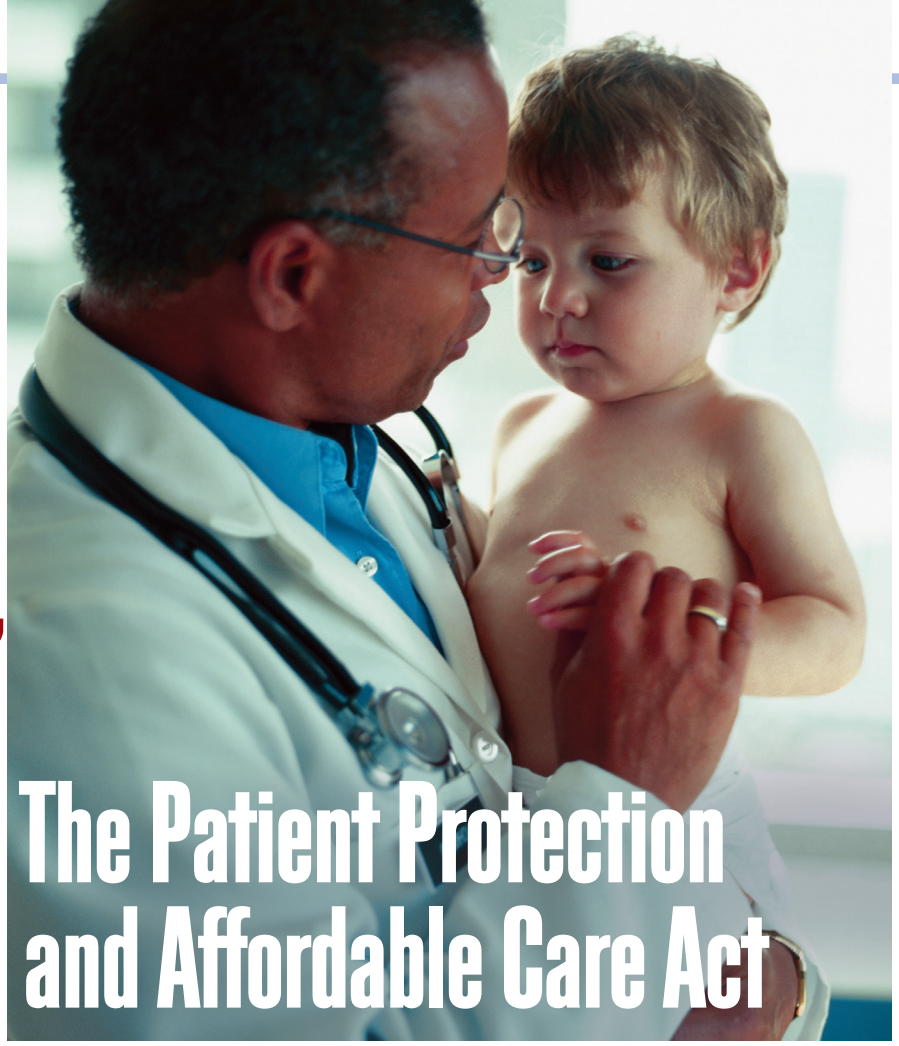
David C. McBride and
Raymond P. Pepe



Federalism, Liberty and Preemption: The Patient Protection and Affordable Care Act

The hotly contested healthcare reform law raises perennial issues on the prerogatives of Congress, the States and individuals in our federal system.

There is nothing more basic to the Constitution and the Bill of Rights than the elusive concept of liberty. When the Constitution was adopted, liberty was principally conceived as freedom from government power, and the States that ratified the Constitution were concerned that the newly-created central government might pose a threat to both the sovereignty of those States and the freedom of their citizens. Consequently, the Constitution reserved to the States all powers not delegated to the Federal Government, denied to the States, or necessary and proper for the exercise of enumerated responsibilities of the Federal Government.[1]

More than 100 years later, during the Progressive Era and the subsequent New Deal, Theodore Roosevelt and his distant cousin Franklin Roosevelt envisioned action by the Federal Government less as a threat to liberty and more as a tool to promote new liberties for individuals by restraining the power of private wealth and promoting economic security.[2] Today, our nation lives with both of those legacies, unable to decide which to emphasize and unwilling to lose either.

The uneasy bedfellows of State's rights, individual liberty and progressive government wrestle with one another under the constitutional umbrella of federalism. Within that context, two legal issues often arise: what are the powers of the Federal Government and, when the Federal Government does act within its proper scope, to what extent has it pre-empted the States?

