Individual Mandates: Congress’ Power to Force Individuals to Purchase Goods From Private Entities is Older Than You Think

Eli A Alcaraz, University of California - Los Angeles
Individual Mandates: Congress’ Power to Force Individuals to Purchase Goods From Private Entities is Older Than You Think

Introduction ...........................................................................................................................................2

I. Originalism: A Method of Constitutional Interpretation ..................................................................10

II. What is Meant by “Militia”? ...........................................................................................................12

III. The Founders Understood Individual Mandates and How to Use Them ...................................14

   A. The Origins of the Militia System in Europe ..............................................................................14

   B. The Colonial Militias ....................................................................................................................21

       i. Delaware ....................................................................................................................................24

       ii. New Jersey ...............................................................................................................................24

       iii. New York ...............................................................................................................................26

       iv. Virginia .....................................................................................................................................27

       v. Maryland .....................................................................................................................................28

       vi. New Hampshire .......................................................................................................................30

       vii. Massachusetts ..........................................................................................................................30

       viii. South Carolina .......................................................................................................................31

       ix. North Carolina .........................................................................................................................32

       x. Georgia ........................................................................................................................................32

       xi. Rhode Island .............................................................................................................................33

       xii. Connecticut .............................................................................................................................33

       xiii. Pennsylvania ..........................................................................................................................34

       xiv. Pre-constitutional Federal Use and the Founders’ Understanding of
Individual Mandates………………………………………………………………………………………………34

IV. Empirical Evidence of Approval of a Federal Individual Mandate…………………………..35
   A. Passing the Uniform Militia Act of 1792………………………………………………………….35
   B. Acceptance of a Federal Individual Mandate Through Implementation……………….40
   C. Responding to Criticism: Individual Mandates………………………………………….44
   D. Responding to Criticism: Implicit Approval of the 1792 Act Through Retention of the
      Individual Mandate…………………………………………………………………………………….47

V. Federal Individual Mandates: Restricted to the Militia Clause Powers? No Clear Answer.50
   A. The Militia Clauses Debated: References to Individual Mandate Type Actions….51
   B. The Constitutional Convention and State Ratifying Conventions Focused on Historical
      Harms and Fears……………………………………………………………………………………55
         i. The Constitutional Convention…………………………………………………………..56
         ii. The State Ratifying Conventions…………………………………………………..60

VI. Individual Mandates as a Necessary and Proper Clause Power………………………….64
   A. McCulloch v. Maryland………………………………………………………………………….65
   B. United States v. Comstock……………………………………………………………………..67
   C. Federal Individual Mandates as a Necessary and Proper Clause Power……………..69

Conclusion……………………………………………………………………………………………….71

Abstract

The Affordable Health Care Act’s (“ACA”) individual mandate was challenged as
unconstitutional even before the ACA was passed. Challengers to the ACA assert that the
federal government has never been allowed to force and individual to make a purchase from a
private entity and that the ACA’s requirement that an individual do so is unconstitutional. This
Article takes issue with those asserting that an “individual mandate” is a contemporary invention. In fact, there has been at least one instance where the federal government has forced individuals to make purchases from private entities in the Uniform Militia Act of 1792. This Article traces militia laws from Europe, through the colonies, and to the Constitutional Convention to understand how the founders thought about the militia powers generally and the use of an individual mandate specifically. This Article then examines the passing of the Uniform Militia Act to argue that in at least some instances an individual mandate is a power wielded by Congress and is not an infringement on states’ rights. Next, this Article uses the conclusions of the first several Parts to argue that in light of the Supreme Court decisions McCulloch v. Maryland and United States v. Comstock, the power for Congress to pass an individual mandate is not limited to the militia powers, but is better characterized as a Necessary and Proper Clause power. Finally, this Article concludes that in light of its research, the ACA is not unconstitutional for possessing an individual mandate.

Introduction

One might be interested to know that the federal government has the power to force an individual to take action, and not just any action; the federal government can force an individual to purchase a product from a private entity. Interestingly enough, the federal government, possibly without knowing the existence or extent of this power, tried to use this power when it recently passed the Patent Protection and Affordable Health Care Act\(^1\) (ACA), also known as “Obamacare.”\(^2\) The ACA is a landmark piece of legislation that has faced fervent debate and

---


challenge since inception. The source of the ACA debate is section 1501, commonly known as the “Minimum Essential Coverage Provision,” and reads in pertinent part: “An applicable individual [under the statute] shall for each month ensure that the individual, and any dependent individual of the individual who is an applicable individual [under the statute, be] covered [by health insurance] under [the] minimum essential coverage for such month.”

The Minimum Essential Coverage Provision has sparked a fundamental debate over what this Comment will refer to as an individual mandate. An individual mandate is a requirement by the federal government that an individual purchase a good or a service from a private entity. Challengers of the ACA concede that the federal government has the power pass some individual mandates, but their definition of what is an appropriate individual mandate is distinguishable in two ways. This challenger definition is defined by the exercise of federal power to force an individual to take specific action that is devoid of economics and concerns the heart of American citizenship; essentially that there are only certain exceptional circumstances that allow the federal government to mandate individual action and that those instances do not include an

---

3 The Patent Protection and Affordable Health Care Act (ACA) was passed on March 23, 2010, and within minutes two suits were filed. Kevin Sack, Years of Wrangling Lie Ahead for Health Care Law, N.Y. TIMES, Dec. 14, 2010, at A24.


5 26 U.S.C. § 5000A(a) (2010). Importantly, if someone fails to meet this required coverage, they will be required to pay a penalty with their income tax returns, 26 U.S.C. §§ 5000A(b)(1), (2) (2010), but this portion of the statute does not take effect until 2014, 26 U.S.C. § 5000A(a) (2010), and comes with numerous exceptions, see 26 U.S.C. § 5000A(d), (e) (2010).

economic element. Examples of an appropriate individual mandate according to ACA challengers include serving on juries, filing an income tax return, and entering the draft. Other requirements on individuals involve the exchange of money, such as paying income taxes, but this is not commercial in nature. At its essence, challengers to the ACA argue that the U.S. Congress cannot force individuals to buy products or services from private entities; that Congress lacks the power in the first place to pass the Minimum Essential Coverage Provision. Opponents to the ACA assert that requiring an individual to enter the marketplace was something never contemplated by the founders and crosses into an uncharted territory under the Constitution. Essentially challengers argue that an individual mandate is unprecedented and

7 U.S. CONST. art. III, §2; id., amend. XVI; id., amend. VII.
8 Id., amend. XVI.
9 See generally Selective Draft Law Cases, 245 U.S. 366 (1918).
12 Thus they argue that there is no power to pass the Minimum Essential Coverage Provision because it is economic in nature.
13 See Cong. Budget Office, The Budgetary Treatment of an Individual Mandate to Buy Health Insurance 1 (1994) (“The government has never required people to buy any good or service as a condition of lawful residence in the United States.”). But see infra Part III.B and Part IV.A (discussing the requirement that every free, able-bodied male citizen had to equip himself at his own expense as part of his mandatory militia service).
14 For an in depth discussion about the longstanding history of individual mandates at local and quasi-state levels and their beginnings at the national level, and how this influenced the founders’ understanding of an individual mandate, see infra Part III.B and IV.C (discussing colonial mandates, and events leading up to submission of the Uniform Militia Act of 1792 (1792 Act)). Moreover, Massachusetts passed an individual mandate in 2006 that may have been the first mandate concerning healthcare. See Ian Millhiser, Delaying the Inevitable: Cuccinelli’s
thereby unconstitutional.\textsuperscript{15} But the ACA challengers’ arguments overlook a key individual mandate as this Comment defines them. The mandate discussed in this Comment is important because the founders utilized and approved of an individual mandate that extends into economics in which a private individual benefited monetarily.

Rightfully, not all scholars are convinced that the founding fathers failed to consider and understand individual mandates.\textsuperscript{16} Indeed, the founding fathers passed an act which not only required individuals to take specific action, but required individuals to enter the marketplace to buy goods from private entities. This act was the Uniform Militia Act of 1792 (the 1792 Act)\textsuperscript{17} and was passed on May 8, 1792. The 1792 Act required all free, able-bodied male citizens between the ages of 18 and 45 to equip themselves, at their own expense, with a musket, firelock, or rifle, ammunition, and a knapsack.\textsuperscript{18} This Comment’s research is important because it engages three questions concerning individual mandates and offers an interpretation in light of empirical historical research that can account for and define the use of an individual mandate both at the time of the founding and in modern society. The three questions are as follows. First, were individual mandates that forced economic purchase known to the founders? Second, if an

\textit{Meritless Lawsuit Will Die Another Day}, CENTER FOR AMERICAN PROGRESS (Aug. 3, 2010), http://www.americanprogress.org/issues/2010/08/health_lawsuit.html (discussing how Massachusetts enacted a minimum health insurance coverage provision along with a prohibition on denying health insurance coverage based on preexisting conditions and how these policies lead to striking and immediate improvements in insurance premium payments).

\textsuperscript{15} See Millhiser, \textit{supra} note 14.

\textsuperscript{16} See generally Winkler, \textit{supra} note 11.

\textsuperscript{17} Ch. 3, §§ 1, 4, 1 Stat. 271, 271-74, \textit{repealed by} Dick Act, Ch. 196, 32 Stat. 775 (1903).

\textsuperscript{18} See Winkler, \textit{supra} note 11.
individual mandate was known, and if it was used at some level of government, did the founders understand the Constitution to provide Congress with the power to use a federal individual mandate? Third, if a federal individual mandate was constitutional, was it only constitutional when used in connection with the Militia Clause\textsuperscript{19} powers; those powers used to pass the 1792 Act? This Comment asserts that the answers to these questions are “yes,” “yes,” and “the historical record is woefully insufficient to say definitively.” Moreover, in light of the answer to question three, this Comment argues that because clear congressional power to pass an individual mandate exists, the power is best accounted for as a power that lies with Congress generally and is not restricted to a specific clause.

This Comment explains in six Parts the answers to these three questions and offers an avenue for the use of an individual mandate. Part I provides a brief discussion of originalist principles because this Comment relies on them in Part III to conclude that the founding generation would have felt the militia powers provide for individual mandates. Part II is a definitional section about militias and is useful for understanding which individuals were affected by various militia laws. Part III traces militias and their laws from inception in Europe, though their use in the colonies, and up to the 1972 Act. It shows that the progression of militia laws along with the laws’ continued use of individual mandates indicate that the 1792 Act would be understood to employ an individual mandate. Part IV chronicles the 1792 Act’s passage and

\textsuperscript{19} U.S. CONST. art. 1, § 8, cl. 15 (describing that the U.S. Congress has the power “[t]o provide for Calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”); U.S. CONST. art. 1, § 8, cl. 16 (describing that Congress has the power “[t]o provide for organizing, arming, disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress”).
its implementation to conclude that the founders and founding generation, knowing the 1792 Act would contain an individual mandate, believed the Constitution provided for Congress to utilize a federal individual mandate. Part V examines the records of the Constitutional Convention and various state ratifying conventions to try and determine whether or not the power to utilize a federal individual mandate lies solely with the Militia Clauses. Due to insufficient and conflicting evidence, it is unclear whether a federal individual mandate is restricted to the Militia Clauses. Part VI analyzes *McCulloch v. Maryland*\(^{21}\) and *United States v. Comstock*\(^{22}\) to argue that to the extent the power to enact a federal individual mandate exists, these decisions arguably provide that a federal individual mandate lies with Congress to use as part of its Necessary and Proper Clause powers when implementing powers enumerated in the Constitution.

Finally, the answer and proposed solution to question three\(^ {23} \) presented above are important because this Comment’s conclusions can be useful for those engaged in deciding the

---

\(^{20}\) One of the pitfalls of relying on the documentation of the Constitutional Convention and state conventions thereafter is that each record is inherently incomplete because of limited means of documentation and the various foci of the participants. Moreover, the actions and statements of various founders or individuals on a single issue were at times contradictory, making an absolute determination untenable. The strength of this Comment is in understanding the progression of individual mandates and seeing that at the local level, state level, and federal level, a federal individual mandate was considered appropriate. This Comment then attempts to provide some guidance for the use of individual mandates currently.

\(^{21}\) 17 U.S. (4 Wheat.) 316 (1819).

\(^{22}\) 130 S. Ct. 1949 (2010).

\(^{23}\) If a federal individual mandate was constitutional, was it only constitutional when used in connection with the Militia Clause powers; those powers used to pass the 1792 Act?
constitutionality of the ACA. Congress passed the ACA under the Commerce Clause and asserts that under U.S. Supreme Court precedent concerning the Necessary and Proper

---


25 U.S. CONST. art. 1, § 8, cl. 3.

26 Gonzalez v. Raich, 545 U.S. 1, 21 (2005). The government’s argument progresses as follows: Individuals who do not have health insurance are not divorced from the insurance market, see Obama, 720 F. Supp. 2d at 894 (“[P]laintiffs have not opted out of the health care services market because, as . . . beings, who do not oppose medical services on religious grounds, they cannot opt out of this market. . . . [P]laintiffs have made a choice regarding a method of payment for . . . services they expect to receive.”), and at some point will be in need of medical care. See Id. at 894 (“No one can guarantee his . . . health, or ensure that he . . . will never participate in the health care market. Indeed, the opposite is nearly always true.”). Because the ACA prevents insurers from denying coverage based on preexisting conditions, when these individuals require medical care they will increase insurance costs because they will wait to purchase health insurance and shift costs to others. This sequence of events will undercut the comprehensive ACA scheme’s success and for that reason, the individual mandate is constitutional and essential because it prevents this cost shifting. But see, e.g., Editorial, States Argue the Feds Can’t Force Purchase of Health Insurance, WASH. POST, Mar. 25, 2010, at A20 (“[W]hile the goal of the mandate is crucial to reform, the mandate isn’t the only way to achieve that goal. . . .”)

