

2013

The Individual Mandate's Due Process Legality: A Kantian Explanation, and Why It Matters

Peter Brandon Bayer

William S. Boyd School of Law, University of Nevada, Las Vegas

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>

 Part of the [Law Commons](#)

Recommended Citation

Peter B. Bayer, *The Individual Mandate's Due Process Legality: A Kantian Explanation, and Why It Matters*, 44 Loy. U. Chi. L. J. 865 (2013).

Available at: <http://lawcommons.luc.edu/lucj/vol44/iss3/7>

This Non-Colloquium Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

The Individual Mandate's Due Process Legality: A Kantian Explanation, and Why It Matters

*Peter Brandon Bayer**

In National Federation of Independent Business v. Sebelius, one of the most controversial decisions of this young century, an intensely divided Supreme Court upheld the Patient Protection and Affordable Care Act's most provocative feature—the Individual Mandate—under Congress's taxing power. In so doing, the Court rejected what appeared to be the Individual Mandate's more applicable constitutional premise—Congress's authority to regulate interstate commerce. Yet, neither the Constitution's Taxing Clause nor its Commerce Clause provide the ultimate answer as to whether Congress may regulate the multi-billion dollar healthcare market by compelling unwilling persons to buy private health insurance. The final determination of the Individual Mandate'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—i.e., infringes liberty—when it compels individuals to purchase unwanted products, even for the greater public good. As the popular cliché goes, if today Congress can make us buy health insurance, tomorrow it could be cars or broccoli. This Article argues that, to the contrary, the Individual Mandate fully comports with vital liberty interests without opening a “floodgate” whereby Congress can force persons to buy any commodity to promote any purported societal benefit.

Specifically, 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

* 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 McAfee, Ann McGinley, and my research assistant Erica Okerberg.

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; that is, persons who, due to dependence on charity for minimal sustenance, become virtual slaves. 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 that Kant anticipated to prevent individuals from becoming vagabonds—effectively slaves—pleading for the vital healthcare that they cannot afford but eventually will need. Thus, the Individual Mandate 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 these products to survive but be unable to purchase them absent insurance.

TABLE OF CONTENTS

INTRODUCTION: HOW KANTIAN ETHICS ELUCIDATES THE TRUE	
CONSTITUTIONAL VALIDITY OF THE INDIVIDUAL MANDATE.....	867
I. A TERSE PRÉCIS OF COMMERCE’S LINK WITH LIBERTY	871
A. Today’s Constitutional Benchmark: The “Economic Effects” Standard	872
B. The Four Judicial Phases of Commerce Clause Jurisprudence.....	875
C. Commerce, Federalism, and Individual Liberty.....	879
D. Why the Individual Mandate Comports with Congress’s Power to Tax, but Not Its Power to Regulate Commerce	884
II. THE KANTIAN DEFENSE OF THE INDIVIDUAL MANDATE	887
A. Moral Theory Is Deontological, Not Utilitarian/Consequentialist.....	888
B. Professor Barnett’s Quasi-Deontology.....	892
C. Dignity, Morality, Duty, and the Necessity to Form Societies under Due Process of Law	896
1. The Rational Capacity of Each Person to Discern a “Metaphysics of Morals”	897
2. Kant’s Dignity Principle.....	899
3. The Categorical Imperative Formulations One and Two ...	900

2013]	<i>The Individual Mandate’s Due Process Legality</i>	867
	4. The Categorical Imperative’s Third Formulation: The “Kingdom of Ends”	903
	D. Perfect and Imperfect Duties.....	907
	E. 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	909
	III. GOVERNMENT’S DUTY TO AID THE DESTITUTE AND ITS APPLICATION TO THE INDIVIDUAL MANDATE.....	912
	A. Property Law and the Enslavement of Poverty	913
	B. Government’s Perfect Duty to Tax for the Benefit of the Destitute	915
	C. The Due Process Legitimacy of the Individual Mandate.....	917
	CONCLUSION.....	922

INTRODUCTION: HOW KANTIAN ETHICS ELUCIDATES THE TRUE
CONSTITUTIONAL VALIDITY OF THE INDIVIDUAL MANDATE

Ironically, neither the Constitution’s Commerce Clause¹ nor its Taxing and Spending Clause² provides the ultimate answer as to whether Congress may regulate the multi-billion dollar healthcare market by requiring unwilling adults to purchase private health insurance. Although the Supreme Court recently upheld the Patient Protection and Affordable Care Act’s (“Affordable Care Act”)³ most provocative and crucial component, the Individual Mandate,⁴ in *National Federation of Independent Business v. Sebelius*,⁵ the Supreme Court’s final word will come if and when the Individual Mandate is tested under the Constitution’s foremost standard: the paradigm of *liberty* inspiring and impelling the Due Process Clauses of the Fifth and

1. The Commerce Clause gives Congress the authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

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.

3. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.) [hereinafter “Affordable Care Act” or “Act”].

4. See Affordable Care Act § 1501, 26 U.S.C. § 5000A (Supp. IV 2010).

5. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2600 (2012). Specifically, the Court found the Individual Mandate valid and enforceable pursuant to Congress’s taxing powers, and further ruled that the Individual Mandate is not sustainable under Congress’s authority to regulate interstate commerce. *Id.* at 2598–601.

Fourteenth Amendments.⁶ Indeed, unlike the Constitution's Article I, the predominant command of due process resolves the Individual Mandate issue at both the federal and state levels.⁷ This Article explains why compelling unwilling persons either to purchase unwanted health insurance or to pay a penalty does not offend core principles of substantive due process.⁸

To so demonstrate, Part I briefly explains that the prime principle animating the commerce and tax precedents upon which *Sebelius* relied is safeguarding individual liberty, something the Justices acknowledged but did not address. Because the parties never pursued the due process issue,⁹ 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, Part II explains why the Individual Mandate is consistent with liberty. Rather than appealing to widely cited analogous precedent,¹⁰ this Article offers an alternative (and perhaps more

6. As four Justices correctly noted, the argument against the Individual Mandate in fact implies a substantive due process aspect that had not been pressed except that the parties "now concede that the provisions here at issue do not offend the Due Process Clause." *Id.* at 2623 (Ginsburg, J., with Breyer, Sotomayor and Kagan, JJ., concurring in part, concurring in the judgment in part, and dissenting in part). Presumably due to the parties' perhaps rash concession, *Sebelius* did not address the due process bona fides of the Individual Mandate.

7. 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's Individual Mandate falls under the Fifth Amendment. However, logic dictates that "[t]he 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 (9th Cir. 1993) (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, if any, of a state to enact a local individual mandate is identical to Congress's leeway to pass the national Individual Mandate.

8. "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)).

9. See *supra* note 6 and accompanying text (noting that neither majority nor dissent addressed the due process issue).

10. For example, Government may compel unwilling persons to be vaccinated against communicable diseases. See, e.g., *Zucht v. King*, 260 U.S. 174, 176 (1922) ("Long before this suit was instituted, [the Court] had settled that it is within the police power of a state to provide for compulsory vaccination." (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)); *Workman*

compelling and convincing) approach. 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 our Founders, individuals may “pursue happiness,” but only while respecting the dignity of others within a society governed by predominating moral laws that protect “life” and “liberty.” Although they hardly ever cite Kant’s work, 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, Part III 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 needy persons, arguing that while there is no individual moral obligation to supply aid, Government¹¹

v. Mingo Cnty. Bd. of Ed., 419 F. App’x 348, 355–56 (4th Cir. 2011) (holding that 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. *See, e.g.*, *Robinson v. California*, 370 U.S. 660, 666 (1962); *United States v. Buchard*, 580 F.3d 341, 349 (6th Cir. 2009). Moreover, Government may enforce a draft (i.e., compulsory military conscription). *See, e.g.*, *Arver v. United States*, 245 U.S. 366, 378 (1918) (“It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need, and the right to compel it.”). 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 Individual Mandate, 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.

11. For purposes of this Article, and for the sake of diversity, the terms “Government” and “State” are used interchangeably and refer generally to the panoply of legislative and executive

itself has a mandatory duty to tax the wealthy 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 to meaningfully pursue happiness within a society governed by law. Because, as detailed herein, such poverty is the byproduct of indispensable property and contract law, the government that made those laws must restore the poor's 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 Individual Mandate comports with Kantian moral theory. Because Kant's "metaphysics of morals" is the manifest yet unacknowledged paradigm of American due process jurisprudence, it makes sense to consider his graceful argument that Society is duty-bound to restore persons from beggars to independence.¹² Thus, there

aspects of the government.

12. As explained more thoroughly *infra* Parts II and III, the applicable Kantian duty is based not only on the need to help those too poor to afford available health insurance. Other Government programs, such as Medicaid, arguably address this social problem. Rather, the moral justification for the Individual Mandate is premised as well on the fact that society is riddled with persons who can afford to obtain at least minimally adequate health insurance, but who foolishly refuse to do so. With rare exceptions, at some time in their lives, the members of this subpopulation will suffer from a serious illness or accident requiring extensive medical treatment that they will demand but that, due to their uninsured status, they cannot afford. Thus, this class becomes beggars seeking whole or partial forgiveness for their unreimbursed (seemingly avoidable) medical costs.

In addition, recent controversial but eminently correct Supreme Court decisions provide yet another Kantian-based explanation of the Individual Mandate's constitutional morality. For instance, with some popular controversy, *Citizens United v. Federal Elections Commission*, 130 S. Ct. 876 (2010), reaffirmed that corporations are "persons" entitled to virtually the full panoply of individual rights under the Constitution. Absent the Individual Mandate, enforcement of the Affordable Care Act's other provisions likely would bankrupt the corporate entities comprising the private healthcare industry.

Kantian morality reveals that, even for arguably beneficent reasons, Government cannot inadvertently extinguish a class of individuals that are not causing Society harm—doing so would defy the dignity of both the adversely affected group and the individuals that comprise the group. Therefore, a surprising, yet plausible Kantian application of the *Citizen United* core principles evinces that Congress was obligated to adopt the Individual Mandate or some other device to assure that the Affordable Care Act will not obliterate the private health insurance market—a collection of corporate persons entitled to due process dignity.

is a Kantian defense for the Individual Mandate; and, in light of what Kant's theories teach us, the defense provides the integral ideas—i.e., the moral arguments—that define, establish, and enliven American due process of law. Without this paradigm of dignity, decency, and morality, all analogous precedents lack meaning. That is why a Kantian defense of the Individual Mandate matters.

I. 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 accessible, affordable, comprehensive, and reliable healthcare.¹³ The centerpiece and surely most controversial portion of the Affordable Care Act, the Individual Mandate,¹⁴ directs (with limited exceptions)¹⁵ 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.¹⁶

13. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2580 (2012). See also THE HENRY J. KAISER FAMILY FOUND., SUMMARY OF NEW HEALTH REFORM LAW 1 (2011), available at <http://www.kff.org/healthreform/upload/8061.pdf> (explaining the key provisions of the Act).

14. Because it imposes tax penalties for failure to comply, the Individual Mandate is found in subtitle D of the Internal Revenue Code, entitled "Miscellaneous Excise Taxes," under Title 26 of the United States Code.

15. 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) (2006).