These issues are often seen as a battle over sovereignty between the Federal Government and the States. But there are liberty interests at stake in the answers to both of these questions. The reservation of powers to the States was intended by the framers of the Constitution to protect "fundamental liberties," prevent an "excessive accumulation of power in one branch," and "reduce the risk of tyranny and abuse from either front."[3]

The most current and prominent issue of federal power concerns the constitutional challenges to the Patient Protection and Affordable Care Act passed by Congress in 2010. One of the challenges is that the "private mandate" in that Act is beyond the power of Congress to regulate commerce. In essence, the mandate requires most persons to obtain health insurance or pay a penalty or tax (the characterization of the payment being disputed).

Here there is a palpable collision between the classic "progressive" objective of providing affordable health care to all and the classic "libertarian" objective of precluding government from mandating private decisions.[4] Pending before the United States Supreme Court is an appeal from the Eleventh Circuit's decision holding that the individual mandate contained within that Act exceeds the power of the Federal Government to regulate commerce.[5]

Beyond this high-profile constitutional battle, there is the less prominent but no less important issue of federal preemption. Even when acting within its proper sphere, Congress may leave to the States significant latitude also to act within the same area. The sharing of responsibilities between the Federal Government and the States promotes other values important to liberty. Those include tolerating the diversity of cultures among the States and providing opportunities for experimentation — both of which are often the end products of liberty.[6]

Can the Federal Government compel every person to purchase health insurance from private insurance companies?

The Patient Protection and Affordable Care Act

The basis for the constitutional challenge to the Patient Protection and Affordable Care Act is almost intuitive: can the Federal Government compel every person to purchase health insurance from private insurance companies? If so, is there any limit to the products or services the Federal Government may compel us to purchase?

These two questions go to the core of the Eleventh Circuit's conclusion that the Act exceeds the power of the Federal Government under the Commerce Clause. Two other circuits — the D.C. Circuit[7] and the Sixth Circuit[8] — have concluded that the Constitution does allow this mandate, and the Supreme Court has accepted an appeal of the Eleventh Circuit's opinion.

Briefing on that appeal will be completed in early March, a three-day, five-and-one-half-hour oral argument is scheduled in late March and a decision is expected by the end of June, 2012.

The fundamental difference between the Circuits does not turn upon any disagreement over the scope of the commerce power as articulated by the Supreme Court for more than 50 years. Rather, the difference seems to turn upon whether this admittedly unique use of federal power transgresses a limitation to the commerce power inherent in federalism's concern about liberty.

This is a limitation on the commerce power never before articulated — perhaps because that power has never before been used in this manner. And this new limitation — as articulated by the Eleventh Circuit — applies to the Federal Government but not the States. Thus, Massachusetts may compel its citizens to purchase health insurance, but the Federal Government may not do likewise.

The Eleventh Circuit and other Circuits agree that Congress has the power to regulate and has regulated both the market for health insurance and the market for health care.[9] The Circuits further agree that Congress may regulate purely intrastate economic conduct by individuals if that conduct — when aggregated — may rationally be perceived by Congress as affecting interstate commerce.[10]

It is further agreed that "Congress can regulate purely intrastate activity that is not itself *'commercial'*... if it concludes that failure to regulate that class of [noncommercial] activity would undercut the regulation of the interstate market."[11] And the Circuits also seem to agree that the distinction between action and inaction — which the plaintiffs in each case assert as the boundary line for Congress's power over commerce — is not a persuasive or workable distinction by itself.[12]

The Circuits also decline to classify the decision not to purchase health insurance as "noneconomic activity"

— another distinction pressed by the plaintiffs.[13]

Although the Eleventh Circuit argues that the mandate in the Act is overbroad, it does not hold that it was irrational for Congress to conclude that an individual's decision to forego health insurance could have substantial effects on the interstate markets for health insurance and health care. The mandate is intended to prevent the uninsured from shifting the cost of their care to persons with insurance or health care providers, thereby increasing the cost of both health care and health insurance for others.

Although the Eleventh Circuit argues that the cost-shifting may not be as substantial as Congress perceived, there is no dispute it occurs.[14] In addition, the Eleventh Circuit affirmatively states that another objective of the Act is to compel the healthy and the young — who might otherwise not purchase insurance — to purchase insurance to contribute to the care of the less healthy and older.[15]

The Eleventh Circuit concludes: "Thus, *even assuming that decisions not to buy insurance substantially affect interstate commerce*, that fact alone hardly renders them a suitable subject for regulation."[16]

What then ultimately renders the mandate an unsuitable subject for regulation? It is the degree of intrusion on liberty. What drives the Eleventh Circuit to differ with the other Circuits is *not* some basic difference over the scope of the commerce power as traditionally articulated or some difference in assessing the impact of the mandate on interstate commerce.

