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The Federal and State Implications of Wyoming's Health Care Freedom Amendment *by Stephen R. Klein*

EXECUTIVE SUMMARY

In the 2011 Legislative Session, the 61st Wyoming Legislature passed a referendum to amend the Wyoming Constitution known as the Health Care Freedom Amendment ("HCFA"). The amendment will be placed on the ballot in the 2012 general election, and if ratified will provide strong protection of individual liberty. The HCFA would codify a legal basis upon which to challenge the Patient Protection and Affordable Care Act ("PPACA"), but it is just as important for the protections it would secure from state government.

The HCFA's challenge against the federal PPACA combines a number of judicial threads to weave a strong tie of freedom. The first thread is "Incorporation," i.e., federal enforcement of the individual rights contained in the Bill of Rights against state and local governments. Building on this, we look to Judicial Federalism. This doctrine originally focused on making state constitutions more protective of the rights described within the federal Bill of Rights, but has expanded to include rights that are only recognized in state constitutions. When a state provides more protection for a federal constitutional right, there is no ground to appeal a state constitutional question to the United States Supreme Court. These traditions must be considered in light of the Ninth and Tenth Amendments to the United States Constitution, which provide that the Bill of Rights is not the end-all be-all of individual rights; citizens need not amend the U.S. Constitution in order to protect individual rights within their own state. These three threads, combined with the HCFA, should protect an individual's health care choices from both federal and state infringements.

Section (a) of the Wyoming HCFA protects health care decisions. Because this applies to the purchase of health insurance, it directly opposes the PPACA individual mandate, and protects the use of new innovative treatments, alternative medicine, and other procedures that may provide a cure. This section also solidifies the right to refuse treatment. Section (b) of the HCFA prohibits restrictions on direct payment and acceptance of direct payment for

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care. Section (c) reserves to the Wyoming Legislature the ability to restrict health care decisions in reasonable and necessary ways that protect both the health and general welfare of the people. These might include requiring certain immunizations in the event of an outbreak of a disease, restricting recreational drugs, restricting assisted suicide and, if *Roe v. Wade* is ever overturned, further restricting or banning abortion. Finally, section (d) of the HCFA requires the Wyoming government to pursue policies that will buttress health care freedom rather than whittle it away and gives standing to the Wyoming Attorney General to defend individuals and the state from federal incursions into health care freedom.

Whether or not the PPACA remains in effect, the HCFA is a necessary addition to the Wyoming Constitution. In the continuing struggle between individual liberty and government power, a ratified HCFA would paint a line that government cannot cross. The HCFA would require government to formulate policies that respect health care freedom. Such policies have the potential to lower costs and increase the effectiveness of Wyoming's health care system as individuals select and purchase the care they want. If the HCFA is ratified, it will be a first step on the road to market-driven health care; its language securing our fundamental right to make our own health care decisions will ensure that journey starts off on the right foot.

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INTRODUCTION

In the 2011 Legislative Session, the 61st Wyoming Legislature passed Senate Joint Resolution 2,¹ a referendum to amend the Declaration of Rights in the Wyoming Constitution with a new section. Known as the Health Care Freedom Amendment (“HCFA”), this was the third year that such an amendment was considered by the state legislature,² and in the wake of other states passing similar amendments it received strong support across Wyoming.³ The amendment will be placed on the ballot in the 2012 general election. If more than 50% of those voting vote “yes,” the Amendment will become part of the Wyoming Constitution.⁴ The language of the Amendment is straight-forward:

Article 1, Section 38.
Right of health care access.

- (a) Each competent adult shall have the right to make his or her own health care decisions. The parent, guardian or legal representative of any other natural person shall have the right to make health care decisions for that person.
- (b) Any person may pay, and a health care provider may accept, direct payment for health care without imposition of penalties or fines for doing so.
- (c) The legislature may determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution.
- (d) The state of Wyoming shall act to preserve these rights from undue governmental infringement.

If ratified, the HCFA will provide strong protection of individual liberty. It will defend our property rights to use our own income and personal funds for health care purchases, and go so far as to protect the decisions we make for diet and exercise. Although most Wyomingites, like most Americans, are greatly concerned with the affordability and availability of health care, they do not support state solutions that coerce individuals into a large, centralized system.⁵ In matters of state-run health care, the government “solutions” not only suppress liberty; they fail to live up to their promises.⁶

The response to government-controlled health care is not simply pragmatic. It calls forth the understanding that government exists to secure individuals’ rights that are “endowed by their creator.”⁷ There was a time—the first 200 years of the Republic—that the rights and virtues inherent in the HCFA (voluntary exchange, altruism, etc.) did not have to be specifically enumerated. That time has, unfortunately, passed. Fortunately, the efforts of those who deny natural rights do not stand unchallenged, and one such correction is embodied in the HCFA.