16. 26 U.S.C. § 5000A(a)–(b). Put briefly, the Affordable Care Act'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. And the third leg is the Individual Mandate that, 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*, 132 S. Ct. at 2613–14 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2644–45 (Scalia, J., with Kennedy, Thomas, and Alito, JJ., dissenting) [hereinafter Joint Dissent]. The justification is abolishing "free riders"—that is, persons who, despite lacking insurance, will not be refused expensive medical treatment for which they are unable to pay out-of-pocket. See, e.g., *id.* at 2620 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Additionally, the Affordable Care Act creates state-controlled "Health Benefit Exchanges" allowing individuals, families and small businesses 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. See, e.g., *State of Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1246 (11th Cir. 2011), *rev. in part and aff'd in part*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). The latter

Not surprisingly, Congress asserted the Commerce Clause as its primary source of constitutional authority to enact the Affordable Care Act.¹⁷ Because access to, and the attendant costs of, healthcare undeniably affect economies at all levels—personal, business, local, state, and national—the bond between Congress’s Article I authority to “regulate” interstate commerce and the Affordable Care Act’s direct regulation of the multi-billion dollar health care market seemed obvious. However, the Supreme Court rejected the Commerce Clause in favor of the Taxing and Spending Clause as Congress’s legitimate basis to enact the Individual Mandate.¹⁸

A. *Today’s Constitutional Benchmark: The “Economic Effects” Standard*

Based on the *Sebelius* Court’s constitutional law, a brief review of Commerce Clause jurisprudence provides a useful prelude to this Article’s proposed Kantian analysis. The core point is: While “commerce” is certainly definable in its own right, that definition exists within, is informed by, and indeed is subservient to the liberty principles of due process¹⁹ that vindicate our Constitution²⁰—the very principles that Kantian morality elucidates. Thus, there is 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;²¹ enough to fulfill the

provision was struck by the Supreme Court as contravening the Tenth Amendment insofar as it coerces states to enlarge their Medicaid programs. *Sebelius*, 132 S. Ct. at 2601–07 (Roberts, C.J., with Beyer and Kagan, JJ.).

17. See 42 U.S.C. § 18091(1)–(2) (2006) (declaring that the Individual Mandate “is commercial and economic in nature, and substantially affects interstate commerce”).

18. *Sebelius*, 132 S. Ct. at 2595–601.

19. “Liberty” is generally 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)).

20. I say “vindicate” because, as I attempted 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, 335–46, 385–96 (2011).

21. Elementary Federalism informs that, “Congress[s] authority is limited to those powers enumerated in the Constitution.” *United States v. Lopez*, 514 U.S. 549, 566 (1995) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819)).

“necessary and proper” work of a national government²² but, very importantly, duly constrained to forestall tyranny at the federal level.²³ Among its most lively powers, Congress may “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²⁴ At its core, the Commerce Clause accords Congress discretion “to prescribe the rule by which commerce is to be governed.”²⁵ This power is plenary and “like all others vested in Congress, is complete in itself.”²⁶

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.”²⁷ To resolve that persistent inquiry, a pivotal triumvirate of Supreme Court decisions—*United States v. Lopez*,²⁸ *United States v. Morrison*,²⁹ and *Gonzales v. Raich*³⁰—defined “commerce” as “economic activity” of a “commercial character.”³¹ In other words, any congressional regulation of purported intrastate commerce must involve actual “economic activity” linked fairly directly to interstate commerce.³² Thus, the Court understands commerce to

22. 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.

23. As the Supreme Court has repeatedly emphasized, “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. 52, 458 (1991) (internal quotation marks omitted)). See also, e.g., *Sebelius*, 132 S. Ct. at 2578 (“The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions.”). This Article emphasizes this essential concept *infra* at notes 54–74 and accompanying text.

24. 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).

25. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

26. *Id.* See also *Champion v. Ames*, 188 U.S. 321, 357 (1903) (“Congress alone has the power to occupy, by legislation, the whole field of interstate commerce.”).

27. *Ogden*, 22 U.S. (9 Wheat.) at 194.

28. 514 U.S. 549 (1995).

29. 529 U.S. 598 (2000).

30. 545 U.S. 1 (2005).

31. *Morrison*, 529 U.S. at 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.

32. See, 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*

demarcate commercial dealings from all other social interactions.³³

For the purposes of this Article, the controlling question is not whether these recent decisions establish a constitutionally apt standard for enforcing one of Congress's most forceful powers.³⁴ Nor is it whether each precedent reached the correct holding.³⁵ Rather, the

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 189–90 (emphasis added).

33. Regarding application of the economics effects framework to the *Lopez-Morrison-Raich* trilogy, *Lopez* invalidated the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V), making it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." That Act exceeded Congress's commerce power because it neither regulated "commercial activity" nor mandated any meaningful nexus between gun possession in school zones and interstate commerce. *Lopez*, 514 U.S. at 551.

Similarly, *Morrison* struck part of the Violence Against Women Act of 1994, Pub. L. 103-322, §§ 40001–40703, 108 Stat. 1796, 1902–55, according a civil remedy to victims of "crime[s] of violence motivated by gender." 42 U.S.C. § 13981(c) (2006). The Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617–18.

By contrast, *Raich* upheld federal convictions under the Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970), of individuals who, pursuant to California's so-called medical marijuana law, cultivated and used marijuana for certain medicinal purposes. The Court concluded that Congress's commerce authority "includes the power to prohibit the local cultivation and use of marijuana in compliance with California law." *Raich*, 529 U.S. at 9.

34. Not surprisingly, commentators disagree whether the *Lopez-Morrison-Raich* "economic activity" standard sets an appropriate norm. For instance, Professor Randy Barnett believes, "the economic-noneconomic distinction . . . is useful because the regulation of intrastate economic activity is far more likely to be closely related to interstate commerce than is the vast array of intrastate noneconomic activity." Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J. L. & LIBERTY 581, 600 (2010). Professors Akhil Amar and Jack Balkin differ, urging that the Framers manifestly understood "commerce" to encompass noneconomic as well as economic activity. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 107–08 (2005); Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 5, 15–16 (2010). This disagreement is discussed in Ian Millhiser, *Worse than Lochner*, 29 YALE L. & PUB. POL'Y REV. INTER ALIA 50, 60 (2011). Similarly, four Justices chided the economic-noneconomic distinction with a particularly unkind jurisprudential insult: "categorical formalism." *Morrison*, 529 U.S. at 645 (Souter, J., dissenting).

35. 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 woman engender huge expenditures in medical bills, police and court costs, victims' lost earnings, employer's lost productivity, and other comparable expenses measurable in economic markets. *Morrison*, 529 U.S. at 634 (Souter, J., dissenting).

Similarly, a high market price for marijuana might induce some to sell rather than to ingest their state-authorized medical marijuana, impeding Congress's perceived legitimate interest to eliminate the interstate demand for illegal drugs. *Raich*, 545 U.S. at 19–20 & n.29. Still, if the undisputed market consequences of both firearms in school zones and criminal assaults against

inquiries are: how did the Court come to this “economic activity” paradigm; and what, if anything, does this 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.³⁶ 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. These precedents echo the Court’s frequent assertion that Congress’s commerce authority includes regulating “purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”³⁷

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 the first phase, starting with *Gibbons v. Ogden*³⁸ and continuing until about 1918, courts accepted that Congress’s 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

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*, 545 U.S. at 52 (O’Connor, J., dissenting).

36. See, e.g., *Morrison*, 529 U.S. at 660 (Breyer, J., dissenting). But see *Lopez*, 514 U.S. at 568 (Kennedy, 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.”).

37. *Raich*, 454 U.S. at 17. Similarly, the Court ruled in *Lopez* that 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.

38. 22 U.S. (9 Wheat.) 1, 196 (1824).

commerce 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.³⁹ Thus, it has always been within Congress competence to use its commerce discretion to promote or to forestall behavior not for the economic effects such behavior engenders, but due to such behavior's perceived moral worth or corruption.

During the early 1900s—perhaps best exemplified by 1918's *Hammer v. Dagenhart*⁴⁰—the paradigm shifted to hold “that Congress could not use its power over interstate commerce as a pretext to reach such economic but non-federally commercial intrastate activities as manufacturing or agriculture, activities which were instead within the police power of states to regulate.”⁴¹ 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 the 20th-century economy, and formalistic commercial distinctions were thought to be useful instruments in achieving that object.”⁴²

39. Millhisser, *supra* note 34, at 53 (footnotes omitted). See *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 327 (1917) (upholding statute restricting interstate sale of alcoholic beverages); *Hoke v. United States*, 227 U.S. 308, 322 (1913) (upholding statute banning transportation of prostitutes in interstate commerce). 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). See also *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 261–62 (1964) (holding that Congress could use the Commerce Clause to force private business to abide by Title II (the public accommodations provision) of the Civil Rights Act of 1964); *United States v. Patton*, 451 F.3d 615, 621 (10th Cir. 2006) (upholding the public accommodations provisions of the Civil Rights Act of 1964); *Groome Resources Ltd. v. Parish of Jefferson*, 234 F.3d 192, 209 (5th Cir. 2000) (upholding the Fair Housing Amendments Act's reasonable accommodations provisions); *Gibbs v. Babbitt*, 214 F.3d 483, 493 & n.2 (4th Cir. 2000) (upholding federal regulations to protect and preserve endangered species). *But see Patton*, 451 F.3d at 621 (holding that a statute criminalizing possession of body armor by felon was outside interstate commerce).

40. *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding Congress's statute barring interstate sale of products made by child labor as improper interference with state manufacturing).

41. *Barnett*, *supra* note 34, at 589 (footnote omitted). See also *Morrison*, 529 U.S. at 642–43 (Souter, J., dissenting) (finding that *Morrison* unnecessarily and wrongly revived the distinction between commercial and noncommercial conduct).

42. *Morrison*, 529 U.S. at 643–44 (Souter, J., dissenting) (citation omitted). Concurrent with restricting Congress's 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. In sum, under *Lochnerism*, the Court struck, as violating substantive due process, state laws regulating business and industry—the same types of laws that the Court held Congress could not

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 judicial branch had indulged an illegitimate quasi-legislative posture to impose its social policy preferences as constitutional 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’s power to regulate.⁴³ 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.”⁴⁴

Surely the most prominent incarnation of “post-1937” Commerce

enact because such regulation of manufacturing was the exclusive province of state governments. *See, e.g., Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1362 (11th Cir. 2011) (Murphy, J., dissenting in part) (summarizing the “bygone” *Lochner* era as a period where “substantive due process was more broadly interpreted as also encompassing and protecting the right, liberty, or freedom of contract”), *rev’d in part, aff’d in part*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

Although substantially repudiated during 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 based on 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; *id.* at 67 (Harlan, J., dissenting); *id.* at 76 (Holmes, J., dissenting). Pursuant to this 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 at the federal level under the Fifth Amendment and have “incorporated,” that is, applied to the states, almost all of the Bill of Rights. *See Bayer, supra* note 20, 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.”

43. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (upholding the Fair Labor Standards Act); *United States v. Darby*, 312 U.S. 100, 118 (1941).

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

Clause theory is *Wickard v. Filburn*,⁴⁵ 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” fell within Congress’s Commerce Clause power.⁴⁶ Because home-consumed wheat “constitute[d] the most variable factor in the disappearance of the wheat crop,”⁴⁷ the *Wickard* Court concluded that Filburn’s home-consumed wheat competed with wheat he otherwise would have had to purchase on the open market.⁴⁸ In rejecting the 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.⁴⁹ Because Congress’s commerce power includes authority to affect markets by regulating the price and supply of commodities, “[i]t 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.”⁵⁰

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 aptly 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.”⁵¹ If Roscoe

45. 317 U.S. 111 (1942).

46. *Florida*, 648 F.3d at 1269 (discussing *Wickard*). 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, an amount that Court accepted was used exclusively for home consumption and not commercial farming. *Id.* at 125–27.

47. *Wickard*, 317 U.S. at 127.

48. *Id.* at 128.

49. *Id.* at 125–27.

50. *Id.* at 128.

51. *United States v. Morrison*, 529 U.S. 598, 660 (2000) (Breyer, J., dissenting). Justices Kennedy and O’Connor offered the same sentiment five years prior to *Morrison*: “In a sense any

Filburn's growing and consumption of a bit of wheat is subject to congressional commerce regulation, any behavior, incurring any economic impact, no matter how local or private, is seemingly federally governable.

There are two possible resolutions to this dilemma. The first is that, consistent with *Wickard*, contemporary commercialism has begot a practical federal power to regulate all 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 mentioned Supreme Court decisions—*Lopez*, *Morrison*, and *Gonzales*—that adopted the “economic activity” of a “commercial character” standard.⁵² As previously discussed, any congressional regulation of intrastate commerce must concern actual “economic activity”—that is, actual commercial pursuit—linked fairly directly to interstate commerce.⁵³

C. Commerce, Federalism, and Individual Liberty

This latest governing test and whether it actually vouchsafes intrastate commerce⁵⁴ begs the pivotal question: why should we care

conduct in this interdependent world of ours has an ultimate commercial origin or consequence” *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., with O'Connor, J., concurring).