Rather, it is a concern for liberty, and the Eleventh Circuit says as much. It begins its analysis with the "first principle" that the limitation on Congress's power "was adopted by the Framers to ensure protection of our fundamental liberties."[17] The Court states:

> …We must look not only to the action itself but also its implications for our constitutional structure… While these structural limitations are often discussed in terms of federalism, their ultimate goal is the protection of individual liberty.[18]

The mandate is intended to prevent the uninsured from shifting the cost of their care to persons with insurance or health care providers.

The emphasis on the liberty interest also is evident when the Eleventh Circuit confronts the most expansive precedent on the scope of the commerce power — the decision in *Wickard v. Filburn*.[19] The distinction the Eleventh Circuit draws between *Wickard* and the present case turns upon the degree the regulation intrudes upon individual liberty, not any distinction between effects on commerce or the nature of the commerce.

In *Wickard*, the Supreme Court held that Congress's wheat production quotas were constitutional as applied to a plaintiff farmer's home-grown and home-consumed wheat. Roscoe Filburn wanted to grow wheat to feed his family in excess of the acreage permitted to him under the Agricultural Adjustment Act of 1938.

Despite the fact that Filburn's conduct was solely intrastate in nature and his conduct alone would not have any significant effect on interstate commerce, the Supreme Court concluded Congress had the power under the Commerce Clause to prohibit him from growing wheat for his family to eat.

And the intended effect of this prohibition was to force him to purchase wheat in the market, thereby supporting the price of wheat in a period of deflation.

The Eleventh Circuit concludes that the holding in *Wickard* does not justify the individual mandate in the Act. The Court explains that the reason this prohibition on growing wheat was constitutional — and the mandate to purchase insurance is *not* — has to do with the extent of the intrusion on the liberty of the individual.

According to the Eleventh Circuit, Mr. Filburn was not compelled to purchase wheat for his family in the market. He had other alternatives available to him. "The wheat-acreage regulation imposed by Congress…was a limitation — not a mandate — *and left Filburn with a choice*. The Act's economic mandate to purchase insurance, on the contrary, leaves no choice and is more far-reaching."[20]

In short, it is not a difference in the effect upon commerce or the nature of the commerce that distinguishes *Wickard* from the mandate in the Act; it is the degree of intrusion on individual liberty. The Eleventh Circuit states:

> Although this distinction appears, at first blush, to implicate liberty concerns not at issue on appeal, in truth it strikes at the heart of whether Congress has acted within its enumerated power. Individuals subjected to this economic mandate have not made a voluntary choice to enter the stream of commerce, but instead are having that choice imposed upon

them by the federal government.[21]

The D.C. Circuit expressly addresses and rejects this argument:

> Appellants' view that an individual cannot be subject to Commerce Clause regulation absent voluntary, affirmative acts that enter him or her into, or affect, the interstate market expresses a concern for individual liberty that seems more redolent of Due Process Clause arguments. But it has no foundation in the Commerce Clause. The shift to the "substantial effects" doctrine in the early twentieth century recognized the reality that national economic problems are often the result of millions of individuals engaging in behavior that, in isolation, is seemingly unrelated to interstate commerce.
>
> * * * *
>
> That a direct requirement for most Americans to purchase any product or service seems an intrusive exercise of legislative power surely explains why Congress has not used this authority before — but that seems to us a political judgment rather than a recognition of constitutional limitations. It certainly is an encroachment on individual liberty, but it is no more so than a command that restaurants or hotels are obliged to serve all customers regardless of race, that gravely ill individuals cannot use a substance their doctors described as the only effective palliative for excruciating pain, or that a farmer cannot grow enough wheat to support his own family.[22]

The liberty constraint that the Eleventh Circuit finds in the Commerce Clause makes new law, but it serves as the only reasoned basis for the difference in its decision and those of the other Circuits (or prior precedent). In dissent, Judge Marcus of the Eleventh Circuit argues that the Act's intrusion on individual decision-making would survive scrutiny under substantive due process analysis, unless the Supreme Court were to revive the *Lochner* line of cases, which was used to invalidate much of the Progressive Era and New Deal legislation as intruding upon economic liberty.[23]

Perhaps the Eleventh Circuit has established a new foundation for individual liberty, embedded in the structure of federalism.

