FUNDAMENTAL RIGHTS OF CONSUMER LIBERTY: THE UNCONSTITUTIONALITY OF OBAMACARE'S INDIVIDUAL HEALTH INSURANCE MANDATE

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I. INTRODUCTION

On March 23, 2010, President Barack Obama signed into law the *Patient Protection and Affordable Care Act of 2010* (PPACA).[1] The PPACA, based upon Congress' power to regulate interstate commerce under the Commerce Clause, provided the most sweeping attempt at restructuring health care coverage and insurance in the nation's history.[2] The law, at over 2,700 pages in length, presents one of the longest and more complex bills passed by Congress and politically has become one of the most incendiary. Not atypical of federal legislation, the PPACA contains a number of controversial provisions having nothing to do with the immediate subject of health care – for example, mandating under the *Internal Revenue Code* all businesses file Tax Form 1099 notices with the Internal Revenue Service for any vendor purchase over $600,[3] making changes to recovery of damages in wage disputes and altering nursing mother entitlements under the *Fair Labor Standards Act*.[4] In so doing, the President and Congress set off one of the largest national and polarizing political controversies since the 1960s.

Proponents of PPACA refer to it as *Health Care Reform* and point to, among other things, the social costs of over 15% of the population lacking health insurance and an estimated 35% having health insurance with inadequate coverage.[5] Among a myriad of issues, 62% of all personal bankruptcies filed in the U.S. Bankruptcy Courts, at least in part, involve medical debt as a contributory factor.[6] The PPACA purports to reduce health care costs to the government and all its citizens.

Others, referring to the law in shorthand as *ObamaCare*, point out the deleterious potential economic impact of quasi-nationalizing an industry that represents over 17% of United States GDP;[7] a sector of the economy employing over 14.3 million jobs in over 595,000 health care establishments.[8] Studies by the non-partisan Congressional Budget Office have repeatedly shown that the PPACA will cost the public from $900 billion to $2 trillion at a time when the

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[1] PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA) U.S. Pub. L. No. 111-148, 125 Stat. 119 (2010). (Hereinafter "ObamaCare").

[2] U.S. CONST., art. I, §8, cl. 3.

[3] PPACA, *supra*, §9006 amends the Internal Revenue Code 26 U.S.C., et. seq., requiring the filing of Form 1099 with the IRS for every transaction by businesses over $600. Even the Internal Revenue Service has expressed alarm that such a system would overwhelm their system and impedes their ability to effectively function.

[4] PPACA *supra* §1558 expands damages recoverable by employees in wage cases; §4207 requires breaks for nursing mothers on company premises, both sections amending Fair Labor Standards Act, 29 U.S.C. § 201 et. seq.

[5] *Income, Poverty, and Health Insurance Coverage in the United States: 2007*, U.S. CENSUS BUREAU, August 2008.

[6] *Medical Debt Huge Bankruptcy Culprit,* CBS NEWS, June 5, 2009, www.cbsnews.com).

[7] Ken Terry, *Health Spending Hits 17.3% of GDP in Largest Annual Jump*, BNET, February 4, 2010, www.bnet.com).

[8] *Career Guide to Industries,* 2010-11 Edition, BUREAU OF LABOR STATISTICS, (Dep't of Labor, 2010), www.bis.gov/oco/cg/cgs035.htm.

U.S. Government is facing its largest budget deficit in history, over $1 trillion, and the imperative felt by both parties of Congress to reduce federal spending.[9]

A larger public policy outcry has been two fold. At the state level, lawmakers fear additional Medicaid unfunded mandates on their strained budgets and the intrusion of the federal government into what has traditionally been a state function, i.e. insurance and insurance regulation, implicating the Tenth Amendment of the U.S. Constitution. Individual citizens and small businesses are alarmed at the law's requirement in §1501 of the PPACA that every citizen or resident must purchase health insurance for themselves and their dependents by 2014 or face federal civil penalties.[10] This provision is known as the *Individual Mandate* and its implication on individual freedoms is unprecedented in United States history.

Simultaneous with the signing into law of PPACA, twenty-six state attorneys general, led by then Attorney General McCollum of the State of Florida, filed suit in Federal Court against the PPACA asserting that it was unconstitutional.[11] The Commonwealth of Virginia filed its own separate case also challenging the law in *Commonwealth of Virginia v. Sebelius (Virginia)*.[12] Other challenges were filed in federal district courts in Virginia, Michigan, and the District of Columbia. The trial court cases have all centered on allegations of unconstitutionality of PPACA beyond merely the state's rights issues including, violation of Congress' taxing power[13] and the current primary focus of all cases, Congress' overreach of the Commerce Clause.[14]

II. STATUS OF CURRENT PPACA CASES

As of this writing, three lower courts have held the *Individual Mandate* constitutional: *Thomas More Law Center v. Obama*,[15] *Liberty University v. Geithner,*[16] and *Mead, et. al. v. Holder*.[17] In all three cases, however, federal judges found the individual mandate penalty to not be a tax and thus an unconstitutional application of Congress' Article I taxing powers.

Two cases have found the law to be unconstitutional, including the large multi-state Florida case. In *Virginia*, the court found the individual mandate, and its penalty, unconstitutional and severed it from the PPACA. [18] In *Florida ex rel.,* the court found the entire PPACA unconstitutional and

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[9] Jeffrey H. Anderson, *CBO: Obamacare Would Cost Over $2 Trillion*, THE WEEKLY STANDARD, March 18, 2010, www.weekly standard.com, and, see: Phil Gingrey, *Cost of Obamacare is Too High*, THE HILL, March 4, 2011, www.thehill.com.

[10] PPACA*, supra* §1501.

[11] Florida ex rel. v. United States, 716 F. Supp.2d. 1120 (2011): D. N.D., FLA. Pensacola Division, Filed March 23, 2010. Plaintiffs are the States of Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisiana, Michigan, Mississippi, Nebraska, Nevada, North Dakota, South Dakota, Pennsylvania, South Carolina, Texas, Utah and Washington.

[12] 702 F.Supp.2d 598 (2010), D. E.D. VA., Richmond Division.

[13] U.S. CONST. art. I, §. 8, cl. 1.

[14] U.S. CONST. art. I, §. 8, cl. 3; see Florida, et. al. *supra* see *Complaint* filed March 23, 2010.

[15] Thomas Moore Law Center v. Obama, 720 F.Supp.2d 882, E.D. Mich., 2010.

[16] __ F.3d ___, 2011 WL 3962915, September 8, 2011.

[17] 766 F.Supp.2d 16 (2011).

[18] *Virginia*, *supra* note 12; *Order Granting Summary Judgment*, Document 161, December 13, 2010.

stayed its enforcement pending appeal. Currently, cases have been accepted for review by the U.S. Fourth, Sixth, and Eleventh Circuit Courts of Appeal, and were heard during the summer of 2011.[19]

III. AN ALTERNATE THEORY OF UNCONSTITUTIONALITY: OBJECTIVES OF THE PAPER

This paper diverges from the current Commerce Clause line of judicial challenge on PPACA's *Individual Mandate* to assert an alternate theory of its particular unconstitutionality. Approaching the subject from the standpoint of violation of fundamental constitutional rights of consumers provides strong evidence not only of the provision's lack of constitutionality, but in its long-term implications and potential harm to the balance of the U.S. economy and the free enterprise system.

This paper posits that the individual mandate, forcing every citizen or resident to buy health insurance involuntarily, is a decidedly unconstitutional infringement of fundamental individual liberty rights guaranteed by the U.S. Constitution under the Constitution's First[20], Fifth and Fourteenth Amendments[21] and Contract Clause.[22] Moreover, the individual mandate provision squarely infringes fundamental liberty rights in a manner that fails to meet the U.S. Supreme Court's requirement of strict scrutiny. As such, the mandate, if upheld, would serve to undermine and usurp the traditional system of economic choice that underlies the U.S. economy,[23] and, if not struck down, could well increase the power of central government to dictate consumer choice in almost any product or service in the economy.

This paper demonstrates these aspects based upon the *Two-Step Test* established by the U.S. Supreme Court in *Glucksberg v. Washington*[24] and by showing the negative implications to the future of free market choices of consumers were the individual mandate precedent

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[19] Jim Davanport, *Appeals Court Speeds up Health Care Overhaul Appeal*, ASSOCIATED PRESS, March 11, 2011, www.ap.com. Since the original writing of this article the Eleventh Circuit ruled the PPACA's Individual Mandate unconstitutional and the U.S. Supreme Court has granted cert. to hear the case in March 2012.

[20] U.S. CONST. amend. I.

[21] U.S. CONST. amend. V and XIV.

