Individual Mandates: A Founder-Approved Means Under the Necessary and Proper Clause

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Abstract

The Affordable Health Care Act’s ("ACA") individual mandate requiring most Americans to purchase healthcare 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 an individual to make a purchase from a private entity and that the ACA’s requirement that
an individual do so is unconstitutional. This Comment takes issue with those asserting that an “individual mandate” is a contemporary invention and unconstitutional. As a matter of fact, there is at least one historical example where the federal government has forced individuals to make purchases from private entities. That individual mandate existed as part of the Uniform Militia Act of 1792. This Comment examines colonial militia laws and the passing of the Uniform Militia Act to argue that the founders understood individual mandates and conceptualized their implementation. This Comment also examines the debates of the Constitutional Convention to show that an individual mandate is a power wielded by Congress and is not an infringement on States rights. Next, this Comment 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 of Congress to pass an individual mandate is not limited to the militia powers, but is better characterized as a founder-approved means under the Necessary and Proper Clause. Finally, this Comment concludes that the ACA’s use of an individual mandate to effectuate Congress’s Commerce Clause powers is constitutional.

**Introduction**

One might be interested to know that the federal government can require an individual to take action, and not just any action. As a matter of fact, the federal government can require an individual to purchase a good from a private entity. Interestingly enough, the federal government, possibly without knowing the existence or extent of this ability, used it when the U.S. Congress passed the Patent Protection and Affordable Health Care Act¹ (ACA), also known

as “Obamacare,”\textsuperscript{2} in 2010. The ACA is a controversial piece of legislation that has faced fervent debate and challenge even before it was passed.\textsuperscript{3} The source of the ACA debate is section 1501, commonly known as the “Minimum Essential Coverage Provision.”\textsuperscript{4} The provision 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.”\textsuperscript{5}

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. ACA challengers essentially argue that Congress cannot require individuals to buy products or services from private entities because Congress cannot require that someone engage in economic activity.\textsuperscript{6} Challengers further assert that the founders never considered using individual mandates, individual mandates are unconstitutional, and consequently, Congress fundamentally


\textsuperscript{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, \textit{Years of Wrangling Lie Ahead for Health Care Law}, N.Y. TIMES, Dec. 14, 2010, at A24.


\textsuperscript{5} 26 U.S.C. § 5000A(a) (2010). Importantly, if someone fails to meet this required coverage, they will be required to pay a tax penalty, 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).

lacks the power to pass the Minimum Essential Coverage Provision.\textsuperscript{7} But the ACA challengers overlook key legislation, specifically the Uniform Militia Act of 1792 (the 1792 Act).\textsuperscript{8}

Indeed, the 1792 Act required individuals to buy a product from a private entity, similar to the Obamacare legislation. This Comment bases its conclusions about individual mandates on empirical historical research concerning the 1792 Act along with other militia laws. It concludes that the founders knew what an individual mandate was. Moreover, the founders considered the use of individual mandates by Congress. And most importantly, the founders decided that it was constitutional for Congress to use an individual mandate.

\textsuperscript{7} Challengers cite a number of different sources for their argument. See, e.g., Cong. Budget Office, \textit{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."). \textit{But see infra} Part III.A 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). On a related note, Massachusetts passed a health care bill in 2006 that is similar to Obamacare and that has an individual mandate. The law accomplished what Obamacare set out to accomplish: providing universal health care without undermining a comprehensive regulatory scheme that requires insurance companies to provide health care to individuals with pre-existing conditions. See Ian Millhiser, \textit{Delaying the Inevitable: Cuccinelli’s 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). This law is important for ACA supporters because it bolsters the argument that an individual mandate will effectuate an enumerated power like the Commerce Clause.

\textsuperscript{8} Ch. 3, §§ 1, 4, 1 Stat. 271, 271-74, \textit{repealed by} Dick Act, Ch. 196, 32 Stat. 775 (1903). The Uniform Militia Act of 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. \textit{See Id.; see also} Winkler, \textit{supra} note 6. This was essentially the first individual mandate.
The federal government can “make all [l]aws which shall be necessary and proper” for effectuating the powers enumerated within the U.S. Constitution under Article 1, section 8, clause 18. This clause has been interpreted to give the government the power to use “means” that are appropriate and plainly adapted to effectuate these enumerated ends.\(^9\) Specifically, the constitutional use of individual mandates by Congress is best explained as a “means” under the Necessary and Proper Clause. Consequently, the Obamacare individual mandate, like others, is a constitutional means to an end under the Necessary and Proper Clause. Concluding that individual mandates are a “means” that Congress can use to effectuate an enumerated power is key to the ACA debate. Congress used the Commerce Clause to pass the ACA, and the Necessary and Proper Clause allows for use of an individual mandate to effectuate enumerated constitutional powers such as the Commerce Clause. Based on these conclusions, the ACA should be found constitutional.

This Comment progresses in six Parts. Part I briefly discusses originalism as a method of constitutional interpretation. Part II is a definitional section about militias that demonstrates that the 1792 Act affected many U.S. citizens, just like Obamacare. Part III discusses militia history and examines two types of militia laws to show that the founders knew what an individual mandate was. Part IV chronicles the 1792 Act’s passage and implementation and concludes that the founders and founding generation believed the Constitution allows Congress to use an individual mandate. Part V uses the records of the Constitutional Convention and various state ratifying conventions to conclude that Congress’s use of an individual mandate is not tied to the

specific clauses used to pass the 1792 Act, the Militia Clauses.\textsuperscript{10} Part VI analyzes \textit{McCulloch v. Maryland}\textsuperscript{11} and \textit{United States v. Comstock}\textsuperscript{12} and argues that an individual mandate is best accounted for as a “means” under the Necessary and Proper Clause and can be used by Congress to effectuate enumerated powers in the Constitution.

\section{Originalism: A Method of Constitutional Interpretation}

There are two major schools of thought for constitutional interpretation: originalism and living constitutionalism. Originalists are among the harshest critics of the ACA and this Part explains originalism’s tenants. Originalists tend to have more limited views of the government’s powers and, as a method of constitutional interpretation, the philosophy has enjoyed varying degrees of popularity.\textsuperscript{13} However, these tenants will be useful and necessary to determine that the founders understood what an individual mandate was and felt that Congress could use individual mandates as constitutional means to ends enumerated within the Constitution. This

\textsuperscript{10} 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”).

\textsuperscript{11} 17 U.S. (4 Wheat.) 316 (1819).

\textsuperscript{12} 130 S. Ct. 1949 (2010).

Comment uses originalism as its preferred means of constitutional interpretation. Applying originalist techniques to the 1792 Act, among other militia laws, shows how the founders used individual mandates to effectuate the Militia Clause powers.

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.”¹⁴ This focus has use beyond text by distilling into the idea that someone engaging in originalism must look to the context¹⁵ to see what powers a reasonable person at the time the law was enacted would consider appropriate. Originalists caution that there is a difference between searching for original meaning as opposed to original intent.¹⁶ 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.¹⁷ Original meaning interpretation allows for a view of powers available to the founding generation that may be more complete, requiring a


¹⁵ 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 contemporary conditions. See Alan Hirsch, The Militia Clauses of the Constitution and the National Guard, 56 U. CIN. L. REV. 919, 942 n.121 (1988). As such, the meaning of a specific constitutional provision can be gleaned from the immediate historical context. See Saul Cornell, The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History, 17 STAN. L. & POL’Y REV. 571, 576 (2006).

¹⁶ See Barnett, supra note 14.

¹⁷ Id. at 241.
more fact-specific and refutable inquiry than original intent interpretation.\textsuperscript{18} 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.\textsuperscript{19} Thus, originalism has varying strains and one must remain cognizant of the method employed.\textsuperscript{20} This Comment engages in original-meaning originalism and makes the case that the founding generation understood what an individual mandate was and believed that an individual mandate could be used as means under the Necessary and Proper Clause. If individual mandates are an approved means under the Necessary and Proper Clause, Obamacare supporters have a strong argument that, just as an individual mandate was used to effectuate the Militia Clause power in 1792, an individual mandate can be used to effectuate the Commerce Clause powers today.