52. *See supra* notes 27–37 and accompanying text. As *Morrison* summarized, “[I]n every case where we have sustained federal regulation under the aggregation principle, the regulated activity was of an apparent commercial character.” 529 U.S. at 611 n.4 (citation omitted). *See generally* Leslie Meltzer Henry & Maxwell L. Stearns, *Commerce Games and the Individual Mandate*, 100 GEO. L.J. 1117, 1129 (2012) (discussing how *Lopez* arguably reinterpreted *Wickard*).

53. *See, e.g.,* *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (discussing Congress's power to regulate economic activities that substantially affect interstate commerce). *Sebelius* has added one important corollary: Congress cannot “compel individuals not engaged in commerce to purchase an unwanted product.” 132 S. Ct. 2566, 2587 (2012) (opinion of Roberts, C.J.). *See also id.* at 2643–46 (Joint Dissent). *See also infra* notes 75–87 and accompanying text (discussing that while Congress does not have the authority to force individuals to purchase products, Congress *does* have the power to impose a tax).

54. Professor Barnett observed,

In the wake of *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 34, at 588.

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 that something other than innately defined "commerce" 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's commerce power as grounded in expediency rather than originating from some pristine *a priori* quintessence. As the celebrated judicial rationalist Oliver Wendell Holmes offered, "[C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."⁵⁵ To a considerable extent, Holmesian pragmatism has guided Commerce Clause philosophy throughout the twentieth century and into the new millennium.⁵⁶

Nonetheless, practical commercial reality is not, and correctly never has been, sufficient to explicate entirely Congress's 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.*"⁵⁷ Accordingly, the Commerce Clause is restrained to the extent its exercise conflicts with other constitutional requisites. Indeed, eighty-one years later, at the turn of the outset of the twentieth century, the Supreme Court in *Champion v. Ames* elucidated *Gibbons* in terms of the Constitution's greatest requisite, liberty: "[T]he power of Congress to regulate commerce among the states, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or 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.*"⁵⁸

The judiciary has fulfilled *Ames's* elegant imperative by affirming

55. *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905).

56. See *United States v. Lopez*, 514 U.S. 549, 573–74 (1995) (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) ("[I]nterstate commerce itself is a practical conception.").

57. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (emphasis added).

58. *Champion v. Ames*, 188 U.S. 321, 362–63 (1903) (emphasis added).

that, despite the Commerce 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.⁵⁹ Such power would transgress crucial constitutional Federalism by tapping into 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."⁶⁰ This Amendment recognizes an enveloping realm of state "police power," or comprehensive regulatory authority.⁶¹ 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."⁶²

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's power ends somewhere in favor of states' rights is not true simply because the Tenth Amendment declares, and thus supposes, a zone of undivided state legal authority. Precedent rightly rejects the formalistic argument that as part of the

59. As the *Morrison* Court 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." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) (citations omitted). *See also* Nat'l Fed'n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566, 2578 (2012) (discussing that the police power is a power reserved for the states and not the federal government); *Lopez*, 514 U.S. at 564–65 (noting that the limitations placed on the federal government's commerce power are often indistinguishable and hard to define).

60. U.S. CONST. amend. X.

61. *See Morrison*, 529 U.S. at 618 (stating that the regulation and punishment of actions not directed at the "instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States").

62. *Taffin v. Levitt*, 493 U.S. 455, 458 (1990); *accord* *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). 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." *Ashcroft*, 501 U.S. 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, at 292–93 (James Madison) (Clinton Rossiter ed., 1961). *See also* *New York v. United States*, 505 U.S. 144, 156 (1992) (stating that a power not conferred to the federal government in the Constitution is withheld and belongs to the states).

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.⁶³ In other words, limits on Congress's "practical" exercise of its commerce authority are not proved under a theory that economic pragmatism cannot obviate the Tenth Amendment. Rather, 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 *individual* 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 people's rights would be secured by the division of power."⁶⁴ The Court very recently unambiguously reaffirmed that "Federalism secures the freedom of the individual,"⁶⁵ smartly linking this integral thesis to the Constitution's

63. 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.

New York, 505 U.S. at 156–57.

64. *Morrison*, 529 U.S. at 616 n.7 (citations omitted). *See also Lopez*, 514 U.S. at 552, 564 (discussing the balance of power between the federal government and the states).

65. *Bond v. United States*, 131 S. Ct. 2355, 2363 (2011). *See also Stern v. Marshall*, 131 S. Ct. 2594, 2609 (2011) (noting that the separation of powers protects the individual in addition to protecting each branch of government from intrusion by other branches); *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*, 132 S. Ct. at 2578 (opinion of Roberts, C.J.) ("The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions.").

Indeed, not a decade after the Constitution's ratification, Justice Cushing explained the constitutional quintessence that after 220 years still 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, 468 (1793) (opinion of Cushing, J.), *overruled* U.S. CONST. amend. XI. Chief Justice Jay concurred, stating that "the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each

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.*”⁶⁶ In *Sebelius*, Justices Scalia, Kennedy, Thomas and Alito expressed this 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 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.⁶⁷

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 and indeed civilized by the Constitution’s greatest liberty protection, “due process of law”⁶⁸—rightfully identified by noted constitutional scholar Justice Felix Frankfurter as “ultimate decency in a civilized society.”⁶⁹ Indeed, because they are the Constitution’s principal arbiters of “fundamental fairness,”⁷⁰ the Due Process Clauses of the Fifth and Fourteenth

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.). Similarly, James Madison and Alexander Hamilton touted Federalism as one of the yet-to-be-ratified Constitution’s prime bulwarks against governmental subjugation. See THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961); *Id.* NO. 20, at 180–81 (Alexander Hamilton).

66. *Gregory*, 501 U.S. at 558 (emphasis added) (citations omitted).

67. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2676–77 (2012) (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; those amendments have obviated reliance on the Tenth Amendment as a source of liberty. I accept for this discussion the judicial avowal that absent Federalism, individual liberty is in jeopardy. Accordingly, determining whether Congress’s enactments contravene the Tenth Amendment requires an assessment of the threat to *individual liberty* that, of course, is the exclusive province of due process.

68. See *Sec’y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 616 (1950) (noting that the Commerce Clause cannot defy due process).

69. *Adamson v. California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964).

70. See, e.g., *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007); *Clark v. Arizona*, 548 U.S. 735, 770–71 (2006); *Rogers v. Tennessee*, 532 U.S. 451, 460 (2001); *United States v. Salerno*,

Amendments are the repository of America's "deepest notions of what is fair and right and just."⁷¹ Thus, "not even resort to the Commerce Clause can defy the standards of due process,"⁷² which is a logical subset of the dominant premise of constitutional law. 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."⁷³

Because commerce litigation is not, and never has been 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 the Individual Mandate is that it unconstitutionally intrudes into both individual liberty and the liberty of the States.⁷⁴

D. Why the Individual Mandate Comports with Congress's Power to Tax, but Not Its Power to Regulate Commerce

Despite the undeniable adverse economic effects that the willingly uninsured inflict on the healthcare market,⁷⁵ the Supreme Court ruled

481 U.S. 739, 746–48 (1987); *Duncan v. Louisiana*, 391 U.S. 145, 177 (1967) (Harlan, J., dissenting); *Rochin v. California*, 342 U.S. 165, 169 (1952).

71. *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) (emphasis added), *abrogated by Ford v. Wainwright*, 477 U.S. 399 (1986).

72. *Cent. Roig Ref. Co.*, 338 U.S. at 616. *See also* *Currin v. Wallace*, 306 U.S. 1, 14 (1939) (discussing that while there is no uniformity requirement in connection with the Commerce Clause, the power is still subject to the Fifth Amendment); *United States v. Clark*, 435 F.3d 1100, 1108 (9th Cir. 2006) (outlining the finding in *Central Roig Refining Co.*); *United States v. Hawes*, 529 F.2d 472, 477 (5th Cir. 1976) (noting that the commerce power is subject to the Due Process Clause of the Fifth Amendment).

73. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350 (1909). *See also* *United States v. Smith*, 480 F.2d 664, 668 n.9 (5th Cir. 1973) (noting that the guarantee of due process is one of the most important protections found in the Constitution).

74. Justices Ginsburg, Breyer, Sotomayor, and Kagan agreed that the challengers' position implied a substantive due process matter that had not been pressed, except that the parties ultimately conceded that "the provisions here at issue do not offend the Due Process Clause." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2623 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). 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 2646 (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." *Id.* (citing THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

75. As the Eleventh Circuit summarized the Government's data-laden legal theory, "Given the 50 million uninsured, \$43 billion in uncompensated costs, and \$90 billion in underwriting costs,

that pursuant to the Framers' original understanding of the nature of commerce, Congress has no authority under the Commerce Clause to enact the Individual Mandate.⁷⁶ Briefly put, "The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated."⁷⁷ Accordingly, Congress has no authority to create a sphere of regulable commerce by inventing the commerce itself. Rather, Congress can only regulate extant markets.⁷⁸ Based on this arguably formalistic standard emanating from the Founder's perceived definition of "commerce," Congress cannot force individuals to purchase products from markets in which they are not otherwise engaged.⁷⁹ For this reason, the Court held that the Individual Mandate is unenforceable under the Commerce Clause.⁸⁰

Congress determined these problems affect the national economy and interstate commerce." Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235, 1246 (11th Cir. 2011) (citation omitted), *rev. in part and aff'd in part*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012). Uncompensated costs, or cost shifting, means costs borne by medical providers, and often passed to predominately insured medical consumers, due to treating those who lack any or sufficient insurance coverage. According to Congress, "the mandate will reduce the number of the uninsured and the \$43 billion cost-shifting and thereby 'lower health insurance premiums.'" *Id.* at 1298 (citation omitted).

76. Arguably, that ruling is dictum in that, by upholding the Individual Mandate under the Article I's Taxing and Spending Clause, it is unclear whether the Court needed to reach the commerce issue at all. That the Individual Mandate might fall beyond Article I's Commerce Clause power does not render it any less lawful under the Taxing and Spending Clause. *See Did Chief Justice Roberts Craft a New, More Limited Commerce Clause?*, CONST. L. PROF BLOG, <http://lawprofessors.typepad.com/conlaw/2012/06/did-chief-justice-roberts-craft-a-new-more-limited-commerce-clause.html> (last visited June 20, 2012).

77. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.).

78. *Id.* at 2644 (Joint Dissent).

79. *Id.* at 2586 (opinion of Roberts, C.J.); *id.* at 2644–50 (Joint Dissent). One might retort that the market for health insurance existed prior to the Affordable Care Act. Thus, Congress did not create a new market to regulate; rather, it compelled unwilling individuals into the extant insurance marketplace. The Court's arguably strained rendition of markets all the more implies a not too hidden true rationale sounding in liberty.

80. 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's 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." *Id.* at 2587 (opinion of Roberts, C.J.). 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. *Id.* at 2591 (opinion of Roberts, C.J.); *id.* at 2650 (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's thirst to impose imprudent laws, the Fifth

Despite judicial fears of untrammelled commerce authority, *Sebelius* upheld seemingly comparable congressional willfulness, ruling the Individual Mandate valid under Congress's 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."⁸¹ As Chief Justice Roberts 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."⁸² According to the *Sebelius* Majority, the Individual Mandate presents taxpayers with a lawful "option": buy health insurance or pay a tax penalty to the U.S. Treasury.⁸³ 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.⁸⁴

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's power to require persons to pay a tax if they refuse to buy broccoli.⁸⁵ There is an explanation why the Court may be

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. *Id.* at 2624 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part). Indeed, the Joint Dissent implicitly so acknowledged, noting that during oral argument the federal government was unable to articulate a limiting principle, "other than those explicitly prohibited by the Bill of Rights or other constitutional controls." *Id.* at 2647 (Joint Dissent).

81. *Id.* at 2579 (majority opinion) (citing U.S. CONST., art. I, § 8, cl. 1).

82. *Id.* (citation omitted).

83. *Id.* at 2599–600. For the argument that the Individual Mandate's tax "penalty" indeed is a tax under the Constitution, see *id.*

84. See *id.* at 2596 ("[T]axes that seek to influence conduct are nothing new. . . . Indeed, every tax is in some measure regulatory." (citation omitted)).