[22] U.S. CONST. art. I, §. 10, cl. 1. *The Contract Clause* was held to be an explicit *Liberty to Contract* derived from the due process clause of the Fourteenth Amendment, Lochner v. New York, 198 U.S. 45 (1905). *Lochner* held until the 1930's Roosevelt Era of increased government regulation of commerce in the case of West Coast Hotel v. Parrish 300 U.S. 379 (1937). The Court in West Coast Hotel, while not explicitly overruling *Lochner*, nevertheless held that the Constitution permitted the restriction of *liberty of contract* by state law where such restriction protected the community, health and safety or vulnerable groups. Here, *West Coast Hotel* dealt specifically with a local regulation by states, not a broad Federal government mandate compulsion to involuntary contract. Nevertheless, while the Supreme Court has cast doubt on an absolute fundamental right of liberty *to Contract*, it has yet to be confronted with the issue PPACA poses, i.e., is there a fundamental constitutional liberty from contract?

[23] Mitra Toosi, *Consumer Spending: An Engine for U.S. Job Growth,* MONTHLY LABOR REVIEW, U.S. Bureau of Labor Statistics, U.S. Dept. of Labor, November 2002 pp. 12-22. Also see: *Top U.S. GDP Forecaster Herrmann Sees Consumer Spending Boosting Recovery*, BLOOMBERG BUSINESS, January 13, 2011 http://www.bloomberg.com/news/2010-12-09/greenlaw-as-top-spending-forecaster-sees-u-s-consumer-pickup.html. Consumer spending represent two-thirds of GDP.

[24] 521 U.S. 702 (1997).

established. Such a precedent would portend future obstacles to personal liberty and choice consumers have as a matter of fundamental rights through engaging in lawful commerce within the United States, a key underpinning of the nation's historic free enterprise economy.

Finally, the paper suggests that even were universal health care for all citizens a national imperative, the use of a statute and regulations such as the PPACA presents is a constitutionally improper mechanism. If, indeed, a manifest national consensus were to exist pressing the federal government to mandate health insurance, health care, or otherwise establish a national health insurance mandate, the Constitution contains an appropriate mechanism to do so and one historically used in the past for a like public health purpose, i.e. the process of amending the U.S. Constitution.[25]

Of course, many people who support a national health care system point to the human good that government might provide. In an ideal world, health care, just as any other desired good, necessary or discretionary, would be available to help citizens reach the American dream. Such political decisions, no matter how well-meaning, must comport with the Constitution. Hence, the issue is examined here as to the constitutionality of the legal mechanism and the unconstitutional nature of the individual mandate that, by statute, effectively negates Constitutional fundamental individual rights.

As we open this discussion, we should heed the warning of Chief Justice William Howard Taft in *Bailey v. Drexel Furniture Co*.[26] a similar case in an earlier era of Congress overreaching the Constitution to achieve an unquestionable social good, the elimination of child labor: "The good sought in unconstitutional legislation is an insidious feature, because it lends citizens and legislators of good purpose to promote it without thought of the serious breach it make in the ark of our covenant, or the harm which will come from breaking down recognized standards."[27]

IV. IN THE BEGINNING: THE AMERICAN CONSUMER ECONOMY

Historians and scholars view the birth of the United States to be as much an economic revolution as it was a military one. At the time of the founding of the Republic, colonial American consumers' freedom of choice in purchases was severely limited by British Mercantile Laws. Beginning with the Navigation Acts of 1650, 1651 and 1660, the Royal British government mandated the nature and type of purchases made by American colonists to those of British origin on British ships. While the American consumer had cheaper and higher-quality alternatives through trade with French, Dutch, Portuguese and Spanish suppliers nearby, Britain, with shades of justification not too dissimilar to the PPACA's individual mandate today, imposed restrictions that became increasingly limiting. These included wool (1698), hats (1732), molasses (1733), iron (1750) and sugar (1764).[28]

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[25] U.S. CONST. art. V.
[26] 259 U.S. 20 (1922).
[27] *Id.* at 21.
[28] Henry J. Sage *America and the British Empire*, ACADEMICAMERICA.COM, 2010, p. 3. George Washington, himself complained bitterly about these conditions. Author Chernow quotes: "For instance the finest salt for curing fish came from Lisbon, but England's mercantilist policies forced him to import inferior salt from Liverpool. He constantly felt snarled in a tangled web of perverse economic regulations drawn up by London bureaucrats." Ron Chernow, WASHINGTON: A LIFE (Penguin, New York, 2010 edition).

Consequently, a key influence upon the Framers was the concept of free markets and liberty of consumers to purchase and exchange goods as identified by Adam Smith's seminal work *The Wealth of Nations*.[29] Smith's work corresponded with the American Revolution and its subsequent period. Smith's language linking economic decisions and the concept of "Liberty" was highly influential with the Framers and can be seen as integral in language incorporated within the U.S. Constitution. In particular, Smith stated: "A 'system of natural liberty and justice' combined with free trade and division of labor would make virtually every member of society prosperous, if interested in self-help."[30]

Smith went further to define what he meant by "natural liberty" vested with consumers. In fact, Smith's definition established the foundational pillars of what we refer to today as the free enterprise system, intertwining it with those fundamental liberties guaranteed in the Bill of Rights of the U.S. Constitution. Liberty means "not only freedom of speech and freedom of religion, but freedom to earn a living, freedom from burdensome taxes and trade restrictions, freedom from excessive government regulations, and the freedom to own and use property to create a new business…."[31]

The U.S. Constitution, as has often been stated, is a document that limits the power of government. Post-revisionists aside, the Constitution made clear the intent of the people to limit government, delegating the federal government specific enumerated powers,[32] leaving the remainder of governmental power to the States and the people.[33] The first ten amendments to the Constitution, known as the *Bill of Rights*, were enacted to explicitly protect individual liberty.[34]

Even today, with hundreds of interpretations and re-interpretations of the Constitution by the courts, and expansion of the Constitution to twenty-seven amendments, there remain three, and only three, duties an American citizen is absolutely compelled to do involuntarily for the government, as a condition of citizenship:

1. comply with the decennial census;[35]
2. comply with a military conscription (i.e. draft);[36] and
3. comply with a jury summons and ultimately jury service.[37]

Beyond those mandated duties a citizen has, in constitutional theory, absolute freedom and liberty to the lawful conduct of their lives. This liberty right was famously described by Justice Louis Brandeis as "the right to be left alone…the most comprehensive of [individual] rights and the right most valued by civilized men."[38]

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[29] Adam Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776), (The University of Chicago Press, 1970 edition).
[30] *Id*. at 157 (emphasis added).
[31] *Id*. (emphasis added).
[32] U.S. CONST., art. I, et. seq.
[33] U.S. CONST., amend. IX and X.
[34] In 2010 the Court formally acknowledged the status of the Second Amendment as a fundamental individual right; McDonald v. City of Chicago, 561 U.S.__(2010), 130 S.Ct. 3020, coming on the heels of District of Columbia v. Heller 554 U.S. 570 (2008).
[35] U.S. CONST. art. I, §. 2,(as enacted in statute, 13 U.S.C. 221).
[36] Government power derived under U.S. CONST., art. I, § 8, cls. 12-16, see Arver v. U.S. 245 U.S. 366 (1918).
[37] Government power derived under the U.S. CONST. amend. VI and various provisions relative to the establishment and operation of courts.
[38] Olmstead v. U.S., 227 U.S. 438 (1922), DISSENT by Associate Justice Louis Brandeis.

It is interesting to point out that unlike other foreign nations, there is no compulsory federal law requiring United States citizens to vote in elections, to obtain and carry state issued identification cards, to contribute to religious organizations, nor even to use a particular type of automobile. Those decisions are left to individual choice. Likewise, among other things a citizen in the U.S. pays no income, Social Security or Medicare taxes unless they earn income, sales taxes unless they buy goods in a state that has a sales tax, and is not compelled to buy auto insurance unless they chose to drive a vehicle on a public road.

V. INDIVIDUAL MANDATE INFRINGEMENT ON FUNDAMENTAL RIGHTS

In the shadow of PPACA, American citizens, residents and business entities face, for the first time in the history of the Republic, a government fiat to purchase a commercial product or service, in this case health insurance, as a condition of citizenship or residency within the United States. As is often stated, under the guise of the Commerce Clause, Congress has attempted in §1501 of the PPACA to regulate *inactivity*. In short, §1501 institutes a never before seen requirement that each individual obtain health care coverage or pay a monetary penalty which the government has claimed to be a *tax* subject to enforcement by the Internal Revenue Service under its alleged constitutional taxing power. This is in effect a tax on citizenship.[39]

Congress, heretofore, has never attempted to mandate a private activity of commerce under the Commerce Clause. The Courts have long established a line of cases regulating commerce and commercial activity starting with *Gibbons v. Ogden*[40] and progressing to the far reaching *Wickard v. Filburn*,[41] and the more recent *Gonzales v. Raich*.[42] In every single one of the historic Commerce Clause cases, the Court asserted its limitations based on an actual consumer/business affirmative act of engaging in an action of commercial "intercourse."[43]

Even here, the Court in modern Commerce Clause cases signaled a limit to which it would allow the Commerce Clause to be stretched as a pretext to infringement on individual fundamental rights and liberties. For example, Chief Justice Rehnquist writing in his majority opinion in *U.S. v. Lopez*[44] stated:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad

[39] 26 U.S.C. §5000A(a). The penalty is scheduled to be 2.5% of individual income or $695, whichever is larger.
[40] 22 U.S. (9 Wheat.) (1824).
[41] 317 U.S. 111 (1942).
[42] 545 U.S. 1 (2005).
[43] *Florida ex rel.*, 716 F.Supp.2d at 1155. Judge Vinson took note that the Founders relied on the definition of *commerce* as that of Samuel Johnson's famous 1773 *Dictionary of the English Language,* "Intercourse; exchange of one thing for another; interchange of any thing; trade; traffik" and that this held throughout the 19th century and into the 20th Century.
[44] 514 U.S. 549 (1995).