9
Clause,\textsuperscript{27} the individual mandate to purchase health insurance is an appropriate tool for regulating interstate commerce as an essential part of a larger comprehensive scheme.\textsuperscript{28} The government argues that a person’s decision to purchase healthcare, either now or when sick, is an economic activity that can be regulated by the Commerce Clause. This Comment’s conclusion would then provide that given the constitutionality of a federal individual mandate that is divorced from the Militia Clause powers, Congress could use such mandate in this situation, as well as others, under the Necessary and Proper Clause so long as the individual mandate is being used to effectuate an enumerated power.\textsuperscript{29}

\textbf{I. Originalism: A Method of Constitutional Interpretation}

\textsuperscript{27} U.S. \textsc{Const.} art. 1, § 8, cl. 18.

\textsuperscript{28} See Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Dismiss at 40, Florida v. United States HHS, 716 F. Supp.2d 1120 (N.D. Fla. 2010), \textit{available at} http://myfloridalegal.com/webfiles.nsf/WF/JFAO-883LV3/$file/MotionToDismiss.pdf; see also Obama, 720 F. Supp. 2d at 894-95.

\textsuperscript{29} See \textit{infra} Part VI. Concerning the Necessary and Proper Clause, policy analyst at the Center for American Progress, Ian Millhiser, has noted that the “Constitution gives Congress the power to make all laws which shall be necessary and proper to carrying into execution its power to regulate interstate commerce. Millhiser, \textit{supra} note 14. Millhiser also quotes Justice Scalia as saying that the Necessary and Proper Clause means: “where Congress has the authority to enact a regulation of interstate commerce, it possesses every power needed to make that regulation effective.” \textit{Id.} (internal quotation marks omitted). It should be noted though that the Necessary and Proper Clause does not grant its own power. See Memorandum for the Cato Institute, \textit{supra} note 6, at 3 (“[The] Necessary and Proper Clause is not an independent source of congressional power; instead, it enables Congress to carry out its enumerated powers or ends by means that are ‘appropriate’ (Chief Justice Marshall’s term for ‘necessary’) and ‘plainly adapted to a [constitutional] end’ (his definition of ‘proper’).” (quoting \textit{McCulloch v. Maryland}, 17 U.S. (4 Wheat.) 316, 421 (1819)). This Comment’s conclusion is not arguing that the Necessary and Proper Clause grants its own power to pass an individual mandate, but rather the Necessary and Proper Clause should provide for a federal individual mandate so long as the mandate is tied to an enumerated power.
Traditionally, there are two major schools of thought for constitutional interpretation: originalism and living constitutionalism. Originalists are among the harshest critics of the ACA yet this Part lays the foundation to explain why originalism’s tenants will in fact be useful and necessary to determine that the founders understood what an individual mandate was and that the Constitution provides Congress with the power to pass at least one federal individual mandate. This Comment utilizes originalism to illustrate how the founding generation understood the militia powers. Consequently, the militia laws of Part III.B, infra, are numerous examples showing that the militia powers were understood to include the power to use an individual mandate.

Originalists tend to find more limited views of the government’s powers and as a method of interpretation, the philosophy has enjoyed varying degrees of popularity. Originalist scholar, Randy E. Barnett, has written that “originalists . . . focus entirely on the original meaning of the text- the meaning that a reasonable speaker of the language would have attached to the words at the time of the text’s enactment.” This focus has use beyond text by distilling into the idea that someone engaging in originalism must look to the context to see what powers


32 This style of examination is similar to analysis engaged in by scholar Alan Hirsch. Hirsch has advocated for use of interpretive and noninterpretive strategies which include paying close attention to text, history, structure, and
would be considered appropriate by a reasonable person at the time a law was enacted. Originalists caution that there is a difference between searching for original meaning as opposed to original intent.\(^\text{33}\) Original intent involves trying to search for the specific original intentions of the framers, through what Barnett calls “channeling the framers,” to conclude what the framers would have thought of a particular controversy.\(^\text{34}\) Original meaning interpretation allows for a view of powers available to the founding generation that may be more complete; original meaning interpretation at least requires a more fact specific inquiry that can be refuted than does original intent interpretation.\(^\text{35}\) Moreover, according to original-meaning originalists, the secret intentions of any individual are not binding because the method interprets what would best reflect the publically accessible meaning of the text at issue.\(^\text{36}\) Thus, originalism has varying strains and one must remain cognizant of the method employed.\(^\text{37}\) This Comment engages in original-meaning originalism and the case is strong that the founding generation understood what an individual mandate was and that at the very least, the militia powers provided for one.

---

33 See Barnett, supra note 31.

34 Id. at 241.

35 Id.


37 Indeed, most originalists have gravitated toward original meaning interpretation. See Cornell, supra note 32, at 575.
II. What is Meant by “Militia”?

Before analyzing the use of the militia powers, I must note an important distinction within militias themselves. There is a significant division between an “organized” militia and an “unorganized” militia. “Unorganized” militias generally consist of all able-bodied men in the nation between the ages of seventeen and forty-five, while “organized” militias are regularly drilling units of armed citizens.38 This is not to say that “unorganized” militias did not possess arms or did not drill regularly, but rather that “organized” militias, as colonists would have understood them, are similar to what the National Guard is today;39 a specific and narrow group of individuals. Some scholars have distinguished the two militias using the terms “enrolled” or “unenrolled”40 militias, but even those terms can be confusing given developments over time in the militias. An “enrolled” militia is one that actually lists its members on some official roster with infrastructure in place to train and discipline, while “unenrolled” militias consisted of individuals obligated to serve, but who are not formally listed or trained.41 The reason for confusion is that the National Guard today consists of enrolled members on official lists and would be considered an “organized/enrolled” militia by the founders, while the militia regulated by the Uniform Militia Act of 1792 had enrollment based on the simple act of registering for


39 JAMES B. WHISKER, THE RISE AND DECLINE OF THE AMERICAN MILITIA SYSTEM 7 (1999); cf. William S. Fields & David T. Hardy, The Militia and the Constitution: A Legal History, 136 MIL. L. REV. 1, 2 (1992) (arguing that today’s U.S. militia, the National Guard, would have “been viewed as a ‘standing army’ by political leaders of the Revolutionary Era”).

40 WHISKER, supra note 39.

41 Fields & Hardy, supra note 39.
militia service by providing a full name and address, yet the latter was welcomed as a “unorganized/unenrolled” militia. Because of the development of what it is to be enrolled, this distinction has its limitation when used over time.

For this Comment, it is easier to understand what is referred to with the word militia by thinking about the idea behind each militia. The militia regulated by the 1792 Act and the many colonial laws that came beforehand targeted the levée en masse or a military organization made of the entire nation, not a select or advanced group. The militia, as this Comment refers to it, is the elemental and basic citizen soldier, not a well-trained and select group that founders feared. Both the “organized” and “unorganized” militia are distinguished from a regular army that consists of professional soldiers, but an “organized” militia breeds selectivity, like a standing army, while an “unorganized” militia is expansive and covers most of the adult, white-male population irrespective of skill or status. This Comment discusses the development and laws affecting the “unorganized” militia, that which existed in English common law and colonial military custom long before our Constitution. It is important to understand the militia was a general and simple institution rather than the combined state and federal institution that it has

42 Id. at 8.
43 Id. at 9.
44 See infra Part V.B for a discussion of how the founders had a fear of a standing army and felt that an “organized” militia would either be or become a standing army. A standing army was considered one of the most fundamental threats to a free society and the citizen militia was considered the antithesis of this threat.
45 Hirsch, supra note 32, at 921.
become in modern times\(^{47}\) because the acceptability of a future use of individual mandates requires an understanding that those affected by the first individual mandate were, in fact, average citizens. Just like the ACA’s individual mandate affects all citizens and has an economic aspect, the militia laws of this Comment also affected average citizens, forcing them to make economic purchases from private entities.

**III. The Founders Understood Individual Mandates and How to Use Them**

**A. The Origins of the Militia System in Europe**

The unorganized militia system has its roots in Europe. The European assessment of the system as the bulwark of a free society and the protections it offered is nearly identical to those present at the Constitutional Convention and state ratifying conventions, as seen *infra* Part V.B. This idea of a fundamental reliance on an unorganized militia also came with a history of individual mandates, and as a consequence, implies that the founders understood the key provisions of the Uniform Militia Act of 1792 to function as an individual mandate.

Fears of standing armies date as far back as Julius Caesar and Constantine I.\(^{48}\) The militia system developed as a check on the power of a standing army and militias as an institution developed slowly until the Norman Conquest.\(^{49}\) Similarly, the Greeks and the Romans felt the militia was “necessary to a free state.”\(^{50}\) In medieval Europe, militias were

\(^{47}\) See Mullins, *supra* note 38, at 330.


\(^{49}\) See Fields & Hardy, *supra* note 39, at 1.

\(^{50}\) See *id.* at 14 (describing how Classical Republicans were also influenced by this sentiment and drew inspiration from Niccolo Machiavelli who believed that mercenaries of standing armies were “disunited, ambitious, without discipline, [and] faithless”).
comprised of “the whole body of freemen” between the ages of fifteen and forty and were required by law to keep weapons in order to defend the nation.51 Likewise, the militia in the latter Middle Ages was comprised of “‘citizens, burgesses, free tenants, villeins [serfs] and others from [fifteen to sixty] years of age’ who were obligated by law to be armed.”52 Although these militias resemble the militia known to the founders, it was the Saxon tradition of fyrd specifically that established unorganized militias as the founders would understand the institution.

The citizen soldier truly originated within Europe’s Germanic area53 with the Saxon militia, fyrd, which was comprised of all able-bodied, land-owning men.54 Fyrd was called on during emergencies to aid threatened areas, and participation came with the legal obligation that participants provide their own arms and provisions in accordance to their socioeconomic standings.55 This obligation reached England through the Angles and Saxons.56 The militia system as a whole was imbedded into the psyche of Saxons during the Norman Conquest when soldiers destroyed English lands. The Conquest imposed feudal institutions,57 but also caused

51 See WHISKER, supra note 39.
52 Id.
53 MAHON, supra note 46, at 6.
54 See Fields & Hardy, supra note 39, at 3.
55 Id.
56 See MAHON, supra note 46.
the Saxons to resent their conquerors and adhere to their idea of the citizen soldier.58 While the lineage of the militia as an institution cannot be directly traced to fyrd,59 the similarities in militia development between England and the American colonies are more than coincidental.

Following the Norman Conquest, King Alfred first settled a national militia.60 Then, with his Assize of Arms in 1181, English King Henry II reaffirmed the universal military obligation. The Assize of Arms required that all able bodied men bear arms, that the arms only be used in service to the king, and that the type of arm was based on what an individual could afford.61 Not only was each individual to provide his arm at his own expense, but he had to prove ownership of his arm according to the worth of his chattels.62 Eventually the development of the longbow made universal participation in the militia easier because bows were cheaper to fabricate. Consequently, in 1285 under Edward I, the Statute of Winchester required that “anyone who can

58 See Fields & Hardy, supra note 39, at 5. Other scholars have traced the obligation imposed by fyrd to the United States. See MAHON, supra note 46, at 6 (describing how the obligation was expressed in the colonial militia system and the states, lasting in theory to the Dick Act of 1903).

59 One cannot draw a conclusively direct link between the “unorganized” militia of the United States and fyrd because fyrd was based on land ownership and the land ownership requirement never reached the English colonies. See MAHON, supra note 46, at 7. But, it should be noted that the preponderance of control of the American militias was in the hands of landowner officers. See id. But see id. at 9 (“Militia musters were brought into the English colonies without much modification from Elizabethan practice.”).

60 Fields & Hardy, supra note 39.

61 See MAHON, supra note 46, at 7; see also 1 AMERICAN MILITARY HISTORY, supra note 57, at 147; WHISKER, supra note 39, at 10 (describing how men were ordinarily called for service and expected to bring arms at their own expense and of the kind that was in common use at the time).

62 See Fields & Hardy, supra note 39, at 6.
afford them shall keep bows and arrows," thereby affirming universal participation and an individual mandate. Richard II followed suit when he required all Englishmen and Irishmen to possess a bow their own height. Richard II also controlled the prices of bows to make them available to the poorest citizens. This militia system affected the common folk and required that the militia members would not only cooperate in the common defense, but acquire a certain proficiency with their weapon prior to deployment. Scholars have described the American militia system with its universal coverage, foundation in the common defense, and forced purchase of arms during service as a “throwback to such [English] practices of an earlier age.” In fact, laws requiring training days and imposing fines for failure to attend militia musters were among the earliest laws enacted in the colonies.

