited Kant’s Categorical Imperative, First Formulation to opposed defendants’ motion to dismiss their lawsuit. The court, however, ruled that a rational person could not will as a universal law that the defendants’ dismissal motion be denied because, “Plaintiffs have presented the Court with an amended complaint that, more than simply being
**C. Government’s Duty To Aid the Destitute and Its Application to the Individual Mandate**

At first blush, under Kant’s theory, Government has no authority to assure that healthcare is generally available. Similarly, the Individual Mandate appears beyond any legislature’s competence. After all, while certainly a moral pursuit, any duty of benevolence to enhance the happiness and comfort of others is imperfect under the Kantian concepts just explained. Because Government may only enforce perfect duties, the IM cannot be legitimized under the theory that a good and generous society will not allow persons to go without affordable essential medical services. Such an argument is Consequentialist and, thus, not informative whether the IM violates the Categorical Imperative -- confounds individual dignity -- by compelling unwilling individuals to purchase health insurance from the private market.¹⁹³

Therefore, the Kantian justification -- thus the due process correctness -- must be that the Individual Mandate enforces some perfect duty, in which case its impositions are legitimate. Indeed, as next discussed, such a perfect duty exists; but it inures not to individuals, nor to private groups. Rather, Government sustains a unique, perfect duty to tax for the benefit of those so destitute that they cannot function as dignified individuals, that is, they cannot truly enjoy the “universal principle of justice.” As Kant expressed it:

[I]t follows from the nature of the state that the government is authorized to require the wealthy to provide the means of sustenance to those unable to provide the most necessary needs of nature for themselves. Because their existence depends on the act of subjecting themselves to the commonwealth for the protection and care required in order to stay

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¹⁹³ The distinct possibility that those who foolishly deny themselves the protections of health insurance but for governmental compulsion might be better off due to that such paternalism is irrelevant because, as we know, arguments based on outcomes -- Consequentialism -- cannot resolve moral dilemmas.
alive, they have bound themselves to contribute to the support of their fellow-citizens, and this is the ground for the state’s right to require them to do so.”

As detailed below, because lack of access to medical treatment is comparable to poverty, government must tax to assure that those who otherwise cannot afford it enjoy minimally decent healthcare. The Individual Mandate is equivalent to a tax, but with the unique advantage that taxpayers may choose insurance coverage from among available options instead of sending their money to the general governmental coffers and taking what the Government is willing to give.

i. Property Law and the Enslavement of Poverty --

We have learned that forming a legitimate state under principles of due process is not simply a good idea, it is a perfect duty because persons otherwise cannot be certain that they are interacting with others pursuant to the Categorical Imperative. Therefore, individual wills are subject to the universal will of collective society -- the State -- the duty of which is to enact and to enforce laws comporting with individual dignity -- that treat all affected individuals as ends in themselves, and not merely means.

Aside from the occasional hermit, we are not content to live in tiny dwellings, enjoying exclusive use only of the food, clothes and other amenities that we can actually hold in our hands at any one time. Nor may we be so constrained if we are to fulfill the right to pursue happiness, Kant’s “universal principle of justice.” Therefore, Society needs a regime of private law, particularly property and

194 MURPHY, supra note 93, at 123-24 at 123-24 (the quoting, The Metaphysical Elements of Justice (Pt. I, Rechtslehre, of the Metaphysics of Morals) 93, trans. John Ladd Indianapolis, 1965); also, e.g., Weinrib, supra note 155, at 797.

195 Remarkably, Kant presaged exactly how the Supreme Court would uphold legislation such as the Individual Mandate. See, supra notes 78-84 and accompanying text (the Court sustained the IM as lawful under Congress’ power to tax).