> language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. *To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated* … and that there never will be a distinction between what is truly national and what is truly local… This we are unwilling to do.[45]

Similarly, five years after *Lopez*, Chief Justice Rehnquist in *U.S. v. Morrison*[46] reiterated the Court's view that Congress has limitations in using its authority under the Commerce Clause or Section 5 of the Fourteenth Amendment to federalize state functions or traditional individual liberties:

> Section 5 of the Fourteenth Amendment, which permits Congress to enforce by appropriate legislation the constitutional guarantee that no State shall deprive any person of life, liberty, or property, without due process or deny any person equal protection of the laws, … also does not give Congress the authority to enact §13981. Petitioners' assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence is supported by a voluminous congressional record. However, the *Fourteenth Amendment* places limitations on the manner in which Congress may attack discriminatory conduct. *Foremost among them is the principle that the Amendment prohibits only state action, not private conduct.*[47]

Even where a more direct regulation under the Commerce Clause is enacted, the Court has been clear that the Commerce Clause may not undermine fundamental constitutional rights. Quoting from *Printz v. U.S.*, Judge Vinson in his decision in *Florida ex rel.* made this point: "When a "Law....for carrying into Execution" the Commerce Clause [violates other Constitutional principles], it is not a "'Law...proper for carrying into Execution the Commerce Clause,'" and is thus, in the words of the Federalist, 'merely an act of usurpation' which "'deserves to be treated as such.'"[48]

If commercial activity is grist for courts and legal scholars to apply the commerce clause does that also apply to consumer/citizen inactivity? In other words, may the law regulate a citizen's right not to purchase a product or service or, for that matter, do anything of an economic nature, even work, save or invest? Here is the unknown constitutional quandary posed by the PPACA. Already, one federal district court judge has taken the concept to a level some might consider "Orwellian." In *Mead,* Judge Kessler stated that an individual's private mental thoughts, mental activity constitutes "commerce" which Congress can regulate through individual mandates. "Making a choice is an affirmative action, whether one decides to do something or not do something. They are two sides of the same coin. To pretend otherwise is to ignore reality."[49]

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[45] *Id*. (emphasis added; citations omitted).
[46] 529 U.S. 598 (2000).
[47] *Id*. (emphasis added).
[48] *Florida ex rel*, 716 F.Supp.2d at 1155, quoting from Printz v. U.S. 521 U.S. 898 at 923-24, citations and brackets omitted, emphasis in the original).
[49] *Mead*, 766 F.Supp.2d. at 45.

Taking this legal logic to an extreme, if an individual decided in their mind's eye to rob a bank or to assault an individual (only in thought, not action), would they not be guilty of a crime? We do not need, of course, to answer such hypotheticals here. What need be determined is whether an individual consumer's decision to decline to purchase health insurance or make personal and private provision for their own prospective health needs constitutes the exercise of a constitutionally protected fundamental right for which the Commerce Clause cannot impede individual consumer liberty. Ironically, prior *stare decisis* suggests an affirmative answer.

The importance of this question goes to the standards set by the Court in 1938 of an extreme level of justification known as strict scrutiny Congressional action must pass in order to enact any legislation, commerce or otherwise, that places a restraint on fundamental rights. Past cases in this area are known as ordered liberty cases. The standard set under *U.S. v. Carolene Products*[50] states that to impinge on fundamental rights or liberty the government must show:

1. clearly defined compelling government interest
2. remedy that is narrowly tailored and,
3. that is the least restrictive to minimize intrusion on the fundamental right.[51]

Moreover, the conduits through which a citizen exercises fundamental rights are as much protected liberties as the explicit right itself. This is what the Court referred to in *Griswold v. Connecticut*, [52] a privacy right case which dealt with contraception, as the *penumbras*, peripheral rights, without which the specific fundamental rights would be less secure.

Consequently, the Court in *Griswold* restated its long held principle that continues to be supported by the current Court, which is that "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and, thereby, invade the area of protected freedoms."[53]

Recent cases prove to be some of the rare demonstrations of near unanimity in an otherwise divided Court. The Court reiterated this principal in 1997 in *Glucksberg* citing its previous decision in *Flores*: "As we stated recently in Flores, the Fourteenth Amendment 'forbids the government to infringe...'fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[54]

And in the 2010 term, the Court in an 8-1 decision decided that no matter how offensive and outrageous the speech by a group protesting U.S. war policy at the private funerals

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[50] 304 U.S. 144 (1938).

[51] *Id*.

[52] 381 U.S. 479 (1965) at 481; See Poe v. Ullman, 367 U. S. 497, 516-522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment, in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

[53] *Id*. at 484, quoting from NAACP v. Alabama, 377 U. S. 288, 307.

[54] *Glucksberg*, 521 U.S. at 721; quoting Reno v. Flores, 507 U.S. 292 (1993) at 302 (emphasis added).

of fallen soldiers, the freedom of speech guarantee of the First Amendment prevailed over alleged compelling state interests.[55]

VII. HEALTH CARE DECISIONS AS A FUNDAMENTAL RIGHT: GLUCKSBERG AND THE TWO-STEP TEST[56]

As the legal battle lines draw over the application of the Commerce Clause to PPACA, a key element of the status of an individual's health care decision or non-decision as an individual fundamental right has not been directly addressed. Ironically, the Supreme Court addressed the fundamental right of health decisions in the case of *Washington v. Glucksberg*. The case involved a group of doctors challenging the State of Washington's prohibition on assisted suicide for terminally ill patients as violating a patient's fundamental right to life and liberty under the Fourteenth Amendment. The Court was challenged to address a subject that on its face might theoretically appear to be a liberty, but was abhorrent to society and the Court itself.

The Court found, in numerous references within the majority opinion, that a person's decision to accept or decline health care was a fundamental right and liberty interest protected by the 14th Amendment.[57]

The Court further stated, quoting from its previous *Cruzan*[58] decision, that: "After reviewing a long line of relevant state cases, we concluded that the common law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment."[59] Likewise, the Court quoted *Planned Parenthood of Southeastern Pa. v. Casey* [60] in further emphasizing its past position that medical decisions, other than suicide, are fundamental liberties protected by the Constitution: "At the heart of liberty is the right to define one's own concept of existence, of meaning of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[61]

Clearly, an individual's decision to buy or not buy health insurance falls squarely into the penumbra of fundamental liberty right articulated in *Glucksberg*. After all, the economic decisions of health care are as much an essential factor of individual economic decision making as the medical condition and alternative treatments themselves. Daily citizens are faced with these choices. Do I use a prescription drug or over the counter remedy? Do I go to the doctor, hospital, clinic, or treat the symptoms at home? Do I have surgery or treat with medicines or diet and exercise? All these and more are decisions of free people, exercising liberty to use, or not

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[55] Snyder v. Phelps et. al., Case #09-751 U.S. Sup. Ct., March 2, 2011.

[56] I acknowledge the extensive analysis of *Glucksberg* and the *Two-Step Test* provided by Professor Randy Barnett of Georgetown University Law School on which much of this analysis is based. See, Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV., 1479 (June 2008) at 1488-1500.

[57] The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. Collins v. Harker Heights, 503 U.S. 115, 125 (1992)(Due Process Clause "*protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them,*" quoting Daniels v. Williams, 474 U.S. 327, 331 (1986).

[58] *Id*.

[59] *Glucksberg*, 521 U.S at 726.

[60] 505 U.S. 833 (1992).

[61] *Glucksberg*, 521 U.S at 726, quoting from *Casey*, 505 U.S. at 720-721 (emphasis added).

use, health care products, services or treatments. And, as with life insurance, there is a liberty right to buy or not buy the risk protection related to such present and future decisions. PPACA seeks, by statutory compulsion of the individual mandate, to not only intrude, but usurp this fundamental individual liberty.

In rendering the Court's unanimous ruling, Chief Justice Rehnquist crafted a two part test to determine whether the right asserted was a fundamental right subject to strict scrutiny. The *Glucksberg* Two-Step Test states that for a fundamental right to exist and be subject to strict scrutiny, the right must be both a narrowly defined liberty and one deeply rooted in American history and tradition.[62]

Our discussion of *Glucksberg* demonstrated that the liberty to define one's own health care and make health care decisions including the penumbra of whether to insure or not against health costs is a narrowly defined liberty. The second question is whether government compulsion in health care or government decisions on individual medical and health care are a deeply rooted tradition in American history. Indeed, history tells us they are not. Health insurance, itself, is a rather modern phenomenon, originally developed as a strategy to bypass post World War II wage and price controls. Let us take a quick look at the role of health care in America's founding and the Framers, themselves.