85. Unlike the Commerce Clause, there apparently is little jurisprudence addressing Federalism limits on Congress's taxing power. See Ruth Mason, *Federalism and the Taxing Power*, 99 CAL. L. REV. 975, 1026–27 (2011) (arguing Federalism should constrain Congress's taxing power to the same extent it constrains Congress's spending power). Accordingly, Professor Mason labeled the taxing power "the Constitution's hidden giant." *Id.* at 1035. Of course, regardless of whether Federalism's restrictions on taxing are greater, lesser or equal to commerce regulation, due process—i.e., Federalism's true interest—controls Article I, Section 8, Clause 1. See *infra* notes 86–87 and accompanying text.

For an informative analysis of both the history of American tax jurisprudence and the difficult dilemma of distinguishing between lawful taxes and unlawful "regulations backed by penalties"

unbothered by that 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.⁸⁶ Accordingly, despite the Individual Mandate'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,⁸⁷ should the Individual Mandate violate due process liberty principles, such legislation would be irredeemably unconstitutional. Accordingly, this Article next addresses the matter of liberty under due process of law.

II. 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.⁸⁸

As explicated below, because enforcing due process of law is the prime imperative of any legitimate government, and because the United States has explicitly accepted that truly moral responsibility pursuant to the

posing as taxes, see Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1219 (2012). Of course, as the Individual Mandate demonstrates, not unlike commerce enactments, tax regimes combine an economic motive—raising revenue—with a societal motive—encouraged perceived valuable behavior of discouraging perceived harmful behavior. See *id.* at 1219–20.

86. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 306–07 (1992) (“[D]ue process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.”); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344–45 (1954) (same); *Red Earth LLC v. United States*, 657 F.3d 138, 143 (2d Cir. 2011) (same). See also *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 24–25 (1916) (finding arbitrary taxation likely constitutes deprivation of property without due process of law); *Quarty v. United States*, 170 F.3d 961, 969 (9th Cir. 1999) (same); *United States v. Carlton*, 512 U.S. 26, 30–32 (1994) (holding that retroactively applied tax may violate due process); *Picano v. Borough of Emerson*, 353 F. App’x 733, 735 (3d Cir. 2009) (holding that a tax must not offend substantive due process); *Berne Corp. v. Govt. of the Virgin Islands*, 570 F.3d 130, 138 (3d Cir. 2009) (holding that a taxpayer must have procedural due process rights to challenge the legality of a tax or application thereof).

87. Assuming Congress has not preempted states from doing so. See, e.g., *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1265–66 (2012) (explaining the federal preemption doctrine); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540–42 (2001) (same).

88. Bayer, *supra* note 20, 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.”)).

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, this Article addresses briefly why, as Kant believed, morality, and thus due process of law, is *deontological* rather than *consequentialist*.⁸⁹ That is, due process is not concerned with generating the most pleasant or popular outcome or consequence. 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 the framework for due process Deontology. Believing that Kantian ethics offers the soundest moral philosophy yet expressed, this Article reviews Kant's liberal theory explaining why individuals' compulsory moral duties require the formation of societies governed by due process of law. Such governance is necessary if persons are to exercise liberty—that is, seek self-fulfillment by pursuing happiness—in an ethical manner. 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 with human dignity, and thus are not free to pursue happiness within the strictures of morality. Based on these theories of personal morality and governmental duties, this Article implores that lack of access to meaningful health care is an entirely consistent contemporary form of destitution, validating governmental intervention, such as the Individual Mandate.

A. *Moral Theory Is Deontological, Not Utilitarian/Consequentialist*

Commentaries defending the Individual Mandate 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

89. Utilitarianism is the most well-known form of Consequentialism. Bayer, *supra* note 20, at 294 (citations omitted). For purposes of this Article, the specific elaborations that the former offers the latter are immaterial. Therefore, this Article uses the two terms interchangeably. Similarly, it uses the terms *morality* and *ethically*, and *morals* and *ethics*, as essentially synonymous.

material harms on others, whether financial or otherwise.”⁹⁰ 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.”⁹¹

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.⁹² Purdy and Siegel accent the arguably immoral behavior of *free riders*: persons who could afford but refuse to buy insurance, eventually will need medical care, and will eagerly consume high-priced healthcare, the costs of which will be passed onto innocent others because the ill individuals are unable to pay their high medical costs due to their uninsured status.⁹³ By failing to pay for such services, 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 have responsibly purchased health insurance.⁹⁴ 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 Individual Mandate is lawful under Mill’s “harm principle.” Such reasoning 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.⁹⁵

But “best outcomes” is neither an appropriate nor accurate basis to

90. Jedediah Purdy & Neil S. Siegel, *The Liberty of Free Riders: The Minimum Coverage Provision, Mill’s “Harm Principle,” and American Social Morality*, 38 AM. J. L. & MED. 374, 389 (2012) (first emphasis added).

91. *See id.* at 382 (discussing JOHN STUART MILL, ON LIBERTY 139 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859)).

92. *Id.* at 385, 388.

93. Indeed, hospitals that provide emergency treatment may not refuse to treat uninsured persons who otherwise are unable to pay for medical services. *See* Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (2006).

94. Purdy & Siegel, *supra* note 90, at 386 (footnote omitted).

95. As Professor Blum explains,

“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 *good*, meaning the greatest *happiness*.”

Bayer, *supra* note 20, at 294 (emphasis added) (quoting Gabriella Blum, *The Laws of War and the “Lesser Evil,”* 35 YALE J. INT’L L. 1, 38 n.166 (2010)) (citing ALLEN W. WOOD, KANTIAN ETHICS 262 (2008)).

evaluate the very morality—the liberty implications of the Individual Mandate—that Purdy and Siegel extol. Even assuming that the Individual Mandate accomplishes its presumably beneficent purpose, it nevertheless violates due process of law if it unduly constrains personal liberty. As do all fundamental rights, liberty protects individuals from illicit “contemporary social morality”; that is, a majority’s (even an overwhelming majority’s) possibly well-intentioned but misguided will. To raise the classic exemplar, due process will not sustain the unconstitutional conviction of a guilty person even if Society would be safer from violence if that 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 their collective level of accord—that is, what some, most, or all people *want* their world to be. Consensus provides no independent basis to verify the correctness of moral answers unless one simply wishes to declare that morality is defined by popular fiat.⁹⁶ Under such a theory, abominations like racism, slavery, and genocide are immoral only if enough members of a given social order so agree.⁹⁷ With respect to the Individual Mandate, suppose Purdy and Siegel’s assumption regarding contemporary popular morality is wrong or is correct today but popular sentiment changes tomorrow? If a majority of Americans decide that tyranny includes Government 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 Individual Mandate is unconstitutional. Based on the tenor of their article, those latter policies do not comport with Purdy and Siegel’s moral stance. It is unlikely these scholars would abandon the Individual Mandate simply due to a change in civic sentiment.

Utilitarians like Professors Purdy and Siegel frequently attempt to escape this dilemma by incorporating humanizing controls.⁹⁸ Their tactics are unavailing because, put coarsely, reformed

96. WOOD, *supra* note 95, at 266–68.

97. Bayer, *supra* note 20, at 322 (citing JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF THE RIGHT 91 n.1 (1994)).

98. 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 & Siegel, *supra* note 90, at 384. See Bayer, *supra* note 20, 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”).

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, 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.⁹⁹

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 best they reaffirm human fallibility; at worst they allow us to camouflage our selfish preferences as genuinely moral.¹⁰⁰ As a result, a "consequentialist definition of morality is both unremittingly circular and distressingly self-indulgent."¹⁰¹

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.¹⁰²

Despite many theorists' avowed preference for utilitarian solutions, transcendent morality really is much more comfortable. By freeing

99. Purdy & Siegel, *supra* note 90, at 388 (citing JOHN RAWLS, *POLITICAL LIBERALISM* 223–27 (1993)).

100. See Bayer, *supra* note 20, at 310 ("Our inability to find something does not mean that thing is nonexistent."). See also Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 312 (1985) (distinguishing the realist from the skeptic); Michael Moore, *Moral Reality*, 1982 WISC. L. REV. 1061, 1109 (discussing factual and moral belief).

101. Bayer, *supra* note 20, at 296.

102. *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.

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.¹⁰³

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

B. Professor Barnett’s Quasi-Deontology

Before explaining Kant’s deontology and how his moral theory vindicates the Individual Mandate, this Article briefly turns to Professor Randy Barnett’s provocative and noteworthy article, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*.¹⁰⁴ Professor Barnett, a well-regarded scholar, attempts in his article to replace pure Consequentialism with a constitutional deontology derived from the phrase, “or to the people,” in the Tenth Amendment to prove that the Individual Mandate is unconstitutional.¹⁰⁵ With respect, Barnett’s reasoning is so doctrinal that it fails to acknowledge the actual basis of his condemnation of the Individual Mandate: that the Individual Mandate violates due process of law, a position with which this Article emphatically disagrees. As Professor Barnett is rightly among the most esteemed of contemporary legal theorists, his work may well be influential on attorneys and courts if and when the Individual Mandate’s due process bona fides are fully litigated. Therefore, a brief rejoinder of his theory is appropriate.

Professor Barnett urges that the Individual Mandate is unlawful pursuant to the Supreme Court’s “anti-commandeering” doctrine: “Congress may not simply ‘commandeer the legislative processes of the

103. *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)).

104. *See generally* Barnett, *supra* note 34.

105. *Id.*

States by directly compelling them to enact and enforce a federal regulatory program.’”¹⁰⁶ Clearly, “anti-commandeering” is part of the Constitution’s basic Federalism, the essential balance of power between the federal and state government.¹⁰⁷ 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.*”¹⁰⁸ If, as the Tenth Amendment’s text implies, a domain of “sovereignty” belongs exclusively to “the people,”¹⁰⁹ the same anti-commandeering standards that constrain federal intervention into state arenas logically forestall like congressional intrusions into individuals’ personal affairs.¹¹⁰

It seems that Professor 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.” However, Barnett does not acknowledge that 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 violate¹¹¹—“anti-commandeering” must find its content within the Due Process Clauses.¹¹²

This realization is important because, lacking a due process liberty theory, Professor Barnett’s Tenth Amendment “anti-commandeering” argument cannot elucidate *why* the Individual Mandate is purportedly unconstitutional. Granted, Professor Barnett contrasts the draft, jury service, paying taxes, and completing census forms as examples of constitutionally appropriate, non-commandeering governmentally

106. *Id.* at 622 (quoting *New York v. United States*, 505 U.S. 144, 161 (1992)).

107. *Id.* at 623. For a discussion of Federalism, see *supra* notes 54–74 and accompanying text.

108. See U.S. CONST. amend. X (“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.”).

109. Barnett, *supra* note 34, at 627 (quoting *U.S. Term Limits v. Thornton*, 514 U.S. 779, 848 (1994) (Thomas, J., dissenting)).

110. *Id.* at 629.

111. See, e.g., Bayer, *supra* note 20, at 391–96.

112. Along similar lines, Federalism itself exists predominately to vouchsafe *individual liberty*. It seems, therefore, the “anti-commandeering” concept as applied to persons is subsumed by the Constitution’s Due Process Clauses. Because these clauses are the conclusive and ultimate exemplars of constitutional liberty, there is nothing “anti-commandeering” under the Tenth Amendment that due process does not already provide. Bayer, *supra* note 20, at 383–403.

mandated duties.¹¹³ Finding that these obligations are acceptable governmental coercion, Professor Barnett concludes,

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. *Each of these duties can be considered essential to the very existence of the government, not merely convenient to the regulation of commerce.*¹¹⁴

This assertion reveals the limits of the “anti-commandeering” argument. Doubtless, Congress cannot violate due process liberty—cannot “commandeer”—to attain, in Professor Barnett’s words, the “convenient regulation of commerce,” or, 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.¹¹⁵ That being said, “Congress’s power to regulate economic behavior” includes manipulating markets both for purely financial purposes and to *preclude, for its own sake, immoral conduct*—a principle fully settled by the Supreme Court.¹¹⁶ Indeed, Congress famously uses its commerce power to premise civil rights enforcement, prohibiting private persons from violating the rights of other private persons.¹¹⁷ In sum, the use of economic regulation *to mandate* principles of American decency is more prevalent than Professor Barnett’s analysis allows.¹¹⁸

113. Barnett, *supra* note 34, at 630.

114. *Id.* (emphasis added).