The influences of English thought concerning the militia are not limited to a universal system with an individual mandate. Many English concerns related to the militias were present in the colonies, see Part V.B, infra. Memories from the Norman Conquest along with the development of mercenary armies instilled a deep aversion to a professional army among Englishmen. Peasants associated armies with oppression and abuse as

63 Id. at 7.
64 Id.
65 Id.
66 See WHISKER, supra note 39, at 10, 12.
67 Id. at 12.
68 See MAHON, supra note 46, at 10.
69 See Fields & Hardy, supra note 39, at 6. The armies were largely comprised of “tramps, beggars, criminals, and the persons who were ‘passed’ into military service.” Id. In fact, Edward I pardoned 450 criminals in a single year in exchange for their services in the army. Id.
the soldiers were notorious for their mistreatment of the citizenry.\textsuperscript{70} As a consequence, the militias were seen as an inexpensive\textsuperscript{71} and nonthreatening defense mechanism.\textsuperscript{72} A notion developed that popular governments depended on an independent voting population with sufficient property in land to support them and that the independent yeoman was the best protection for a popular government against both foreign and domestic foes.\textsuperscript{73} Essentially, the armed yeoman was embodied in a militia and stood as the primary protection against a standing army\textsuperscript{74} and in defense of sovereignty.\textsuperscript{75} Because militia service had diminished after Henry II, Edward I’s reaffirmation of \textit{fyrd} revitalized the idea that a militia was the keystone to defense and the maintenance of law and order.\textsuperscript{76} Additionally, there was discontent among Englishmen over the crown’s policy of moving militia men over geographic bounds, a fear which made its way to the colonies as well.\textsuperscript{77} Indeed, the development of the militia in England serves as the basis for many concerns the founders possessed.

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} This is probably because there was little formal training or drilling and because militiamen were required to provide their own weapons at their own expense.

\textsuperscript{72} William S. Fields and David T. Hardy also attribute, in part, the evolution of civil liberties and democratic institutions in England and America to English mercenary armies and the corresponding fondness for the “unorganized” militia. \textit{See} Fields & Hardy, \textit{supra} note 39, at 6.


\textsuperscript{74} \textit{Id.}

\textsuperscript{75} \textit{Id.} at 125.

\textsuperscript{76} \textit{See} MAHON, \textit{supra} note 46, at 7.

\textsuperscript{77} \textit{See id.} at 8.
Finally, the influence on the founders’ understanding of militias was not limited to the development of the militias before the establishment of the colonies, but arguably continued even as the colonies were diverging toward the establishment of a sovereign nation. English political philosopher, James Harrington, argued that republics could only be free when there was a yeomen population to take up arms when liberty was threatened. Harrington’s book, *Commonwealth of Oceana*, published in 1656 was commonly read by Americans of the revolutionary era and recommended that the militia be used for national defense and as a deterrent against the misuse of political power. Moreover, the English Whigs maintained a fear of standing armies and this holding influenced revolutionary Americans’ beliefs that a standing army was destructive to liberty. Whig philosophy gained momentum in the colonies; in fact, John Adams estimated that nine-tenths of Americans were Whigs at the onset of the Revolution. Even wealthier and more conservative colonists like George Mason and John Adams were persuaded by Whig ideals. Additionally, Sir Walter Raleigh championed a familiar cry when he said that it was tyranny to disarm the people and that a “sophistical or subtle tyrant” would seek “to unarm his people and store up their weapons, under pretense of

78 See Saul Cornell, Whose Right to Bear Arms Did the Second Amendment Protect? 9 (2000). For an interesting examination on why the militia was held in such high esteem although it was not very adept at functioning as a military force, see Morgan, *supra* note 73, at 123-44.


80 The Origin of the Second Amendment: A Documentary History of the Bill of Rights 1787-1792, at xxv (David E. Young, ed., 2d ed. 1995).


82 See Fields & Hardy, *supra* note 39, at 18.
keeping them safe.”83 Raleigh’s statements were in the wake of two acts. The 1662 Militia Act enabled militia officers to confiscate the weapons of individuals they felt were dangerous to peace in the Kingdom and the Huntington Act of 1671, which was designed to disarm those not owning land.84 English libertarian James Burgh’s work, *Political Disquisitions*, was useful for Americans in articulating their vision of republicanism.85 He perceived a dynamic relationship between the spirit and character of a people and their possession of arms.86 Also, libertarians viewed Americans as an “agrarian society of armed, self-sufficient husbandmen” and this flattering view was quickly adopted by Americans.87 Thus, there is evidence that militias have long had individual mandates and that perceptions of militias and their use impacted American colonists.

**B. The Colonial Militias**

This Part chronicles militias through the colonies as the middle step between the militias of Europe and use of militia power by the federal government; connecting the individual mandate through a traceable history in militias that culminated in use of an individual mandate

---


86 See id.

87 See *id*. The belief of the invincibility of a citizen militia when fighting for country and kin has been described as the final powerful heritage to come to North America. See Mahon, *supra* note 46, at 10.
by the federal government. 88 It focuses on how the exercise of the militia power at the colonial level was understood to have an individual mandate through its repetitive implementation, thereby showing how the founders understood the militia powers before the Constitutional Convention.

Within this Part, there are two noteworthy options utilized in militia laws to arm militiamen that set an important foundation for Part VI’s argument that a federal individual mandate should be described as a Congressional power under the Necessary and Proper Clause. The first option was using an individual mandate. The line of successive militia laws in the colonies that required the adult male population to be armed and trained is long in most colonies. 89 The laws generally required every man sixteen to sixty to obtain his own firearm, ammunition, and other essential materials with a few exceptions for individuals such as government officials or clergymen. 90 The first of such laws was enacted just after the founding of the Jamestown colony. 91 The law called for a militia similar to the English militia that the settlers were familiar with, although it required the constant carrying of arms. 92 While individuals like John DeWitt considered militias “the bulwark of a free people” that were

88 See generally Dan Higginbotham, *The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship*, 55 WM & MARY Q., Jan. 1998, at 39, for a description on how the citizen militia was deeply rooted in American political culture and how there was a gradual progression from local to federal action as states had total control over the militias and then shared power under the Constitution.

89 See *The Origin of the Second Amendment*, supra note 80, at xxiv.

90 See id. at xxiv.


92 *Id.*
“composed of the yeomanry of the country,”93 this use should not distract from the value of a continued implementation of individual mandates. In actuality, the militias were rarely drilled or disciplined because of laxly enforced laws, but nearly every militia was expected to equip itself at its own expense.94

The second option is what this Comment calls “the public option” where local governments attempted to arm militiamen through their own funds or otherwise; essentially colonies decided not to use an individual mandate to effectuate their militia powers. Using this option signaled that an individual mandate was not indispensably necessary to the militia powers. By not being indispensably necessary, the option’s use adds support to the idea that the founders knew of individual mandates by specifically considering them; it also supports the idea that an individual mandate may be separable from the militia powers.95 Implementing militia powers through means other than an individual mandate took several forms. The Charter of New

93 John DeWitt, Letter V: To The Free Citizens of the Commonwealth of Massachusetts, reprinted in 4 THE COMPLETE ANTI-FEDERALIST 34, 37 (Herbert J. Storing ed., 1981); see also Fields & Hardy, supra note 39, at 23 (mentioning the militia as a popular check on excessive use of royal power); cf. Cornell, supra note 32, at 572 (discussing the use of militias as a guard against standing armies).

94 See WHISKER, supra note 39, at 96. Whisker notes that the accoutrements to be provided were not unsubstantial: an appropriate firearm, bayonet, or sword and gunpowder and flints, and that the burden of these laws was evidenced by the exceptions provided by some colonies for the urban poor. Id. Others have identified requirements of a smooth bore musket, ammunition, clothes, and enough food for a short expedition and compared the burden to that of a British knight, who was required to provide his own armor, horse, and weapons in feudal warfare. See 1 AMERICAN MILITARY HISTORY, supra note 57, at 30. One significant difference in the British knight to citizen soldier comparison is that the British night was part of a select class charged only with protection, while the citizen soldier was every able-bodied free male between sixteen and sixty.

95 See infra Part III.B, V, and VI.
England in 1602 created a militia to “encounter expulse, repel and resist by force of Arms” both foreign and domestic foes of the colonies, but the charter obligated the president and council to supply arms, ammunition, and other necessities of battle. Some local authorities kept a supply of muskets and ammunition on reserve for those too poor to buy weapons, but the individual mandate option was the most popular choice by far. Over time, the colonists felt the obligations of the tangled militia laws were a nuisance, but they were generally accepted for their “lofty” purpose.

i. Delaware

Delaware, established in 1631 by the Dutch, took less than two decades to impose an individual mandate on all able-bodied men by requiring each man “provide himself with a good gun and requisite powder and lead.” When the English took control of the territory in 1664,

96 WHISKER, supra note 39, at 103. Even the last colonial charter, that of Georgia, draws the connection from the English militia as it specifically refers the militia as the “backbone of the colonial defense.” See MAHON, supra note 46, at 14.

97 See 1 AMERICAN MILITARY HISTORY, supra note 57, at 30.

98 See MAHON, supra note 46, at 14. While initial acceptance of an individual mandate may have been tied to a “lofty” purpose, this Comment focuses on understanding how Americans knew of individual mandates at the time of ratification. This commentary is a means of showing understanding because based on information presented in Part V infra, a federal individual mandate may or may not be specifically restricted to the Militia Clauses. Moreover, based on the evidence presented in Part IV, infra, it seems that early Americans enacted state laws as an enforcement of federal power, not because they appreciated an individual mandate’s “lofty” goal.

99 See WHISKER, supra note 39, at 193; see also THE FOUNDERS’ VIEW OF THE RIGHT TO BEAR ARMS 48 (David E. Young, ed., 2d ed. 2007) (describing how the requirement to “possess and make use of arms necessary for their own
colonists immediately started reconstituting the militia which has fallen out of regular use. In 1670, the current militia law enlisted all able-bodied men and required them to possess a gun, two pounds of balls, and one pound of powder. Nearly identical requirements were set out in a November 7, 1671 law, and then were affirmed again on November 23, 1671, when the requirements were extended to all colonists in New Netherlands. The last of the Delaware laws requiring individuals to purchase their own supplies was enacted in 1754.

ii. New Jersey

In 1665, New Jersey Governor Carteret passed a law ordering that all adult freemen provide himself with “a good musket, boare 12 bullets to the bound[,]” twenty ponds of lead bullets, and ten pounds of gunpowder. A year later the law was modified, but only to provide exemptions to service. On March 1, 1682, the East New Jersey General Assembly became more explicit in requiring all men between sixteen and sixty to provide their own firearm and ammunition when it added the words “at his own cost and charge” to militia laws. New Jersey’s Militia Act of 1744 again specified that arms be provided at an individual’s own defense” had been forgotten, but the proprietor issued new orders requiring each man “be bound to provide himself with a good gun and requisite powder and lead”).

100 See THE FOUNDERS’ VIEW, supra note 99, at 48.

101 Id. at 49.

102 Id. at 49.

103 Id. at 58.

104 See WHISKER, supra note 39, at 197; see also 4 JAMES BISER WHISKER, THE AMERICAN COLONIAL MILITIA: THE COLONIAL MILITIAS OF NEW YORK, NEW JERSEY, DELAWARE, AND MARYLAND 67 (1997) [hereinafter WHISKER, AMERICAN COLONIAL MILITIA].

105 See WHISKER, AMERICAN COLONIAL MILITIA, supra note 104.

106 See id. at 68.
expense, but increased the requirement to “a good musket or Fusee, well fixed, and a Bayonet fitted to it, a cutting Sword or cutlace, a Cartouch Box or powder horn, with 6 Charges of Powder, and 6 sizable Bullets.” New Jersey also experimented with the public option of providing for the militia when the legislature voted an appropriation for the purchase of two hundred muskets to supply to volunteers. New Jersey’s laws passed in 1775 contained an individual mandate with a small fine for failure to provide oneself with the appropriate supplies, even thought there was a scarcity of most military arms and supplies.

iii. New York

Similarly, New York’s use of militia laws containing individual mandates began early. In 1648, New Amsterdam Governor Peter Stuyvesant confiscated smuggled arms and redistributed them to the colonists on the condition that they maintain the arms along with powder, bullets, and accoutrements. By 1650, the States General on the Affairs of New

---

107 See id. at 73. This law also made minor changes to the age requirement, requiring service to start at seventeen instead of sixteen, and provided numerous exceptions for “most political officers, ministers, judges, clerks of courts, justices of the peace, sheriffs and under-sheriffs, physicians and surgeons, coroners, and millers actually attending gristmills.” See WHISKER, supra note 39, at 201. Additionally, mounted militia men were required to provide, at their own expense, “a good Horse, Saddle, Breast Plate, Crupper, Kirb Bridle, Holsters, a Case [brace] of Pistols, Cutting Sword or Cutlass and double Cartouch Box and 6 Charges of Powder and Ball.” Id.

108 See WHISKER, supra note 39, at 205. Initially, the use of individual mandates was proliferated through local governments, providing a base of experience from which the founders could draw. See WHISKER, AMERICAN COLONIAL MILITIA, supra note 104, at 82 (noting that local committees bore full responsibility for arming and equipping the militia).

109 See WHISKER, AMERICAN COLONIAL MILITIA, supra note 104, at 84.

110 See id. at 5.
Netherlands required that “the inhabitants generally shall be bound each to provide himself with a good gun and requisite powder and lead and be enrolled and formed into companies.”

On May 30, 1775, New York’s Provincial Congress ordered that the “militia of New York be armed and trained and in Constant readiness to act at a moment’s warning” and that each militia man “furnish themselves with necessary Arms and Ammunition [and] to use all Diligence to perfect themselves in the Military art.”