VII. HISTORY AND TRADITION: FUNDAMENTAL RIGHT OF INDIVIDUAL LIBERTY IN HEALTHCARE DECISIONS

At the time of the American Revolution and the framing of the Constitution, health care was a major life challenge and expense. Relatively speaking, it was likely more severe than Americans find today both from the lack of technology, public sanitary standards, access to medical care and the inherent dangers of living in those times. At the time of the Constitutional Convention medical issues were an imperative, yet, as with food, clothing, personal issues were considered outside the realm of government. The 18th Century saw a great expansion in medical care with establishment of medical schools, training and practice of physicians and dentists.

In fact five physicians were signers of the Declaration of Independence including Drs. Benjamin Rush of Pennsylvania; Matthew Thornton of New Hampshire; Josiah Bartlett of New Hampshire; Lyman Hall of Georgia; and Oliver Wolcott of Connecticut. Moreover, physician members of the Constitutional Convention included Gunning Bedford, Jr. of Delaware.[63] Both Thomas Jefferson and Benjamin Franklin were well-known and respected authors and scientists having quite intense interest in medicine and medical issues.

During the Constitutional Convention, Benjamin Franklin suffered from ongoing affliction of gout and kidney stones. Arguably the most respected member of the Convention, he was given the honor of nominating George Washington to preside, that nomination to be held May 25, 1787. Franklin missed his honor due to a major flare-up of kidney stones. He was often attended to by physician Dr. Benjamin Rush, a delegate to the Convention and one of the members of the nearby University of Pennsylvania's Medical School, established in 1765.[64]

George Washington, President of the Constitutional Convention and revered *Father of His Country* suffered serious and expensive medical conditions and situations among his family

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[62] *Id*. at 720-21.
[63] *Strong Medicine: Doctors who signed the Declaration of Independence*, WALL ST.J., July 3, 2008.
[64] Walter Isaacson, BENJAMIN FRANKLIN: AN AMERICAN LIFE. (Simon & Schuster, 2004) at 439, 446.

and himself. Author Ron Chernow noted by age twenty-six Washington had endured and survived smallpox, pleurisy, malaria and dysentery.[65] Washington lost his venerated older brother, Lawrence, to consumption after spending a fortune taking him to various physicians (good and bad) and treatments.[66] Stepdaughter with Martha, Patsy Custis, died in adolescence of epilepsy and a congenital heart condition. Stepson, Jacky Custis died after the Battle of Yorktown of "camp fever." Washington was a pioneer in having the Continental Army vaccinated against smallpox, a disease killing more soldiers than the British, by Dr. William Shippen. This proved prescient when Cornwallis at Yorktown in one of the first uses of germ warfare sent infected individuals into the American lines.[67] Martha Washington suffered with recurrent liver ailments, abdominal pain and jaundice.[68]

Of perhaps more fame was Washington's severe periodontal disease. Washington suffered humiliating disfigurement and discomfort when eating due to the loss of teeth and bone. He spent a major portion of his fortune in secret with cutting-edge oral surgeons and dentists of the era on unsuccessful experimental dental implants, transplants and, later, extraordinary mechanical false teeth; losing all but one original tooth by the time of his presidency.[69] And finally, during his Presidency, between the adoption of the main Constitution and later Bill of Rights, Washington was stricken with a tumor in his thigh, later considered a carbuncle, in which he nearly died. Surgeons successfully removed it, procedures at that time having neither anesthetic nor antibiotics. Later, he developed a flu like condition, which was also nearly fatal to him.

Other Framers of the Constitution suffered from severe health issues as well. James Madison, known as the Father of the Constitution, was always in weak health, frail from epilepsy and arthritis.[70] John Adams suffered from depression.[71] Thomas Jefferson witnessed the early death of his wife and Alexander Hamilton encountered serious illness among his family and a later a near fatal illness in the first Washington administration. Notwithstanding, the dire health conditions faced in 18th Century American society, the chronic health conditions individually faced by the Framers themselves, and the lack of twenty-first century medical technology, the key prominent Framers of the Constitution all ended up with life expectancies consistent with or exceeding modern averages for white males which, according to a 2006 federal study is 74.8 years.[72] At the time of death their ages were: Benjamin Franklin, 84; James Madison, 85; Thomas Jefferson, 83; John Adams, 90; John Jay, 83; and George Washington, 67.[73]

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[65] Chernow, *supra* note 28, at 75.
[66] *Id*. at 23-26.
[67] *Id*. at 286, 327, 409-423.
[68] *Id*. at 400, 444.
[69] *Id*. at 437-439, 513.
[70] Ralph Louis Ketcham, JAMES MADISON: A BIOGRAPHY, (University Press of Virginia, 1990 edition) at 51.
[71] Bumgarner, John R. THE HEALTH OF THE PRESIDENTS: THE 41 UNITED STATES PRESIDENTS THROUGH 1993 FROM A PHYSICIAN'S POINT OF VIEW**.** (Jefferson, NC: MacFarland & Company, 1994).
[72] Laura B. Shrestha, *Life Expectancy in the United States: CRS Report to Congress*, CONG. RESEARCH SERV. LIBRARY OF CONGRESS, August 16, 2006, Table 1 at 4.
[73] *Penn in the Age of Franklin,-Benjamin Rush*, ACHIEVES OF THE UNIVERSITY OF PENNSYLVANIA LIBRARY, Philadelphia, Pennsylvania, www.archieves.upenn.edu, (last visited Nov. 1, 2010); see: Isaacson, *supra* at 439, 446). At the time Congress was considering amendments of fundamental rights to the Constitution, in Philadelphia, just four years after the Constitution's enactment, a yellow fever epidemic struck harder than any of the six previous epidemics. From August through November 1793, 4,000 to 5,000 residents of Philadelphia died of the disease or about one-tenth of the city's population.

Given these extraordinarily serious medical experiences of the Framers and their families, some of the best minds in the nation, one would think, national health and medical care would have been first and foremost on the minds as a Constitutional power for government or at least an individual right for citizens along with free speech, press, religion, liberty and the like, but it was not. The *Federalist Papers* are devoid of any reference to health care as even a topic of constitutional contemplation.[74] Medical care, as food, shelter and the raising of one's children were considered at the time, and as many do to this day, to be classic personal and individual responsibilities conducted under the fundamental rights of citizens' liberty to live their lives free of government compulsion or interference.[75]

Health insurance made a brief appearance during the Civil War, but health care remained primarily a direct, individually purchased service until the advent of Blue Cross-Blue Shield's insurance plans in 1932.[76]

The major increase in medical cost and ultimately government intervention and regulation traces to World War II wage and price controls. In 1943 the Internal Revenue Service ruled that employer-provided health benefits were neither income nor wages and thus were exempt from the wage and price controls and income taxes. By 1946 Blue Cross-Blue Shield and like plans became a key tactic for employers to bypass post World War II wage and price controls and attract the best of returning veterans for much needed labor. By 1950, over one-third of the workforce was covered by employer plans and by the 1950's most workers were covered.[77] To protect access to the indigent and uninsured, Congress passed the *Hill-Burton Act of 1946* requiring any hospital receiving federal funds to provide medical care free to those who could not afford it.[78]

In summary, the second test of *Glucksberg* demonstrates that there has been a deeply rooted history and tradition of personal health care purchases and decisions being a highly valued and respected fundamental individual right of liberty. Given those traditions, it would appear that Congress would have to overcome an extraordinarily high bar of *strict scrutiny* to justify an involuntary compulsion that every individual buy health insurance or be fined. Indeed, one could argue in the light of American history, tradition and court affirmation of health care decisions as fundamental rights, the PPACA's individual mandate is as unconstitutional as a prior restraint on free speech, assembly, or religion, which are all strongly protected by numerous Supreme Court rulings. Judge Vinson in *Florida, ex rel.* acknowledged this historical fact: "It is difficult to imagine that a nation which began, at least in part, as the result of opposition to a British mandate … giving the East India Tea Company a monopoly and imposing a nominal tax on all tea sold in America would have set out to create a government with the power to force people to buy tea in the first place."[79]

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[74] THE FEDERALIST PAPERS: Complete Collection (Primary Source Documents) www.garyrutledge.com/ Documents/ federalists_main.htm (last visited October 1, 2010).

[75] Even after enactment of the Bill of Rights, Congress medical-health care was not a compelling national matter to address. The next amendment to the Constitution, amend. XI, was enacted in 1795 to protect States from suit by individuals in Federal Courts, overturning the case of *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793),

[76] Melissa Thomasson, *Health Insurance in the United States*, EH.NET, February 1, 2010.

[77] Micheal E. Porter and Elizabeth Olmsted Teisberg, REDEFINING HEALTH CARE, (Harvard Business School Press, 2006) at 73.