196 Weinrib, supra note 155, at 801-811. Of course, the dignity principle requires that “the use of a thing by one person be formally consistent with the freedom of others, regardless of the intensity with which they want the thing or the urgency with which they need it.” Id. at 806. Accordingly, in light of the Categorical Imperative, one cannot misuse objects in ways that treat other persons merely as means; in particular, one may not obtain another’s object through theft,
contract law recognizing abstract rights over things. The freedom to pursue goals is empty if the sole property rights are: ownership only of whatever one happens to be holding and begging others to borrow whatever they happen to be holding.  

\[197\] We must be able to relinquish physical control over objects secure in the knowledge that we have not forfeited the right to possess and to use those objects at will. Such allows individuals to assert lawful, exclusive claim to things not in their immediate physical possession such as their parked cars, bank accounts, and just about everything else over which they reasonably would exercise some sort of reserved interest.  

Therefore, the “innate right to freedom” requires a correlative freedom to have exclusive access to things outside of one’s immediate grasp so long as that right is exercised in a manner consistent with the freedom of all others.  

Accordingly, the State must enact a regime of private property and contract law to which everyone as possible owners of property implicitly consents … [J]ust as an acquirer cannot claim a right for oneself without recognizing the similar rights of others, so others cannot assert the rightfulness of their own acquisitions without respecting the acquisitions of everyone else. Because no one is obligated to respect the entitlements of others unless assured that everyone will do so, the state's coercive power is required to guarantee what everyone owns.

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fraud or other immoral ways. “Take whatever you can grab” is not the hallmark of a moral society.

\[197\] “Free persons can authorize enforceable property rights, because those rights are a way of enabling them to exercise their respective freedom.” Ripstein, supra note 135, at 1431.

\[198\] Id. at 1431; RIPSTEIN, supra note 134, at 281.

\[199\] Weinrib, supra note 155, at 809.

Of course, to maximize utility, such a system would recognize various forms of simultaneous ownership allowing co-owners to exercise discrete property interests -- different forms of control -- over the same object. For instance, Smith may own a car that she leases for a year to Jones who lends the car to Brown for a week. The point is even when they are not in physical possession of the car, Smith, Jones and Brown enjoy and may expect State enforcement of their particular property rights.

\[200\] Weinrib, supra note 155, at 809 (emphasis added) (citing, Kant, Metaphysics at 408-09 [6:255-56], 457-58 [6:314]).

Of course, enforcement of property and contract law rests with the general will, rather than the discrete, individual wills of the contesting parties, each “the judge of his or her own entitlements, doing what seems right and good in his or her own eyes.” Weinrib, supra note 155,
The argument that abstract property rights are obligatory for the sake of liberty reveals a fascinating truth: in a society with a rightful regime of property and contract, poverty is an intolerable condition. “Those who have to concentrate (because of a lack of such basic needs as food and clothing and shelter) on mere animal survival are barred from the realization of any of their uniquely human potentials. Destitution so profoundly impedes indigents’ innate right to freedom that they become virtual things rather than persons.” Thus, impoverishment deprives persons of their due -- the universal principle of justice -- because “they are completely subject to the choice of those in more fortunate circumstances.” That is, they are in a condition of “private dependence,” reliant on benevolence for minimal sustenance. As Tennessee William’s pitiful Blanche DuBois shows us, “always depend[ing] on the kindness of strangers” wrenches the dignity from an individual, making her a supplicant in the hope that some people will choose to follow an imperfect duty of charity.

Therefore, whether through the whims of unkind Fate or by their own hubris, beggars violate the “duty of rightful honor” which, as earlier noted, states, “Do not make yourself a mere means for others but be at the same time an end for them.” The violation occurs because mendicants are virtual slaves, dependent on strangers for sustenance. Accordingly, “dependence on private charity is inconsistent

at 808 (citing, Kant, Metaphysics at 455-56 [6:312]). Society through proper governmental devices, traditionally the judiciary, resolves such disputes. Id. at 808-09.

201 MURPHY, supra note 93, at 125.
202 Ripstein, supra note 135, at 1430.
203 Id.; also, e.g., Weinrib, supra note 155, at 815-16.
206 RIPSTEIN, supra note 134, at 133-42.
with the united will that is required for people to live together in a rightful condition.”