115. *See supra* notes 68–73 and accompanying text (citing cases).

116. *See supra* note 39 and accompanying text (citing cases).

117. *See, e.g.*, The Federal Public Accommodations Act, 42 U.S.C. §§ 2000a–2000a-6 (prohibiting race, color, national origin, and religious discrimination in access to public accommodations, such as hotels and restaurants); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (prohibiting race, sex, color, national origin, and religious discrimination in employment); The Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (prohibiting discrimination against disabled individuals regarding employment and access to public accommodations and public offices); The Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (forbidding a wide range of employment discrimination based on age).

118. One might respond that Professor 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 Individual Mandate obliges the unwilling to purchase health insurance. By contrast, “negative” duties mandate that persons refrain from certain behaviors they wish to perform, such as discriminating based on race or sex. *See 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-versa. *See 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,

One final important observation is that Professor Barnett does not detail the Individual Mandate actual defect from the perspective of individual liberty, the seeming heart of “anti-commandeering.” Rather, he appeals to the notorious “slippery slope” argument:

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.¹¹⁹

Of course, theorists arguing a “parade of horrors” must prove either that the given object, here the Individual Mandate, 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.¹²⁰ As Justice Frankfurter summarized, “The task of scrutinizing is a task of drawing lines.”¹²¹

Applying “the task of drawing lines” to one of Professor 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 also conscript them into prescribed civilian

hotel managers, restaurateurs, merchants, and customers (among others) will have to hire, serve, work alongside, deal with, and otherwise associate with persons who, absent mandating legislation, such bigots would disregard. The positive-negative duties distinction, then, offers little regarding the legitimacy of the Individual Mandate.

119. Barnett, *supra* note 34, at 634.

120. Appropriately, courts accent that “[t]his familiar parade of dreadful calls to mind wise counsel: ‘Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.’” Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 195 n.16 (1999) (citing ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 169 (1990)).

121. Freeman v. Hewitt, 329 U.S. 249, 253 (1946). 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. See, e.g., Armour v. City of Indianapolis, 132 S. Ct. 2073, 2083 (2012); Perry v. Perez, 132 U.S. 934, 941 (2012) (discussing relevant considerations to enable line drawing); Pollard v. Hagan, 44 U.S. 212, 220 (1845). Writing for the Court, Justice Holmes explained the necessity of drawing lines: “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. United States, 206 U.S. 246, 260 (1907).

occupations.¹²² Likewise, Professor Barnett should have explicated why government compulsion to aid greater society by purchasing health insurance is more akin to his example of unconstitutional laws—e.g., “mandating what you eat”¹²³—and less like his example of constitutional laws—e.g., compulsory military service. In sum, while the specter of Government forcing unwilling persons to divert their money into designated commercial markets certainly seems totalitarian, “anti-commandeering” only informs us there are limits to Congress’s (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 Professor 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 law¹²⁴—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.¹²⁵ 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. To Kant, the social contract “does not symbolize a discretionary arrangement of expediency, but rather a moral requisite without which

122. 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, some sort of conscription might be justifiable.

123. Assuming, for argument’s sake, such would be beyond Congress’s legislative authority.

124. “In the state of nature, where there is no controlling, official governmental authority, persons may pursue their happiness by any means.” Bayer, *supra* note 20, 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).

125. “[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 HOBBS, *LEVIATHAN* 86–90, 117–21 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651)).

[human] dignity . . . cannot be achieved.”¹²⁶ There is an intrinsic nobility and true beauty in Kant’s theory of society, exceeding any derived from a consequentialist framework.¹²⁷ Kant grasped the moral vigor required of the social contract: Government is unremittingly devoted to due process of law. Such is the fitting source to discern the legality *vel non* of the Individual Mandate.¹²⁸

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, this Article offers the following encapsulation: the bedrock upon which applicable Kantian philosophy rests is his “dignity principle” that extols 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.¹²⁹ The inestimable worth of human beings does not stem from the good and decent acts that may be attributable to persons, groups, or Society. Rather, the native value of every person simply springs from innate “dignity,” meaning persons’ rational capacities to surpass their sensibilities—to escape the grip of their desires and preferences and employ reason¹³⁰ to discern and to apply *a priori* moral precepts.¹³¹

126. Bayer, *supra* note 20, at 361.

127. “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.*

128. 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 95, at xii. “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’” Bayer, *supra* note 20, at 347 (quoting WOOD, *supra* note 95, at 1). Most modern theorists find Kant’s specific ethics steeped in racial, sex-based, and similarly appalling bigotry. *See, e.g.*, WOOD, *supra* note 95, 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, Professor Wright reminds us of commentators’ appropriate leeway: 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).

129. WOOD, *supra* note 95, at 3.

130. 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. *See also* THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT’S MORAL THEORY 40–41, 207–08 (1992) (noting that humans’ rationality enables them to plan for and consider future consequences). Reason enables

Due to their rational capacities, human beings are “purposive,”¹³² 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.¹³³ 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.”¹³⁴ 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-being.”¹³⁵ The ability to be purposive by exercising practical reason verifies Kant’s ultimate principle: “autonomy of the will” enables individuals to discover the “metaphysics of morals.”¹³⁶

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 (N. Smith trans., 1965)).

131. *E.g.*, Wright, *supra* note 128, at 274.

132. Peter Benson, *External Freedom according to Kant*, 87 COLUM. L. REV. 559, 569 (1987) (footnote omitted).

133. WOOD, *supra* note 95, at 67.

134. *Id.* at 127 (referring to the concept as “practical freedom”). *See also* Weinrib, *Kantian Idea of Reason*, *supra* note 130, at 481 (citing KANT, *CRITIQUE OF PURE REASON*, *supra* note 130, at *A800/B828–A802/B830) (referring to the concept as “practical reason”).

135. Bayer, *supra* note 20, at 349 n.335 (citing Weinrib, *Kantian Idea of Reason*, *supra* note 130, 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 95, at 152. *See also* Wright, *supra* note 128, at 278 (discussing Kant’s recognition that the duty owed to others cannot be determined by a universal rule). “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 20, 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.

136. Benson, *supra* note 132, 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, “[F]rom such crooked wood as man is made of, nothing perfectly straight can be built.” IMMANUEL KANT, *IDEA FOR A UNIVERSAL HISTORY FROM A COSMOPOLITAN POINT OF VIEW*, *reprinted in* KANT ON HISTORY 17–18 (Lewis White Beck ed., 1963) (1784). Yet, 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.

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,"¹³⁷ and 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."¹³⁸ Professor Arthur Ripstein identified this principle 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 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."¹³⁹

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 Professor Hill's words, our "own life plan[s]."¹⁴⁰ 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."¹⁴¹ 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.¹⁴² To do otherwise would deprive persons of that which is theirs by birthright—their very humanity.

This human status as an "end" mandates that every person must

137. See, e.g., Bayer, *supra* note 20, at 335–46 (discussing the Declaration of Independence as an expression of deontological political and moral theory).

138. HILL, *supra* note 130, at 54. See also ARTHUR RIPSTEIN, *FORCE AND FREEDOM* 288 (2009) (noting that each person has the right to use his or her means to pursue personal interests rather than use that right to advance the interests of another person); 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).

139. Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391, 1399 (2006).

140. HILL, *supra* note 130, at 54.

141. Bayer, *supra* note 20, at 350 (citing WOOD, *supra* note 95, 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 128, at 275).

142. For a discussion of Kant's "Categorical Imperative" second formulation, see *infra* notes 151–59 and accompanying text.

respect the dignity of every other person at all times and under all circumstances.¹⁴³ 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 rather due to one’s innate rational capacity.¹⁴⁴ Consequently, “innate dignity allows individuals to demand moral treatment from others while simultaneously requiring those individuals to treat others morally.”¹⁴⁵

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 happiness¹⁴⁶—the pivotal question becomes: How do actors choose and pursue goals in a moral fashion, without offending the innate dignity of those with whom they deal?

For Kant, the expedient to abide by the dignity principle is the hugely important Categorical Imperative . . . , 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 [Categorical Imperative] is his understanding of . . . how people should live in a world of others.¹⁴⁷

143. Wright, *supra* note 128, at 275. See also WOOD, *supra* note 95, at 94 (stating that individual dignity must be respected and cannot conflict with respecting the dignity of another).

144. HILL, *supra* note 130, at 204; Bayer, *supra* note 20, at 350–51 (citations omitted).

145. Bayer, *supra* note 20, at 351. From this, Kant derived perhaps his noblest, if not his most shocking proposition: “[H]umankind’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.* at 351 (quoting WOOD, *supra* note 95, 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 a human being, such objectification must be avoided at all costs, including the cost of life. *Id.* at 351–52. Thus, we find inspiring regard, not reckless extremism, 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., 2006).

146. See, e.g., Wright, *supra* note 128, at 277 (explaining that there is a critical difference between using individuals as a means and using individuals as both a means and an end). See also *infra* notes 162–87, 199–203 and accompanying text (discussing the concept of a united rational will and perfect duties, which individuals must comply with as a matter of right, and concepts such as imperfect duties, which individuals are not, by right, entitled to assert).

147. Bayer, *supra* note 20, at 353–54 (quoting Fernando R. Tésou, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 64 (1992) (citing IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 95, 96, 105 (Harper Torchbooks ed., H.J. Paton trans., 1964)). See also WOOD, *supra* note 95, at 68 (The Categorical Imperative is Kant’s “supreme principle of morality [that] admits of no conditions or exceptions, of course, because there is nothing higher

The first of Kant's three variants of the Categorical Imperative states: "Act only on that maxim through which you can at the same time will that it should become a universal law."¹⁴⁸ Put differently, Formulation One appears to be Kant's restatement of the Golden Rule: Do unto others as you would have them do unto you.¹⁴⁹ Thus, one ought not do X unless one believes that all other persons under like circumstances may morally do X. 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—isolating one's self from one's desires and inclinations to concentrate on the law-like nature of one's action to create the possibility of acting out of pure duty.¹⁵⁰

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."¹⁵¹ 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."¹⁵²

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."¹⁵³ That is, all persons at all

by reference to which conditions or exceptions could be justified").

148. Tésón, *supra* note 147, at 63 (quoting KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS*, *supra* note 147, at 88). The test is "whether you could will it to be *permissible* (under the moral law) for everyone to act on the maxim." WOOD, *supra* note 95, at 70.

149. Bayer, *supra* note 20, at 354 (citing Bailey Kuklin, *The Morality of Evolutionarily Self-Interested Rescues*, 40 ARIZ. ST. L.J. 453, 498 (2008)).

150. George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 540 (1987).

151. *Id.* at 541.

152. Bayer, *supra* note 20, at 354. Put 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 ALENKA ZUPANCIC, *ETHICS OF THE REAL: KANT, LACAN* 93 (2000)). For example, Smith might honestly believe that any person who insults another, no matter how slightly, deserves to be executed. Although his principle certainly is immoral on its face, Smith may satisfy Formulation One of the Categorical Imperative so long as he is willing to be executed should he forget himself and insult someone. Formulation One eliminates hypocrisy, but cannot alone confirm the bona fides of a proposed ethical precept.

153. Tésón, *supra* note 147, at 64 (quoting KANT, *GROUNDWORK OF THE METAPHYSIC OF*

times must be considered “ends in themselves,” thereby respecting their individual dignity.¹⁵⁴ 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.¹⁵⁵ 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.”¹⁵⁶ 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.”¹⁵⁷ 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, persons cannot give meaningful consent. Either they do not really know to what they are consenting or their informed consent is the product of extortion.¹⁵⁸

MORALS, *supra* note 147, at 96).

154. *Id.*

155. See WOOD, *supra* note 95, at 87 (explaining that individuals may treat others as both ends and means, provided that they respect others’ rights and dignity); Wright, *supra* note 128, at 277 (stating that individuals may use others as means, so long as they treat them also as ends).

156. CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 295 (1996).

157. Bayer, *supra* note 20, at 355. See also Tésou, *supra* note 147, at 64 (quoting Kant’s recognition of intrinsic human value).

158. KORSGAARD, *supra* note 156, at 295. See also Bayer, *supra* note 20, at 355–58 (stating that the context within which action occurs is crucial to understanding a theory because circumstances and constraints are crucial to our understanding). 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 her imprisonment. See Bayer,

Based on the foregoing, Formulation Two asserts a corollary integral to understanding the due process 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.”¹⁵⁹ In sum, just as 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.¹⁶⁰ Thus, there is an affirmative duty—a moral imperative—not to allow oneself to be “subordinated” by “surrendering control of [personal freedom] to others.”¹⁶¹

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 who may not understand their moral duties, others who 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 when properly constituted, is not coercive upon its citizens and guests, even though Government is the only establishment rightfully empowered to use violence to compel compliance with, and to punish disobedience of, the law.¹⁶²

supra note 20, at 367–68 (footnotes omitted).

159. Ernest J. Weinrib, *Poverty and Property in Kant’s System of Rights*, 78 NOTRE DAME L. REV. 795, 811 (2003) (quoting Immanuel Kant, *The Metaphysics of Morals*, in THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT—PRACTICAL PHILOSOPHY 392 [6:236] (Mary J. Gregor ed. & trans., 1996) (1797)).

160. A person must be her “own master”—that is, safeguard her “non-dependence on anyone with whom [s]he might interact.” *Id.* at 812 (citing Kant, *The Metaphysics of Morals*, *supra* note 159, at 394 [6:238]). Of course, to obtain products and services, we depend habitually on the unique knowledge, experience, and expertise of others. Kant is certainly not cautioning that it is immoral to depend on the learning of physicians, lawyers, artisans, and other professionals 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 position seems to imply that the Individual Mandate is immoral. As later discussed, however, the Individual Mandate is not figurative bondage. To the contrary, the Individual Mandate forestalls metaphorical enslavement. *See infra* notes 222–41 and accompanying text.

161. *Id.* (discussing Kant, *The Metaphysics of Morals*, *supra* note 159, at 427 [6:278]). *See also* Ripstein, *Private Order and Public Justice*, *supra* note 139, at 1430–31 (discussing poverty).

162. *See* Ripstein, *Private Order and Public Justice*, *supra* note 139, at 1417 (addressing

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."¹⁶³ 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."¹⁶⁴

As discussed previously,

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 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.¹⁶⁵

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.¹⁶⁶ Thus, departing the state of nature¹⁶⁷ to

Kant's position that individual rights are meaningless unless they are accompanied by an established system of order that subjects each individual to the same rights and obligations).

163. Kant, *The Metaphysics of Morals*, *supra* note 159, [4:400] (quoted in WOOD, *supra* note 95, at 66–67).

164. The idea of the State, then, is "a systemic union of different rational beings through common laws." HILL, *supra* note 130, at 58.

165. Bayer, *supra* note 20, at 359 (citing, HILL, *supra* note 130, at 45).

166. One 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 owner's hands. See *infra* notes 197–201 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 152, at 395 (citing RAWLS, *supra* note 99, at 55). 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 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 90–103 and accompanying text.

167. See *supra* notes 124–26 and accompanying text (addressing the "social contract," humankind's rise from the "state of nature" (incivility) to the elegance of social order (civility), and Kant's position that such social order is not merely convenient, but rather imperative).

form a society under law is a moral imperative; it is neither a convenience nor a matter of consent,¹⁶⁸ if one is to interact properly in a world of others.¹⁶⁹ Accordingly, forming a society under law is not coercive because “every rational 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.”¹⁷⁰ 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 rather than as a mere means.¹⁷¹

Because human interaction is both necessary and inevitable if we are to pursue happiness beyond 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.”¹⁷² The function of Government,

168. See MULHOLLAND, *supra* note 141, at 278–81 (discussing Kant’s view of property). See also *id.* at 289–90 (discussing why Kant was not really a “social contractualist”). As Professor Ripstein explained, Locke believed private persons could transfer their rights to the State to enhance efficient and effective enforcement of those rights. Ripstein, *Private Order and Public Justice*, *supra* note 139, at 1417. 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.” *Id.*

169. See Bayer, *supra* note 20, at 361 (“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.”). As Professor Wood précised, the “idea of a state” is “derived” from “the universal principle of right.” WOOD, *supra* note 95, at 214–15. See also MULHOLLAND, *supra* note 141, at 285 (distinguishing Kant’s postulate that people enter civil conditions because doing so allows them to acquire rights and “not remain in a situation of conflict over the use of external objects,” with the more Hobbesian view that people only enter into civil conditions based on self-interest); Waldron, *supra* note 125, at 1546 (discussing Kant’s position that the state of nature necessarily involves human interaction that instigates antagonism and violence among men, because without law, humankind would seek justice in a disorderly fashion).

170. WOOD *supra* note 95, at 76. See also HILL, *supra* note 130, at 58–59 (describing Kant’s “kingdom of ends” as a “systematic union of different rational being through common laws”).

171. For example, law rationally may require that certain professionals be licensed, including mandating educational requirements, special examinations, and fees not imposed on other workers. While such laws uses licensees as means in that, prior to offering their services, they must prove their capabilities, when other types of workers need not, one could rationally mandate that persons who would engage in highly technical, often dangerous occupations first satisfy Society of their apparent competence to perform such work. After all, a person who without training nonetheless chooses to engage in a highly skilled profession is so dangerous that she is treating her clients purely as means, even if she informs them that she has insufficient education.

172. Bayer, *supra* note 20, at 362 (quoting Waldron, *supra* note 125, at 1545). See also MURPHY, *supra* note 97, at 104; MULHOLLAND, *supra* note 141, at 304–05 (explaining Kant’s

then, is to preserve the pursuit of happiness—Kant’s “universal principle of justice”—in a manner consistent with Kant’s 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.¹⁷³

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 this conception of law promotes the universal law of freedom and the Categorical Imperative.¹⁷⁴ Indeed, the surrendering of individual

theory that although individuals exist as morals outside of the State, nonetheless, due to the fact that there are only a limited amount of resources in the world, then also “as a matter of *fact*, persons are in nature subject to the conditions that lead to a state”). Rather than have a war of discrete, individual wills—each “the judge of his or her own entitlements, doing what seems right and good in his or her own eyes,”—we need the external control of a State. See Weinrib, *Poverty and Property*, *supra* note 159, at 808 (citing Kant, *The Metaphysics of Morals*, *supra* note 159, at 455–56 [6:312]). See also Ripstein, *Private Order and Public Justice*, *supra* note 139, at 1414–27 (discussing the strong role of public perspective in the reciprocal enforcement of individual rights, and the inefficiencies of private enforcement as a unilateral mechanism).

173. See Fletcher, *supra* note 150, at 535 (citing 8 IMMANUEL KANT, *WERKE IN ZWÖLF BÄNDEN* 337 (Suhrkamp ed., 1956) (author trans.)). See also MULHOLLAND, *supra* note 141, at 318 (explaining how Kant justified welfare rights through reference to freedom); Weinrib, *Poverty and Property*, *supra* note 159, at 797 (discussing Kant’s portrayal of “private law,” that of property and contract, as a system of rights that allows for the coexistence of one person’s action with another’s freedom under a universal law). As Professor Ripstein explained, “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, *Private Order and Public Justice*, *supra* note 139, at 1437.

174. Ripstein, *Private Order and Public Justice*, *supra* note 139, 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). See also *Printz v. United States*, 521 U.S. 898, 933 (1997) (citing *New York*, 505 U.S. at 187) (concluding, categorically, that the “Federal Government may not compel the states to enact or administer a federal regulatory program”); *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1037 (9th Cir. 2012) (“There can be no doubt that securing exemplary care for our nation’s veterans is a moral imperative. But Congress and the President are in far better position [to undertake the type of reform that appellant requests].”).

capacity to dictate social terms in favor of a universal will explains the legal viability of the Individual Mandate.

D. 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 Categorical Imperative.¹⁷⁵ Not surprisingly, Kant recognized separation of powers and due process of law as the overarching concepts to constrain governmental acts into conformance with the Categorical Imperative.¹⁷⁶ 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 “[o]ur own perfection, and the happiness of others”; but doing so is not

175. See generally Bayer, *supra* note 20, at 297–99, 362–63 (discussing why groups, organizations, and governments are subject to moral principles). There is some disagreement as to 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 150, at 552, Professor Fletcher argued that “[w]hile the prevailing view today treats law and morality as intersecting sets of rules and rights, the Kantian view treats the two as distinct and nonintersecting.” *Id.* at 534. See also *id.* at 542–43 (discussing the Kantian distinctions between law and morality). In this regard, Fletcher accuses commentators of “conflat[ing]” the two, in that Kant did not believe that a person has a “right” to enforce another person’s moral “duty.” *Id.* at 543–45, 553–58.

But Professor 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 132, at 565–67 (discussing IMMANUEL KANT, PHILOSOPHY OF LAW 101–04 (W. Hastie trans., 1881); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 215, 221–22 (J. Ladd trans., 1965)). 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 568–77. 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.

176. See Bayer, *supra* note 20, at 365–68 (discussing that Kant embraced the notion that the republican state was based upon three main principles: freedom, due process, and equality; and describing Kant’s endorsement of the separation of powers). For a discussion of how American due process jurisprudence has tacitly embraced Kantian ethics, particularly the dignity principle, see *id.* at 396–403 and *infra* notes 187–93 and accompanying text. Writing for the Court, the first Justice John Marshall Harlan aptly summarized this principle nearly 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. Massachusetts*, 197 U.S. 11, 26–27 (1905).

obligatory under Kantian morality.¹⁷⁷ Accordingly, a “duty is imperfect if no one is in a position to demand by *right* that it be complied with.”¹⁷⁸ 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 actions embody a good life. But, one could not rationally will an immutable duty to ensure the happiness of 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—simply, we would have to do whatever is necessary to assure others’ happiness and they would have to do likewise for us. Thus, there is no moral duty either to perfect ourselves (such a duty would be self-enslavement) or to maximize another’s happiness.¹⁷⁹ “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.”¹⁸⁰

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.”¹⁸¹ 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.¹⁸² Imperfect duties, then, are not “juridical duties”—that is, are unenforceable by the rightful coercion of Government because Society cannot compel one to do that

177. WOOD, *supra* note 95, at 166–67. See also KORSGAARD, *supra* note 156, at 20 (distinguishing between nonobligatory duties of virtue and duties of justice, which are strict obligations that require particular actions).

178. MURPHY, *supra* note 97, at 34–35 (emphasis added).

179. WOOD, *supra* note 95, at 167. See MURPHY, *supra* note 97, 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, *FORCE AND FREEDOM*, *supra* note 138, at 288 (explaining how each person has their own private right to best accommodate their purposes, and how publicizing such rights would “systematically cancel the effects that one person’s choices had on others . . . [which] would preclude the exercise of private freedom”). As Professor Ripstein explained,

[P]eople 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 [And] [y]ou 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, *Private Order and Public Justice*, *supra* note 139, at 1407–08.

180. Bayer, *supra* note 20, at 364 (footnote omitted).

181. WOOD, *supra* note 95, at 220.

182. MURPHY, *supra* note 97, at 36.

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.”¹⁸³

Perfect duties, by contrast, are moral imperatives that 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.”¹⁸⁴ Thus, a perfect duty arises 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.¹⁸⁵ Given the non-volitional character of such duties, individuals may demand—indeed, have a legally enforceable right—that others perform their perfect duties.¹⁸⁶

*E. 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*

Perfect duties are “juridical duties”: duties of right that are proper subjects for State enforcement.¹⁸⁷ Under American law, Government’s core perfect duty—the integral obligation from which virtually all others flow—is to formally enforce the Categorical Imperative through due process of law.¹⁸⁸ Indeed, as previously discussed, 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.”¹⁸⁹

183. WOOD, *supra* note 95, at 214–16. As Professor 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 97, at 37.

184. KORSGAARD, *supra* note 156, at 21.

185. *See, e.g.*, MURPHY, *supra* note 97, at 35 (discussing the general duty to keep promises).