The HCFA provides a legal basis upon which to challenge the federal Patient Protection and Affordable Care Act (“PPACA”). The current challenges against the PPACA focus on the individual mandate, a requirement that individuals purchase government-approved health insurance or pay a tax penalty.⁸ These challenges are all based on the Commerce Clause.⁹ If the commerce argument fails, the HCFA could be used to challenge the individual mandate provi-

sion on Ninth and Tenth Amendment grounds. The HCFA also provides a legal basis for protecting against over-reaching by state government. This benefit was widely overlooked in the debate surrounding legislative approval. This paper discusses how the HCFA's broad protection of health care decisions could serve to protect the people of Wyoming from both federal and state interference into health care decisions and provide an anchor for innovative, market-driven health care reform.

I. THE FEDERAL IMPLICATIONS OF THE HEALTH CARE FREEDOM AMENDMENT¹⁰

The greatest backlash against the federal PPACA law focuses on a provision called the individual mandate, the requirement that all Americans purchase federally-approved health insurance by 2014.¹¹ There are a number of high-profile lawsuits by states challenging the individual mandate on Commerce Clause grounds. Earlier this year, Wyoming joined the largest of these, the Florida suit.¹² The Commerce Clause states that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."¹³ The lawsuits challenge the mandate because, instead of regulating actual commerce, it requires individuals who are not engaging in commerce (not buying insurance) to perform that activity (buy insurance) that triggers Commerce Clause regulation.¹⁴ The states argue that a decision not to purchase a product is not an economic activity, and thus cannot be classified as "commerce" and is not within the pur-

view of the Commerce Clause.¹⁵ At the time of this writing, both the Virginia and Florida cases are pending appeal to the Fourth and Eleventh Circuit Courts of Appeal, respectively. Both have favorable rulings behind them at District Courts.

It is very likely that the Supreme Court will hear and decide one or all of the Commerce Clause challenges before the people of Wyoming vote on the HCFA in November 2012. Should the individual mandate be upheld, how might Wyoming's HCFA provide an alternative challenge to the individual mandate?

Such a challenge would utilize the Ninth and Tenth Amendments of the United States Constitution. The Ninth Amendment reads, "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." These amendments have not fared well in light of some case law, but an examination of the recent history of constitutional rights—the last 100 years or so—tells a different story. Implicitly, the principles of individual rights and federalism are alive and well. It is this rich history that provides the map to explicitly restoring the Ninth and Tenth Amendments, and to preventing improper federal supremacy over state governments and individual rights such as health care freedom.

a. Incorporation and Judicial Federalism

The doctrines that implicitly recognize expansive rights under the Ninth and Tenth Amendments are Incorporation and Judicial Federalism. “Incorporation” concerns the federal enforcement of the individual rights contained in the Bill of Rights against state and local government. The Incorporation cases follow the Fourteenth Amendment, which was ratified in 1865 and declares that “[no] State [shall] deprive any person of life, liberty, or property, without due process of law.”¹⁶ The most recent affirmation of Incorporation is in 2010’s *McDonald v. City of Chicago* decision.¹⁷ Here the United States Supreme Court ruled that the Second Amendment—the right to bear arms—applies to the city of Chicago, and that the city’s handgun ban violates the right. The Second Amendment is one of the last parts of the Bill of Rights to be incorporated. Incorporation affirms that there are freedoms that cannot be infringed by any level of government in the United States. Just as importantly, the history of Incorporation shows that judges are still aware of this.