That is, while one must join Society, one could not rationally will, nor could the collective rationally will, a social order in which one might become a vagabond, “entirely subject to the discretion of others, because such … would be inconsistent with the freedom of those who were dependent in this way.”

ii. Government’s Perfect Duty To Tax for the Benefit of the Destitute --

Because poverty and the threat to dignity arise within a system of essential laws, the cure must come from Government itself. Indeed, Kant’s conception of “property requires redistribution to the poor for its own legitimacy,” lest law illicitly becomes, “a unilateral power exercised by the strong against the weak.” This is because, under a regime of conceptual property, given that the world and its commodities are finite, other persons might control all the land, or all the food, or all similar needful things. Poverty, then, is not the result of any given individual’s lawful appropriation of property; that is, “the prospect of impoverishment is created by the systemic legitimacy of acquisition, rather than by the appropriative acts of any particular acquirer. [Accordingly, the] people … must collectively discharge the duty that is incidental to achieving that rightful condition.”

207 Ripstein, supra note 135, at 1430-31 (citing, Immanuel Kant, Groundwork for the Metaphysics of Morals 224 (Thomas E. Hill, Jr. & Arnulf Zweig eds., Arnulf Zweig trans., Oxford Univ. Press 2002) (1785); emphasis added)). As Prof. Ripstein later explained, under poverty, “a person cannot use his or her own body, or even so much as occupy space, without the permission of another. The problem is not that some particular purpose depends on the choice of others, but that the pursuit of any purpose does.” RIPSTEIN, supra note 134, at 281.

208 A person cannot rationally contract herself into slavery. Id. at 133-142.

209 Ripstein, supra note 135, at 1431.

210 Weinrib, supra note 155, at 801. “The existence of a duty to support the poor is the necessary precondition for establishing a state that guarantees property in a manner consistent with each person's innate right. Unless the duty is fulfilled, the state forfeits its legitimacy. … A people that fails to fulfill its duty to support its poor cannot be regarded as joined together in a rightful condition [because that society has breached individuals’ right to pursue happiness, the universal principle of justice].” Id. at 818.

211 Ripstein, supra note 135, at 1431.

212 Weinrib, supra note 155, at 815-16.

213 Id. at 817.
arises from the law itself, it falls to the law to find the answer, to allow for some mandatory redistribution so that the destitute will not become supplicants. Indeed, because the universal will could not rationally intend otherwise, a governmental solution is a perfect duty.\(^{214}\)

Thus, it is not that the poor are entitled to sustenance or even to survival, rather relieving the plight of poverty is the fortuitous outcome of Government obeying its perfect duty to prevent the law from creating a class of beggars.\(^{215}\)

The solution, understandably, is some form of tax. True, any tax to aid the poor is paid by individuals; but, as explained, that is not because individuals have a duty to help the poor. Rather, Government may impose the obligation on its constituents to pay taxes “for its own preservation.”\(^{216}\) Such “preservation” includes maintaining governmental legitimacy by enforcing its perfect duties such as taxing to restore the poor to personhood.\(^{217}\)

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\(^{214}\) Prof. Ripstein summarized the idea well, “Without an institutional solution to this problem, those who are in need could not regard themselves as authorizing the general will at all. … Need is a natural problem, but dependence on the goodwill of others is a problem of justice.” Ripstein, supra note 135, at 1431.

\(^{215}\) “The poor are supported not because they hold a right but because they are the beneficiaries of a duty,” arising from leaving the state of nature to form a society that allows possession of property beyond what one can physically hold in one’s hands. Weinrib, supra note 155, at 821.

\(^{216}\) Weinrib, supra note 155, at 818 (quoting, Kant, Metaphysics at 468 [6:326]).

\(^{217}\) Id.; also, e.g., Aditi Bagchi, Distributive Injustice and Private Law, 60 HASTINGS L. J. 105, 123 (2008). Not surprisingly, some commentators dispute the Weinrib-Ripstein explanation of Kant’s proposed governmental perfect duty to aid the poor. Prof. Fisher, for example, argues that poverty is not a form of domination that the State has a duty to end because, “Market processes … are anonymous and impersonal in that they do not depend on or reflect the wills of particular individuals. Individual market players cannot deliberately alter the course of market forces nor can they effectively counteract them. The market is, in this sense, an external, objective macro-cosmos.” Fisher, supra note 148, at 393 (citations omitted).