[78] 42 U.S.C. 124.

[79] *Florida ex rel.*, 716 F.Supp.2d at 1286 (emphasis and bracket added).

VIII. INDIVIDUAL MANDATE AND COMPELLING GOVERNMENT INTEREST

In the courts and the media, debate rages on whether America has a *health care* crisis, a national emergency that only presumptively the federal government can address. Some objective perspective assists in viewing the actual economic weight of health care in the family budget and the implications for accepting anecdotal stories of individual tragic health care situations. It is here where the danger of acting along the political-emotional wave portends setting a precedent that may well usurp the right of individual consumers to make any and all purchase choices, if not at least those that do not comport to some government defined view of political correctness.

Proponents of the individual mandate attempt to justify a compelling state interest in mandating the purchase of health insurance, claiming that health care is different, unusual, special and differentiated from any other industry or essential life purchase.[80] This line of reasoning was articulated in *Mead* where the District Court quoting from *Liberty University*, stated: "Nearly everyone will require health care services at some point in their lifetimes, and it is not always possible to predict when one will be afflicted by illness or injury and require care." The Court continued, "… if an individual is sick or injured, medical providers may not refuse basic medical services under federal law regardless of the individual's ability to pay."[81]

In other words, the court suggests the Constitution would allow Congress to extinguish individual consumer liberty to make economic choices on *any* life essential decision, by merely asserting that the absence of such decision, real or imagined, would cost-shift, or otherwise add, to the welfare costs of the state. Thus, a simple assertion of an economic *free rider effect* would be sufficient to establish strict scrutiny compromising fundamental rights. The legal and economic logic of this argument may be a good starter, but is a bad stayer. In this, health care is not unique or essentially differentiated from other like necessities in economic choice. Inarguably there are a host of life decisions that would fall into such category and belie the proponents of PPACA's individual mandate.

For example, there is no federal or state mandate that an individual buy pre-paid funeral insurance despite the fact that everyone will die. Yet, every year citizens who die and have made no such plans cost-shift burial expense upon the government.[82] The average cost of a funeral is usually more than $6,000.[83] This is approximately 2.1 times the average annual consumer unit expenditure for health care published by the U.S. Department of Labor. The growth of indigent burials has put such an enormous strain on local budgets to the point that, for example, Wayne County (Detroit), Michigan in 2011 had run out of funds for pauper burials.[84] Would then the government require an individual mandate for every citizen and resident to procure pre-paid funeral insurance?

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[80] *Id*.

[81] See *Liberty,* --- F.3d ----, 2011 WL 3962915 at 39.

[82] For example, under §694.002, TEXAS HEALTH AND SAFETY CODE, the commissioner's court of each county shall provide for the disposition of the body of a deceased pauper.

[83] Kevin Risner, *Government foots bill for indigent burial*, ADVERTISER-TRIBUNE, June 12, 2009, http://www.advertiser-tribune.com/page/content.detail/id/515398. html?nav=5005.

[84] Kate Linebaugh, *Even in Death, Budget Cuts Take a Toll*, LOCALNET360, April 6, 2011, http://www.localnet360.com/even-in-death-budget-cuts-take-a-toll/.

Likewise, a significant proportion of total public welfare costs occur because a family breadwinner refused to buy or otherwise lacked adequate life insurance. A premature death occurs and a family, absent other resources, ends up on a host of state and federal social welfare programs at a cost of billions of dollars a year. According to LIMRA International, as of 2007, 28% of U.S. households lacked life insurance, nearly the same percentages as PPACA proponents state lack health insurance.[85] This includes over 10% of households with children under 18 years old. LIMRA's data also indicates the population carrying life insurance on average only has sufficient coverage to replace family income for 4.2 years and would have to double its current coverage to meet the recommendation of financial experts that life insurance be sufficient to replace 7 to 10 years of income.[86]

The aforementioned examples are but two specific life decisions no different from health care that, if the legal logic of PPACA's individual mandate is upheld would open the door for further Congressional individual mandate and restriction on fundamental liberty. Other essential products or services that could be so impacted with "individual mandates" would include food, shelter, telecommunications, energy, transportation and the like and have been referenced in current court challenges to date.[87]

Another factor by which PPACA's individual mandate would fail the test of *strict scrutiny* is to view health care in terms of its actual financial magnitude to the average U.S. family. Overall, it is statistically not as high as most headlines would lead one to believe. According to the U.S. Department of Labor, as of 2009, health care represented 5.7% of overall consumer expenditures.[88] This amount hardly rises to a level of "compelling state interest" sufficient to impinge fundamental liberty rights. It may well even be questionable as a magnitude for impeding interstate commerce.

In previous discussion regarding the *Lopez* and *Morrison* cases, we showed that the Court's reluctance to endorse a low bar of strict scrutiny to any legislation that the government attempts to root in the Commerce Clause. Nevertheless, the Court has not established a quantitative economic threshold, continuing to leave decisions on a case by case basis and the judgment of judges. The trend, at least in the current Supreme Court, suggests that economic regulation of the nature contemplated by PPACA would be subjected to a very strict analysis of high economic impact in order to convince the Court that fundamental individual liberties should be subordinated to the government interest.

We have seen in the Court's recent first amendment decisions, bi-partisan intolerance of curbs on the First Amendment when in conflict with government health and welfare arguments, a most recent example striking down California's ban and restriction of violent video games.[89] In any event, even were the PPACA to survive this level of analysis, it would face a very high strict scrutiny wall to justify itself as a "narrowly tailored" remedy. It remains to be

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[85] LIMRA INTERNATIONAL, AMERICAN FAMILIES AT RISK, FACT SHEET 2007, http://www.limra.com/PDFs/NewsCenter/Materials/07USFAQ.pdf.
[86] *Id.*
[87] Florida ex rel., 716 F.Supp.2d at 1150-1151.
[88] U.S. DEPT. OF LABOR, BUREAU OF LABOR STAT., *Consumer Expenditures: Where Does The Money Go?,* April, 2009.
[89] Brown, Governor of California v. Entertainment Merchants Association, U.S. Sup. Ct. Case #09-1448, June 27, 2011.

seen how the Court will ultimately react to the unprecedented consumer individual rights restriction posed by PPACA.[90]

Consider that according to the same government analysis, the following consumer choices represent a decidedly much higher percentage of consumer unit expenditures than health care, in fact, spending almost as much on entertainment as health care:

Housing-Shelter	34.3%
Transportation	17.4%
Food	12.4%[91]

If the federal government can establish that health care at 5.7% of consumer unit spending constitutes a "compelling state interest" legal threshold, and, that a forced individual mandate such as the PPACA's §1501 represents a "narrowly tailored" remedy, then what would the future hold for the free market in those areas that are far and away larger in socio-economic proportion to health care? It is not a stretch to see the slippery slope that would occur were the federal government allowed such unfettered power.[92]

Were the government able to compel one to contract for health care, it could then compel one to contract for food and even certain foods that the government itself determines to be healthy. Could the government under this assumption of un-enumerated constitutional authority prohibit the consumption by consumers of *Big Macs*, *Moon Pies*, steak, chocolate or ice cream claiming their fat, sugar or salt content may lead to costly heart disease, diabetes or cancer, thereby placing a substantial undue burden on commerce, society or the economy at large? Or in converse, mandating the consumption of government determined "healthy foods." Further, Congress, as it has in the past, could dictate what must be in a health insurance policy, how it may be used or not used, in essence making *de facto* health care decisions that are a matter of fundamental individual liberty rights. The possibilities may well be endless.

To what limit would government go to craft the ideal society it envisions as being good, but against the individual free choice and liberty to contract enjoyed by citizens? In effect, the government would be taking away the right of a citizen to choose not to spend or contract with an enterprise; a fundamental right of free choice and association implied in the Constitution's First Amendment and which underlies a free market economic system. Judge Henry Hudson of the U.S. District Court in Richmond, Virginia speaking from the bench during a motion hearing in *Virginia* stated as much: "Allowing such power could open the door for the federal government to require Residents to buy a car, join a gym and eat asparagus. It's boundless."[93]

Professor Randy E. Barnett of Georgetown University Law School points out directly the slight of constitutional hand created by the individual mandate. Quoting from the PPACA

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[90] For a more lengthy discussion of strict scrutiny, see Barnett, *supra at* 55.

[91] *Id*.

[92] Historically, it has been problematic when Courts have attempted to craft a quantified threshold in legal interpretations. For example, illegal monopoly, under federal anti-trust laws was often considered to be a showing of market power over 50%. Then came U.S. v. Vons Grocery, 384 U.S. 270 (1966) in which the Court allowed market share of as low as 10% to be considered under monopoly prohibitions. Thus, the number allowed today may become the *slippery slope* basis of consumer liberty loss tomorrow.