\textbf{II. What is Meant by “Militia”?}

Just as Obamacare is applicable to all citizens unless an individual falls under a narrow class of exceptions,\textsuperscript{21} militia laws of the colonies and the 1792 Act applied to most of the adult

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\textsuperscript{18} \textit{Id.}
\textsuperscript{20} Indeed, most originalists have gravitated toward original meaning interpretation. \textit{See} Cornell, \textit{supra} note 15, at 575.
population. It is important to note a distinction in the definition of the word “militia,” however, which shows just how many people the colonial laws of Part III and the 1792 Act of Part IV affected. This distinction draws an additional parallel between Obamacare’s individual mandate and that of the 1792 Act.

There is a significant difference between an “organized” militia and an “unorganized” militia. In the late 18th Century, “Unorganized” militias generally consisted of all able-bodied men in the nation between the ages of seventeen and forty-five, while “organized” militias were regularly drilling units of armed citizens.\(^{22}\) 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, were similar to what the National Guard is today\(^{23}\) a specific and narrow group of individuals. Some scholars have distinguished the two militias using the terms “enrolled” or “unenrolled”\(^{24}\) militias, but even those terms can be confusing given developments over time in the militias. An “enrolled” militia was 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.\(^{25}\) The

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\(^{23}\) 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”).

\(^{24}\) WHISKER, supra note 23.

\(^{25}\) Fields & Hardy, supra note 23.
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. The militia regulated by the Uniform Militia Act of 1792, despite having “enrollment” based on registration of one’s full name and address, was considered an “unorganized/unenrolled” militia. Because of the changes in what is considered 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 before it targeted the levée en masse or a military organization made of the entire nation, not a select or advanced group. This militia is the elemental and basic citizen soldier, not a well-trained and select group that founders feared. Additionally, both the “organized” and “unorganized” militia are distinguished from a regular army that consists of professional soldiers. However, “organized” militias breed 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 of and laws affecting

\[26\] Id. at 8.

\[27\] Id. at 9.

\[28\] See infra Part V.A 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.

\[29\] Hirsch, supra note 15, at 921.
the “unorganized” militia, which existed in colonial military custom\(^{30}\) long before our Constitution. There are two key reasons why it is important to understand that the militia was a general and simple institution that regulated most of the population, rather than the select, combined state and federal institution that it has become in modern times.\(^{31}\) First, applying an individual mandate to most of the population shows that the founders understood an individual mandate to be a tool with widespread application. Second, it undercuts the ACA challenger argument that Obamacare and its individual mandate are unlike any previous law and congressional act. Instead, Obamacare and its individual mandate share key attributes with the framer-approved 1792 Act: congressional use and national application.

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

A. The Colonial Militias: Providing Militias With Arms Through Two Types of “Means” Demonstrates That the Founders Knew What an Individual Mandate Was

This Part categorizes militia laws that were passed during the colonial period to show that the founders knew what an individual mandate was because they affirmatively chose to use them over another option.\(^{32}\) It groups the two main types of militia laws, those with and those without

\(^{30}\) See Mullins, supra note 22, at 330; see also John K. Mahon, The History of the Militia and the National Guard: The Machmillan Wars of the United States 9-13 (1983); W. Riker, Soldiers of the States: The Role of the National Guard in American Democracy 1-10 (1975).

\(^{31}\) See Mullins, supra note 22, at 330.

\(^{32}\) Various scholars have researched how militias had an impact on the colonial experience and psyche. See, e.g., Dan Higginbotham, The Federalized Militia Debate: A Neglected Aspect of Second Amendment Scholarship, 55 WM & MARY Q., Jan. 1998, at 39 (describing how the militia was deeply rooted in American political culture and how
an individual mandate, and also gives some quintessential examples of both. It then describes a breakdown of how the colonies used the two types of laws. Finally, it draws some parallels between Obamacare’s exceptions\textsuperscript{33} and penalty for noncompliance,\textsuperscript{34} with these local precursors to the 1792 Act.

Laws that were used to arm militiamen can be divided into two categories. The first type of militia laws where those that used 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.\textsuperscript{35} The laws generally applied to every man sixteen to sixty years old with a few exceptions for individuals such as government officials or clergymen.\textsuperscript{36} The individual mandate laws varied in complexity. One of the simpler laws was passed in New York on May 30, 1775 and ordered that the “militia of New York be armed and trained and in [c]onstant readiness to act at a moment’s warning.”\textsuperscript{37} Militiamen were directed to “furnish themselves with necessary Arms and Ammunition [and] to use all Diligence to perfect themselves in the Military art.”\textsuperscript{38} This law clearly imposes the requirement that an individual furnish himself with a weapon at his

\begin{itemize}
\item \textsuperscript{33} See supra, note 21.
\item \textsuperscript{34} If someone fails to meet Obamacare’s required health insurance coverage, he or she will be required to pay a penalty with their income tax returns. See 26 U.S.C. §§ 5000A(b)(1), (2) (2010).
\item \textsuperscript{35} See The Origin of the Second Amendment: A Documentary History of the Bill of Rights 1787-1792, at xxiv (David E. Young, ed., 2d ed. 1995).
\item \textsuperscript{36} See id.
\item \textsuperscript{37} See 1 New York in the Revolution 5 (Berthold Fernow, ed., 1887).
\item \textsuperscript{38} See Id.
\end{itemize}
own expense. Other laws were applied to different parts of the militia, like cavalrmen, or were more detailed in the accoutrements that were required. The Third Virginia Convention ordered that “every militia man should furnish 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 1775. The first of such laws was enacted just after the founding of the Jamestown colony. 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. It is clear that these laws included an individual mandate similar to that in Obamacare. Each requires an individual to make a purchase at his own expense. Like the language of the colonial laws, the language of Obamacare is unambiguous on this point. Importantly, Part IV, infra, will describe the 1792 Act, which uses similar language to the colonial militia laws.

This Comment calls the second category of militia laws “the public option” where local governments attempted to arm militiamen through local funds or otherwise; essentially colonies decided to supply arms to the militias through means other than an individual mandate. Some examples of the public option are as follows. The New Jersey legislature voted to appropriate funds for the purchase of two hundred muskets to supply to militiamen. A more impressive use of the public option occurred in New York. In 1756, the Governor of New York, Sir Charles


40 See id. at 65, 76.


42 Id.

43 See WHISKER, supra note 23, at 205.
Hardy, ordered the use of 10,000 muskets owned by the city for use in the militia to supplement the arms that were provided by individuals.\textsuperscript{44} Similarly, South Carolina passed a law in 1737 that apportioned £ 35,000 for the defense of the colony, including arming and equipping the militia.\textsuperscript{45}

Between the establishment of the first colony and the Revolutionary War, all the colonies except Pennsylvania established a compulsory militia with some history of using an individual mandate as a means to supply arms to militiamen.\textsuperscript{46} Six of the twelve colonies that used

\textsuperscript{44} See 4 JAMES BISER WHISKER, THE AMERICAN COLONIAL MILITIA: THE COLONIAL MILITIAS OF NEW YORK, NEW JERSEY, DELAWARE, AND MARYLAND 19 (1997) [hereinafter WHISKER, AMERICAN COLONIAL MILITIA]. Congress took similar action after 1792 when it supplemented the 1792 Act individual mandate with federally provided arms, see infra Part IV.D. Supplying additional arms does not weaken this Comment’s argument because the founders still chose to use an individual mandate. Supplying arms merely shows 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. Moreover, Obamacare seems to be cognizant of the financial situations of various individuals with all of its exceptions for the poor.