Militia law was strengthened in anticipation of war with Indians in January of 1663, and not only enrolled all able-bodied men, but also provided for arming, training, discipline, staffing, and fines for noncompliance. An August 1753 law affirmed the obligation to provide one’s own arms. However, it should be noted that there are two instances in which New York chose either to supplement arms provisions utilizing an individual mandate or provide arms in other ways. In 1756, Governor of New York, Sir Charles Hardy, ordered the use of ten thousand muskets owned by the city for use in the militia to supplement the arms that were provided by individuals. Second, on August 10, 1776, a militia law was passed ordering “each man be furnished with a good musket or Firelock; bayonet or

---

111 See id.

112 See 1 NEW YORK IN THE REVOLUTION 5 (Berthold Fernow, ed., 1887).

113 See WHISKER, AMERICAN COLONIAL MILITIA, supra note 104, at 6.

114 See id. at 16.

115 See id. at 19. Congress took similar action in 1792 when it supplemented the individual mandate with federally provided arms, see infra Part IV.D, but this help does not discount the choice to implement an individual mandate. Acts like this merely show cognizance of the individual needs of citizens since it was known that some were so indigent that they could not purchase proper arms. See id.
Tomahawk; blanket and knapsack . . . “*116 This law was applied to all able-bodied men sixteen to fifty.*117

iv. Virginia

Virginia’s House of Burgesses created a militia in 1658 that required every “man able to beare armes [sic] to have in his house a fitt gunn [sic], two pounds of powder and eight pounds of shott [sic] at least which are to be provided by every man for his family before the last of March next.”*118 In 1705, Virginia passed its first comprehensive militia law establishing the general obligation to maintain arms, but with a long list of exceptions to serve, although those exempted still needed to supply their own arms or face a fine.*119 A few decades later, in 1738, the Virginia legislature expanded the obligation of providing suitable arms at one’s own expense to cavalryman.*120 A similar law was passed in 1755.*121 The law passed in 1757 expanded the obligation to “a well fixed firelock, bayonet and double cartridge box; and [to] keep in his home [one] pound of gunpowder and four pounds of musket balls fitted to his gun,” while also providing arms for any sons living in the house.*122 Virginia’s requirement was further affirmed in 1775 by the Third Virginia Convention when it ordered “every militia man should furnish

---

116 See Whisker, supra note 39, at 145; Whisker, American Colonial Militia, supra note 104, at 30.
117 Whisker, supra note 39, at 145.
119 See id. at 21-22.
120 See id. at 31.
121 See id. at 41.
122 See id. at 50. This law tried to provide some relief to the colonists who were too poor to afford a musket by allowing them to certify with county officers, at which point the county would provide them with such arms. Id.
himself with a good rifle, or common firelock, tomahawk, bayonet or scalping knife, pouch or cartouch box, and three charges of powder and ball.”

In 1777, this law still stood intact, even in the face of a shortage of arms and accoutrements.

An interesting characteristic of Virginia’s militia laws was adherence to an individual mandate when it was not overwhelmingly popular. This adherence demonstrates that the choice to have an individual mandate was not a foregone conclusion in the minds of colonists or the founders. Virginia’s requirements on militiamen served only to further impoverish the already poor lower classes.

Some colonists complained of the burden the law imposed upon them through a forced purchase.

v. Maryland

Maryland too instituted individual mandates, and initially, their use was in more than militia service. In 1638, Maryland required individuals to have a gun in their home, while a 1654 act required men to inspect the guns of their family members.

Maryland distinguished

---

123 See id. at 65, 76.
124 See id.
125 See WHISKER, supra note 39, at 96. Another example of the poverty and general lack of arms in private hands is evidenced by a law passed as the Revolutionary War was ending that required those no longer serving in the militia to return their weapons to the state. An act for the recovery of arms and accoutrements belonging to the state, Act of Oct. 21, 1782, ch. XII, 1782 Va. Acts 132.
126 See WHISKER, SOUTHERN STATES, supra note 118, at 17.
127 See WHISKER, AMERICAN COLONIAL MILITIA, supra note 104, at 98, 100. The 1638 law required specifically that every person have in their house “one Serviceable fixed gunne of bastard musket boare, one pair of baldeers or shott bagg, one pound of good powder, fowre pounds of pistol or musket shott and Sufficient quantity of match or locks and of flints firelocks and before Christmass next shall also find a sword and Belt for every such person.” WHISKER, supra note 39, at 225.
between “organized” and “unorganized” militias in 1655 when it authorized the furnishing of the “organized” militia with colonial equipment, but did not do the same for the “unorganized” militia.  

Again, an individual mandate was not the only option available to the colonies as evidenced by a 1733 law that reaffirmed the governor’s power to contract for the purchase of arms intended for distribution to the militia, in addition to the ability to call the militia into service. Yet, even with this precedent, the Maryland Convention of December 12, 1774, passed a resolution requiring each man to provide himself with a firelock, bayonet, and ammunition.

vi. New Hampshire

---

128 WHISKER, AMERICAN COLONIAL MILITIA, supra note 104, at 10.
129 Id. at 122.
130 See THE FOUNDERS’ VIEW, supra note 99, at 43. The convention also unanimously praised the militia for its natural strength in securing a free government and as a replacement for a standing army, which was dangerous to liberty. Id.
Militia law in New Hampshire also required all males between sixteen and sixty to serve in the militia. Each man was to supply himself with a musket, bayonet, knapsack, cartridge box, one pound of gunpowder, twenty lead bullets and twelve flints. Like other colonies, New Hampshire’s provincial congress passed a militia law that utilized an individual mandate in a flexible way. On September 9, 1776, a New Hampshire law was passed that required militia members to provide themselves with their arms at their own expense, but had a grievance appeal for those who were too poor to purchase arms. The town council would determine if the individual was too poor, and if so, the town would equip the individual. However, even if the town equipped the individual, the indigent individual might have been charged with a civil duty to recoup the costs.

vii. Massachusetts

Many Massachusetts men between the ages of sixteen to sixty were so poor they could not afford to supply their own arms and relied on attempts to supply guns at public expense, but only in exchange for performing a public service. There was a time when colonists relied on money, materials, equipment, and arms from England, but the Massachusetts policy was still theoretically that each person provide his own arms, ammunition, accoutrements, and

---

131 See WHISKER, supra note 39, at 121. An interesting side point is that while the militia was the “bulwark of a free people” in other colonies, Governor John Wentworth, in the years leading up to the revolution tried to develop the militia not to protect the colonists, but to control patriotic and nationalistic groups. See id.

132 WHISKER, supra note 39, at 121.

133 See id. at 123-24.

134 See id.

135 See id.

136 See id. at 104-05.
Finally, Massachusetts passed an act in 1776, thereby repealing all previous acts, and requiring “each man . . . provide himself, at his own expense, with a suitable firearm, priming wire and brush, bayonet, sword, hatchet or tomahawk; knife; tow for wadding; canteen; knapsack; blanket and ammunition.”

viii. South Carolina

South Carolina enacted its first militia law in 1671 and conscripted all able-bodied men between sixteen and sixty years old. A full twenty-five years later the individual mandate requirement made its way into the law with an obligation that each militiaman provide himself with a gunlock cover, a cartridge box holding a minimum of twenty rounds of ammunition, a gun belt, a worm for removal of a ball, a wire for cleaning the touch-hole, and either a sword, bayonet, or tomahawk. A fine was imposed for failure to provide oneself with the necessary accoutrements. Seven years later in 1703, South Carolina revamped its militia law with a comprehensive regime, but any change related to exemptions from services, not the individual mandate itself. In fact, because of the comprehensive nature of the equipment listed and because of little advancement in warfare, the materials a militiaman was required to carry remained unchanged for decades. Even as South Carolina was transitioning from a dependent state to a sovereign state, it still required individuals to outfit themselves with equipment in its

---

137 See id. at 95, 161.
138 Id. at 164.
139 Id. at 235.
140 Id.; WHISKER, SOUTHERN STATES, supra note 118, at 120.
141 See WHISKER, SOUTHERN STATES, supra note 118, at 120.
142 See id. at 122.
143 See id. at 123.
Finally, like other colonies South Carolina understood the economic impact of a forced purchase and tried to supply arms in alternate ways via a public option. It passed a law in 1737 that appropriated thirty-five thousand pounds for the defense of the colony, including arming and equipping the militia.

ix. North Carolina

Some colonies had shorter or less involved militia histories. For example, North Carolina got a slower start than other colonies, but ended up utilizing an individual mandate. North Carolina established its militia in 1644, and it was not until 1712 that the legislature obtained a law requiring “every person between 16 and 60 years of age able to carry arms” be armed at his own expense. This law lasted through the revolution.

x. Georgia

The Georgia charter of 1732 provided for a militia. Many of Georgia’s militia laws dealt with either controlling the slave population or allowing for a slave to be armed by his master if the master recommends. But in 1770, Georgia passed law that required all while male inhabitants to carry a personal firearm to all places of public worship to provide for better security.

xi. Rhode Island

---

144 See id. at 155.
145 See id. at 141.
146 See WHISKER, supra note 39, at 231.
147 See id. at 232.
148 WHISKER, SOUTHERN STATES, supra note 118, at 161.
149 See id. at 161-63.
150 Id. at 163.
Rhode Island, in 1680, simply required that each man provide his own accoutrements, which was to include “a musket, cartouche box, 12 bullets, a half pound of [gun]powder and 6 flints.”

Rhode Island passed another law in the winter of 1775-1776 with an individual mandate that included a fine for failure to provide oneself with the appropriate arms in the hopes of strengthening the militia; however, the legislation failed to achieve its ends.

**xii. Connecticut**

Connecticut initially passed militia laws in 1638, but only addressed equipping the militia. The Connecticut Code of Law, in 1644, required the town to provide the “military provisions” while each militiaman was to provide powder, shot, cartridge box, and accoutrements. In 1673, the Grand Committee of Connecticut ordered that the colony provide arms. In March of 1687 each militia man was to provide himself with a musket, cartridge box, sword, one dozen bullets, and gunpowder. There were small changes to the number of times a militiaman would be called to service or at which age service would begin and end, but ultimately, Connecticut required individuals to provide their own arms and supplemented individuals without arms with the town’s stock.

**xiii. Pennsylvania**

151 *See* WHISKER, *supra* note 39, at 125.

152 *See id.* at 125-26.

153 *See id.* at 126-27.

154 *See id.* at 127.

155 *See id.*

156 *See id.*

157 *See id* at 128.
Finally, Pennsylvania lacked militia law entirely until 1755, at which point they passed a law making service voluntary.\textsuperscript{158} In fact, by the Revolutionary War, all the colonies established a compulsory militia with some history of use of individual mandates except for Pennsylvania.\textsuperscript{159}

\textbf{xiv. Pre-Constitution Federal Use and the Founders’ Understanding of Individual Mandates}

The understanding and use of an individual mandate made its federal debut early. On October 28, 1775, the first year of the Revolutionary War, Congress passed its first federal militia law and directed the enrollment of all men capable of bearing arms between the ages of sixteen and fifty to enroll in the militia and that each person “furnish himself with a good Musket or Firelock, and Bayonet, Sword or Tomohawk, a steel Ramrod, Worm, Priming Wire and Brush fitted thereto, [and] a Cartouch Box [containing] 23 rounds of Cartridges . . . .”\textsuperscript{160}

It is evident that an individual mandate was present in these numerous laws and that the individual mandate was not an independent decision made on two different continents (North America and Europe) or at two different levels of government (local and federal). The evidence of the same fears among Englishmen and colonists, in addition to establishing militias soon after colonization, demonstrates uniformity in the ideas of militias. Also, because various colonies experimented with different ways of providing weapons, it is more likely that the founders contemplated and understood individual mandates.

The founders’ affirmative choices to exclude an individual mandate can also signify that while individual mandates were understood to be part of the militia powers, their inclusion was

\textsuperscript{158} AMERICAN MILITARY HISTORY, \textit{supra} note 57, at 31.

\textsuperscript{159} See \textit{id.} at 30; Brown, \textit{supra} note 91.

\textsuperscript{160} See WHISKER, \textit{supra} note 39, at 351.
not a foregone conclusion. This implies that the founders may have considered an individual mandate as separable from the militia powers. There was poverty in the colonies and dissatisfaction with the individual mandate requirement, thus including an individual mandate was not evidence of the path of least resistance. By experimenting with various options within militia laws, the use of individual mandates is further supported as a conscious choice. Connecting progressive use of individual mandates from a truly local setting to a federal one proves that the founders knew what an individual mandate was and how it functioned.

Under the initial distribution of power after the Revolutionary war, it was unclear if an individual mandate was only a local tool. Under the Articles of Confederation, the state retained the power to train and equip the militias and to appoint officers, but there was no way for Congress to force cooperation. However, after the passage of the Constitution, the 1792 Act contained an individual mandate. To understand that this change--this explicit use of an individual mandate with the Militia Clause powers--was considered a constitutional exercise of federal power, see infra Part IV.

IV. Empirical Evidence of Approval of a Federal Individual Mandate

A. Passing the Uniform Militia Act of 1792

Now that it has been shown that an individual mandate was conceived by the founders and utilized at various levels, it is necessary to determine if the founding generation would understand the Constitution to provide for a federal individual mandate. This Part concludes that the answer is yes. The Uniform Militia Act that passed on May 8, 1792 was the first time Congress tried to provide for a well-regulated militia. It was the only act of its kind passed by Congress for over 110 years until the Dick Act, which removed compulsory military service,

161 Hirsch, supra note 32, at 923.
reorganized the militia into the National Guard, and increased federal control and funding.\textsuperscript{162} Even before these changes, the Uniform Militia Act of 1792 would already be a hollow shell of what it was originally meant to include. The hollowing process demonstrates that even as federal power was chipped away, Congress accepted the use of a federal individual mandate by ultimately including it in the 1792 Act.