[93] Janet Adams *Judge to Rule by Year End in Virginia Health-Care Suit*, WALL ST. J., October 19, 2010.

language of §1501 of the PPACA: "The individual responsibility requirement provided for in this section…is commercial and economic in nature, and substantially affects interstate commerce, as a result of the effects described in paragraph (2). Paragraph 2 then begins: "The requirement regulates activity that is commercial in nature: economic and financial decisions about how and when health care is paid for, and when health care is purchased." [94]

The meaning of this technical language and its important implications to consumers and the citizenry are clear: "In this way, the statute speciously converts inactivity into the "activity" of making a decision. By this reasoning, your "decision" not to take a job, not to sell your house, not to buy a Chevrolet is an "activity" that is "commercial and economic in nature" and can be regulated by Congress."[95]

This seemingly theoretical Orwellian outcome has become reality in some recent government actions. In November, 2010, a veto-proof majority of San Francisco (California) Board of Supervisors decided that parents lacked intellectual *capacity* to determine what fast foods they should select or allow for their children, passing a city ordinance restricting their consumer liberty to choose so called *Happy Meals* for their own children.[96]

> San Francisco fast-food restaurants will be allowed to give away a free toy, trading cards, admission ticket or other "incentive item" as part of its kiddy meals but only if the food items meet the city's new guideline: it must contain fewer than 600 calories, have less than 640 milligrams of sodium, derive less than 35 percent of the calories from fat, or 10 percent from saturated fat. And, the meals must contain at least a half cup of fruits or vegetables…. Under the new rules drinks can't be sugary or overly sweetened either.[97]

Likewise, Congress recently decided individual consumers lacked the intellectual capacity to make effective free choices of lighting for their homes or establishments. Notwithstanding consumer choice when faced with daily economic preferences relative to the price of electricity, individual tastes and preferences and cost of lighting fixtures, under the pretext of national security and energy independence, Congress banned the sale of standard incandescent light bulbs, a harmless, ubiquitous product used in the U.S. and worldwide since 1878. The ban begins January 2012 and would be complete by 2018.[98]

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[94] Randy E. Barnett, *The Insurance Mandate in Peril*, WALL ST. J., April 29, 2010, A19, quoting from the language of PPACA, *supra*. § 1501 (emphasis added).

[95] *Id*.

[96] *HAPPY MEAL* is a trademarked product of McDonalds Corporation, used here generically to refer to special meals provided by fast food restaurants for children containing a toy or game as part of the packaged children meal. Typically such meals contain a hamburger, cheeseburger, chicken tenders, French fries and a soft drink, milk or juice.

[97] Leiani Albano, *Happy Meals are About to Get a Lot Less Happy*, LA WEEKLY, November 4, 2010, also see Lisa Baertlein, *Law Curbs McDonald's Happy Meal Toys*, REUTERS, YAHOO NEWS, November 3, 2010, www.yahoo.com/s/nm/ us_mcdonalds_toys.

[98] ENERGY INDEPENDENCE AND SECURITY ACT OF 2007, Pub. L. 110-140 (2007). The Federal law superseded acts by some states enacted or in process at the time, notably the State of California's AB 1109 LIGHTING EFFICIENCY & TOXICS REDUCTION ACT of October 12, 2007. California's law would have banned the incandescent light bulb by 2018.

Immediate consequences of federal fiat to restrict consumer "light bulb liberty" were swift. In September 2010, GE Energy Division of General Electric Corporation, the largest manufacturer of light bulbs, closed its Winchester, Virginia manufacturing plant, the last remaining incandescent light bulb factory in the United States costing 200 jobs. Manufacturing of the *legal* compact fluorescent (CFL) light bulbs is almost exclusively in China, employing in excess of 14,000 workers.[99] That consumer liberty of choice has been limited is a certainty. To what extent national security or energy independence has been achieved is quite another question. Bills are now pending in Congress to repeal the law, *Better Use of Light Bulbs Act, B.L.U.E*, and even South Carolina is considering legislation asserting state sovereignty that would allow the State to assemble and become the only domestic manufacturer of incandescent light bulbs.[100]

In the area of housing, the largest single component of consumer expenditures, there is little question of future adverse consumer liberty implications were the individual mandate held constitutional. It is generally accepted that the *Great Recession of 2008* with its close and substantial effect on commerce and public fiscal policy was triggered by the *sub-prime mortgage* crisis. Consumers made choices that resulted in record mortgage defaults, foreclosures and subsequent unprecedented intervention by the federal government in the private financial markets.[101]

Not dissimilar to the health insurance issue posed by *PPACA*, the U.S. Government is the largest insurer of individual home mortgages. The Federal Housing Administration (FHA) as of 2009 insured 37% of all home mortgages against default. Though Congress requires the FHA to maintain a capital reserve of 2%, by summer 2009 FHA capital reserves had fallen to a low of 0.53%.[102] Recent statistics cited from DataQuick Information Systems reveal that at its peak (and since 2007) at least seven major U.S. metropolitan areas have fifty percent or more of single family home mortgages insured by the federal government through FHA.[103]

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[99] Paul Whoriskey, *Light Bulb Factory Closes: End of Era For U.S. Means More Jobs Overseas*, WASH. POST, September 8, 2010.

[100] Ron Barnett, *Bill Would Keep Light Bulbs Burning In S.C.*, THE SUN NEWS, March 25, 2011, at 7C.

[101] Dan Fitzpatrick, Nick Timiraos and Ruth Simon, *Banks Bristle at Mortgage-Loan Plan*, WALL ST. J, February 25, 2011, at C1. Nationally, twenty-two percent of home mortgages are *underwater* (debt higher than the value of the property), a financial exposure of over $744 billion. At least five states have fifty-percent or more homes underwater or in default (Nevada, Arizona, Florida, Michigan and California).

[102] 12 U.S.C. §1709. See, Michael Kraus, *FHA Backs Record Number of Mortgages in 2009*, MORTGAGE RATES AND TRENDS: MORTGAGE BLOG September 21, 2009, http://www.totalmortgage.com/blog/mortgage-rates/fha-backs-record-number-of-mortgages/.

[103] Lily Leung, *Use of FHA Loans in San Diego, U.S. Fall in February*, SAN DIEGO UNION TRIBUNE, April 6, 2011, http://www.signonsandiego.com/news/2011/apr/06/ use-fha-loans-san-diego-us-fall-february/(Orlando, FL; Las Vegas, NV; Baltimore, MD; Riverside, CA; Nashville, TN; Denver, CO; and Phoenix, AZ), this does not include other government insured mortgages through the Veterans Administration, or, secondarily through Fannie Mae and Freddie Mac. While there are no reliable U.S. statistics on home many individuals purchase mortgage life insurance to protect against financial tragedy, a 2010 study in England by Sainsbury's Financial found that 47%, almost one in 2 home mortgages lack life insurance to cover their mortgage. The exposure in the U.K. is 7.1 million uninsured mortgages representing £318 billion (approximately $US 519 billion). *Almost Half of Mortgage-Holders Have No Insurance, ABOUT PROPERTY-U.K.*, November 3, 2010, http://www.aboutproperty.co.uk/uk-property/2010/11/03/.

Consequently, against the fundamental liberty of consumers, some future Congress could well impose an individual mandate under pretext of compelling state interest forcing every homeowner or renter to carry insurance against mortgage or lease default, thus substantially raising the cost of housing and shelter to individuals. Taking this one step further, under the pretext of energy independence, a Congress could use such legal precedent to further infringe on consumer choice of size and type of home. Indeed, Secretary of Energy, Dr. Steven Chu recently suggested that, notwithstanding an individual's right to determine his own housing color, the government should mandate the roofs of all homes to be painted white to slow global warming.[104]

IX. CONFLICTS OF INTEREST: THE FEDERAL GOVERNMENT AS A BUSINESS

Finally, there is the issue of the federal government as a supplier of goods and services and the inherent conflict of interest that exists when the government itself controls supply or the means of production. Such situations provide chilling implications to fundamental liberty rights of consumers to choose what to buy or not buy.

Professor Barnett's previous quote is prescient when one considers that Chevrolet, a division of General Motors, was once the largest vehicle manufacturer in the world, commanding nearly 50% market share within the United States. Poor management decisions and the effects of the *Great Recession* caused a fearful federal government to purchase General Motors in 2009.

In the 2008-2010 recession the government found itself also owning all or significant portions of certain banks and insurance companies. It owns directly and indirectly Fannie Mae and Freddie Mac (the main holders of U.S. home mortgages), all passenger rail service through its government corporation, AMTRACK. The federal government also controls all mail and package delivery in the government corporation, U.S. Postal Service which is now in serious financial distress, and in energy in parts of the nation, electricity production in various states and a myriad of businesses. The U.S. Government is the single largest land owner in the nation owning over 30% of the territory of the United States comprising 650 million acres.[105]

To the specific issue of health care, the U.S. Government acknowledges that it, alone, is the largest single provider of medical insurance in the nation: "HHS' Medicare program is the nation's largest health insurer handling more than 1 billion claims per year. Medicare and Medicaid together provide health care insurance for one in four Americans."[106]

Adding to this condition, the U.S. Government's provision of health care for veterans, military, its civilian employees and other federal health programs, finds the federal government, as the market dominant leader in the sale and provision of health insurance.