\textsuperscript{45} See WHISKER, SOUTHERN STATES, supra note 39, at 141.

\textsuperscript{46} 1 AMERICAN MILITARY HISTORY: THE UNITED STATES ARMY AND THE FORGING OF A NATION, 1755-1917, at 31 (Richard W. Stewart, ed., 2005); Brown, supra note 41. For a description of the many colonial laws with individual mandates, see generally 1 NEW YORK IN THE REVOLUTION (Berthold Fernow, ed., 1887); WHISKER, AMERICAN COLONIAL MILITIA, supra note 44; WHISKER, SOUTHERN STATES, supra note 39; JAMES B. WHISKER, THE RISE AND DECLINE OF THE AMERICAN MILITIA SYSTEM (1999); THE FOUNDERS’ VIEW OF THE RIGHT TO BEAR ARMS (David E. Young, ed., 2d ed. 2007). Actually, Georgia did not have an explicit individual mandate as this Comment describes them. Many of Georgia’s laws dealt with either controlling the slave population or allowing for a slave to be armed by his master if the master recommends. WHISKER, SOUTHERN STATES, supra note 39, at 63. The reason Georgia is included in the list of states that had an individual mandate is because in 1770, Georgia passed a law that required all while male inhabitants to carry a personal firearm to all places of public worship to provide for better security. Id. at
individual mandates during the colonial period also used at least one public option law during the same period. New Jersey,\textsuperscript{47} New York,\textsuperscript{48} Maryland,\textsuperscript{49} Massachusetts,\textsuperscript{50} South Carolina,\textsuperscript{51} and Connecticut\textsuperscript{52} all experimented with providing arms to the militiamen through a public option.

This widespread use of a public option shows that the founders understood what an individual mandate was. First, public option laws spanned the length of the colonies, so their use was as geographically expansive as individual mandate laws. This means that many founders up and down the eastern seaboard were faced with the choice of supplying arms to militiamen in one of two ways. When faced with this choice, lawmakers sometimes chose individual mandates and sometimes chose the public option. Because our founders had to make a choice in the means used to supply militiamen with arms and because they wavered between means, the founders engaged in a balancing. They were able to choose the means that best accomplished their goal (to arm the militia) at any particular time. ACA challengers cannot show that the founders did not know what an individual mandate was because the founders repeatedly made conscious decisions to use them before the 1792 Act. Indeed, deciding to use an individual mandate in the 1792 Act was likely the result of this long succession of laws.

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\item \textsuperscript{47} See WHISKER, \textit{supra} note 23, at 205.
\item \textsuperscript{48} See WHISKER, \textit{American Colonial Militia, supra} note 44, at 19.
\item \textsuperscript{49}\textit{Id.} at 122.
\item \textsuperscript{50} See WHISKER, \textit{supra} note 23, at 104-05; \textit{id.} at 95, 161.
\item \textsuperscript{51} See WHISKER, \textit{Southern States, supra} note 39, at 141.
\item \textsuperscript{52} See WHISKER, \textit{supra} note 23, at 126-27.
\end{enumerate}
\end{footnotesize}
Second, this procession of militia laws also shows that the founders thought of individual mandates as one of several means to arm the militias. This implies, as Part VI will argue, that an individual mandate is a means that can be used to accomplish specific ends as opposed to a vehicle that is indispensably tied to effectuating Militia Clause-like powers. Thus, the use of the public option selectively as opposed to indiscriminately advances the argument that the founders understood how an individual mandate would work and bolsters the claim that an individual mandate is best described as a means under the Necessary and Proper Clause.

**B. Additional Insights Into Using Individual Mandates**

Further, some individual mandate laws came with penalties for noncompliance, some were unpopular, some came with exceptions for specific types of professions or the poor, and some were hybrids between individual mandate and public option laws. These nuances add additional insights into the founders’ understanding of individual mandates, the ways they might be used today, and the number of similarities with Obamacare.

**PENALTIES:** The militia laws that included penalties for failure to provide oneself with the appropriate arms demonstrate that the founders thought about how an individual mandate could be strengthened as a means to accomplish an end. They also show that the founders engaged in additional balancing when choosing between individual mandate laws and public option laws because an individual mandate might require a penalty. These choices were made in large, powerful states. New York passed a law in 1663 that imposed a fine for failing to provide oneself with a weapon at one’s own expense.53 Interestingly, Virginia’s first comprehensive militia law had a fine for failing to purchase an appropriate arm and had a list of exceptions (mostly for who was required to serve in the militia), but there was no exception to the individual

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53 See WHISKER, AMERICAN COLONIAL MILITIA, supra note 44, at 6.
mandate for those who had to serve. Smaller states also used penalties. New Jersey passed a law in 1775 that contained a small fine for failure to abide by the individual mandate, even though there was a scarcity of most military arms and supplies. Lastly, Rhode Island passed a law in the winter of 1775-1776 with an individual mandate that included a fine for failure to provide oneself with the appropriate arms. These laws show that not only did the founders consider an individual mandate, they conceptualized that a penalty might accompany an individual mandate.

UNPOPULAR: Similarly, the fact that militia laws with individual mandates were unpopular at times demonstrates that the founders balanced the harms and benefits between supplying arms through the public option and supplying them through a sometimes controversial individual mandate. Choosing between these two means of arming militiamen with varying benefits and burdens indicates that the founders knew very well what an individual mandate was. The unpopular laws were not necessarily in small colonies. Some of the most contested laws came from colonies that would be extremely influential in the development of the new nation. Virginia kept an individual mandate despite a shortage of arms and accoutrements in 1777. An interesting characteristic of some Virginia militia laws was adherence to an individual mandate when it was not overwhelmingly popular. Virginia’s requirements on militiamen served only to further impoverish the already poor lower classes. Some colonists complained of the burden a

54 Whisker, Southern States, supra note 39, at 21-22.
55 See Whisker, American Colonial Militia, supra note 44, at 84.
56 See Whisker, supra note 23, at 125.
57 Whisker, Southern States, supra note 39, at 65, 76.
58 See Whisker, supra note 23, 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
forced purchase imposed upon them. ACA challengers cannot logically assert that the founders did not know what an individual mandate was given these facts.

EXCEPTIONS: The laws that included exceptions to the individual mandate indicate that the founders understood the burdens that individual mandates placed on the people. Including exceptions shows additional consideration when choosing an individual mandate as a means and demonstrates that the founders likely imagined an individual mandate could be comprehensive without being unreasonable. New Jersey’s Militia Act of 1744 had a number of exceptions for various professions. A different New Jersey militia law that contained an individual mandate was amended solely to provide exceptions to the individual mandate. Similarly, a New Hampshire law from September 9, 1776, was passed that required militia members to provide themselves with arms at their own expense, but had a grievance appeal for those who were too poor to purchase them. 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 indigent individual, he might have been charged with a civil duty to recoup the costs.

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.

59 See Whisker, Southern States, supra note 39, at 17.

60 See Whisker, American Colonial Militia, supra note 44, at 73. This law 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 23, at 201.

61 Whisker, American Colonial Militia, supra note 44, at 67.


63 See id.

64 See id.
HYBRIDS: Militia laws that were hybrids of the individual mandate and the public option explain that the founders did not likely think an individual mandate, while comprehensive, would be the only means necessary to accomplish any particular end. For example, New York and Connecticut had hybrid militia laws. The Connecticut law required individuals to provide their own arms, but also provided that the town’s stock of arms be available to certain individuals. Some local authorities kept a supply of muskets and ammunition on reserve for those too poor to buy weapons.