George Washington, a Federalist, complained that “to place any dependence upon the Militia, is, assuredly, resting upon a broken staff.”\textsuperscript{163} Although Washington relied on the militias by the end of the Revolutionary War, his plans, along with the plans of others like Henry Knox and Alexander Hamilton, intended to use federal power to move militias from a state of poor regulation and lack of discipline to one where they were better trained.\textsuperscript{164} Washington, inter alia, wanted some sort of standing army because he felt the Revolutionary War would have been over sooner had one existed.\textsuperscript{165} Both Washington and Knox understood the provisions of the Militia Clauses of the Constitution\textsuperscript{166} to allow the national government to assume responsibility for


\textsuperscript{163} See Fields & Hardy, supra note 39, at 31.


\textsuperscript{165} WHISKER, supra note 39, at 352.

\textsuperscript{166} U.S. CONST. art. 1, § 8, cl. 15 (describing that Congress has the power “[t]o provide for Calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”); U.S. CONST. art. 1, § 8, cl. 16 (describing that Congress has the power “[t]o provide for organizing, arming, disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress”).

37
training the militias, and desired to start that task immediately.\textsuperscript{167} Consequently, Washington proposed the Knox plan for a small but well trained militia in January of 1790.\textsuperscript{168} The Knox plan called for a system of classifying the militia by age, providing for summer encampments, and most importantly, standardized weapons and equipment of young militiamen whom would constitute an elite class.\textsuperscript{169} Knox also wanted to have men aged eighteen to twenty trained successively for thirty days.\textsuperscript{170}

Various administrators under Washington also had detailed plans along these lines. Baron Von Steuben, Washington’s Inspector General, devised his plan in 1784.\textsuperscript{171} Hamilton not only supported Washington’s idea of a modest standing army, he actually wanted a stronger army, but restrained his desires because he knew the practical realities of antifederalist fears of a standing army created an insurmountable obstacle to that type of plan.\textsuperscript{172} Instead, Hamilton proposed a three-tiered system of militia organization by dividing men into three categories: single men, all married men, and voluntary and select men.\textsuperscript{173}

Ultimately, Washington’s proposed legislation was introduced four separate times, twice in 1790 and twice in 1791.\textsuperscript{174} The plan was drafted by then Secretary of War Henry Knox and

\textsuperscript{167} WHISKER, supra note 39, at 352.

\textsuperscript{168} Gary Wills, To Keep and Bear Arms, in SAUL CORNELL, WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT? 82 (2000).


\textsuperscript{170} WHISKER, supra note 39, at 352.

\textsuperscript{171} Fields & Hardy, supra note 39, at 41 n.153.

\textsuperscript{172} WHISKER, supra note 39, at 50-51.

\textsuperscript{173} Id.

\textsuperscript{174} Wiener, supra note 164, at 187.
borrowed liberally from ideas advanced by him and Washington during the Confederation years. The plan produced fervent opposition as being unworkable and exceedingly expensive.\textsuperscript{175} Congress rejected both the notion of a select militia and of undertaking the responsibility for state militia training.\textsuperscript{176} The Knox Plan limped through a number of ad hoc committees during its four submissions, in which each committee weakened its original contents; no vote on the matter occurred during the First Congress.\textsuperscript{177} The Second Congress finally passed the Uniform Militia Act of 1792, but eliminated nearly every part Washington and Knox felt were crucial.\textsuperscript{178} In fact, the bill that was passed was opposed by its sponsors.\textsuperscript{179}

Scholars have used many terms to describe what the 1792 Act became with the constant tightening and removal of power,\textsuperscript{180} but all of them agree that the Act was not what Washington and Knox had in mind. On March 8, 1792, the Act was passed by a narrow margin of thirty-one to twenty-seven; a victory for those opposed to Washington’s ideas.\textsuperscript{181} The 1792 Act required

\textsuperscript{175} Higginbotham, \textit{supra} note 169.

\textsuperscript{176} \textit{WHISKER}, \textit{supra} note 39, at 352.

\textsuperscript{177} Higginbotham, \textit{supra} note 169, at 110.

\textsuperscript{178} \textit{Id}.

\textsuperscript{179} Wiener, \textit{supra} note 164, at 187.

\textsuperscript{180} Gary Wills noted Washington wanted a small but well-trained militia and instead Congress gave him the 1792 Act, which made the militia a “velleity.” \textit{See} Wills, \textit{supra} note 168. Fredrick Wiener described the Act as “notorious” and that it was passed with “the heart cut out.” Wiener, \textit{supra} note 164, at 187. William Fields and David Hardy said that after a year and a half of work, the enactment was emasculated. \textit{Fields} \& \textit{Hardy}, \textit{supra} note 39, at 41 n.153. Richard Steward stated that the act bore little resemblance to the one proposed by Washington and Knox. \textit{1 AMERICAN MILITARY HISTORY}, \textit{supra} note 57, at 114.

that “each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of 18 years, and under the age of 45 years provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack.”  The requirement to secure your own weapon, regardless of condition, unless the states elected to furnish arms indicates that Congress has scant interest in arming and funding the state militias and that the costs, therefore, fell on the individual states or their individual citizens. In actuality, the 1792 Act did “little more than establish a continuing military census to provide role of ready reserves” because the Act created a massive military manpower bookkeeping system rather than establishing a true reserve force. The militias were only required to muster once a year and the individual mandate had no penalties for states that did not enforce these guidelines. One scholar has noted that the individual mandate was a dead letter because the Act did not provide for organized training. This situation was likened to defining a jury pool as the citizenry at large without providing for voir dires, so that no jury panel could be formed.

As to be expected, the Federalist public response to the Act was negative, but this entire process is illustrative of acceptance of federal individual mandates. Washington and Knox

182 See Pitcavage, supra note 162.
183 Higginbotham, supra note 169, at 110.
184 Brown, supra note 91, at 26.
185 See Mullins, supra note 38, at 333.
186 Wiener, supra note 164, at 187.
187 Higginbotham, supra note 169, at 110.
188 Wills, supra note 168.
189 Id. at 82
190 CORNELL, supra note 181, at 46.
proposed an aggressive Federalist plan that was carved out over four consecutive submissions to Congress. The final version was considered a victory against the Federalists, yet this legislation still maintained an individual mandate. Had this act been a victory for Federalists, critics could argue that an individual mandate was railroaded through Congress, but it was not. This demonstrates that despite strong antifederalist opposition, an individual mandate was accepted for use by the federal government because the issue was fear of a standing army, not a distain for individual mandates. Most important is that Congress included every man under the reach of the Act.  

A basic fallacy of the Act was that it was unselective; rather, it imposed a duty on everyone, even though the duty was not discharged as regularly as anticipated. A number of congressmen complained that a significant proportion of the potential militia men were young men such as apprentices and they might not be able to afford a musket as the bill required. With the number of revisions this act went through, it was no mistake that an individual mandate was kept in the bill, especially since some scholars have described the Act as “emasculated.”

**B. Acceptance of a Federal Individual Mandate Through Implementation**

Actions at the state level provide clear evidence of acceptance of the federal government’s power to impose an individual mandate. The Tenth Amendment makes it clear that the Constitution is a grant of power and that all remaining powers lie with the states. If the States felt an individual mandate was not within federal power, then the acts which led to a House Report by Henry Knox during the second session of the Third Congress would not have occurred as they did.

---

191 See Part II supra.
192 Wiener, supra note 164, at 187.
193 CORNELL, supra note 181, at 46.
194 U.S. CONST. amend. X.
On December 11, 1794, Secretary of War Henry Knox communicated to the U. S. House of Representatives under orders by Washington to discuss the difficulties and inconveniences that existed from executing the Uniform Militia Act of 1792. Knox began by stating the issue of primary importance was that “there [was] no penalty to enforce the injunction of the law” that required the militia to arm and equip themselves at their own expense. According to Knox’s reports, Massachusetts passed an act on June 22, 1793, which required that a militiaman who neglected to keep himself armed and equipped, or who did not muster, “shall pay a fine, not exceeding twenty shillings, in proportion to the articles of which he shall be deficient.” Massachusetts also mandated that masters, guardians, and parents furnish those under their care and command with the necessary arms and equipment. The Massachusetts act further provided that if a “select man” was without the means to arm himself, the burden would fall on the town to provide for him and the arms and equipment would remain the town’s property. The Massachusetts act finally provided that if any soldier was to embezzle or destroy the arms and equipment he was furnished, he would need to replace the articles and pay the costs associated with convicting him of this offense.

North Carolina also had similar enactments. On July 18, 1794, North Carolina required that all regular militiamen pay ten shillings if they mustered unarmed and ill-equipped and to

---

196 Id.
197 Id. at 70.
198 Id.
199 Id.
200 Id.
forfeit the additional five shillings paid by the state.\textsuperscript{201} Again there was an exception for individuals unable to arm themselves.\textsuperscript{202} North Carolina passed this act even though it noted within the text of the act that there are probably 450,000 men between eighteen and forty-five that needed to arm themselves, while only approximately 100,000 were armed in accordance with the Act.\textsuperscript{203} It is particularly impressive that knowing of these deficiencies, North Carolina still passed legislation to enforce the federal individual mandate in the 1792 Act.

New Jersey passed an act on April 11, 1793, which ordered that if a militiaman mustered without his musket, he would be fined three shillings along with six pence for every other article he was missing.\textsuperscript{204} New Jersey also provided that if a Major determines a militiaman is too poor to arm himself, then the militiaman was free from this fine.\textsuperscript{205} Similarly, Maryland passed a law in November of 1793 that ordered a commander to pay one sum for failure to provide himself with the necessary arms and equipment, while all regular militiamen would be fined less for the same offense.\textsuperscript{206} Finally, Pennsylvania, even with the sentiments of the Pennsylvania Minority not long in the past,\textsuperscript{207} passed legislation on April 11, 1793, to enforce the act.\textsuperscript{208}

\begin{footnotes}
\item[201] \textit{Id.}
\item[202] \textit{Id.}
\item[203] \textit{Id.}
\item[204] \textit{Id.}
\item[205] \textit{Id.}
\item[206] \textit{Id.}
\item[207] \textit{See infra} Part V.B.
\item[208] \textit{H.R. Rep. No. 3-21, at 70} (1794).
\end{footnotes}
provided that if a person was judged unable to provide for himself, then he would not be subject to the 1972 Act. 209

Knox’s was concerned that the 1792 Act may not be susceptible to alterations and amendments by the states to help provide for an organized militia. 210 He ultimately concluded that whether or not to include a federal penalty or allow the states to impose their own penalty would be a question best suited for Congress. 211

These state acts are important because they take no issue with the use of a federal individual mandate. In fact, state approval is evidenced by limited exemptions for the poor and various fines for failure to follow the 1792 Act. Scholars made similar conclusions by noting that the states did not object to the degree of central control of the 1792 Act when the states called for stricter regulations. 212 In March of 1794, Knox had approached the House to propose a change to the Act by creating a military college. 213 Professor James Whisker notes that the Third Congress, on March 24, 1794, reported that, while they were generally in agreement with the proposal, they felt powerless to encroach on states’ rights. 214 The inference from these concerns is that it was widely accepted that there was no encroachment under the 1792 Act. Additionally, the Military Arms Committee, headed by Representative Stephen A. Cobb, asserted there was an

209 Id.

210 Id. at 71.

211 Id.

212 See Pitcavage, supra note 162.

213 WHISKER, supra note 39, at 353.

214 Id.
importance [to] . . . a more energetic system for the establishment of a uniform militia than what is contemplated by the present existing law of the United States; but, in viewing this subject, as applied to the Constitution of the United States, and the powers herein expressly reserved to the different states, . . . [there are] doubts [about] how far Congress can, consistent therewith, make any important alterations or amendments to the present law.215 Cobb’s statements imply that up to the point at which he made the statements, the Uniform Militia Act was not considered to have infringed on the rights of states. That same committee’s investigation concluded that “the principal defect in the existing provisions for arming the militia consist in the want of a competent source of supplying [the militia with uniform] arms.”216 It further recommended that there be a uniform body of law to provide penalties for citizens whom did not arm themselves appropriately.217 These statements and conclusions indicate that the 1792 Act, as enacted, considered and accepted the use of a federal individual mandate. When one considers the state enforcement, of which all states affirmed the duty of the individual to arm himself,218 along with these ideas entertained in Congress, it necessitates a conclusion the Constitution provides Congress with the power to use a federal individual mandate.

C. Responding to Criticism: Individual Mandates

Two potential arguments that the founders’ use of individual mandates does not show specific understanding of an individual mandate such that the founders might not approve of its use or that the use was unconstitutional at the federal level can be dismissed rather quickly.

215 Id. (quoting 4 CONG. REC. H1134 (statement of Rep. Cobb)).

216 Id. at 353.

217 Id.

218 MAHON, supra note 46, at 55. There was approval at the state level of the 1792 Act. Id. When there was variation in provisions, it tended to be in supplying arms to individuals who could not provide for themselves. Id.
First, one could argue that the precedential significance of including individual mandates should be lessened or removed completely because the use of an individual mandate was indispensably tied to colonial militia service. Do to such indispensability, one could argue that the founders’ understanding of individual mandates was restricted to local governments. Conceivably, the individual mandate was indispensably tied to implementing militia power such that there was no real “understanding” of individual mandates. In that instance, one would argue that one cannot approve of something one does not understand or did not consider. Part III.B *supra* has already demonstrated that there were active considerations of individual mandates by early Americans as evidenced by colonial legislatures choosing to supply weapons in various ways, such as a public option.219

Moreover, influential founders knew of inadequate numbers of guns for the militias.220 The Western and Southern states and territories had extremely severe shortages of weapons in the early years of the Republic, and weapons were expensive when available.221 Those states petitioned Congress to buy weapons for the militia, or loan them weapons, however Congress repeatedly refused to take comprehensive action.222 There was also great resistance among individuals having to arm themselves.223 This evidence affirms an understanding of individual mandates because of their use was an affirmative choice in the face of these facts. Finally, this

---

219 *See, e.g.*, *supra* text accompanying notes 108, 115-17.