In the late 20th Century, scholars studying the Incorporation cases of the time—and even some judges who were making the rulings—began to advocate for greater protection of individual rights in state constitutions. Justice William Brennan of the United States Supreme Court weighed in with unequivocal support.¹⁸ This movement, known as Judicial Federalism, originally focused on making state constitutions more protective only of those rights described in the federal Bill

of Rights, in particular of the Fourth Amendment protection against unreasonable search and seizure.¹⁹

Recently, the philosophy has expanded: “The New Judicial Federalism recognizes that the United States Constitution is the *baseline* or the starting point for many basic freedoms, and state courts now commonly turn to state constitutions to support broader protections for such freedoms.”²⁰ Unlike expansion of freedom through judicial interpretation, in the case of the HCFA the courts could base their rulings on an individual right specifically recognized by the people of Wyoming. Not only must federal, state, and local governments respect the Bill of Rights pursuant to Incorporation; the federal government must respect state constitutions that are even more protective of individual rights. Incorporation and Judicial Federalism build a basis for answering the question of how the PPACA relates to the HCFA: can federal statutes be allowed to trump the rights that states reserve for their citizens?

b. Ninth and Tenth Amendment Principles versus the Supremacy Clause

Currently federal law exerts near-absolute supremacy over the states, purportedly under the Supremacy Clause: “This Constitution, and the laws of the United States which shall be made *in the pursuance thereof* . . . shall be the supreme law of the land”²¹ But the Supremacy Clause is not a rubber stamp, because the Constitution is limited to enumerated powers; this is made clear in its wording and in the original understanding of the Ninth and Tenth Amendments. Securing

health care freedom—or any right at the state level—is pointless if an ever-expansive federal government is able to subvert rights via a limitless interpretation of the Supremacy Clause. The maxims of individual rights and the proper state protection of them could reassert a just balance with Wyoming’s Health Care Freedom Amendment.

Pursuant to the Ninth Amendment, the Bill of Rights is not the end-all be-all of individual rights; citizens are not required to amend the U.S. Constitution in order to protect individual rights within their own states. The Tenth Amendment complements this by unequivocally reserving all governmental powers not specifically granted to the federal government in the Constitution “to the states respectively, or to the people.” Based on the structure and wording of the Constitution, and following the spirit of Incorporation and Judicial Federalism, no government power may infringe upon state-recognized rights.

To be sure, the Supremacy Clause would still make the U.S. Constitution supreme as a minimum platform for protecting individual liberty and with regard to its enumerated federal powers. Assertions of individual rights are not meant to subvert or nullify the actions of the federal government; they are meant to restore the two-way street of federalism that the founders intended. The states cannot pass state constitutional amendments that commandeer authority over interstate commerce, or over the treaty power, nor can they declare freedom from the federal income tax, because all of these are specifically enumerated federal powers that

cannot be overridden by state constitutions.

The matter of federal supremacy over rights recognized by states is not limited to health care freedom. Some states provide greater protections than the Fourth Amendment against search and seizure, but this protection is violated regularly because, as it currently stands, federal agencies (the FBI, etc.) are not required to respect more protective state constitutions.²² There are even instances where state police agencies have turned over cases to federal authorities in order to circumvent state constitutions.²³ Proper recognition of the “dual” federalism contemplated by the Ninth and Tenth Amendments could remedy this by making the greatest protection supreme, whether it is derived from a state constitution or the U.S. Constitution. Absent dual federalism, greater state protections are not worth the paper their constitutions are printed on.

The long history of precedents that allowed the federal government to exert more and more control over the lives of citizens (with exceptions only for the federal Bill of Rights)—and act with appalling disregard of the Ninth and Tenth Amendments—may still be successfully challenged by the states. The current Commerce Clause challenges to the individual mandate are backed up by Wyoming’s HCFA. Provided the HCFA receives voter approval, the Wyoming Constitution could protect Wyoming residents from unwanted federal incursions into health care.

II. THE STATE IMPLICATIONS OF THE HEALTH CARE FREEDOM AMENDMENT

The debate surrounding the HCFA when it was before the 61st Legislature hinted at a key question: if the Supreme Court *does* strike down the individual mandate on commerce grounds, is there still need for an HCFA? The short answer is “yes, there is a need.” It will be just as important to ratify the HCFA whether the Supreme Court strikes down the individual mandate or not. This section discusses the state implications of the HCFA, taking each of the amendment’s four sections in turn.

a. Health Care Decisions

Section (a) of the HCFA states that “Each competent adult shall have the right to make his or her own health care decisions. The parent, guardian or legal representative of any other natural person shall have the right to make health care decisions for that person.”²⁴ This language protects choice in health care for individuals and those whom they are responsible for. As this applies to the purchase of health insurance, it is this part of the amendment that directly opposes the PPACA individual mandate and establishes the argument made in the previous section. But the protection of the HCFA goes far beyond this at the state level.