INSIGHTS: Now that it is well established that the founders understood what individual mandates were, nuances in militia laws likely provide a framework for how the founders felt an individual mandate could and would operate. Obamacare uses an individual mandate to effectuate an ends: providing national healthcare. The Obamacare individual mandate is a means to effectuate this end, just like the militia law individual mandates were an unpopular means to arm local militiamen. Similar to the founders’ use of various penalties in combination with individual mandates, Obamacare includes a penalty for noncompliance in the form of a tax. Obamacare has exceptions for the poor and certain individuals, thereby making the burden more reasonable. The colonial militia laws provided similar exceptions for the poor. It seems that Obamacare’s individual mandate incorporates many of the same concerns and remedies to an individual mandate that the founders developed. This Comment argues that these nuances define how the founders conceptualized the operation of an individual mandate and suggests that Obamacare approximates that conceptualization.

65 See id. at 128.

66 See 1 American Military History, supra note 46, at 30.
Most important to this conceptualization are the hybrid laws. The hybrid laws seems to show that an individual mandate is a good means for accomplishing an end, but there are times when a “public option” can do work that an individual mandate cannot. Basically, the public option can really help the poor. Current United States healthcare fits this scheme that the founders created with respect to individual mandates. Obamacare is comprehensive. However, it attempts to place a reasonable burden on individuals through exceptions to the individual mandate, akin to the militia law individual mandates. Medicare and Medicaid can be viewed as the “public option” to Obamacare. These two types of aid will help those where an individual mandate will fall short. Thus, not only did the founders know what an individual mandate was, but their militia laws demonstrate a conceptualization of how individual mandates fit with other means and Obamacare falls within that conceptualization.

C. Moving From an Individual Mandate as a Local Means to a Means Available to Congress

An individual mandate used by the federal government 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.\textsuperscript{67} They law also directed 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{68}

\textsuperscript{67} See WHISKER, supra note 23, at 351

\textsuperscript{68} See id.
Although this is another example of the founders’ use of an individual mandate, it is particularly important because it is the transitional step from an individual mandate being a truly local means to an attempt by Congress to accomplish ends enumerated within the Constitution. At the outset and under the initial distribution of power after the Revolutionary War, it was unclear whether an individual mandate would solidify itself as a means available to Congress. Under the Articles of Confederation, the state retained the power to train and equip the militias and to appoint officers, and there was no way for Congress to force cooperation.69 However, after the ratification of the Constitution, the passage of the 1792 Act, which contained an individual mandate, showed that the founders decided to take the lessons they learned from colonial militia laws and condone Congress’s use of an individual mandate.

IV. Empirical Evidence That the Founders Approved of Congress Using an Individual Mandate as a Means to an End

A. Passing the Uniform Militia Act of 1792

It is necessary to establish that the founders, who conceptualized an individual mandate, felt it was constitutional for Congress to use an individual mandate to effectuate its Militia Clause powers. Without this finding, Obamacare is no doubt unconstitutional because absent such finding, there can be no approval of an individual mandate to effectuate Congress’s Commerce Clause powers. This Part concludes that the founders did approve of Congress’s use of this means.

The Uniform Militia Act that passed on May 8, 1792 was Congress’s first attempt 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, reorganized the

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69 Hirsch, supra note 15, at 923.
militia into the National Guard, and increased federal control and funding.\(^7^0\) Even before these changes, the Uniform Militia Act of 1792 was a hollow shell of what it was originally meant to include. The hollowing process demonstrates that even as federal power was chipped away, the founders 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.”\(^7^1\) 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.\(^7^2\) Washington, inter alia, wanted some sort of standing army because he felt the Revolutionary War would have been over sooner had one existed.\(^7^3\) Both Washington and Knox understood the provisions of the Militia Clauses of the Constitution\(^7^4\) to allow the national government to assume responsibility for

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\(^7^1\) See Fields & Hardy, *supra* note 23, at 31.


\(^7^3\) Whisker, *supra* note 23, at 352.

\(^7^4\) 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”).
training the militias, and desired to start that task immediately. Consequently, Washington proposed the Knox plan for a small but well-trained militia in January of 1790. 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. Knox also wanted to have eighteen to twenty year old men trained successively for thirty days.

Ultimately, Washington’s proposed legislation was introduced four separate times, twice in 1790 and twice in 1791. The plan produced fervent opposition as being unworkable and exceedingly expensive. Congress rejected both the notion of a select militia and of undertaking the responsibility for state militia training. 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. The Second Congress finally passed the Uniform Militia Act of 1792, but eliminated nearly every part Washington and Knox felt were crucial. In fact, the bill that was passed was opposed by its sponsors.

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75 WHISKER, supra note 23, at 352.
76 Gary Wills, To Keep and Bear Arms, in SAUL CORNELL, WHOSE RIGHT TO BEAR ARMS DID THE SECOND AMENDMENT PROTECT? 82 (2000).
78 WHISKER, supra note 23, at 352.
79 Wiener, supra note 72, at 187.
80 Higginbotham, supra note 77.
81 WHISKER, supra note 23, at 352.
82 Higginbotham, supra note 77, at 110.
83 Id.
Scholars have used many terms to describe what the 1792 Act became with the constant tightening and removal of power, 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. The 1792 Act required 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 that each individual secure his 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 [a] role of ready reserves” because the Act created a massive military manpower

84 Wiener, supra note 72, at 187.

85 Gary Wills noted that Washington wanted a small but well-trained militia and instead Congress gave him the 1792 Act, which made the militia a “velleity.” See Wills, supra note 76. Fredrick Wiener described the Act as “notorious” and that it was passed with “the heart cut out.” Wiener, supra note 72, at 187. William Fields and David Hardy said that after a year and a half of work, the enactment was “emasculated.” Fields & Hardy, supra note 23, at 41 n.153. Richard Steward stated that the act bore little resemblance to the one proposed by Washington and Knox. 1 AMERICAN MILITARY HISTORY, supra note 46, at 114.


87 See Pitcavage, supra note 70.

88 Higginbotham, supra note 77, at 110.

89 Brown, supra note 31, at 26.
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 rules. 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 the process is illustrative of acceptance of federal individual mandates. Washington and Knox 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 this was not the case. This demonstrates that despite strong antifederalist opposition, an individual mandate was accepted for use by the federal government. As a matter of fact, the primary challengers to the bill feared a standing army. They did not express distain for individual mandates. Most importantly, Congress included every man under the reach of the Act, demonstrating its approval of an individual mandate as a means to effectuate an end that is comprehensive and

90 See Mullins, supra note 22, at 333.
91 Wiener, supra note 72, at 187.
92 Higginbotham, supra note 77, at 110.
93 Wills, supra note 76.
94 Id. at 82
95 CORNELL, supra note 86, at 46.
96 See Part II supra.
expansive. A basic fallacy of the Act was that it was unselective; rather, it imposed a duty on everyone.⁹⁷ 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,⁹⁸ much like the complaints of ACA challengers and various colonists under colonial militia laws. However, with the number of revisions the 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.⁹⁹ 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. Because the States enforced the 1792 Act on their own, it indicates that they did not feel that Congress’s use of an individual mandate encroached on their rights and powers. This means that Obamacare’s individual mandate would also not encroach upon the States’s powers because Congress implemented a means of which the founders approved.

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 1792.¹⁰⁰ Knox began by stating the issue

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⁹⁷ Wiener, *supra* note 72, at 187.

⁹⁸ *Cornell*, *supra* note 86, at 46.

⁹⁹ U.S. Const. amend. X.

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.\(^{101}\) 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.”\(^{102}\) Massachusetts also mandated that masters, guardians, and parents furnish those under their care and command with the necessary arms and equipment.\(^{103}\) 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.\(^{104}\) Moreover, 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.\(^{105}\)

North Carolina 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 forfeit the additional five shillings paid by the state.\(^{106}\) Again there was an exception for individuals unable to arm themselves.\(^{107}\) North Carolina passed this act despite explicitly noting that while there were approximately 450,000 men eighteen and forty-five years old that needed to arm

\(^{101}\) Id.

\(^{102}\) Id. at 70.