Prof. Fisher’s description of the market forces is true enough; but this system of “‘masterless slavery,’” Id. at 394, n. 33 (quoting, Max Weber, ECONOMY AND SOCIETY 636 (1978)), exists because Government has a perfect duty to promulgate laws recognizing and enforcing the private right to assert exclusive use and control over objects not physically held by the owners. Basic deontological theory demonstrates that individuals cannot avoid their ethical duties by outsourcing immoral behavior to entities they create and then claim that they are not culpable because those entities are beyond the control of the very participants who benefit from
iii. The Due Process Legitimacy of the Individual Mandate --

Kant’s example of the State’s perfect moral duty to tax for the benefit of the poor allows reasonable extrapolations because, given its unique and indispensable authority, “to speak and act for all,” the organs of Government, “must be organized so that they do not systematically create a condition of dependence.”\textsuperscript{218} In other words, the duty to tax to aid the poor is part of a larger perfect duty to assure that otherwise proper laws do not generate vagabonds. Accordingly, so long as it is “carried out without violating any person’s innate right of humanity,”\textsuperscript{219} government can regulate the healthcare market including mandating the purchase of health insurance.\textsuperscript{220}

As we now understand, the Kantian metaphor is not the perfect duty to avoid suicide\textsuperscript{221} because extant American society will provide medical care for those who are uninsured, thus failure to carry insurance does not \textit{per se} court the risk of dying needlessly from illness due to refusal of treatment.\textsuperscript{222} Rather, the imagery is virtual enslavement. It seems irrefutable that almost certainly, persons without health insurance someday will need expensive medical care, will want such care but will be unable to pay out-of-pocket.\textsuperscript{223} Individuals’ decisions to seek healthcare despite their inability to pay is rational because, like starvation, homelessness, and nakedness, sickness can thwart the ability to enjoy the

\textsuperscript{218} RIPSTEIN, \textit{supra} note 134, at 272.
\textsuperscript{219} \textit{Id.} at 285.
\textsuperscript{220} \textit{Id.} (generally noting the possibility of legitimate Government mandated healthcare regulations but not discussing any particular mechanisms).
\textsuperscript{221} For Kant, suicide based on despondency is an immoral act as an affront to the humanity of one’s own person. \textit{E.g.}, HILL, \textit{supra} note 126, at 51, 203.
\textsuperscript{222} For instance, hospitals that provide emergency treatment may not refuse to treat uninsured persons who otherwise are unable to pay for medical services. \textit{See}, Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd.
\textsuperscript{223} \textit{E.g.}, \textit{Sebelius}, 21012 WL 2427810 (U.S.) at 40-42 (Ginsberg Opinion).
“innate right of freedom,” to pursue happiness. Thus, the needy unwell will render themselves supplicants to the largess of charity to regain health enough to be independent. Because Government cannot employ the collective rational will to enact property and other private law provoking an economic system that would financially enslave some of its constituents, its perfect duty to tax for the benefit of the poor likewise allows a taxation system to benefit those who need but cannot afford medical services.

For Kantian purposes, the Individual Mandate is a tax designed to assure that there will be no beggars in the healthcare market. Indeed, the tax is nicer that simply putting money into the public treasury because each taxpayer enjoys some discretion to choose among available insurance coverages that meet at least the Affordable Care Act’s minima. So long as it otherwise does not violate the Categorical Imperative, such as imposing a tax so oppressive it is confiscatory, the IM comports with Kantian ethics and, therefore, satisfies the “fundamental fairness” standard of the Constitution’s guaranty of liberty, the due process clauses.

One might respond that Medicaid already protects the ill who are too poor to obtain private health insurance, thus the destitute are covered without imposing a burden on others to purchase their own private coverage or pay a tax penalty. But, the IM’s due process validity does not derive only from aiding the extant poor. Rather, and very importantly, the Individual Mandate precludes the better-off

224 Of course, these arguments in no manner imply that persons with severe chronic illnesses invariably are unable to be independent. Still, for the ill, minimally adequate healthcare is the route to enable their right to pursue happiness by overcoming pain, fatigue or other medically related disabilities.