While the 61st Wyoming Legislature considered the HCFA, there were concerns that the wording of the HCFA, if worded “health care choice,” could be conflated to protect abortion rights.²⁵ In the event that *Roe v. Wade*²⁶ and *Planned Parenthood v. Casey*²⁷ – the cases that recognize abortion

rights – are overturned, legislators feared that this would make outlawing or restricting abortions in Wyoming difficult or impossible. This concern will be addressed in part (c) of this section, as will other limits on the rights under the HCFA. For this part, it should be noted that abortion is among the few areas where the Supreme Court has recognized a right to health care decisions;²⁸ in other cases, it has recognized the right to refuse treatment.

If health care decisions are a protected right, options should include innovative treatments, alternative medicine, and other procedures that may provide a cure. In 2008, around 540,000 Americans travelled abroad to seek medical treatment.²⁹ Known as “medical tourism,” Americans usually make these journeys because treatment is cheaper in other countries. However, they also make these trips to utilized treatments that are restricted or are not yet available in the United States. Effective treatments that are currently unavailable here include different types of cervical/lumbar artificial disc replacement and certain hyperthermia treatments for cancer.³⁰ With the right to make health care decisions, these treatments may come to Wyoming and allow individuals to decide the best course of care.

The right to make medical decisions has a necessary corollary: the right to decide not to accept treatment. This right has already been recognized by the Supreme Court, most recently in *Washington v. Glucksberg*.³¹ In this case, in discussing the liberty protected by the Due Process Clause, the Court stated “We have also

assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment."³² The HCFA adopts this assumption and solidifies the right to refuse treatment.³³

Some argue that if persons cannot afford certain treatments, they do not in fact have a right to health care decisions, since they cannot necessarily choose whatever treatment they want. Some go farther and advocate that health care itself is a human right, not a decision.³⁴ It is beyond the scope of this paper to address the economic implications of health care reform: the Wyoming Liberty Group addresses the costs and effects of the PPACA and other government health care efforts in other studies, and offers market-driven alternatives.³⁵ Suffice it to say, individual liberty is not exclusive of social welfare, and programs that sacrifice the former in the name of the latter succeed only in hampering *both* freedom and the well-being of those in need. Section (a) of the HCFA would unequivocally protect health care decisions, and would serve as a lasting addition to the Declaration of Rights in the Wyoming Constitution.

b. Direct Payment

The second section of the HCFA circumvents the possible fallout of eliminating state and federal mandates to purchase insurance: "Any person may pay, and a health care provider may accept, direct payment for health care without imposition of penalties or fines for doing so."³⁶ Assuming the federal mandate is defeated and certain Wyoming state mandates

are restricted by way of the HCFA, clever politicians and regulators could instead force individuals into purchasing certain insurance policies through onerous taxes and other disincentives on direct payment for care. The state could make other moves to commandeer health care, even going so far as to mandate a public system that will inevitably ration care. By preventing restrictions on direct payment and acceptance of direct payment for care, this part of the amendment is crucial: it is an escape valve from government-controlled health care. So, whereas section (a) protects the end of health care freedom, section (b) secures the means of procuring health care services.

c. "Reasonable and necessary restrictions . . . to protect the health and general welfare"

The third section of the HCFA reads "The legislature may determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution."³⁷ This section of the amendment is the most disquieting: what is a right if it can be restricted? However, considering the legal implications of the language in this section, the broad grant of health care decisions in section (a) is only minimally restricted.

To begin, the latter portion of this part is half reservation, half truism: the legislature may pass restrictions "to accomplish the other purposes set forth in the Wyoming Constitution." The Wyoming Constitution provides for certain mandated

health care systems that will continue unaffected by the HCFA because of this section. These include worker's compensation,³⁸ "the humane treatment of prisoners,"³⁹ and other areas. In addition, the Wyoming Constitution may always be amended: it will be possible to add future reservations or undo the HCFA in its entirety.⁴⁰

The first half of this part raises the most concern. Who will be able to restrain the legislature from abusing its power to "determine reasonable and necessary restrictions . . . to protect the health and general welfare"? The answer is twofold: the courts and the people of Wyoming. When considering a challenge to a restriction on health care freedom, the Wyoming courts will look at these requirements in their entirety. A restriction must not merely be reasonable, it must be necessary as well. Instead of simply presuming a "reasonable" need for a restriction, the legislature must establish that restriction is actually necessary. Furthermore, any such restrictions must be designed to protect both the health and general welfare of the people. Restrictions, then, may only serve for serious wide-scale problems that call upon the traditional police power of the state. Like the latter part of this section, this half of the section buttresses one of the original sections of the Wyoming Constitution.⁴¹