\(^{103}\) Id.

\(^{104}\) Id.

\(^{105}\) Id.

\(^{106}\) Id.

\(^{107}\) Id.
themselves, only about 100,000 were armed in accordance with the 1792 Act.\textsuperscript{108} 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 declared that if a militiaman mustered without his musket, he would be fined three shillings and six pence for every other article he was missing.\textsuperscript{109} New Jersey also provided that if a Major determined that a militiaman was too poor to arm himself, the militiaman was free from his fine.\textsuperscript{110} 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{111} Finally, Pennsylvania passed legislation on April 11, 1793, to enforce the 1792 Act.\textsuperscript{112} Pennsylvania additionally provided that if a person was judged unable to provide for himself, he would not be subject to the 1792 Act.\textsuperscript{113}

Knox was concerned that the 1792 Act may not be susceptible to alterations and amendments by the States to help provide for an organized militia.\textsuperscript{114} He ultimately concluded that Congress was best suited to decide whether to include a federal penalty or allow the States to impose their own.\textsuperscript{115}

\begin{flushright}
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} H.R. Rep. No. 3-21, at 70 (1794).
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 71.
\textsuperscript{115} Id.
\end{flushright}
These state acts are important because they take no issue with the use of a federal individual mandate. Strong state approval of an individual mandate is evidenced by limited exemptions for the poor and various fines for failure to follow the 1792 Act. Scholars have made similar conclusions about founder approval by noting that the states did not object to the degree of central control of the 1792 Act because they called for stricter regulations. State approval shows that individual mandates, like the one in Obamacare, were approved of as means to accomplish an end. Importantly, other means and powers did not gain approval.

The founders were hesitant to expand the reach of the 1792 Act. This hesitation to take different actions is important to show the fundamental acceptance of Congress’s use of an individual mandate. In March of 1794, Knox approached the House to propose a change to the Act by creating a military college. Professor James Whisker noted 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. 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 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.

116 See Pitcavage, supra note 70.
117 WHISKER, supra note 22, at 353.
118 Id.
119 Id. (quoting 4 CONG. REC. H1134 (statement of Rep. Cobb)).
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.”\footnote{120} It further recommended that there be a uniform body of law to provide penalties for citizens who did not arm themselves appropriately.\footnote{121} These statements and conclusions indicate that the founders considered and accepted the use of a federal individual mandate in the 1792 Act as enacted. When one considers the unanimous state enforcement of the militia laws,\footnote{122} combined with the ideas entertained in Congress, it necessitates a conclusion that the founders believed Congress could use an individual mandate without upsetting states’ rights or the Constitution.

C. Responding to Criticism: Individual Mandates

Despite the information presented in Part III.A and B, ACA challengers might argue that there are two reasons why the founders did not know what individual mandates are.

First, one could argue that there should be no precedential significance of including individual mandates in militia laws because individual mandates were indispensably tied to colonial militia service. One could argue that the founders’ understanding of individual mandates was restricted to local governments at best. Conceivably, one would argue that the founders did not approve of something they did not fully consider. Part III.A and B \textit{supra} have already demonstrated that there were active considerations of individual mandates by early

\footnote{120} \textit{Id.} at 353.

\footnote{121} \textit{Id.}

\footnote{122} \textit{MAHON, supra} note 30, at 55. There was approval at the state level of the 1792 Act. \textit{Id.} When there was variation in provisions, it tended to be in supplying arms to individuals who could not provide for themselves. \textit{Id.}
Americans as evidenced by colonial legislatures choosing to supply weapons in various ways, such as a public option.\textsuperscript{123}

Moreover, influential founders knew of inadequate numbers of guns for the militias.\textsuperscript{124} 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.\textsuperscript{125} Those states petitioned Congress to buy weapons for the militia, or loan them weapons, yet Congress repeatedly refused to take significant action.\textsuperscript{126} There was also great resistance among individuals having to arm themselves.\textsuperscript{127} This evidence affirms that the founders knew what choice they were making when they decided to use an individual mandate to effectuate an ends. 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 and was not necessarily the path of least resistance.

Second, one could argue that practically speaking, there was an established colonial fear of disarmament\textsuperscript{128} which might justify an individual mandate without consideration of its

\begin{footnotes}
\item See, e.g., supra text accompanying notes 41-43.
\item 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 70.
\item See id.
\item See id.
\item See infra Part V.A. 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 70.
\end{footnotes}
constitutionality. 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 the fact that the founders and the early Congresses 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.\textsuperscript{129} 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. Thus, ACA challengers’ arguments that individual mandates are novel and unconstitutional for lack of consideration and approval by the founders lack merit.

\textbf{D. Responding to Criticism: The Longstanding Nature of the 1792 Act, Using a “Public Option,” and Constitutional Challenges}

ACA critics may argue that the events surrounding the 1792 Act do not support this Comment’s argument that the founders approved of Congress’s use of an individual mandate as an appropriate means to an end. First, they may argue that congressional actions to provide arms through means other than an individual mandate indicate that the founders no longer approved of Congress’s use of an individual mandate. Scholars have criticized the 1792 Act for doing little more than creating a military census.\textsuperscript{130} The Act and its individual mandate did not effectively provide for a uniform militia as intended. During the 1792 Act’s tenure, militia men in New York, New England, and other locales had trouble arming themselves so Congress modified the

\textsuperscript{129} 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. \textit{See} Pitcavage, \textit{supra} note 70.

\textsuperscript{130} Mullins, \textit{supra} note 22, at 333.
Act to provide for loaning arms to some in 1798.\textsuperscript{131} Congress later directed the President to sell or loan arms to volunteer companies and to sell 30,000 firearms to the states if required.\textsuperscript{132}

Despite the Act’s inadequacies, it still demonstrates approval of Congress’s use of an individual mandate. First, keeping the Act for over 110 years adds support to the appropriateness of an individual mandate because the founders could have amended or repealed the law sooner. Also, the actions taken by Congress to supply some arms still show approval. The failure of Congress to effectively use an individual mandate 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. This may mean that the penalty in Obamacare would allow for more success in meeting the statute’s desired end. The fact that Congress attempted to supplement its original 1792 plan by buying weapons does not mean an individual mandate is inappropriate. Rather under Congress’s militia powers, it elected to supplement the individual mandate with a “public option,” just like the colonists did before the Constitution. One needs to separate the practical considerations (that the individual mandate was largely unenforced by the federal government and that militiamen did not have the funds to supply their own weapons) from the legal considerations (that for all of its faults in implementation, the founders approved of Congress’s use of an individual mandate).

Second, ACA challengers might argue that individual mandates are not an accepted means to be used by Congress because the 1792 Act was never subject to a constitutional challenge. According to this argument, a current Congress may pass acts which it considers constitutional based on its understanding of the Constitution, but ultimately a challenge and a

\textsuperscript{131} MAHON, supra note 30, at 58.

\textsuperscript{132} Id.
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. According to originalist arguments, Congress today must try to 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 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. This presumption is unworkable.

**V. Congressional Use of Individual Mandates: Not Restricted to the Militia Clause Powers**

This Part examines the historical record of the Constitutional Convention and various state ratifying conventions in order to learn whether or not Congress’s use of a federal individual mandate is restricted to the enumerated powers used to pass the 1792 Act: the Militia Clause.
Powers. Congress’s use of an individual mandate is not restricted to the Militia Clauses and consequently is available as a means for Obamacare to effectuate its enumerated ends.

There are three possible explanations for Congress’s ability use an individual mandate to arm militias under the 1792 Act. 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 is appropriate. Second, the power to use individual mandate is distinct and only exists in specific clauses of the Constitution, like the Militia Clauses, given that 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.