220 This led a number of members of Congress during the period between 1789 and 1807 to argue that the federal government should bear the cost of weapons, rather than individuals. Pitcavage, *supra* note 162.

221 *See id.*

222 *See id.*

critique only speaks to the applicability of an individual mandate to areas outside of militia powers. The militia laws and the 1792 Act, see Part III.B and IV.A supra, required individuals to engage in commerce and if some additional level of understanding is needed, that would not detract from the assertion that individual mandates are not foreign to congressional power under the Constitution. Because colonies provided for uses of the militia powers without individual mandates, there existed an understanding that the use of an individual mandate was an active choice.

Second, one could argue that practically speaking, there was an established colonial fear of disarmament224 which might justify an individual mandate without consideration of its constitutionality given their extended use in the militias. This would mean that the individual mandate’s acceptance would merely stem from enacting a federal law which embodied a longstanding tradition. This argument ignores that the founders and the Congresses of the time of the Constitution were implicitly committed to making changes to our government. It does not follow to allow an unconstitutional use of power to go uncontested, especially if the means chosen were known to be burdensome.225 Thus, an individual mandate was not just passed passively as an accepted practice without considering its constitutionality. Rather, individual mandates were understood by the founders and affirmatively chosen.

224 See infra Part V.B. Historian Mark Pitcavage, in his work for the Anti-Defamation League, attributes the decision that militiamen provide their own arms, rather than the government supplying them, was based on the fear the government would give arms to some and deny them to others and the sheer cost of arming so many militiamen. See Pitcavage, supra note 162.

225 In the wake of the 1792 Act, many poor militiamen complained because they had to buy expensive weapons, which were easy for the rich to afford. See Pitcavage, supra note 162.
D. Responding to Criticism: Implicit Approval of the 1792 Act Through Retention of the Individual Mandate

The Uniform Militia Act of 1792 lasted for over 110 years and was the only permanent legislation that provided for organizing the militias.\textsuperscript{226} While less powerful evidence than state implementation of the Act, maintaining the individual mandate over this time indicates its appropriate use. Some criticize the 1792 Act as being outdated or inoperable from inception, but these critiques do not detract from the use of the individual mandate. Critics could lead one to believe that the use of an individual mandate was meaningless and uninformative because the Act was crippled from inception. But the reasons critics do not value the Act stem from subsequent militia development in the United States and inadequacies in implementing the Act; dissatisfaction is based on reasons unrelated to the use of a federal individual mandate and does not impact the importance of using one.

Professor James Whisker criticized Congress for allowing a “wholly obsolete law . . . to remain the fundamental law on its subject” for so long.\textsuperscript{227} Whisker noted that there were various monetary and supplemental militia bills passed, but that at its essence, provisions like the requirements to own firelocks or for officers to carry a spontoon, were wholly outdated.\textsuperscript{228} Scholar Fredrick Wiener has criticized that the Act’s provisions were unworkable at adoption, and were worthless for generations before repeal.\textsuperscript{229} President Theodore Roosevelt commented

\begin{footnotesize}
\begin{enumerate}
\item Wiener, \emph{supra} note 164, at 187.
\item WHISKER, \emph{supra} note 39, at 356.
\item Id.
\item Wiener, \emph{supra} note 164, at 187.
\end{enumerate}
\end{footnotesize}
that it was absurd that the nation relied on a militia act that never worked satisfactorily in the beginning and that was perfectly obsolete well before his presidency.230

Moreover, during the 1792 Act’s tenure militia men in New York, New England, and other locales, had trouble arming themselves and Congress modified the Act to provide for loaning some arms in 1798.231 Congress later directed the president to sell or loan arms to volunteer companies and to sell thirty thousand firearms to the states if required.232

These critiques and these actions by Congress do not indicate that the use of an individual mandate is any less significant in proving that the Constitution provides Congress with the power to enact a federal individual mandate. Critiques that the 1792 Act was obsolete stem from the development of weapons, not the use of an individual mandate. Furthermore, a reason to describe the Act as having never worked satisfactory is the lack of an enforcement mechanism and the fact that it did little more than make a military census.233 The failure of Congress to effectively use its power to accomplish the Act’s ends does not affect the fact that a federal individual mandate was intended to be used; it only demonstrates the method used was unworkable. Criticisms of being outdated stem from political ideology that took hold a mere two decades after the ratification of the Constitution. American political leaders abandoned the original concept of the militia when “the ideological assumption of revolutionary republicanism would no longer play an important role in the debate over the republic’s military requirements.”234 By the end of the Civil War, states relied more heavily on select bodies of men

230 WHISKER, supra note 39, at 256.

231 MAHON, supra note 46, at 58.

232 Id.

233 Mullins, supra note 38, at 333.

234 See Fields & Hardy, supra note 39, at 42.
similar to what we now see as the National Guard. The fact that Congress attempted to supplement its original plan by buying weapons does not mean an individual mandate is inappropriate, but rather that under its militia power, it elected aid as the means for helping to accomplishing its overall goal. One needs to separate the practical considerations (that the individual mandate was largely unenforced by the federal government, that militiamen did not have the funds to supply their own weapons, and that progressions in military thought made this Act outdated) from the legal considerations (that for all its faults in implementation, the Act was a federal use of an individual mandate). Keeping the Act for over 110 years adds support to the appropriateness of an individual mandate. Weighing of the criticisms should only impact the practical considerations of this use of an individual mandate because the consideration that it was intended to be used is not undercut by failures in implementation.

Moreover, notwithstanding the lack of a constitutional challenge to the 1792 Act, we can say that individual mandates were an accepted exercise of federal power. Critics might argue that a current Congress may pass acts which it considers constitutional based on its understanding of the Constitution, but ultimately a challenge and a Supreme Court ruling is necessary to determine the final constitutionality of an act. But the Second Congress passing the Uniform Militia Act of 1792 is a different scenario than a current Congress trying to pass legislation. Congress today must try and pass laws that are constitutional based on what average citizens at the time of the Constitution reasonably felt was an appropriate use of constitutional power. If a contemporary Congress passed a bill that went unchallenged, there is a greater likelihood the bill would be unconstitutional than if the Congress in existence at the time of the Constitution were to pass a bill. The lack of direct constitutional challenge is less significant in

---

235 Wiener, supra note 164, at 191.
the case of the individual mandate of the 1792 Act because the Act was passed by many of the same individuals who drafted the Constitution, and consequently there is a lower probability that an act considered unconstitutional would be passed. This probability alone does not mean the use of the individual mandate in the 1792 Act was constitutional, but its constitutionality is hard to deny when Part IV.A and B *supra* are also considered. Finally, one might argue that slavery was originally included in the Constitution yet it is now universally accepted as unconstitutional. Acts like slavery are distinguishable because of the massive debates and compromises it took to keep slavery in the Constitution. Moreover if one presumes that every unchallenged act passed during the founding era has no indicia of constitutionality, then many foundations of our style of government are open to attack and will require a Supreme Court decision on the issue; this presumption is unworkable.

**V. Federal Individual Mandates: Restricted to the Militia Clause Powers? No Clear Answer**

Parts III and IV have provided affirmative answers to the first two questions presented in this Comment: (1) were individual mandates known to the founders? and (2) if an individual mandate was known, and if it was used at some level of government, did the founders understand the Constitution to provide Congress with the power to use a federal individual mandate? This Part examines the historical record of the Constitutional Convention and various state ratifying conventions to learn whether the federal individual mandate power is restricted to the Militia Clauses, which were the basis for passing the 1792 Act, or if it rested with Congress generally. Ultimately this evidence will show that the historical record is woefully insufficient to provide a clear answer.
There are three possible explanations for Congress’ power to implement an individual mandate. First, the power is indispensably tied to the Militia Clauses’ “arming” power such that when arming the militias, one available means is through individual mandates and that there is no other instance in which an individual mandate requiring economic purchase is appropriate. Second, the power for an individual mandate is distinct and only exists in specific clauses, one of which is Article one section eight clause sixteen of the Constitution, provided those clauses are detailed enough to provide for an individual mandate. Third, an individual mandate is a means available to Congress under its Necessary and Proper Clause powers, and the individual mandate present in the 1792 Act was an exercise of that power. The ambiguity, lack of consistency, and specific contradiction concerning the powers available to Congress through the word “arming” under the Militia Clauses that are described in this Part indicate that there was no clear idea whether or not an individual mandate was tied to the specificity of the word “arming.” Moreover, the options for arming present in colonial militia laws implies that there was more discretion on the part of the legislatures to choose specific means; indicating that the power to enact an individual mandate may lie with the legislature. These considerations should be kept in mind while reading this Part.

A. The Militia Clauses Debated: References to Individual Mandate Type Actions

The limited and conflicting nature of the debates over the Militia Clauses that actually touch upon uses of constitutional power related to individual mandates makes determining the scope of those powers difficult when using original meaning interpretation. The conflicting information only provides that some of the founders, some of the time, may have intended the Militia Clauses to include the power to enact an individual mandate. This uncertainty cannot be
the base of an original intent conclusion, let alone an original meaning interpretation of the Militia Clause powers.

Negotiations over the Militia Clauses began on August 8, 1787. Under the Militia Clauses, the federal government was given authority to provide for the “organizing, arming, and disciplining, [of] the Militia” while states were given authority to provide for the officering and training of the militias. On August 23, 1787, James Madison stated that “arming” did not extend to furnishing arms, nor did the term “disciplining” involve penalties and court martials for enforcing them. On that same day, Rufus King replied that arming meant to provide for the uniformity of arms, and also the authority to regulate the modes of furnishing, either by the militias themselves, the states, or the national treasury. King also said that disciplining laws would invariably involve penalties and all things necessary to enforce the penalties. He also said it would govern the manual exercise of evolutions. Oliver Ellsworth and Roger Sherman tried to amend the clauses to reflect their intent by changing the language: “To establish a uniformity of arms, exercise, and organization.” Meanwhile, Jonathan Dayton stood against “absolute uniformity.” Ellsworth also expressed concern that the term discipline “was of vast

---

237 U.S. CONST. art. 1, § 8, cl. 16.
238 See Wiener, supra note 164, at 214 n.189.
240 Wiener, supra note 164, at 214 n.189.
241 Hirsch, supra note 32, at 966.
242 Federal Convention, supra note 239.
243 Id. at 9.
extent and might be so expounded as to include all power on the subject.”244 Some convention members even argued that there should be forced purchase of arms, but the states would be required to make the purchases.245 Other discussions imply any power tied to arming was only a delegation of purchasing power to Congress. Patrick Henry, at the Virginia Convention on June 9, 1788, commented

We have not one fourth of the arms that would be sufficient to defend ourselves. The power of arming the militia, and the means of purchasing arms, are taken from the states by the paramount power of Congress. If Congress will not arm them, they will not be armed at all.246

But Henry’s understanding of the Militia Clauses is slightly ambiguous. Henry also argued that if this congressional power did not supplant state arming power, it would duplicate it.247 He noted that if arms were duplicated, how could the people be able to pay for double sets of arms?248 At first it is unclear if he was referring to a cost imposed by taxes or by an individual mandate. His subsequent comment that laws for many years, as described infra Part III.B,

244 Hirsch, supra note 32, at 966.

245 See Shalhope, supra note 85, at 40.

246 Virginia Convention, June 9, 1788, in THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS, 1787-1792, at 381 (David E. Young, ed., 2d ed. 1995). Henry’s voiced concerns were repetitious from statements he made on June 5, 1788, and seem to indicate that the militia powers extended to supplying arms to the militias not a federal individual mandate. See Virginia Convention, June 5, 1788, in THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS, 1787-1792, at 373 (David E. Young, ed., 2d ed. 1995). Some scholars have also viewed the language of clause sixteen as imposing an obligation to provide arms to the militias. Finkleman, supra note 22, 204.

247 Wills, supra note 168, at 67.

248 See id.
endeavored to have the militias completely armed\textsuperscript{249} implies that he understood Congress’s power to include an individual mandate because those militia laws contained individual mandates. So there is ambiguity and opacity even on an individual founder scale. The New York Convention’s debate considered adding an explicit amendment stating that Congress’s power under clause sixteen “should not be construed to extend further than to prescribe the mode or arming and disciplining the same.”\textsuperscript{250} This implies that even when limiting constitutional power, forced purchases were included as being constitutional under the Militia Clauses to prescribe how to arm.

A tangentially related debate about the rights of individuals to possess arms, under the Second Amendment, provides that there was no consensus regarding whether or not individuals should be required to bear arms in the militia.\textsuperscript{251} One representative declared: “As far as the whole body of the people are necessary to general defense, they ought to be armed; but the law ought not require more than is necessary; for that would be a just complaint.”\textsuperscript{252} But, another representative replied “the people of America would never consent to be deprived of the privilege of carrying arms. Though it may prove burdensome to some individuals to be obligated to arm themselves, yet it would not be so considered when the advantages were justly estimated.”\textsuperscript{253} Additionally, the House debates of August 20, 1789, were not concerned with the

\begin{footnotesize}
\textsuperscript{249} See id.