Originally understood, the police powers of each state "are numerous and indefinite."⁴² It is up to the people of each respective state to determine the limits of these powers through their state constitutions and by holding elected leaders accountable. The police power is vast, and

though the HCFA would curb its reach in health care, the drafters of the amendment have reserved the ability to restrict areas that Wyomingites do not believe are valid exercises of health care choice. This likely includes dealing with outbreaks of disease: if there is an epidemic such as smallpox, polio, or a wholly new disease, the state retains the power to force citizens to undergo quarantine, accept treatment or accept immunization for the safety of others.⁴³ Another area is recreational drugs: as the nationwide medical marijuana debate continues, the Wyoming government will retain the right to regulate such drugs.⁴⁴ Finally, although the HCFA protects the right to refuse medical treatment, it does not require allowing health providers to assist suicide.

As briefly mentioned in part (a) of this section, one of the greatest concerns during the HCFA debate regarded whether the amendment would protect abortion.⁴⁵ Currently, this concern is largely irrelevant because abortion is protected as a right under the United States Constitution. If this is to be changed, it must be done so by either overturning *Roe v. Wade* in the courts or amending the United States Constitution to include the right to life.⁴⁶ However, in the event that the federal constitution is changed, the HCFA would not be a hindrance to preventing abortion because of section (c). In fact, it is very likely that Wyoming would quickly adopt a right to life amendment to its own constitution. The abortion debate is as intense as ever, but neither side of it is served or hindered by the HCFA.

The limited reservation for the Wyoming government to exercise its police power

does not hurt the HCFA. All laws and powers are open to abuse, and it is up to the electorate and the judicial system to ensure government does not override the amendment if it is ratified. As worded, the reservation for the general welfare is narrow, while the protection of health care decisions is wide. This is nearly as strong as legal protections get.

d. Preservation of Rights

The final section of the HCFA reads “The state of Wyoming shall act to preserve these rights from undue governmental infringement.”⁴⁷ This constitutional duty, so broadly stated, extends to all who take the oath of office in the legislative branch, the executive branch, and the judicial branch.⁴⁸ This portion represents the commitment of the Wyoming government to pursue policies that will buttress health care freedom rather than whittle it away. It ensures that health care freedom is the supreme consideration when there is a tension between health care freedom and policy. This duty could play a pivotal role any time a health care bill is considered by the legislature, any time a regulatory body considers an action, and any time judges consider health care laws.

This section also serves to empower the Wyoming Attorney General to defend individuals and the state from federal incursions into health care freedom. A separate bill, H.B. 0039, was introduced by the Joint Labor, Health and Social Services Committee in the 2011 session to provide \$500,000 in funds to the Attorney General to litigate such issues.⁴⁹ However, this bill failed to pass in the Senate.⁵⁰ It is unclear how far the Attorney General

can pursue a health care freedom agenda absent specific funding, but the power to do so will be constitutional if the HCFA is passed.

The language of the Health Care Freedom Amendment is straightforward and means what it says. It secures the right to make health care decisions and preserves just enough power to prevent the state from slipping into medical anarchy and for the people to provide contours to what is health care and what is not. The HCFA would assert a strong federal challenge, but its restrictions on the powers of the state government would be far more encompassing. Thus, whether or not the PPACA remains in effect, the HCFA is a powerful bolster to the Declaration of Rights of the Wyoming Constitution.

III. “FREEDOM? THEN WHAT?” - THE ROADMAP TO MARKET-DRIVEN HEALTH CARE

The Health Care Freedom Amendment, by itself, does not address increasing health care costs in Wyoming. However, it is a necessary starting point on the roadmap to market-driven health care. In the continuing struggle between individual liberty and government power, the HCFA would paint a line that government cannot cross, no matter its intentions. Following the HCFA, government must formulate policies that both respect and utilize health care freedom. These policies can lower the costs and increase the effectiveness of Wyoming’s health care system.