When viewing debates over the Militia Clauses through an originalist lens, Congress’s ability to use an individual mandate to effectuate an ends under the Constitution is best explained as a means under the Necessary and Proper Clause. One would not expect to find a debate that discussed individual mandates and used that very term. Instead, this Comment examined the bounds of the debates and the foci. Originalism requires extracting the meaning that a reasonable speaker of the language would have attached to the words at the time of the text’s enactment. By looking at the topics that arose when debating the Militia Clauses, we get a proxy for the meaning a reasonable speaker of the language would have attached to the words of the Militia Clauses at the time of the enactment of the Constitution. Essentially, the powers of the Militia Clauses would be bounded by the topics of the debates. This Comment’s research necessitates the conclusion that the original meaning of the militia clauses did not allow for Congress to use an individual mandate based on the the debates. Thus, Congress’s use of an
individual mandate in the 1792 Act must be explained by some other power or reason. The best explanation is that an individual mandate is a means under the Necessary and Proper Clause and that it can be used by Congress to effectuate other ends enumerated under the Constitution.

A. The Debates Over the Militia Clauses Provide the Boundaries of the Militia Clause Powers and Those Powers Do Not Include an Individual Mandate

The commanding majority of the debates regarding the Militia Clauses focus on historical fears associated with militias and in no way implicate a congressional power to force individuals to make a purchase from a private entity. The Militia Clause debates focused 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.133

i. The Constitutional Convention Debates

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,134 and consequently the division of power between the federal and state governments was contested. The concern was that the federal government would abuse the power to “call forth” and send the militia into various territories indiscriminately. This power was the focus of Hamilton’s arguments in The Federalist No. 29, when he tried to convince readers that a militia needed more than a single day’s or week’s practice and that the government should be able to call them to practice.135 Conversely, an author writing under the pseudonym Centinel III in Philadelphia’s

133 Hirsch, supra note 15, 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).
135 The Federalist No. 29 (Hamilton).
Independent Gazetteer on November 8, 1787, argued that the arming, organizing, and disciplining clause

[would] subject the citizens of [the] states to the most arbitrary military discipline, even death [could] be inflicted on the disobedient; in the character of militia, you [might] be dragged from your families and homes to any part of the continent and as militia you [might] be made the unwilling instruments of oppression, under the direction of the government; there [was] no exemption upon account of conscientious scruples of bearing arms; not equivalent to be received in lieu of personal services. The militia of Pennsylvania [could] be marched to Georgia or New Hampshire however incompatible with their interests or consciences; in short they [might] be made as mere machines as Prussian soldiers.¹³⁶

The parade of horribles that Centinel III described are illustrative of what some individuals felt the federal government could do with its Militia Clause powers. Finally, scholar 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.¹³⁷ This debate sets one of the bounds of the Militia Clause powers and although the founders may have included the ability to require militiamen to take action, the action was not the purchase of a good or service from a private entity.

Another boundary of the Militia Clause powers is the power to remove the arms of militiamen. During ratification an unorganized militia was thought to serve as a source of safety.


¹³⁷See Hirsch, supra note 15, at 927.
There were legitimate concerns during ratification that without a militia under citizen control, it would fall into disrepair or be disarmed by a budding oppressive federal government.\textsuperscript{138} Antifederalists feared congressional power over the militias was simply too extensive.\textsuperscript{139} 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{140} 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{141} The power to arm could be misconstrued as intending to disarm the militias, which in actuality was like disarming the entire population.\textsuperscript{142} 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{143} 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{144}

The debate over arming is informative in two ways. First, the debate implies that reasonable individuals at the time of the Constitution thought the Militia Clause powers allowed


\textsuperscript{139} See \textit{The Origin of the Second Amendment: A Documentary History of the Bill of Rights} 1787-1792, at xlv (David E. Young, ed., 2d ed. 1995).

\textsuperscript{140} See \textit{id.} at xlvi.

\textsuperscript{141} 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, in \textit{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).

\textsuperscript{142} See \textit{The Origin of the Second Amendment}, \textit{supra} note 139, at xlviii.

\textsuperscript{143} See Finkleman, \textit{supra} note 127, at 225.

\textsuperscript{144} \textit{Cornell}, \textit{supra} note 86, at 46.
Congress to require militiamen to be disarmed. One of the reasons antifederalists pushed for the Bill of Rights protections of the Second Amendment was to constitutionally secure an armed populace.\textsuperscript{145} 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.\textsuperscript{146} 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.\textsuperscript{147} Second, and more importantly, the arming power was thought of as the ability of Congress to provide arms to the militias. This power seems more like the power to pass a “public option” type law rather than an individual mandate type law. Thus, it seems that the boundary of the Militia Clauses included the power to disarm or provide arms, but not pass an individual mandate. Consequently, the power to pass an individual mandate must lie elsewhere within the Constitution.

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 towards a military dictatorship, an idea supported by Washington’s advocacy for stronger national control over the militias.\textsuperscript{148} No matter who held control of a standing army, there were fears that the very existence of a standing army would provide the opportunity for social

\begin{footnotes}
\footnotetext{145}{\textsc{The Founders’ View of the Right to Bear Arms} 93 (David E. Young, ed., 2d ed. 2007).}

\footnotetext{146}{\textit{Id.} at 93, 94, 125.}

\footnotetext{147}{\textit{Id.} at 138.}

\footnotetext{148}{See Finkleman, \textit{supra} note 127, at 223.}
\end{footnotes}
corruption through professionalization.\textsuperscript{149} 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.”\textsuperscript{150} 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.\textsuperscript{151} Antifederalists criticized the proposed constitution for its unlimited authority to raise and support armies. Federalists countered that the risks of a federal standing army would be offset by a militia of nearly 500,000 men whose officers were chosen by the states.\textsuperscript{152} 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{153} The debates over standing armies indicate another boundary of the meaning of the Militia Clauses.

These three areas of focus accounted for a commanding majority of the debates over the Militia Clauses. 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


\textsuperscript{150} See \textit{id}.

\textsuperscript{151} See \textit{A Letter From a Gentleman in Neighboring State, to a Gentleman in this City, NEW HAVEN CONNECTICUT JOURNAL}, Oct. 24, 1787, in \textit{The Origin of the Second Amendment: A Documentary History of the Bill of Rights}, 1787-1792, at 61 (David E. Young, ed., 2d ed. 1995)

\textsuperscript{152} See Fields & Hardy, \textit{supra} note 23, at 33.

\textsuperscript{153} See Mullins, \textit{supra} note 22, at 344. In fact, many Convention members favored militia strictly under federal control, but others recognized many states would not consent to this proposition. See Brown, \textit{supra} note 41, at 25.
Clause powers, powers that did not seem to include a federal individual mandate. However, this interpretation of the debates over the Militia Clauses is open to attack because these were the statements of select individuals, not the populace as a whole.

To support the argument that these debates represented the reasonable understanding of the Militia Clause powers by the populace as a whole, I show that state level debates in Pennsylvania, Virginia, New York, and Maryland mirrored the debates of the Constitutional Convention.

ii. The State Ratifying Conventions Repeated the Constitutional Convention Debates

In Pennsylvania, the dissenting antifederalist minority, also called the Pennsylvania Minority, published their arguments in the Philadelphia Packet on December 18, 1787.\textsuperscript{154} They focused on abuse of the calling forth power when they argued that the personal liberty of every man between sixteen and sixty might be destroyed by Congress’s organizing power.\textsuperscript{155} The Pennsylvania Minority worried about the federal government marching the militias over every extremity of the state without consulting the state legislature, and a lack of protection for state governments.\textsuperscript{156} These concerns mirrored those of the Constitutional Convention. The Minority’s concerns regarding abuse also extended to disciplining militiamen because under the terms of the Constitution, militiamen could be subject to corporal punishment of the most

\begin{footnotesize}
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\item\textsuperscript{155} Id.
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humiliating and disgraceful kind and to death by the sentence of a court martial.\textsuperscript{157} The Pennsylvania Minority also asserted that Congress had no power to disarm the militia and that weapons were the birthright of an American.\textsuperscript{158} The Minority feared that the federal government would pass laws disarming the people.\textsuperscript{159} Their fear of disarmament was severe enough that they also requested twice that the right to bear arms for defense or hunting not be infringed upon unless the individual committed a crime.\textsuperscript{160} John Smilie, concerned with disarmament and standing armies, proposed an amendment to the Constitution that no law shall disarm unless there was public injury, and that there should be no standing army.\textsuperscript{161} 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 leave the power to arm, organize, and discipline the militias with the states.\textsuperscript{162} The petitions would resolve Smilie’s concerns and only leave the manner of disciplining under federal control.\textsuperscript{163} 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

\textsuperscript{157} Pennsylvania Minority, supra note 151.