225 It does not matter that Government might have instituted some other form of tax such as a “single-payer” system. Kant’s project was not to devise one or a number of detailed actual systems. In that regard, “The Kantian argument is formal and procedural rather than substantive.” RIPSTEIN, supra note 134, at 284. Rather, Kantian ethics requires that Government satisfy its duties in compliance with the Categorical Imperative. If there is more than one way to do so, Government is free to choose. Id. at 284-85.

226 E.g., Burnet v. Brooks, 288 U.S. 378, 400 (1933); see also, supra note 83 and accompanying text.
from violating the Categorical Imperative-Second Formulation’s earlier accented corollary, “the duty of rightful honor.” That perfect duty states, “Do not make yourself a mere means for others but be at the same time an end for them.” Therefore, one may not volitionally adopt a slave-like status by allowing oneself to be used exclusively as a means.

Certainly, the vast majority of uninsured adults know three things: (1) almost inevitably, due to accident or illness, they will need significant, expensive healthcare for which they will be unable to afford; (2) very likely the onset of such illness or accident will come unexpectedly with little if any warning; and, (3) rather than die or suffer by foregoing medical treatment, they will accept public or private charity. By deliberately refusing available health insurance, such persons consciously place themselves at manifest risk of becoming supplicants. Because it is unlikely that they will simply drop dead thus foregoing intense medical intervention, the uninsured have no liberty interest in courting awaiting beggarmom. In fact, the very act of refusing insurance is so irresponsible that such contrarians compromise their own dignity even when healthy and robust.

Moreover, the IM protects another class of persons from the enslavement of poverty: the health insurance industry itself. The Supreme Court controversially but quite rightly has recognized the legal

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228 See, supra notes 155-57 and accompanying text.
229 Going without insurance is hardly comparable to morally sustainable self-jeopardy such as risking one’s life to save the lives of others. E.g., HILL, supra note 126, at 55-56 (Kant would not oppose a researcher testing an experimental drug on herself if less drastic means are unavailing).
230 As mentioned supra at note 221 and accompanying text, suicide likewise is immoral. Therefore, those who would otherwise refuse cannot avoid their duty to acquire health insurance by earnestly promising to kill themselves before accepting charity in the form of free medical care. The reason is not that they are highly unlikely to keep that promise, although such probably is the case. Rather, no less than begging, suicide violates the perfect duty to respect one’s own dignity.
personhood of corporations of all types, business and otherwise.\textsuperscript{231} Indeed, the constitutional protections accorded to firms do not emanate from any notion of “property,” but, rather, from their status as effective persons under law.\textsuperscript{232} Accordingly, corporations possess virtually the full panoply of constitutional rights.\textsuperscript{233}

It does not matter whether firms hold their own innate personhood or become imbued vicariously with the dignity of those who found, administer and use them. The reality is, individuals must form and rely on corporations to fulfill virtual every type of project, personal or commercial. Corporations have become indispensible devices through which we conduct all manner of dealings. Accordingly, by whatever theory, corporations must be respected as persons for two reasons. First, being persons, they must obey the same immutable moral duties as govern human beings. We, therefore, can hold corporations accountable for both their own acts and for the immoral acts of those who use them. In that

\begin{itemize}
\item \textsuperscript{231} See, e.g., Citizens United v. Federal Elections Commission, 130 S. Ct. 876, 899-900 (2010) (citing cases); Addiction Specialists, Inc. v. Township of Hampton, 411 F.3d 399, 407, n. 6 (3\textsuperscript{rd} Cir. 2005); RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1057, n. 7 (9\textsuperscript{th} Cir. 2002); Northeast Georgia Radiological Associates, P.C. v. Tidwell, 670 F.2d 507, 512 (5\textsuperscript{th} Cir. 1982).
\item \textsuperscript{232} The former standard that any due process rights inuring to corporations stem from property interests, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), “is an artificial mode of analysis, untenable under decisions of this Court.” First National Bank of Boston v. Bellotti, 435 U.S. 765, 779 (1978) (corporations are persons entitled to due process of law).
\end{itemize}
way persons cannot escape their ethical obligations by acting through intermediaries such as corporation.\textsuperscript{234}