The Wyoming Liberty Group has recently addressed the possible benefits of inter-

state health insurance compacts,⁵¹ and will soon publish a paper discussing a charity compacts model for replacing intrastate federal entitlement programs.⁵² A white paper detailing a competitive alternative to the entire health care system is also in its final editing stages.⁵³ If the HCFA is ratified by the people, Wyoming will join other states in securing health care freedom from both federal and state incursion. By enacting innovative market-driven solutions after this is accomplished, Wyoming could serve as a leader in solving America's health care crisis.

CONCLUSION

Wyoming's Health Care Freedom Amendment will be placed on the ballot for popular vote in November 2012. It provides both a unique federal challenge and prevents state government from implementing its own all-encompassing public health program, exemplified by the ongoing boondoggle in Massachusetts. Its effects will be far-reaching. Credit is due to various legislators who drafted the amendment to be a lasting part of the Wyoming Constitution, and not merely a reaction to the federal PPACA. If the HCFA is ratified, it will only be the first step on the road to high-quality, affordable health care, but its statement of a fundamental right to make one's own health care decisions will ensure that journey starts off on the right foot.

ENDNOTES

¹ S.J. 0002, 61st Legis. (Wyo. 2011), *available at* <http://legisweb.state.wy.us/2011/Enroll/SJ0002.pdf>.

² *See* S.J. 0001, 60th Legis., Budget Sess. (Wyo. 2010), *available at* <http://legisweb.state.wy.us/2010/Introduced/SJ0001.pdf>; S.J. 0003, 60th Legis. (Wyo. 2009) *available at* <http://legisweb.state.wy.us/2009/Introduced/SJ0003.pdf>.

³ *See, e.g.,* Anthony McConnell, *Wyoming Residents Disapprove of New Health Care Law*, WYO. REPORTER, Dec. 21, 2010, <http://wyoming.watchdog.org/2010/12/21/wyoming-residents-disapprove-of-new-health-care-law/> (discussing a University of Wyoming poll that resulted in 68% disapproval for the PPACA).

⁴ This must be done according to the Wyoming Constitution. *See* WYO. CONST. art. 20. If a voter does not vote on an amendment and leaves the choices empty, it counts as a "no" vote.

⁵ *See supra* note 3.

⁶ *See, e.g.,* Regina Meena, *Interstate Health Insurance Compacts versus PPACA Exchanges on the Roadmap to Health Care Freedom in Wyoming*, LIBERTY BRIEF, Mar. 2011, *available at* <http://wyliberty.org/wp-content/uploads/2011/04/002-Compacts-v-Exchanges-Regina-Meena.pdf>; MICHAEL D. TANNER, *BAD MEDICINE: A GUIDE TO THE REAL COSTS AND CONSEQUENCES OF THE NEW HEALTH CARE LAW (2011)*, *available at* http://www.cato.org/pub_display.php?pub_id=11961.

⁷ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁸ See TANNER, *supra* note 6, at 3.

⁹ U.S. CONST. art. I, § 8, cl. 3.

¹⁰ Much of this section is adapted from a comprehensive legal analysis in a forthcoming white paper from the Wyoming Liberty Group. See Benjamin T. Barr & Stephen R. Klein, *Medical Freedom Zones: Making Health Care Freedom a Reality in Wyoming* (Wyo. Liberty Grp., Working Paper, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1726074.

¹¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 1501, 1513 (2010) (to be codified at I.R.C. §§ 5000A, 4980).

¹² *Wyoming to Join Florida Lawsuit Challenging Health Care Mandate*, OFFC. GOV. MATT MEAD, Jan. 7, 2011, <http://governor.wy.gov/media/pressReleases/Pages/WyomingToChallengeHealthCareMandate.aspx>.

¹³ U.S. CONST. art. I, § 8, cl. 3.

¹⁴ See *Florida v. U.S. Dep't Health & Human Serv's*, No. 3:10-cv-91-RV/EMT, slip op. at 60-64 (N.D. Fla. filed Oct. 14, 2010), available at <http://plf.typepad.com/Florida%20Order.pdf>; *Virginia v. Sebelius*, No. 3:10CV188-HEH, slip op. at 17-25 (E.D. Va. filed Aug. 2, 2010), available at <http://acalitigation.wikispaces.com/file/view/Opinion+Denying+Motion+to+Dismiss>.

¹⁵ *Id.*

¹⁶ U.S. CONST. amend. XIV, § 1.

¹⁷ 130 S. Ct. 3020 (2010).