\textsuperscript{159} Finkleman, supra note 127, at 208.

\textsuperscript{160} CORNELL, supra note 86, at 51.

\textsuperscript{161} WHISKER, supra note 23, at 58.

\textsuperscript{162} THE FOUNDERS’ VIEW, supra note 145, at 101.

\textsuperscript{163} Id.
for the publicly-owned arms from the militia, amounted to a temporary disarming of the people.¹⁶⁴ These concerns mirrored the Constitutional Convention debates and imply that a larger section of the populace felt these were the boundaries of the Militia Clause powers.

In Virginia, George Mason also feared abuse of the “calling forth” power or the arming power. He argued that Congress possessed the power to destroy the militia by sending them across the country or failing to arm or discipline them.¹⁶⁵ However, he did feel that there should be some federal power, just not the power to abolish.¹⁶⁶ Mason thought that with a proposed amendment, the federal government would only get necessary powers.¹⁶⁷

The Virginia debates essentially describe the arming power as allowing Congress to provide arms, similar to the “public option.” During the disarmament debates, Patrick Henry asserted that the arming power in Congress would lead to a “precarious” dependence on others and that the power should not lay with Congress.¹⁶⁸ 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,¹⁶⁹ demonstrating a focus protecting from a standing army. These powers, especially the arming power, were not thought to include the power for an individual mandate based on these debates.

¹⁶⁴ Id. at 103.
¹⁶⁶ Id. at 401.
¹⁶⁷ Id. at 402.
¹⁶⁸ Id. at 408.
¹⁶⁹ CORNELL, supra note 86, at 63 n.38.
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{170} The powers to arm, appoint officers, and command services were considered best in the hands of the federal and state governments concurrently.\textsuperscript{171} The concerns about a select militia were also present in New York.\textsuperscript{172} In Maryland, a proposed amendment required state consent to march militiamen beyond the borders of the state.\textsuperscript{173} Maryland noted it had no objection to the calling forth power and only wanted to provide a means for curbing abuse.\textsuperscript{174} Maryland also objected to a standing army.\textsuperscript{175}

Ratifying convention debates affirm the argument that the common understanding of the powers of the Militia Clauses was consistent between the Constitutional Convention and the populace. The debates establish that the common understanding of the powers of the Militia Clauses did not include the power of an individual mandate. This conclusion regarding the boundaries of the Militia Clause powers seems to contradict Part IV’s conclusion that the founders felt that an individual mandate can be used with the Militia Clause powers. If the


\textsuperscript{171} Id.

\textsuperscript{172} Id.

\textsuperscript{173} \textit{Maryland Minority}, MARYLAND GAZETTE, May, 6, 1788, in \textit{The Origin of the Second Amendment: A Documentary History of the Bill of Rights}, 1787-1792, at 359 (David E. Young, ed., 2d ed. 1995).


\textsuperscript{175} See Lawrence Delbert Cress, \textit{A Well-Regulated Militia: The Origins and Meaning of the Second Amendment}, in \textit{Saul Cornell, Whose Right to Bear Arms Did the Second Amendment Protect?} 55 (2000). Delaware and North Carolina adopted declarations warning of the dangers of standing armies as well. Id.
Militia Clauses did not provide Congress with the ability to pass an individual mandate to arm the militias, then how can the individual mandate present in the 1792 Act be constitutional? This Comment argues that Congress’s ability to use an individual mandate as a means to effectuate an enumerated end is best accounted for under the Necessary and Proper Clause. Also, as a Necessary and Proper Clause means, Congress was free to use an individual mandate to effectuate its Commerce Clause powers in Obamacare. Part VI advances this argument using current U.S. Supreme Court caselaw regarding the Necessary and Proper Clause.

VI. Individual Mandates as a Necessary and Proper Clause Means

This Part relies on current Supreme Court caselaw regarding the Necessary and Proper Clause. One may reasonably conclude that a means that is legitimate and plainly adapted to a constitutional end can be used by Congress to effectuate an enumerated power. Akin to how the founders used an individual mandate in the 1792 Act to effectuate the enumerated Militia Clause powers, the Obamacare Congress elected to use an individual mandate to effectuate its Commerce Clause powers. Indeed, the founders anticipated using individual mandates as a means to accomplish a specific end even before the Constitution was ratified through their use of an individual mandate in militia laws. This Part examines the framework created by McCulloch v. Maryland and United States v. Comstock to show how Obamacare uses an individual mandate to effectuate an enumerated constitutional end.

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176 U.S. Const. art. 1, § 8, cl. 18.
177 See infra, Part III.
178 17 U.S. (4 Wheat.) 316 (1819).
A. McCulloch v. Maryland

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. In 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. Marshall began his opinion by addressing the threshold question as to whether or not Congress could incorporate a bank. The Court asserted that there was no clause that excluded incidental or implied powers or required every granted power to be expressly and minutely described. The Court then acknowledged that there was 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 regulate commerce. It then follows, according to the Court, that a government with such ample powers must also be entrusted with ample means for their execution. Moreover, the Court reasoned that the Constitution does not attempt to enumerate the means nor withhold the most appropriate means. 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. The Court held that in addition to the enumerated powers,

180 U.S. CONST. art. 1, § 8, cl. 18.
182 Id. at 400.
183 Id. at 406.
184 Id. at 407.
185 Id. at 408.
186 Id.
187 Id. at 408-09.
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{188} This statement was the creation of Necessary and Proper Clause jurisprudence.

The \textit{McCulloch} Court then went on to describe what was meant by “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{189} 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{190} 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{191} The 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{192} 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{193}

\textsuperscript{188} \textit{Id.} at 411-12.

\textsuperscript{189} \textit{Id.} at 413.

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.} at 413-14. Obamacare’s individual mandate employs a means that is calculated to produce universal healthcare coverage under a comprehensive scheme that prevents health insurance companies from denying coverage to individuals with preexisting conditions. For an example of how an individual mandate in the healthcare setting can produce this end, see Millhiser, \textit{supra} note 7.

\textsuperscript{192} \textit{Id.} at 415.

\textsuperscript{193} \textit{Id.} at 419.
Consequently, the Court held “[l]et the end be legitimate, let it be within the scope of the Constitution, 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 Constitution, are constitutional” in describing the scope of the Necessary and Proper Clause powers. Ultimately this definition provided for the conclusion that Congress had the implied power to create a bank to effectuate an enumerated power.

_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, _United States v. Comstock_, principally affirms this framework.

**B. United States v. Comstock**

The _Comstock_ Court reviewed the constitutionality of a federal act that required civil confinement of certain individuals already in federal custody passed under the Commerce Clause. The Court was presented with a question similar to the one presented in _McCulloch_: whether or not through its implied powers, Congress had the authority to enact this federal civil-confinement program. 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. Just like the _McCulloch_ Court, the _Comstock_ Court asserted that there is broad authority to enact laws that are “convenient, or useful or conducive to the authority’s beneficial

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194 Id. at 421.
196 Id. at 1954.
197 Id. at 1956.
198 Id.
exercise.” The Court affirmed the scope of the Necessary and Proper Clause defined in *McCulloch*, and that the word necessary does not mean absolutely necessary. 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.” The Court reiterated that the means must not be prohibited by the Constitution. 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?” 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. Notwithstanding this congressional determination, the Court reiterated that the means-ends relationship cannot pile inference upon inference. The Necessary and Proper Clause power permits more than a single inferential step between the enumerated power and the act of

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199 *Id.* (internal quotations and citations omitted).