Second, absent such personhood, corporations cannot protect the dignity of those with whom they come in contact. For example, if corporations have no rights then persons who entrust to them highly personal information such as medical records or financial statements can expect such material to be public knowledge accessible for the asking. The only way to justify the theory that persons maintain their rights when they willingly convey private things to corporations is by imbuing corporations with personhood, either their own or that of the individuals who use the corporations.\textsuperscript{235}

As earlier discussed, the Affordable Care Act, \textit{inter alia}, requires insurance carriers to insure all persons including those with preexisting conditions. Indeed, companies must cover such conditions from the time individuals enroll. Moreover, with very limited exceptions, insurance carriers may not charge higher premiums, deductibles, co-payments and other fees based on preexisting conditions.\textsuperscript{236} Such requirements almost certainly would bankrupt most, if not all, private insurance firms. Thus, the ACA itself would impoverish the very class of corporations it regulates requiring them either to fold or to become supplicants in bankruptcy. Intuitively complying with Kantian principles to prevent the quasi-enslavement of those businesses -- to respect their dignity as legal persons -- Congress enacted the Individual Mandate, thereby infusing insurance carriers with the cash needed for ACA compliance.\textsuperscript{237}

\textsuperscript{234} \textit{See, Bayer, supra} note 17 at 297-99.

\textsuperscript{235} To cite a similar instance, the judiciary has held that corporations contribute to the dissemination of information, opinions, perspectives and ideas. \textit{E.g., Citizens United, supra} 130 S. Ct. at 900 (corporations add to the national political debate); \textit{Bellotti, supra} 425 U.S. at 783 (same). To deny corporations civil rights such as speech stifles people’s ability to communicate through corporate means, a terrible infringement in our modern age of mass communications. Accordingly, “In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.” \textit{Id.} at 784-85; \textit{accord, Citizens United} at 899.

\textsuperscript{236} \textit{See, supra} note 13 and accompanying text.

\textsuperscript{237} \textit{E.g., id.}
Importantly, contrary to the IM’s critics, the same cannot be said for a government command to buy broccoli, even if the domestic broccoli market were on the brink of collapse. Market failure based on traditional notions of competition does not implicate the issues raised by the IM. Property and contract law generally do not and need not warrant the success of any given business or line of enterprise. In theory at least, firms and markets thrive or fail on their merits, which is all morally responsible ventures reasonably can ask. But, when Government’s direct regulation causes the class of business to collapse, as the ACA would absent the Individual Mandate, one may apply the Kantian tax principle.238

Nor may Congress exercise the Kantian tax concept to safeguard even significant commercial markets because unlike acquiring health insurance, consumers who now refuse to buy cars and broccoli will not suddenly need those products to survive, but be unable to purchase them absent insurance. Thus, the failure of such markets will not create a class of supplicants.239

IV. Conclusion --

Pursuant to the formulations emanating from Categorical Imperative, the Individual Mandate is a rational means to fulfill Government’s unique moral obligation that its legal system not create mendicants, persons who must beg to obtain the sustenance without which they cannot function as

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238 In fact, one might go so far as to assert that the
239 Possibly, persons whose livelihood depended on now collapsed markets will face poverty. If unable to find new sources of income, they will have access to social welfare programs designed, theoretically at least, to enable them to regain societal independence. Similarly, the businesses themselves may access bankruptcy laws. Thereunder, businesses that fail -- fall into poverty -- are accorded the opportunity to reformulate, often with a large degree of debt forgiveness. E.g., FCC v. NextWave Personal Communications, Inc. 537 U.S. 293, 301 (2003); Perez v. Campbell, 402 U.S. 637, 649 (1971) (a prominent purpose of bankruptcy law “is to give debtors ‘a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.’ Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).”) In that way, suitably consistent with the Kantian tax principle, destitute corporations are salvaged by the Government that enacted the framework of property, contract and business law under which those businesses floundered.
independent members of society. In that way, Kantian ethics, which informs America due process jurisprudence, demonstrates that the Individual Mandate complies with integral liberty.