\textsuperscript{250} 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 406 (1901).

\textsuperscript{251} See Shalhope, supra note 85, at 40.

\textsuperscript{252} Id. (quoting Annals of Cong. 1806 (J. Gales ed., 1789)).

\textsuperscript{253} Id.
\end{footnotesize}
idea of a forced purchase when discussing amendments to the Constitution, but only the effects of a forced purchase on those with religious scruples.254

As one can see, the debates at the federal and state level about whether the Militia Clauses provide for a federal individual mandate are conflicting and inconsistent. Fortunately, the research presented in Parts III and IV provide for a federal individual mandate. These debates make it difficult, if not impossible, to engage in a meaningful original-meaning analysis of the scope of the Militia Clause powers as they relate to individual mandates. Thus, these debates that tangentially discuss individual mandates do not provide an answer as to whether the Militia Clauses provide for a federal individual mandate at all, let alone if a federal individual mandate is restricted to these clauses.

B. The Constitutional Convention and State Ratifying Conventions Focused on Historical Harms and Fears

This Part summarizes the content of a commanding majority of the Constitutional Convention and state ratifying convention debates concerning the Militia Clauses. The focus, as can be expected, was not on individual mandates but instead on abuse of the “calling forth” power, disarmament and neglect of the militias, and standing armies, specifically, and federalist-antifederalist disagreement over allocation of power, generally.255 These foci can mean one of

---

254 House of Representatives, Aug. 20, 1789, in The Origin of the Second Amendment: A Documentary History of the Bill of Rights 1787-1792, at 703 (David E. Young, ed., 2d ed. 1995) (“[W]hat justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them?”).

255 Hirsch, supra note 32, at 924 (discussing how the constitutional debates about the militia clauses focused almost exclusively on the extent of power the federal government and the states, respectively, would and should have over the militia).
two things. First, they can mean that these concerns were the more pressing concerns of the powers associated with the Militia Clauses. The implication of that conclusion would be that a federal individual mandate would be tied to the Militia Clauses because those powers were used to pass the 1792 Act, but the mandate was not adequately discussed because of these more pressing fears. Alternatively, these foci can describe the powers thought to emanate from the text of the Militia Clauses. The implication of this conclusion is twofold. First, the reasonable understanding of the powers of the Militia Clauses is bounded by these concerns and debates and did not include an individual mandate. Second, because Parts III and IV, supra, demonstrate the acceptance and approval of a federal individual mandate, the rationale for an individual mandate must lie elsewhere. This Comment argues that because originalism looks at what a reasonable person would have believed the Militia Clause powers to include, the lengthy discussions referenced in this Part are an appropriate proxy to conclude that the second implication is correct. Thus, because the record fails to provide a definitive answer and because lengthy debates are used as a proxy for the bounds of the Militia Clause powers, this Comment explains in Part VI, infra, how the power for a federal individual mandate should lie with Congress generally under its Necessary and Proper Clause powers.

i. The Constitutional Convention

During the Constitutional Convention, the framers were faced with an Articles of Confederation that made it difficult to collect and kept the militias on the field. Concern of abuse of the power to call forth the militia is evidenced by Hamilton’s arguments in The Federalist No. 29 in which he tried to convince readers that a militia needed more than a single

---

256 The Records of the Federal Convention, supra note 236, at 25.
day’s or week’s practice. Also, an author writing under the pseudonym Centinel III in Philadelphia’s *Independent Gazetteer* on November 8, 1787, argued that the arming, organizing, and disciplining clause

will subject the citizens of [the] states to the most arbitrary military discipline, even death may be inflicted on the disobedient; in the character of militia, you maybe be dragged from your families and homes to any part of the continent and as militia you may be made the unwilling instruments of oppression, under the direction of the government; there is no exemption upon account of conscientious scruples of bearing arms; not equivalent to be received in lieu of personal services. The militia of Pennsylvania may be marched to Georgia or New Hampshire however incompatible with their interests or consciences;—in short they may be made as meer machines as Prussian soldiers.

Finally, Alan Hirsch has found that federal control of the militia elicited fears that militias would also be called forth and sent far away in order to harass the militiamen themselves or to exercise routine police powers. These are the general arguments that appeared time and time again during the Constitutional Convention and state ratifying conventions that the Militia Clauses would provide for abuse of the militias.

An unorganized militia serving as a source of safety is not a common notion today, but during ratification, there were legitimate concerns that without a militia under citizen control, it would fall into disrepair or be disarmed as a first step to an oppressive federal government.

---

257 *The Federalist No. 29* (Hamilton).


260 Romano, *supra* note 48, at 235, 238.
Antifederalists feared congressional power over the militias was simply too extensive.\textsuperscript{261} They also believed that while a force of men aged sixteen to forty-five could be an effective military force to defend the country,\textsuperscript{262} the practical effect of the Militia Clause powers was to allow the new government to destroy the militia if it so desired and to do so constitutionally.\textsuperscript{263} The power to arm could be misconstrued as intending to disarm the militias, which in actuality was like disarming the entire population.\textsuperscript{264} John DeWitt voiced the fear that instead of forcing militiamen to turn in their arms, the federal government would just neglect to provide arms.\textsuperscript{265} Without a militia to protect them, the states were said to be at the mercy of a strong government that would consolidate all power.\textsuperscript{266}

As an aside, this fear also implies that the bounds of the Militia Clause powers only included Congress’s power to provide arms. One of the reasons antifederalists pushed for the Bill of Rights protections of the Second Amendment was to constitutionally secure an armed populace.\textsuperscript{267} Federalists tried to ease the fears of antifederalists with a mantra that there would be an armed populace to protect against tyranny, but the antifederalist mantra that disarmament was assured was reinforced by repeated federalist rejection of the Bill of Rights, leading to

\begin{itemize}
\item \textsuperscript{261} See \textit{The Origin of the Second Amendment}, \textit{supra} note 80, at xlv.
\item \textsuperscript{262} See \textit{id.} at xlvii.
\item \textsuperscript{263} See \textit{id.} Antifederalists feared that a strong federal government would be oppressive and that for a standing army to rule, the people must be disarmed; as they were in many European kingdoms. See Noah Webster, \textit{A Citizen of America}, Oct. 10, 1787, \textit{in The Origin of the Second Amendment: A Documentary History of the Bill of Rights}, 1787-1792, at 41 (David E. Young, ed., 2d ed. 1995).
\item \textsuperscript{264} See \textit{The Origin of the Second Amendment}, \textit{supra} note 80, at xlviii.
\item \textsuperscript{265} See Finkleman, \textit{supra} note 223, at 225.
\item \textsuperscript{266} CORNELL, \textit{supra} note 181, at 46.
\item \textsuperscript{267} \textit{The Founders’ View}, \textit{supra} note 99, at 93.
\end{itemize}
extensive debate. Antifederalists even proposed an amendment to the Militia Clauses that each state would have the power to provide for organizing, arming, and disciplining its own militia whenever Congress omitted or neglected to provide the same.

Another focus of Americans during the Convention was the role of a standing army. Antifederalists feared that the federal government’s ability to nationalize the militia was the first step to military dictatorship, an idea supported by Washington’s advocacy for stronger national control over the militias. No matter who held control of a standing army, there existed fears that the very existence of a standing army provided the opportunity for social corruption through professionalization. Joel Barlow denounced this idea, prominent in European nations, when he argued that “money is required to levy armies, and armies to levy money; and foreign wars are introduced as the pretended occupation for both.” Antifederalists feared that Congress’s power to call forth the militias to execute the laws of the union, suppress insurrections, and repel invasions looked too much like the militia proposed by Baron Von Steuben, which was meant and intended to be a standing army. Antifederalists criticized the proposed constitution for its unlimited authority to raise and support armies, to which federalists neither denied nor agreed,

268 Id. at 93, 94, 125.
269 Id. at 138.
270 See Finkleman, supra note 223, at 223.
272 See id.
but rather countered that the risks of a federal standing army would be offset by a militia of nearly five hundred thousand men whose officers were chosen by the states.\textsuperscript{274} The reservation of the officering and training powers to the states was a compromise given in response to antifederalist desires that the militia be the “bulwark” of democracy against a standing army and oppressive government.\textsuperscript{275}

When engaging in an original meaning interpretation, these major areas of concern and debate in the historical records of the Constitutional Convention imply that these were the reasonable interpretations of the Militia Clause powers; powers that did not seem to include a federal individual mandate, much less restrict its use. This interpretation is open to attack because these were the statements of select individuals, not the populace as a whole, so learning the understanding of the Militia Clause powers by examining these debates may be like an original intent analysis: essentially channeling the framers. Thus, in order to argue the negative implication that the topics not covered in the debates were not powers emanating from the Militia Clauses, this Comment employs an original meaning analysis of the debates in the state ratification conventions to serve as a proxy for what was understood at a local level.

\textbf{ii. The State Ratifying Conventions}

Between Massachusetts, South Carolina, New Hampshire, Virginia, and New York, about one hundred separate proposed amendments were attached to their ratification documents.\textsuperscript{276}

\textsuperscript{274} \textit{See} Fields & Hardy, \textit{supra} note 39, at 33.  
\textsuperscript{275} \textit{See} Mullins, \textit{supra} note 38, at 344. In fact, many Convention members favored militia strictly under federal control, but others recognized many states would not consent to this proposition. \textit{See} Brown, \textit{supra} note 91, at 25.  
\textsuperscript{276} \textit{See} Finkleman, \textit{supra} note 223, at 200.
In Pennsylvania, the antifederalist minority was very vocal. In their dissent published in the *Philadelphia Packet* on December 18, 1787, they argued that the personal liberty of every man between sixteen and sixty might be destroyed by Congress’s organizing power.\(^{277}\) They were concerned with disciplining militiamen because they may be subject to corporal punishment of the most humiliating and disgraceful kind and to death itself by the sentence of a court martial.\(^{278}\) They also asserted that Congress had no power to disarm the militia, that the weapons were the birthright of an American.\(^{279}\) Like the debates in the Constitutional Convention, the Pennsylvania Minority worried about compelling service of those with religious scruples, marching the militias over every extremity of the state without consulting the state legislature, and a lack of protection for state governments.\(^{280}\) The Minority also expressed concerns that the federal government would pass laws disarming the people or any of them and specifically mentioned two times that the right to bear arms for defense or killing game not be infringed unless the individual committed a crime.\(^{281}\) John Smilie, concerned with disarmament and standing armies, proposed an amendment to the Constitution that no law shall


\(^{278}\) *Id.*


\(^{281}\) Finkleman, *supra* note 223, at 208.

\(^{282}\) *CORNELL, supra* note 181, at 51.
disarm unless there was public injury, and that there should be no standing army.\(^{283}\) On the last day of the Pennsylvania Convention, Robert Whitehill presented several petitions from Cumberland County that would amend Congressional power by requiring state consent to march militias outside of their respective states and by leaving the power to arm, organize, and discipline the militias with the states.\(^{284}\) The petitions would resolve Smilie’s concerns and only leave the manner of disciplining under federal control.\(^{285}\) Even after Pennsylvania ratified the Constitution, minority members under the pseudonyms “Centinel III” and “Old Militia Officer of 1776,” published papers criticizing the select militia and warning that an order given in early 1788, which called for the publicly owned arms from the militia, amounted to a temporary disarming of the people.\(^{286}\) These concerns mirror the Constitutional Convention and imply the bounds of the powers for the Militia Clauses.

In Virginia, George Mason also feared Congress’s power to destroy the militia by sending them across the country or failing to arm or discipline them.\(^{287}\) However, he did feel that there should be some federal power, just not the power to abolish.\(^{288}\) Mason thought that with his proposed amendment he would only give necessary powers to the government.\(^{289}\)

Because members of the Constitutional Convention tended to be vocal members at the state...

\(^{283}\) Whisker, supra note 39, at 58.

\(^{284}\) The Founders’ View, supra note 99, at 101.

\(^{285}\) Id.

\(^{286}\) Id. at 103.

\(^{287}\) Virginia Convention, June 14, 1788, in The Origin of the Second Amendment: A Documentary History of the Bill of Rights, 1787-1792, at 400 (David E. Young, ed., 2d ed. 1995).

\(^{288}\) Id. at 401.

\(^{289}\) Id. at 402.
conventions, the Virginia debates are also conflicting. Mason felt the power of arming was a concurrent power, not exclusive power,\textsuperscript{290} while Henry believed that the arming power in Congress would lead to a “precarious” dependence on others and that the power should not lay with Congress.\textsuperscript{291} John Randolph wrote to St. George Tucker that a well-armed militia controlled by the states was necessary to provide the states the ultimate check on potential federal despotism,\textsuperscript{292} demonstrating a focus on protection from the federal government, but failing to show specifically what powers were to be feared.

The New York and Maryland convention expressed concerns similar to those at the Constitutional Convention. New Yorkers felt that there were many stipulations necessary to render a militia safe.\textsuperscript{293} The powers to arm, appoint officers, and command services were considered best in the hands of the federal and state governments concurrently.\textsuperscript{294} The concerns about a select militia were also present in New York.\textsuperscript{295} In Maryland, an amendment proposed, although never accepted, required state consent to march militiamen beyond the borders of the

\begin{footnotes}
\item[290] \textit{Id.} at 403.
\item[291] \textit{Id.} at 408.
\item[292] \textsc{Cornell}, supra note 181, at 63 n.38.
\item[293] \textit{Federal Farmer}, May 1788, in \textsc{The Origin of the Second Amendment: A Documentary History of the Bill of Rights}, 1787-1792, at 354 (David E. Young, ed., 2d ed. 1995).
\item[294] \textit{Id.}
\item[295] \textit{Id.}
\end{footnotes}
state. Maryland noted it had no objection to the calling forth power and only wanted to provide a means for curbing abuse, but did object to a standing army.