¹⁸ “State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme

Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed.” William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

¹⁹ See, e.g., Joseph A. Grasso, Jr., “John Adams Made Me Do It”: *Judicial Federalism, Judicial Chauvinism, and Article 14 of Massachusetts’ Declaration of Rights*, 77 MISS. L.J. 315 (2007).

²⁰ Betsy Griffing, *The Rise and Fall of the New Judicial Federalism Under the Montana Constitution*, 71 MONT. L. REV. 383 (2010) (emphasis added).

²¹ U.S. CONST. art. VI (emphasis added).

²² See Tom Quigley, Comment, *Do Silver Platters Have a Place in State-Federal Relations? Using Illegally Obtained Evidence in Criminal Prosecutions*, 20 ARIZ. ST. L.J. 285 (1988).

²³ *Id.*

²⁴ See *supra* note 1.

²⁵ See Bill McCarthy, *Wording of Health-Care Choice Amendment Could Be Tricky*, COWBOY ST. FREE PRESS, Jan. 14, 2011, <http://thewyoneews.net/2011/01/14/wording-of-health-care-choice-amendment-could-be-tricky/>.

²⁶ 410 U.S. 113 (1973).

²⁷ 505 U.S. 833 (1992).

²⁸ See Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1824-28 (2007).

²⁹ *Medical Travel Business Slows in U.S.*, BIOMED ME (Oct. 10, 2010), http://biomedme.com/general/medical-travel-business-slows-in-us_15533.html.

³⁰ *Medical Tourism: Why?*, EUROPEAN MEDICAL TOURIST, <http://www.europeanmedicaltourist.com/frontpage/Itemid,1/> (last visited May 25, 2011).

³¹ 521 U.S. 702 (1997).

³² *Id.* at 720.

³³ One might think this Due Process right would extend to purchasing health insurance, but it is unlikely the Court would consider such an argument: though one can refuse treatment (like any government benefit), one cannot necessarily refuse to pay for it (such as Social Security and Medicare). Thus the challenge to the individual mandate must remain in the Commerce Clause / dual federalism arena.

³⁴ *See, e.g., Health Care is a Human Right*, AMNESTY INT'L, <http://www.amnestyusa.org/demand-dignity/health-care-is-a-human-right/page.do?id=1021216> (last visited Apr. 28, 2011).

³⁵ *See infra* part III.

³⁶ *See supra* note 1.

³⁷ *See supra* note 1.

³⁸ WYO. CONST. art. 10, § 4.

³⁹ WYO. CONST. art. 1, § 16.

⁴⁰ *See* WYO. CONST. art. 20.

⁴¹ "As the health and morality of the people are essential to their well-being, and to the

peace and permanence of the state, it shall be the duty of the legislature to protect and promote these vital interest by such measures for the encouragement of temperance and virtue, and such restrictions upon vice and immorality of every sort, as are deemed necessary to the public welfare." WYO. CONST. art. 7, § 20.

⁴² "The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite." THE FEDERALIST NO. 45 (James Madison).

⁴³ *See generally* *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

⁴⁴ By way of example, in the 2011 Legislative Session (the same session that overwhelmingly passed the HCFA), the Wyoming Legislature banned "spice" drugs, a type of synthetic marijuana. *See* S.F. 0059, 61st Legis. (Wyo. 2011), available at <http://legisweb.state.wy.us/2011/Engross/SF0059.pdf>.

⁴⁵ *See supra* note 25 and accompanying text.

⁴⁶ *See* U.S. CONST. art. V.

⁴⁷ *See supra* note 1.

⁴⁸ WYO. CONST. art. 6, § 20.


⁴⁹ H.B. 0039, 61st Legis. (Wyo. 2011), available at <http://legisweb.state.wy.us/2011/Engross/HB0039.pdf>.

⁵⁰ *See H.B. No. 0039*, <http://legisweb.state.wy.us/2011/Digest/HB0039.htm> (legislative digest) (last visited May 25, 2011).

⁵¹ *See Meena, supra* note 6.

⁵² A working paper version of this paper is available. See Sven R. Larson, *Charity Compacts: A Case Study of Privatizing Welfare Programs in Ohio* (Wyo. Liberty Grp., Working Paper, 2011), available at http://www.libertyworkingpapers.com/welfare_reform.

⁵³ A working paper version of this paper is also available. See Barr & Klein, *supra* note 10.



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