200 *Id.*

201 *Id.* (citing Sabri v. United States, 541 U.S. 600, 605 (2004)).

202 *Id.* at 1957.

203 *Id.* (internal quotations omitted).

204 *Id.* at 1957, 1961.

205 *Id.* at 1963-64.
Congress but not too many.\textsuperscript{206} 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.\textsuperscript{207}

Thus, the \textit{Comstock} court affirmed \textit{McCulloch} and indicated that the framers imagined that the Constitution would allow for Congress to act in a number of varied ways.

\textbf{C. The Obamacare Individual Mandates is a Constitutional Means Under The Necessary and Proper Clause Powers}

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 and appropriate. Legitimate means are those within the Constitution. Appropriate means are those 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 as legitimate. Part IV demonstrates that an individual mandate used as a means to effectuate an enumerated end is appropriate. Individual mandates are not prohibited by the Constitution because the founders

\textsuperscript{206} Id.

\textsuperscript{207} Id. at 1965 (quoting New York v. United States, 505 U.S. 144, 157 (1992)).
used one in the 1792 Act, and individual mandates are not prohibited for infringing upon States’ rights because the States approved of their use. Rather, using an individual mandate to effectuate an enumerated power is consistent with the powers of the federal government under the Constitution. This Comment’s research shows that when the enumerated power is the power over the militias, a federal individual mandate is a means reasonably adapted to effectuate that power. Additionally, an individual mandate is “convenient, or useful, or essential to another” as evidenced by colonial militia laws. Individual mandates were at some times convenient to arm the militias, but when they were not, the founders armed militiamen via the “public option.” Thus, this Comment provides that a federal individual mandate used as a means to effectuate an enumerated power fits within the *McCulloch* and *Comstock* framework as a Necessary and Proper Clause means.

It follows that Obamacare is constitutional if it uses the Necessary and Proper Clause to effectuate an enumerated power. Obamacare is tied to an enumerated power and consequently may rely upon the Necessary and Proper Clause to effectuate the power. While pegged as a massive expansion of the federal government’s role by ACA challengers, Obamacare actually uses a means previously contemplated and approved of by the founders. ACA critics may argue that the *Comstock* Court believed that the federal government will have to do things that were unimaginable to the founders, but that Congress cannot usurp the powers needed to do these unimaginable things. This Comment establishes that the Obamacare individual mandate operates in ways that the founders conceptualized and does not usurp any power. The Obamacare individual mandate has a penalty, provides exceptions for the poor, and operates in a larger framework with some “public option laws” (medicare and medicaid), similar to the earliest individual mandates. Thus, the Obamacare individual mandate does not even fall within the
dicta cited at the end of this Part’s discussion of *Comstock*. There has been no governmental expansion into roles unimaginable to the founders; the founders believed the federal government could force an individual to make a purchase from a private entity.

Obamacare’s use of an individual mandate is tied to an attempt to effectuate an end enumerated under the Constitution: the Commerce Clause.\textsuperscript{208} The Commerce Clause allows for regulation of interstate economic activity.\textsuperscript{209} Congress passed the ACA under the Commerce Clause and asserts that under *Gonzalez v. Raich*,\textsuperscript{210} the individual mandate to purchase health insurance is an appropriate tool for regulating interstate commerce as an essential part of a larger

\textsuperscript{208} U.S. CONST. art. 1, § 8, cl. 3.

\textsuperscript{209}See U.S. CONST. art. 1, § 8, cl. 3.

\textsuperscript{210} See generally, *Gonzalez v. Raich*, 545 U.S. 1 (2005). The government’s argument progresses as follows: Individuals who do not have health insurance are not divorced from the insurance market, see Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 894 (E.D. Mich 2010) (“[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. (“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. . . .”)

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comprehensive scheme. The ACA is regulating economic activity, the purchase of healthcare, as part of a larger regulatory scheme that requires health insurance companies to provide health insurance to individuals with preexisting conditions. Challengers to the ACA assert that Congress is not regulating economic activity, but rather inactivity or an economic decision because an individual is not taking action when they decide to buy healthcare when sick. Challengers assert that this is beyond the reach of the Commerce Clause. 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. The ACA challengers assert an unworkable definition for what constitutes economic activity that can be regulated under the Commerce Clause, especially after Gonzalez. ACA challengers are splitting temporal hairs over

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212 See Jack Balkin, Judge Preserves Constitutional Challenge to Individual Mandate, BALKINIZATION (Aug. 2, 2010, 12:15 PM), http://balkin.blogspot.com/2010/08/judge-preserves-constitutional.html; see also Commonwealth ex rel. Cuccinelli v. Sebelius, 702 F. Supp. 2d 598, 615 (E.D. Va. 2010) (stating that neither the Supreme Court nor any circuit court of appeals have any reported cases in which the Commerce Clause was extended to regulate a “person’s decision not to purchase a product, notwithstanding its effect on interstate commerce”). There is an interesting framing debate by proponents and opponents about the ability of the Commerce Clause to reach “economic decisions” versus “economic activity.” See Obama, 720 F. Supp. 2d at 893; see also Randy Barnett, Some Additional Thoughts on the Michigan Decision Upholding the Individual Mandate, THE VOLOKH CONSPIRACY (Oct. 8, 2010, 8:33 AM), http://volokh.com/2010/10/08/some-additional-thoughts-on-the-michigan-decision-upholding-the-individual-mandate/ (discussing how “economic decision” theory is an expansion of the “economic activity” theory which is a staple in Commerce Clause jurisprudence).

213 See supra, note 210.
what constitutes economic activity. By making the decision to purchase healthcare when one is sick, an individual is acting every day. They are affirmatively withholding the exchange of money regarding a service they will buy. This act has a substantial effect on the comprehensive scheme\textsuperscript{214} and can be regulated under the Commerce Clause. Moreover, after \textit{Comstock}, the Necessary and Proper Clause provides at least one inferential leap between the means used to effectuate an end. Obamacare’s use of an individual mandate falls within this range.\textsuperscript{215} Thus, because the ACA uses an individual mandate to effectuate an enumerated end,\textsuperscript{216} it should be found constitutional by the courts.

\textsuperscript{214} \textit{See supra}, note 210. There is also evidence that Obamacare will have a substantial effect on a regulatory scheme because Massachusetts already passed a similar individual mandate that had an incredible impact on the economics of health care. \textit{See} Ian Millhiser, \textit{Delaying the Inevitable: Cuccinelli’s 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{215} \textit{See supra}, note 210.

\textsuperscript{216} If the Supreme Court concludes 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 to pass an individual mandate. Yet, even if 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. Alternatively, Congress might argue that providing universal healthcare falls under the General Welfare Clause and that an individual mandate to purchase healthcare is a means that can be used to effectuate those ends. These are just two ways to utilize an individual mandate with another enumerated power to accomplish the same ends.
Conclusion

The determination that an individual mandate is not a contemporary invention and that the Constitution allows Congress to enact an individual mandate as a means to effectuate an enumerated end 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 upon the federal government. It demonstrates that the ACA challengers are mistaken in asserting that there is no authority under the Constitution to use individual mandates. Hopefully this research will be helpful for those deciding the constitutionality of the ACA. Yet, despite this Comment’s aid in the ACA debate, my hope is that others may use this research for a deeper understanding of means available to Congress 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 is not tied to any particular constitutional provision is important for other reasons. It implies that individual mandates are a means available for those hoping to effectuate any enumerated power and is useful 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.