Ratifying convention debates demonstrate that the concerns about various actions understood to be within federal power at the state level mirrored the Constitutional Convention. These concerns provide that the foci at the state and federal levels were probably on the powers that a reasonable person at the time would think emanated from the Militia Clauses. The foci of the arming debates at the local level could provide for the plain meaning of the Militia Clauses’ power, which would be noninclusive of an individual mandate because concerns were about the power to disarm. As a result, the empirical conclusions from Part III and IV, supra, that federal individual mandates were considered by the founders and condoned by them and the population at large too, indicate that the accepted individual mandate power would fall with Congress generally. Part VI advances the argument that because the record is insufficient and because it may be inferred from the evidence that the power of an individual mandate lies with Congress generally, then to the extent the power exists, it should be a Necessary and Proper Clause power.

VI. Individual Mandates as a Necessary and Proper Clause Power

This Comment provides evidence that individual mandates were understood by the founders and that a federal individual mandate does not offend the Constitution at least when used as part of the Militia Clause powers. This Part relies on the fact that Part V explains why

---


298 See Cress, supra note 79, at 55. Delaware and North Carolina adopted declarations warning of the dangers of standing armies as well. Id.
the answer to the third question presented\textsuperscript{299} is inconclusive. It also relies on the common sense argument that just because a federal individual mandate is an acceptable use of the Militia Clause powers does not mean it cannot be used elsewhere or does not exist elsewhere. This Part argues that using a federal individual mandate is a proper use of the Necessary and Proper Clause powers under \textit{McCulloch v. Maryland}\textsuperscript{300} and \textit{United States v. Comstock}.\textsuperscript{301}

\textbf{A. McCulloch v. Maryland}

\textit{McCulloch v. Maryland} is most famous for Chief Justice John Marshall’s in depth and scope defining analysis of the implied powers granted to Congress by the Constitution and employed through the Necessary and Proper Clause.\textsuperscript{302} In \textit{McCulloch}, the Court faced a Maryland law which impeded the operation of a branch of the Second Bank of the United States through a tax.\textsuperscript{303} Marshall began his opinion by addressing the threshold question as to whether or not Congress could incorporate a bank.\textsuperscript{304} The Court asserted that there is no enumerated power that establishes a bank and that there is no clause that excludes incidental or implied powers, nor requires that every granted power be expressly and minutely described.\textsuperscript{305} The Court then acknowledged that there is no explicit term for creation of a bank within the Constitution, but that the Constitution grants, inter alia, great powers to lay and collect taxes and

\begin{footnotesize}
\begin{enumerate}
\item[299] Third, if a federal individual mandate was constitutional, was it only constitutional when used in connection with the Militia Clause powers used to pass the 1792 Act?
\item[300] 17 U.S. (4 Wheat.) 316 (1819).
\item[301] 130 S. Ct. 1949 (2010).
\item[302] U.S. CONST. art. 1, § 8, cl. 18.
\item[304] \textit{Id.} at 400.
\item[305] \textit{Id.} at 406.
\end{enumerate}
\end{footnotesize}
regulate commerce.\textsuperscript{306} It then follows, according to the Court, that a government with such ample powers must also be entrusted with ample means for their execution.\textsuperscript{307} Moreover, the Court reasoned that the Constitution does not attempt to enumerate the means nor withhold the most appropriate means.\textsuperscript{308} The Court continued by asserting that reason would find a government with a right to act and with a duty of performing that act, must be allowed to select the means.\textsuperscript{309} The Court held that in addition to the enumerated powers, Congress can make “all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers of the Constitution.”\textsuperscript{310}

The \textit{McCulloch} Court then went on to describe what it was to be necessary and proper. It stated that Congress does not have the power to make all laws with a relation to the enumerated powers, but rather those that are necessary and proper to allow for execution of the enumerated powers.\textsuperscript{311} Necessary was not intended to mean that one thing is necessary if it cannot exist without the other (absolute physical necessity), but rather to mean “convenient, or useful, or essential to another.”\textsuperscript{312} According to the Court, “[t]o employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.”\textsuperscript{313} The

\textsuperscript{306} \textit{Id.} at 407.

\textsuperscript{307} \textit{Id.} at 408.

\textsuperscript{308} \textit{Id.}

\textsuperscript{309} \textit{Id.} at 408-09.

\textsuperscript{310} \textit{Id.} at 411-12.

\textsuperscript{311} \textit{Id.} at 413.

\textsuperscript{312} \textit{Id.}

\textsuperscript{313} \textit{Id.} at 413-14.
Court noted that the Constitution is not a legal code, prescribing the means available to the government for all future time in the execution of its powers.\textsuperscript{314} The Court reasoned further that if necessary was to mean indispensably necessary then the word proper, in modifying a “rigorous meaning,” would deviate from the usual course of the human mind.\textsuperscript{315} Consequently, the Court held “[l]et the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the [C]onstitution, are constitutional” in describing the scope of the Necessary and Proper Clause powers.\textsuperscript{316} Ultimately this definition provided for the conclusion that Congress had the implied power to create a bank to effectuate an enumerated power.

\textit{McCulloch} provides a framework that is somewhat expansive (essentially that a means that is within the Constitution needs to be plainly adapted to an enumerated ends) and the most recent Supreme Court decision concerning the scope of the Necessary and Proper Clause, \textit{United States v. Comstock}, principally affirms this framework.

\textbf{B. United States v. Comstock}

The \textit{Comstock}\textsuperscript{317} Court reviewed the constitutionality of a federal act that required civil confinement of certain individuals already in federal custody passed under the Commerce Clause.\textsuperscript{318} The Court was presented with a similar question to the one it was presented with in \textit{McCulloch}: whether through its implied powers, Congress had the authority to enact this federal

\textsuperscript{314} Id. at 415.

\textsuperscript{315} Id. at 419.

\textsuperscript{316} Id. at 421.

\textsuperscript{317} 130 S. Ct. 1949 (2010).

\textsuperscript{318} Id. at 1954.
civil-confinement program.\textsuperscript{319} The Court began by emphasizing that all laws passed by Congress must be based on one or more of the enumerated powers, although there are ample means for the execution.\textsuperscript{320} Just like the \textit{McCulloch} Court, the \textit{Comstock} Court asserted that there is broad authority to enact laws that are “convenient, or useful or conducive to the authority’s beneficial exercise.”\textsuperscript{321} The Court affirmed the scope of the Necessary and Proper Clause defined in \textit{McCulloch} and that the word necessary does not mean absolutely necessary.\textsuperscript{322} It then elucidated that when determining whether the Necessary and Proper Clause provides the authority for Congress to enact a means tied to an enumerated end, courts must “look to see whether the [enactment] constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”\textsuperscript{323} The Court reiterated that the means must not be prohibited by the Constitution.\textsuperscript{324} The Court said the only relevant inquiry before it was “whether the means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power or under other powers that the Constitution grants Congress the authority to implement?”\textsuperscript{325} The Court then held that the law at hand was “reasonably adapted” to Congress’s power as a federal custodian and how the closeness of the relationship between the means adopted and the ends to be attained are matters for Congress to determine.\textsuperscript{326}

\textsuperscript{319} \textit{Id.} at 1956.

\textsuperscript{320} \textit{Id.}

\textsuperscript{321} \textit{Id.} (internal quotations and citations omitted).

\textsuperscript{322} \textit{Id.}

\textsuperscript{323} \textit{Id.} (citing Sabri v. United States, 541 U.S. 600, 605 (2004)).

\textsuperscript{324} \textit{Id.} at 1957.

\textsuperscript{325} \textit{Id.} (internal quotations omitted).

\textsuperscript{326} \textit{Id.} at 1957, 1961.
Notwithstanding this congressional determination, the Court reiterated that the means-ends relationship cannot pile inference upon inference although the Necessary and Proper Clause power permits more than a single inferential step between the enumerated power and the act of Congress.\(^{327}\) Lastly, when acknowledging the broad scope of the Necessary and Proper Clause powers which provided for the civil commitment statute the Court explained:

> The Federal Government undertakes activities today that would be unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role.\(^{328}\)

**C. Federal Individual Mandates as a Necessary and Proper Clause Power**

These two Supreme Court cases provide for Congress to use its implied powers under the Necessary and Proper Clause to enact means that are legitimate, meaning within the Constitution, and appropriate, meaning plainly or reasonably adapted to an enumerated power within the Constitution. Moreover, the means cannot be prohibited, but must be consistent with the spirit of the Constitution. Part III of this Comment shows that an individual mandate was understood by the founders. Part IV demonstrates that a federal individual mandate is not prohibited, but rather consistent with the powers of the federal government under the Constitution. It shows that if the enumerated power is the power over the militias, a federal

---

\(^{327}\) *Id.* at 1963-64.

\(^{328}\) *Id.* at 1965 (quoting New York v. United States, 505 U.S. 144, 157 (1992)).
individual mandate is a means reasonably adapted to effectuate that power. Given the historical record in Part V, it is unclear whether the federal individual mandate power was restricted to the Militia Clauses. I argue that because (1) the debates in Part V can be a proxy for the original meaning of the militia powers, (2) the existence of a federal individual mandate within the militia powers does not mean it cannot be used elsewhere or does not exist elsewhere, and (3) current Supreme Court precedent in *McCulloch* and *Comstock* that a federal individual mandate is best explained as an implied power vested in Congress that is limited in use by being plainly or reasonably adapted to an enumerated power.

At the very least, this Comment provides that a federal individual mandate to effectuate the Militia Clauses shares many similarities to a Necessary and Proper Clause power. First, as seen in the varying militia laws in Part III.B and Congressional actions in Part IV.D, an individual mandate was not indispensably necessary to effectuate the Militia Clause powers, but rather was a useful, convenient, or essential means that was chosen more often than not. Second, a federal individual mandate is not prohibited under the Constitution because Part IV.A and B show it was supported and bolstered by various state actors. Third, a federal individual mandate is not an enumerated power under the Constitution. Finally, a federal individual mandate, in at least some instances, is a means that is not too attenuated from the ends it hopes to effectuate.

One last point is in response to what some critics may say about the dicta cited at the end of Part VI.B. Critics may argue that although the federal government will have to do things unimaginable to the founders, Congress cannot usurp the powers needed to do these unimaginable things; rather, the Constitution should be amended through the procedure outlined within the Constitution to allow Congress to undertake these unimaginable acts. To that, this Comment provides that a federal individual mandate is not one of these acts that the Founders
never considered and would not necessarily need a constitutional amendment to be used to effectuate an enumerated power. For these above named reasons, a federal individual mandate may more appropriately lie within the Necessary and Proper Clause powers than as a means restricted to the Militia Clauses.

Conclusion

The determinations that an individual mandate is not a contemporary invention and that the Constitution allows Congress to enact at least one federal individual mandate are important from a historical perspective. This evidence provides a fuller picture of the founding of our nation and the bounds our forefathers initially placed on the federal government. It demonstrates that the ACA challengers are mistaken in asserting that there is no authority under the Constitution to have an individual mandate with an economic aspect. Despite this contribution, my hope is that others may use this research for a deeper understanding of the bounds of power initially provided under the Constitution. While the impetus for this Comment’s research has its roots in the ACA debate, the idea that a federal individual mandate may not be tied to any particular constitutional provision and therefore could be a means available for those hoping to effectuate an enumerated power, is important in and of itself as far as future legislation is concerned. So long as Congress acts to effectuate an enumerated power, an individual mandate involving forced economic purchase can be an appropriate means.

Speaking now specifically about the ACA debate, a federal individual mandate as an appropriate means to effectuate an enumerated ends is an important step towards finding the ACA constitutional. Indeed, without the propriety of a federal individual mandate, the Necessary and Proper Clause would not allow for the Minimum Essential Coverage Provision. A common assertion of the challengers to the ACA is that the Commerce Clause (the
Constitutional provision used to enact the ACA) only allows for regulation of activities that are economic and that the decision to buy health insurance is inactivity and does not fall within the reach of the Commerce Clause. While this Comment may help illustrate the appropriateness of a federal individual mandate, the ultimate success of the ACA will likely turn upon whether or not the decision to purchase health insurance is economic activity and as such could be regulated by the Commerce Clause. If it is concluded that the decision to buy health insurance is not an economic activity that can be regulated by the Commerce Clause, the Commerce Clause cannot be the enumerated power hook needed under the Necessary and Proper Clause. The practical result would be that no means under the Necessary and Proper Clause

329 Putting aside the requirement that the activity be interstate.


331 Should the purchase of healthcare be determined to fall outside the bounds of the Commerce Clause, the implication of this Comment is that Congress could use another enumerated power to effectuate universal healthcare. For example, Congress could pass a universal tax on citizens and then offer a tax credit of the entire value of the tax for individuals who purchase healthcare. This could be another way to utilize an individual mandate with another enumerated power to accomplish the same ends.
could be used to regulate the decision to buy health insurance if the enumerated power is the Commerce Clause. Nonetheless, this Comment provides the ACA with a second chance, if necessary, because if the Supreme Court determines that purchasing healthcare is not within the shadow of the Commerce Clause, an individual mandate tied to a different enumerated power would still be available to Congress.