186. *Id.* at 34–35. Logically, one could volitionally 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.

187. *See id.* at 35. *See also id.* at 36 (“Only if I unjustly limit another [person’s] freedom is the State justified in restraining me through the coercive machinery of its force.”); WOOD, *supra* note 95, at 161–62, 220 (discussing the distinction between juridical duties and ethical duties, and noting that Kant does not regard all juridical duties as coercible).

188. Bayer, *supra* note 20, 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)).

189. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350 (1909). *See also United States v. Smith*, 480 F.2d 664, 668 n.9 (5th Cir. 1973) (“The guarantee of due process of law is one of the most important to be found in the Federal Constitution or any of the amendments. . . . The fundamental guarantee of due process is absolute and not merely relative.”).

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. Indeed, the Supreme Court has unequivocally highlighted "dignity" as the Due Process Clause's core meaning and impetus: "[C]hoices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."¹⁹⁰ To offer but one prominent example, *Lawrence v. Texas* held that Government has no authority to criminalize homosexual sodomy performed in private between consenting adults.¹⁹¹ The Court's due process analysis stressed that "[i]t 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.*"¹⁹² Appealing to sentiments identical to Kant's admonition under the Categorical Imperative's Formulation Two against objectifying human beings, *Lawrence* declared, "The 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."¹⁹³ 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

190. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 851 (1992). *See also Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (applying the substantive force of due process protection to homosexual autonomy, and declaring that a statute criminalizing homosexual conduct was unconstitutional under the Fourteenth Amendment); *Chavez v. Martinez*, 538 U.S. 760, 774 (2003) (emphasis added) (quoting *Rochin v. California*, 342 U.S. 165, 172-74 (1952) (explaining Government may not employ tactics 'so offensive to human dignity' that they 'shoc[k] the conscience")); *United States v. Brantley*, 342 F. App'x 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) (citing *Chavez*, 538 U.S. at 544) (holding that an officer's conduct, although reprehensible, fell "short of conduct that [was] 'so brutal and so offensive to human dignity' that it [would give] rise to a substantive due process violation"); *Lombardi v. Whitman*, 485 F.3d 73, 81 (2d Cir. 2007) ("In order to shock the conscience and trigger a violation of substantive due process, official conduct must be outrageous and egregious under the circumstances[.]"). *See generally* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011) (reviewing the uses of "dignity" in Supreme Court individual rights precedents, discussing alternative definitions of dignity, and embracing the broad and multi-faceted approach of philosopher Ludwig Wittgenstein); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006) (examining the role of "human dignity" in the Supreme Court's decision-making).

191. *Lawrence*, 539 U.S. at 578-79.

192. *Id.* at 567 (emphasis added).

193. *Id.* at 578. *See Bayer, supra* note 20, at 400-03 (providing additional judicial examples enforcing due process as innate dignity).

constitutional rights and guarantees.”¹⁹⁴

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.¹⁹⁵ Kant, therefore, provides the right paradigm to review the Individual Mandate's true legal concern: whether it comports

194. Goodman, *supra* note 189 at 743. See also Edwin Baker, *Outcome Equality and Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 938 (1983) (discussing the equality of respect model and its principal theoretical justification: that all persons can demand to be treated with equal respect and concern as autonomous citizens). Reviewing precedents from the late-nineteenth and early-to-middle twentieth centuries, Professor Alschuler likewise explained, “The Court’s view was tolerant of diversity and experimentation but insisted that law must adhere at its core to immutable principles of human dignity.” Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 522 (1986).

195. A Westlaw search performed on July 1, 2012, revealed but forty-one state and federal judicial citations to Kant, none by the Supreme Court, and most referencing Kant lightly in passing. In other words, very few courts offer Kant his due. See, e.g., *United States v. Barker*, 771 F.2d 1362, 1368–69 (9th Cir. 1985) (referencing IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 66–67 (H.J. Paton trans., 2d ed. 1964)) (“Central to our system of values . . . 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.”). 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. See, e.g., HILL, *supra* note 130, at 184–85; WOOD, *supra* note 95, at 210–12. However, there is some commentary that Kant would allow deterrence as a generally valid goal of criminal law, although proportionality to the given crime remains the overarching allowable concern for any punishment. HILL, *supra* note 130, at 209. 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. See *id.* (“Because we find, after a careful review of the record, that the district court’s imposition of sentence was motivated by the desire for general deterrence to the exclusion of adequate consideration of individual factors, we vacate and remand for resentencing.”)

Among other interesting references, a California Supreme Court case 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 ‘[t]he last murderer on earth has to be punished, the last, otherwise there is no justice.’” *People v. Schmeck*, 37 Cal. 4th 240, 300 (2005), *abrogated on other grounds*, *People v. McKinnon*, 52 Cal. 4th 610 (2011). In another decision, the Middle District of Pennsylvania hoisted plaintiffs on their own Kantian petard in *Wicks v. Anderson*, No. 4:09-CV-01084, 2010 WL 491712 (M.D. Pa. Oct. 13, 2010). The plaintiffs cited Kant’s Categorical Imperative, First Formulation to opposed defendants’ motion to dismiss their lawsuit. See *id.* at *11. 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 overrun with grammatical, typographical, and conceptual errors, has as its gravamen an ongoing series of conclusory statements barren of any factual content Kant’s theories for an *a priori* basis of morality do not aid plaintiffs’ case.

Id.

with the Fifth Amendment and, if enacted by a state, the Fourteenth Amendment.

III. GOVERNMENT'S DUTY TO AID THE DESTITUTE AND ITS APPLICATION TO THE INDIVIDUAL MANDATE

At first blush, under Kantian 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 Kantian morality. Because Government may only enforce perfect duties, the Individual Mandate 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 does not inform whether the Individual Mandate violates the Categorical Imperative—that is, confounds individual dignity by compelling unwilling individuals to purchase health insurance from the private market.¹⁹⁶

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 neither 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, those who cannot truly enjoy the “universal principle of justice.” As Kant expressed,

[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 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.¹⁹⁷

As lack of access to medical treatment is comparable to poverty, Government must tax or take other effective measures to assure that

196. 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.

197. MURPHY, *supra* note 97, at 123–24. See also Weinrib, *Poverty and Property*, *supra* note 159, at 797 (discussing Kant's view that there is a public obligation, rather than a mere freedom, to assist the poor).

those who refuse to obtain health insurance, regardless of the reasons, nonetheless may 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 Government is willing to give.¹⁹⁸

A. *Property Law and the Enslavement of Poverty*

Forming a legitimate state under principles of due process is not merely a good idea, it is a perfect duty. 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 and not mere means.

Aside from the occasional hermit, we are neither content to live in conditions of minimal subsistence, nor satisfied with 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."¹⁹⁹ Therefore, Society needs a regime of private law, particularly property and contract law, to recognize *abstract rights over things*. The freedom to pursue goals is empty if property rights include ownership interests only over whatever one happens to be clutching plus begging others to borrow whatever they happen to be holding.²⁰⁰ 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

198. Remarkably, Kant presaged exactly how the Supreme Court would uphold legislation such as the Individual Mandate. *See supra* notes 81–87 and accompanying text (explaining that the Court sustained the Individual Mandate's legality under Congress's taxing power).

199. Weinrib, *Poverty and Property*, *supra* note 159, at 801–11. 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, fraud, or other immoral ways. "Take whatever you can grab" is not the hallmark of a moral society. *See* NAILS, 88 LINES ABOUT 44 WOMEN (RCA Records 1982).

200. *See* Ripstein, *Private Order and Public Justice*, *supra* note 139, at 1431 ("Free persons can authorize enforceable property rights, because those rights are a way of enabling them to exercise their respective freedom.").

they reasonably would exercise some sort of reserved interest.²⁰¹

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.²⁰² 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.²⁰³

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.²⁰⁴

Thus, impoverishment deprives persons of their due process—the universal principle of justice—because they are “completely subject to the choice of those in more fortunate circumstances.”²⁰⁵ That is, they are in a condition of “private dependence,” reliant on benevolence for minimal sustenance.²⁰⁶ As Tennessee Williams’ pitiful Blanche

201. *Id.*; RIPSTEIN, *FORCE AND FREEDOM*, *supra* note 138, at 281.

202. Weinrib, *Poverty and Property*, *supra* note 159, 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 thereafter 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.

203. Weinrib, *Poverty and Property*, *supra* note 159, at 809 (emphasis added) (citing Kant, *The Metaphysics of Morals*, *supra* note 159, 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.” *Id.* at 808 (citing Kant, *The Metaphysics of Morals*, *supra* note 159, at 455–56 [6:312]). Society through proper governmental devices, traditionally the judiciary, resolves such disputes. *Id.* at 808–09.

204. MURPHY, *supra* note 97, at 125.

205. Ripstein, *Private Order and Public Justice*, *supra* note 139, at 1430.

206. *Id.* See also Weinrib, *Poverty and Property*, *supra* note 159, at 815–16 (describing how the possibility of others amassing the finite amount of land and property on Earth would leave a person with no way to exist except by leave of someone else).

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 on the supplicant’s behalf.²⁰⁷

Therefore, whether through the whims of unkind Fate or by their own hubris, the law cannot compel persons to 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.”²⁰⁸ The violation occurs because mendicants are virtual slaves, dependent on strangers for sustenance.²⁰⁹ Accordingly, “dependence on private charity is inconsistent with the united will that is required for people to live together in a rightful condition.”²¹⁰ In sum, 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 vagabond²¹¹—“entirely subject to the discretion of others”—because such “would be inconsistent with the freedom of those who were dependent in this way.”²¹²

B. *Government’s Perfect Duty to Tax for the Benefit of the Destitute*

Because poverty and the threat to dignity arise within, and arguably are the byproducts or outcomes of, a system of essential laws, the cure must come from Government. Indeed, Kant’s conception of property necessitates “redistribution to the poor for its own legitimacy,”²¹³ lest

207. TENNESSEE WILLIAMS, *A STREETCAR NAMED DESIRE*, scene 11 (1947), available at <http://www.scribd.com/doc/21279629/A-Streetcar-Named-Desire> (last visited July 1, 2012).

208. Weinrib, *Poverty and Property*, *supra* note 159, at 811 (quoting Kant, *The Metaphysics of Morals*, *supra* note 159, at 392 [6:236]). See also *supra* notes 159–61 and accompanying text (discussing the duty of rightful honor).

209. See RIPSTEIN, *FORCE AND FREEDOM*, *supra* note 138, at 133–42 (discussing Kant’s objections to slave contracts based on the postulate that rational persons cannot consent to slavery).

210. Ripstein, *Private Order and Public Justice*, *supra* note 139, at 1430–31 (citing IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 224 (Thomas E. Hill, Jr. & Arnulf Zweig eds., Arnulf Zweig trans., 2002) (1785)). As Professor 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 choices of others, but that the pursuit of any purpose does.” RIPSTEIN, *FORCE AND FREEDOM*, *supra* note 138, at 281 (emphasis added).

211. A person cannot rationally contract herself into slavery. RIPSTEIN, *FORCE AND FREEDOM*, *supra* note 138, at 133–42.

212. Ripstein, *Private Order and Public Justice*, *supra* note 139, at 1431.

213. Weinrib, *Poverty and Property*, *supra* note 159, 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

law illicitly becomes “a unilateral power exercised by the strong against the weak.”²¹⁴ This redistribution principle is necessary because, under a regime of conceptual property and 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.²¹⁵ Poverty, then, is not the result of any given individual’s lawful appropriation of property—“the prospect of impoverishment is created by the systemic legitimacy of acquisition, rather than by the appropriative acts of any particular acquirer.”²¹⁶ Accordingly, Society “must collectively discharge the duty that is incidental to achieving that rightful condition.”²¹⁷ As this potential infirmity arises from the law itself, it falls to the law to find the answer—to allow for some mandatory redistribution so that despite their destitution, the impoverished will not become supplicants. Indeed, because the universal will could not rationally intend otherwise, a governmental solution is a perfect duty.²¹⁸ Thus, it is not that the poor are entitled to charitable sustenance or even to survival via societal benevolence. 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.²¹⁹

The solution, understandably, is some form of tax. True, any tax to aid the poor is paid by individuals. As explained, however, a tax is paid by the more well-off not because they have a duty to help the poor, but because Government may impose the obligation on its constituents to pay taxes “for its own preservation.”²²⁰ Such “preservation” includes maintaining governmental legitimacy by enforcing its perfect duties, such as taxing, to restore the poor to personhood.²²¹

rightful condition [because that society has breached individuals’ right to pursue happiness, the universal principle of justice].