Clearly, under such circumstances, a government in large debt and budget deficit would have a keen interest, if not a manifest incentive, in using government authority to compel

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[104] Louise Gray, *Obama's Green Guru Calls for White Roofs*, THE TELEGRAPH, May 27, 2009, http://www.telegraph.co.uk/earth/earthnews/5389278.

[105] Frank Jacobs, *291 Federal Lands in The U.*S., BIG THINK, June 16, 2008; (article source data quoting from U.S. GENERAL SERVICES ADMINISTRATION, *Federal Real Property Profile*, 2004, excluding trust properties). Among them includes, 84.5% of the State of Nevada, 69.1% of Alaska, and over 50% of the States of Utah, Oregon and Idaho.

[106] *About HHS, U.S. Department of Health and Human Services*, HHS.GOV, www.hhs.gov/about/2010 (last viewed October 1, 2010).

purchase of its proprietary products and services or otherwise exert various public powers to artificially lower the cost of production of those products; a vested commercial interest that could quite easily cross the permissible constitutional line. The PPACA's individual mandate, were it upheld by courts, could be the legal precedent cited to coerce involuntary purchases or limit fundamental individual liberty rights to make normal daily economic decisions under color of federal or state law.

The federal government's current direct involvement as an economic enterprise, the direction of the health care reform legislation, in general, and the individual mandate, in particular, raises new questions regarding the line of demarcation separating the federal government acting as a business proprietor, in direct competition with private investor owned companies versus its role as a government, public policy body.

In the former, health related businesses could well find an uneven playing field. To what extent would a government health insurance oligopoly, which effectively exists considering Medicare and Medicaid alone, exempt itself from anti-trust laws such as the *Sherman Act*[107]and Clayton *Act?*[108] Once such a bridge of government coercive consumer purchase is crossed, free choice of consumers in commerce would be compromised, risking untold damage to interstate commerce, the free enterprise system and the nation's economic health. The structure for the American economy the Framers modeled from Adam Smith's concept of liberty would be lost. The nation will have traded off its pre-1776 oppressive *mercantilism of the crown* for a like oppressive *new mercantilism of Congress*.

X. EQUAL PROTECTION CLAUSE?

One final point to briefly address is the issue of the unconstitutionality of the *Individual Mandate* from the perspective of fundamental rights of consumer liberty is whether the provision, itself, can pass muster under the *Equal Protection Clause* of the Fourteenth Amendment. It is a topic of another discussion beyond this paper but is noted here as another area where the PPACA appears to have constitutional problems. The Constitution's Equal Protection requirement grants citizens *equal protection of the laws* that is; the government must apply the law equally and without preference to one person or class of persons over another.[109] While much of the Court's case law has dealt with the application of *Equal Protection Clause* to fundamental, ordered liberty, cases and civil rights related cases, it has also been applied in the past to the arena of laws impacting economic liberties and freedoms. For example in *Village of Willowbrook v. Olech*,[110] the Supreme Court affirmed that anyone asserting a claim to have been singled out for adverse, irrational action by the government may bring a cause of action under the *Equal Protection Clause*.[111]

In the ObamaCare trial court cases litigated to date, the government, in fact, has taken precisely this position in defending the PPACA's individual mandate. That is, the government as defendant has told the courts that the law itself cannot function unless every American

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[107] SHERMAN ANTI TRUST ACT OF 1890, U.S.C. §1-7 (1890).
[108] CLAYTON ANTI-TRUST ACT OF 1914, U.S.C. §12-27; 29 U.S.C. §52-53 (1914).
[109] U.S. CONST., amend. XIV.
[110] 528 U.S. 562 (2000).
[111] *Id.*

participates and every American has health insurance.[112] The individual mandate has been portrayed as the essential part of a finely crafted watch, which cannot function unless all Americans and residents adhere to its dictates.[113] Were this the case, equal protection would not be an issue.

To the contrary, however, the PPACA is replete with so many arbitrarily granted administrative order exceptions that it is legislative Swiss cheese. Under the law's §1501 Individual Mandate, exempted individuals and entities include those who qualify for religious conscience exemption, members of a health care sharing ministry or the incarcerated.[114] It further exempts from penalty individuals for whom health insurance would exceed 8% of household income or fall below the poverty line, members of Indian tribes, individuals deemed to have suffered a hardship with respect to their capability to obtain coverage.[115] These terms remain unconstitutionally vague.

Subsequent to enactment, and prior to promulgation of any uniform and consistent federal rules, the U.S. Department of Health and Human Services (HHS) has granted over one-thousand, three hundred waivers to individuals and corporations, some of the largest in the nation including PepsiCo, IHOP, Foot Locker, McDonalds, San Francisco luxury hotels and gourmet restaurants. HHS has even exempted the entire States of Nevada and New Hampshire and over 40 percent of unions such as the massive International Brotherhood of Teamsters. As of February 2011, the government admits to receiving over 733 additional applicants filed from corporations, unions and individuals and has granted over 500 waivers since December 2010.[116] With so many actual and potential exemptions, who really is covered by the law? That the system is other than legally arbitrary and inconsistent is problematic and the government would be hard pressed to defend the law against an equal protection challenge.

Finally, another blow to the "fine tune watch" theory used to defend the individual mandate can be seen in Congress's bi-partisan passage of the repeal of the infamous 1099 Form requirement of the PPACA; which was supported by President Obama, himself.[117] While welcomed by all businesses, this action belies the government's arguments in court that no part of PPACA can be removed without destroying the entire law.

In summary, the PPACA's Individual Mandate appears to not only be born from a power not enumerated to Congress under Article I of the U.S. Constitution, but one never contemplated by the Framers nor granted by the People. Indeed, history suggests one in which

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[112] See for example, *Mead*, 766 F.Supp.2d at 19.
[113] *Florida, ex rel.*, 716 F.Supp.2d at 1162.
[114] §1311 (d)(4)H).
[115] See §5000A(e); *Mead*, 766 F.Supp.2d at 4, paraphrasing footnote 2.
[116] James Adams, *Hundreds of Waivers From Rules Are Given*, WALL ST. J., February 2, 2011, at A4. Also see: Jeffrey H. Anderson, *Obamacare Waivers Granted to Nevada and New Hampshire*, THE WEEKLEY STANDARD, May 19, 2011, and David Freddosa, *Unions make up 40% of employees exempted from Obamacare*, THE WASHINGTON EXAMINER, January 27, 2011.
[117] CALIFORNIA HEALTH CARE LINE, *Senate Passes Measure to Repeal Reform Law's Tax Reporting Rule*, April 6, 2011. http://www.californiahealthline.org/articles/ 2011/4/6/senate-passes-measure-to-repeal-reform-laws-taxreporting-rule.aspx. The Senate voted 87-12 in favor of a House-passed measure (HR 4) to repeal the 1099 tax-reporting provision of the federal health reform law, *Politico* reports. The vote marks the first time Congress has approved eliminating part of the law. President Obama is expected to sign the bill despite concerns about its offset (Haberkorn, *Politico*, 4/5).

the Framers specifically intended to prohibit Congressional and state power over individual liberty and freedoms.

XI. THE CONSTITUTIONAL MECHANISM TO HEALTH CARE REFORM

We have demonstrated the unconstitutionality of PPACA's Individual Mandate from the perspective of its violation of fundamental liberty rights. Cases are making their way through the federal Courts of Appeals that challenge the mandate as an unconstitutional extension of the Commerce Clause. The subject, however, begs the question. If the American public truly demands some form of universal health care, is there a way the Constitution will allow it? The answer lies squarely within the Constitution itself. The Framers in 1789 anticipated societal and political change. They wanted the document to accommodate true consensus of the American people to shape their destiny and that of their government.

That mechanism, in Article V, is the process of amending the Constitution.[118] The process was deliberately crafted to make amendment difficult to ensure only those issues with the strongest consensus of the American people are enacted. The process has been successful twenty-seven times since 1789. Congress may propose such a reform, even with an individual mandate which may restrict fundamental liberty interests by way of Constitutional amendment. The process requires a passage by two-thirds vote of both houses of Congress and ratification by three-fourths of the states.[119] The critical point is that by amendment, the purported new duty to provide for one's health care insurance would be specific and confined to that issue. Unlike a judicial ruling, it would not set, nor be used as interpretive precedent, to mandate industries or behavior outside the amendment's enumerated subject matter.

United States history provides us a direct example whereby the amendment process was used to craft a restriction on an industry in the interests of health and society that severely impinged on otherwise fundamental consumer liberty. The issue involved a national consensus regarding the sale, manufacture and consumption of alcohol.[120]

The late 19th and early 20th century temperance movement[121] advocated for the elimination of the consumption of alcohol on health and social grounds not dissimilar to the proponents of PPACA and even those suggesting a mandate for nationalized health insurance. This was unquestionably a direct bar on consumer liberty and an entire industry. The government was successful in achieving a national political consensus. Here Congress did not ban alcohol by statute rooted in the Commerce Clause, nor did it attempt an interpretive administrative agency regulatory scheme rooted in existing law such as the *Pure Food and Drug Act of 1906*.[122] Rather, the ban was accomplished by enactment of the Eighteenth Amendment[123]

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[118] U.S. CONST., article V.
[119] *Id.*
[120] *Research and Markets* Report stated in 2009 the estimated wholesale revenue of the U.S. alcoholic beverage market was $231.5 billion of which $153.9 was alcoholic beverages and wine, and, $77.6 billion, beer. Source: GREEN TECHNOLOGY WORLD, *Research and Markets Adds Report: United States Food and Beverages Industry Guide,* April 8, 2011,http://green.tmcnet.com/news/2011/04/ 08/5432560.htm.
[121] New Georgia Encyclopedia, http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-828 (lasted visited February 8, 2012).
[122] Pure Food and Drug Act of 1906, 21 U.S.C. § 301 et. seq.
[123] U.S. CONST., amend XVIII (1919) For further history, see *18 Amendment*,

creating the era of prohibition. The unintended and often severe social consequences of prohibition as well as a public demand to reclaim consumer liberty in adult beverage purchase and consumption, among other things led to a new public consensus enacting the Twenty-First Amendment (1933),[124] repealing the 18th Amendment and bringing an end to prohibition.

The matter of national health insurance mandates a parallel process. However, Congress and the nation lack a similar national consensus requisite to impair the consumer choice and liberty that currently exists for individual decisions. Rasmussen Research tracking polls have shown over half the public consistently opposed to the PPACA and, particularly the Individual Mandate. Rasmussen recently found 58% of Americans opposed and 37% supporting the PPACA. Among Independent voters, 63% oppose and 36% support the PPACA.[125] Likewise, CNN Opinion Research found 57% opposed 39% in favor of the PPACA.[126]

These and other polls point to a lack of political public consensus supporting a law that impinges fundamental liberty rights. The public has nowhere near the public consensus necessary to successfully enact an amendment to the Constitution. To the contrary post November 2010 elections, the 2011 Congress has blocked budget allocations to implement the PPACA, repealed it in the House of Representatives and called for repeal and replacement of the law.

Commenting on the government's contention that the individual mandate is merely a normal exercise of its right to regulate commerce, Judge Vinson, in *Florida ex rel.,* addressed the extraordinary challenge to fundamental individual liberty when he wrote:

> But, in this case we are dealing with something very different. The Individual mandate applies across the board. People have no choice and there is no way to avoid it. Those who fail under the Individual mandate either comply with it, or they are penalized. It is not based solely on citizenship and on being alive. As the non-partisan CBO (Congressional Budget Office) concluded sixteen years ago (when the Individual mandate was considered, but not pursued during the 1994 national healthcare reform efforts): "A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. *The government has never required people to buy any good or service as a condition of lawful residence in the United States.*[127]

Absent a manifest public consensus to enact a constitutional amendment, there needs to be a new recognition either by Congress in repealing at least the individual mandate, or, by the courts finding it unconstitutional. The mechanism chosen to address health care reform cannot go forward no matter the purported good desired or anticipated. The exercise of extra-constitutional power beyond what the Framers intended or to which the people of the United States have ultimately consented has

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*Notes on the Amendment*s, Constitution on Line, www.usconstitution.net/constamnotes.html.

[124] U.S. CONST.. amend. XXI (1933) For further history, see *21 Amendment*, *Notes on the Amendment*s, Constitution on Line, www.usconstitution.net/ constamnotes.html.

[125] Jeffrey H. Anderson, *New Rasmussen Poll on Obamacare*, THE WEEKLY STANDARD, February 7, 2011, www.weeklystandard.com.

[126] CNN Opinion Research Poll, CNN March 22, 2011, http://i2.cdn.turner.com/ 2010/images/03/22/rel5a.pdf.

[127] *Florida ex rel.*, 716 F.Supp.2d at p. 1164 (emphasis added).

always been problematic. We have seen it in a ban on an entire industry, alcoholic beverages, only for the public to reconsider years later and repeal the amendment. American history has offered many examples. The same power of economic activity that compels one's choice of light bulb or child's fast food meal, could set precedent for future loss of individual liberties at the whim of any Congress.

Fundamental liberties are precious rights not sacrificed easily on the spur of the moment or the political emotionalism of the hour. President Ford echoing a statement attributed centuries ago to Thomas Jefferson said it best. In his Presidential Address to the Joint Session of Congress, August 12, 1974, nearly a decade before PPACA's individual health insurance mandate was contemplated by Congress, President Ford's admonition to the nation may well have been prophetic: "A government big enough to give you everything you want is a government big enough to take away everything you have."[128]

XII. CONCLUSION

As Adam Smith foretold, a fundamental tenet to the effective operation of our free market system is liberty of individual consumers, the freedom to pick and choose which products and services they wish to buy, at which time and at which price. This is a basic right of liberty inherent in our Constitution and our system of commerce as well as of every citizen of the United States with its government. It does not matter that another person or group of central government officials thinks a consumer should buy another brand, another product or not make a purchase altogether. Just as the First Amendment grants people the freedom to express an opinion economic or otherwise, so too does it bar individuals from acting as an arm of the *s*tate to compel a private, commercial purchase a citizen feels is unwarranted, unneeded or otherwise undesired. That is the individual responsibility which comes with freedom consumers as free citizens enjoy.

Every day consumers are confronted with choices and every day those choices involve some decision as to one's health and welfare, risk and safety. Citizens decide whether to take an aspirin or even buy one, how many meals to eat, what foods we eat and drink, whether we exercise and how much, how often, when and with whom we should seek medical care and the extent to which we wish to purchase it. Individuals decide whether to drive an automobile to work and what kind, whether to use mass transit, walk, bicycle or fly. Individuals do so sometimes with information provided by the government, sometimes from private sources or their own sources and intuition. Consumers make decisions that prove right and decisions that prove wrong.

Individual citizens make these decisions with their free will, Consumer liberty, not politicians nor the dictates of a pre-1776 Crown, nor automatic statutes made remote in Washington, D.C. govern these decisions. To allow the Individual Mandate of Obamacare to prevail has implications far beyond the issue of health care. Two hundred, thirty-five years after America's split from the tyranny of British mercantilism, upholding such a mandate it would in essence, allow the central government to impose a new form of mercantilism in the long run equally abhorrent to the citizenry and contrary to the history, letter and intent of the Constitution, itself.

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[128] Gerald R. Ford, President of the United States, PRESIDENTIAL ADDRESS TO THE JOINT SESSION OF CONGRESS, August 12, 1974.

The decision to buy a health care insurance policy and decisions on its use are no different than any other personal economic and non-economic determination. Certainly in an ideal world, all needs would be provided for: food, lodging, health care, life insurance, pensions, education and the like. People of good will strive to achieve better lives individually, for their families and collectively as a societal goal for their communities, yet the United States is not nor is any nation a utopia. Decisions are made in America by free citizens, priorities are set and individuals are allowed the fundamental liberty to succeed or fail based on free choice.

The *Individual Mandate* of the PPACA §1501 is unconstitutional. It rises not from a manifest national consensus, but is opposed by the general public with vigor similar to Colonial America's disdain for the 1775 King's Stamp Acts. And as has been demonstrated in this paper, the individual mandate is incongruent with recent line and trend of Supreme Court *stare decisis* relating to government infringement of fundamental rights and liberties. Ultimately, recent cases pro and con PPACA will make their way through the Courts of Appeal to the U.S. Supreme Court. There nine justices will weigh the law, the consequences, and slippery slope that would exist were the individual mandate to be upheld. To be sure penalizing inactivity would create a powerful incentive for future Congressional overreaching in attempts by government to shape society, the business system and national economy in general. Such *Nuevo Mercantilism* would force individuals into involuntary collective goods or service purchases as each Congress defines it for the nation.

The Founders of the United States in 1776 and the 1789 Constitution Framers clearly understood that the only means to prohibit capricious extension of government power was to contain it by enumerating powers and limits on the government's ability to impede liberty and freedom of its people as citizens and as economic consumers.

We end as we began restating Chief Justice Taft's warning in Bailey: "The good sought in unconstitutional legislation is an insidious feature, because it lends citizens and legislators of good purpose to promote it without thought of the serious breach it make in the ark of our covenant, or the harm which will come from breaking down recognized standard.[129]

Glucksberg established that health care decisions and their penumbras are fundamental rights of liberty protected from government interference. The national debate on health care may come ultimately to some consensus on a path forward. The nation has legitimate tools to address the subject through Constitutional amendment, subsidy, incentives or other well established, constitutionally permitted means and mechanisms.

Quashing fundamental rights through imposition of ObamaCare's Individual Mandate is a power neither countenanced by the Framers nor granted by the people of the United States to its federal government in 1776, 1789 ... or even in 2011.

[129] *Bailey*, 259 U.S. at 21.