Id. at 818.

214. Ripstein, *Private Order and Public Justice*, *supra* note 139, at 1431.

215. Weinrib, *Poverty and Property*, *supra* note 159, at 815–16.

216. *Id.* at 817.

217. *Id.*

218. Professor Ripstein aptly summarized the idea: “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, *Private Order and Public Justice*, *supra* note 139, at 1431.

219. “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, *Poverty and Property*, *supra* note 159, at 821.

220. *Id.* at 818 (quoting Kant, *The Metaphysics of Morals*, *supra* note 159, at 468 [6:326]).

221. *Id.* Not surprisingly, some commentators dispute the Weinrib-Ripstein explanation of Kant’s proposed governmental perfect duty to aid the poor. Professor Fisher, for example, argues that poverty is not a form of domination that the State has a duty to end: “Market processes . . .

C. *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."²²² 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,"²²³ Government can regulate the healthcare market and mandate its citizens to purchase health insurance.²²⁴

As we now understand, the Kantian metaphor is not the perfect duty to avoid suicide²²⁵—the Individual Mandate is not consistent with Kantian ethics because those who could but refuse to buy insurance are knowingly placing their lives at risk should they suffer possibly terminal illness or potentially lethal accidents. Since extant American society will provide medical care for those who are uninsured, failure to carry insurance does not per se court the risk of dying needlessly due to refusal of medical treatment.²²⁶ Rather, the imagery is virtual

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 macrocosmos." Fisher, *supra* note 152, at 393 (citations omitted). See also Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 123 (2008) (arguing that the duty is imperfect rather than perfect).

Professor Fisher's description of the market forces is true enough, but this system of "masterless slavery," Fisher, *supra* note 152, at 394 n.33 (quoting MAX WEBER, *ECONOMY AND SOCIETY* 1186 (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. *Id.* Basic deontology demonstrates that individuals cannot avoid their ethical duties by outsourcing immoral behavior to entities they create, and then claim they are not culpable because those entities somehow have developed beyond the control of the very participants who benefit from the entities' immoral conduct. Bayer, *supra* note 20, at 297–99. Because it has a non-delegable duty to design and implement a private property system consistent with individual dignity, Government has a concurrent duty to correct the immoral abuses of the system it creates. As our Founders explained in the Declaration of Independence, such humanly created instruments, particularly governments, must self-correct their illegitimate behavior or suffer correction (even to the point of revolution) by the unified will of the People. *Id.* at 335–42.

222. RIPSTEIN, *FORCE AND FREEDOM*, *supra* note 138, at 272.

223. *Id.* at 285.

224. See *id.* (noting generally the possibility of legitimate Government-mandated healthcare regulations but not discussing any particular mechanisms).

225. For Kant, suicide based on despondency is an immoral act as an affront to the humanity of one's own person. See HILL, *supra* note 130, at 51, 203.

226. For instance, hospitals that provide emergency treatment may not refuse to treat uninsured persons who otherwise are unable to pay for medical services. See Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (2006).

enslavement. It seems irrefutable that almost certainly, persons without health insurance someday will need expensive medical care, will in fact want such care, but will be unable to pay out-of-pocket.²²⁷ Individuals' decisions to seek healthcare despite their inability to pay is rational because, like starvation, homelessness, and nakedness, sickness can thwart the ability to pursue happiness. Thus, the needy unwell will render themselves supplicants to the largess of charity to regain health enough to be independent.²²⁸ Because Government cannot employ the collective rational will to enact property and other private law 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.²²⁹ Indeed, the tax is nicer than simply putting money into the public treasury because each taxpayer enjoys some discretion to choose among available insurance coverage options that meet the Affordable Care Act's minima. So long as it otherwise does not violate the Categorical Imperative, such as imposing a tax so oppressive that it is confiscatory,²³⁰ the Individual Mandate comports with Kantian ethics and, therefore, satisfies the Constitution's "fundamental fairness" standard promulgated in its guarantee of liberty under the due process clauses.

One might respond that Medicaid already protects the ill who are too poor to obtain private health insurance, and thus the destitute are

227. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2610 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. . . . When individuals make those visits, they face another reality of the current market for medical care: its high cost.").

228. 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.

229. 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, *FORCE AND FREEDOM*, *supra* note 138, 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.

230. See *Burnet v. Brooks*, 288 U.S. 378, 400 (1933) (noting that a tax being confiscatory in nature is a consideration in whether particular tax legislation is inconsistent with the fundamental conceptions of justice that are embodied under due process). See also *supra* note 86 and accompanying text (discussing a restriction on taxes imposed by the due process clause that they not be arbitrary, unequal, punitive, or excessive).

covered without imposing a burden on others to purchase their own private coverage or pay a tax penalty. But, the Individual Mandate's due process validity does not derive only from aiding the extant poor. Rather, and very importantly, the Individual Mandate precludes those who are better-off from violating the Categorical Imperative, Second Formulation's earlier accented corollary, "the duty of rightful honor." As previously discussed, the perfect duty states, "Do not make yourself a mere means for others but be at the same time an end for them."²³¹ Therefore, one may not volitionally adopt a slave-like status by allowing oneself to be used exclusively as a means.²³²

Certainly, the vast majority of uninsured adults know three things: (1) almost inevitably, due to accident or illness, they will need significant, expensive healthcare that 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 beggarmdom.²³³ In fact, the very act of refusing health insurance is so irresponsible that such contrarians compromise their own dignity even when healthy and robust.²³⁴

Moreover, an interesting, even startling corollary is that in addition to uninsured *individuals*, the Individual Mandate 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 personhood of corporations of all types, business and otherwise.²³⁵ Indeed, the constitutional protections accorded to

231. Weinrib, *Poverty and Property*, *supra* note 159, at 811 (quoting Kant, *The Metaphysics of Morals*, *supra* note 159, at 392 [6:236]).

232. See *supra* notes 159–61 and accompanying text (discussing Formulation Two and the "duty of rightful honor").

233. Going without insurance is hardly comparable to morally sustainable self-jeopardy, such as risking one's life to save the lives of others. See, e.g., HILL, *supra* note 130, at 55–56 (stating that Kant would not oppose a researcher testing an experimental drug on herself if less drastic means are unavailing).

234. As mentioned previously, suicide likewise is immoral. See *supra* note 225 and accompanying text. Therefore, those who would otherwise refuse cannot avoid their duty to acquire health insurance by earnestly promising to kill themselves through refusing medical treatment 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.

235. See *Citizens United v. Fed. Elections Comm'n*, 130 S. Ct. 876, 899–900 (2010) (citing

firms do not emanate from any notion of “property,” but rather, from their status as effective persons under law.²³⁶ Accordingly, corporations possess virtually the full panoply of constitutional rights.²³⁷

It does not matter whether firms hold their own innate personhood or become imbued vicariously with the dignity of the human beings who found, administer, and use them. The reality is that individuals must form and rely on corporations to fulfill virtually every type of project, personal or commercial. Corporations have become indispensable 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 that 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 way, persons cannot escape their ethical obligations by acting through intermediaries such as corporations.²³⁸ Second, absent such personhood, corporations cannot

cases). *See also* *Addiction Specialists, Inc. v. Township of Hampton*, 411 F.3d 399, 407 n.6 (3d Cir. 2005) (noting that corporations have standing to bring constitutional claims on their own behalf); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1057 n.7 (9th Cir. 2002) (similar); *N.E. Ga. Radiological Assocs. v. Tidwell*, 670 F.2d 507, 512 (5th Cir. 1982) (asserting that a corporation is a “person” with due process rights).

Congress has also acknowledged, in the “Dictionary Act,” the personhood of artificial entities: “In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, [] joint stock companies, [and] individuals . . .” 1 U.S.C. § 1 (2006).

236. The former standard that any due process rights inuring to corporations stem from property interests, *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925), “is an artificial mode of analysis, untenable under decisions of this Court.” *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 779 (1978) (holding that corporations are persons entitled to due process of law).

237. *See Citizens United*, 130 S. Ct. at 899 (ruling that corporations enjoy First Amendment speech rights); *Allied-Signal Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 772–73 (1992) (explaining that taxation of corporations must comport with due process); *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414 (1984) (finding that due process limits states’ exercise of “long arm” jurisdiction over foreign corporations); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (affording corporations Fifth Amendment protection against double jeopardy in a case discussing whether an acquittal rather than a dismissal may be appealed); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (holding that corporations are entitled to Fourth Amendment protection); *Florida Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1323 (11th Cir. 2001) (holding that corporations are persons under 42 U.S.C. § 1983).

238. *See Bayer, supra* note 20, at 297–99 (arguing that due process principles must be applied not only to the individual, but also to created entities so as to prevent individuals from escaping their moral duties simply by forming groups authorized to execute unethical acts). It is true that Society could simply enact laws imposing such duties; but, reasonable people would ask why such laws are consistent with perfect duties as regulating corporations directly affect the individuals who use and run those entities. The answer must be that corporations should be treated as persons under the law.

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.²³⁹

As earlier discussed, the Affordable Care Act, *inter alia*, requires insurance carriers to insure all persons, including those with preexisting conditions and those practicing dubious habits likely to endanger their health. Indeed, companies must cover such conditions from the time individuals enroll. Moreover, with very limited exceptions, insurance carriers may not charge higher premiums, deductibles, copayments, and other fees based on preexisting conditions or personal behaviors.²⁴⁰ Such requirements almost certainly would bankrupt most, if not all, private insurance firms. Thus, the Affordable Care Act 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 Affordable Care Act compliance.²⁴¹

Importantly, contrary to the Individual Mandate's critics, the same cannot be said for a government command to buy, say, 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 Individual Mandate. 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 that morally responsible ventures

239. To cite a similar instance, the judiciary has held that corporations contribute to the dissemination of information, opinions, perspectives, and ideas. *See, e.g., Citizens United*, 130 S. Ct. at 902 (citing *Bellotti*, 425 U.S. at 784) (opining that corporate speech adds to the national political debate). 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 ambit of free speech, the "legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Bellotti*, 425 U.S. at 784–85; *accord Citizens United*, 130 S. Ct. at 899.

240. *See supra* note 16 and accompanying text.

241. Affordable Care Act, Pub. L. No. 111-148, § 1501(a)(2), 124 Stat. 119 (discussing the Act's expected effects on the U.S. economy and interstate commerce, including adding millions of new customers to the healthcare market and increasing supply and demand of medical care).

reasonably can ask. But, when Government's direct regulation causes the class of legitimate business to collapse, as the Affordable Care Act would absent the Individual Mandate, one may apply the Kantian tax principle.²⁴²

Moreover, Congress may not 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.²⁴³

CONCLUSION

Pursuant to the formulations emanating from the 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 independent members of society. In that way, Kantian ethics, which informs American due process jurisprudence, demonstrates that the Individual Mandate complies with integral liberty.

242. I say "legitimate business" because certainly government regulation might place national business at some competitive disadvantage when competing with similar but unregulated, lesser-regulated, or subsidized foreign enterprises. Insofar as such domestic regulations assure safe and effective products and marketing, however, the regulated concerns have no complaint that Government is exceeding its legal and moral authority. The reason is, bound by individual morality, business violates a perfect duty by marketing unsafe products or by dishonestly informing the public about its products. Properly enforced regulations, therefore, compel legitimacy by requiring firms to observe their perfect duties.

243. Possibly, persons whose livelihood depended on markets collapsed through government intervention 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. *See* *FCC v. NextWave Personal Commc'ns, Inc.* 537 U.S. 293, 301 (2003). *See also* *Perez v. Campbell*, 402 U.S. 637, 649 (1971) (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)) ("[Bankruptcy law] is [intended] 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.'"). 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.