Thus, according to the dissent, the protection accorded to liberty under the Due Process Clause of the 14th Amendment would not prevent the States from mandating the purchase of health insurance — as Massachusetts has done — but the liberty constraint the Eleventh Circuit majority imposes under the Commerce Clause does inhibit the Federal Government from intruding on the same individual economic decisions.

Yet if federalism is founded on a concern for liberty from Federal intrusion, as distinct from intrusion by the States, then perhaps the Eleventh Circuit has established a new foundation for individual liberty, embedded in the structure of federalism. Ultimately, the United States Supreme Court must address this issue if it is to affirm the Eleventh Circuit.[24]

Preemption and a Cooperative Federalism

Even if the Supreme Court disagrees with the Eleventh Circuit and holds that the Patient Protection and Affordable Care Act does not unconstitutionally infringe upon liberty interests, or issues a ruling invalidating the mandate to purchase health insurance which allows other provisions of the law to remain in effect, questions about the relationship between Federal and State law are likely to remain and play a prominent role in the implementation of the Act.

Sprinkled liberally through the Patient Protection and Affordable Care Act are numerous provisions which either preempt or preserve various State laws relating to health insurance, or which allow States flexibility in the implementation of the Act which may be difficult to interpret and apply.

Significant issues are also likely to arise regarding the extent to which the law impliedly preempts State law or imposes requirements which sufficiently conflict with State laws so as to require the preemption.

To the extent the Patient Protection and Affordable Care Act, and other Federal laws, fail to provide clear and explicit rules relating to the relationship between Federal and State law, substantial costs may be imposed upon the States, the Federal Government and the private sector. These costs include uncertainty about whether and to what extent State laws are preempted, which may increase transactional costs and deter economic activity and generate expensive and socially unproductive litigation to determine the scope and extent of Federal preemption.

Similarly, the failure to clearly distinguish between Federal and State responsibilities may generate disputes regarding the respective jurisdiction

of Federal and State courts which may delay and impede the efficient resolution of disputes. Disputes about the extent of Federal authority, and perceptions that an excessive concentration of power is being vested in the Federal Government, may also contribute materially to the polarization of political discourse and may impede the development of a broad social consensus needed to effectively implement Federal healthcare legislation and develop solutions to the many problems which confront our society in many other areas.

Creating an effective division of responsibilities between the Federal Government and the States both with respect to healthcare legislation and in other areas poses difficult challenges because our Constitution does not create a bipolar system in which States are prohibited from enacting laws governing matters subject to Federal law.

Instead, our Constitution has created a system of shared responsibilities and overlapping authority in which Federal action does not automatically preempt State law, but only does so to the extent expressly provided for in Federal laws and regulations, or to the extent necessary to avoid inconsistencies between Federal and State law, or as necessary to achieve the fundamental objectives of Federal laws or regulations.

In addition, the closely related scope of the power to regulate interstate commerce delegated to the Federal Government and the scope of police powers reserved to the States makes substantial areas of overlapping Federal and State responsibilities inevitable.[25]

Where Federal and State authority overlaps substantially, as in the Patient Protection and Affordable Care Act, litigation to resolve disputes regarding the extent of Federal preemption of State law is inevitable. While the Federal judiciary plays an important role in resolving these disputes, the courts cannot be relied upon to determine the most efficient and effective manner in which to balance Federal and State responsibilities. As unelected officials, judges cannot and should not exercise legislative powers or participate in the administration of governmental programs, but should limit their role to the interpretation of Federal law, determining Congressional intent, and defining the outer limits of Federal power.

Where Federal and State authority overlaps substantially, litigation to resolve disputes regarding the extent of Federal preemption of State law is inevitable.

As a result, it is primarily the responsibility of the political legislative and regulatory process, through the interaction between the Federal Government and the States, to create and preserve an effective balance of Federal and State roles.[26] Unfortunately, far too often Federal action is taken without due regard to its impact upon State law and without a careful and deliberate allocation of Federal and State responsibilities.

There is a broad and bi-partisan consensus that improved efforts are needed to create a more effective system of cooperative federalism. Both Presidents Reagan and Clinton issued executive orders intended to improve the balance of Federal and State responsibilities by directing federal agencies to respect the role of State governments and avoid the preemption of State law whenever possible and to consult with and coordinate their actions with State officials.[27]

Shortly after his inauguration, President Obama also issued a Presidential Memorandum embracing the objectives of the Reagan and Clinton executive orders which directed federal agencies to review and re-evaluate the preemptive impact of all federal regulations issued within the last 10 years.[28]

Pursuant to the Presidential Memorandum, the Administrative Conference of the United States recently developed detailed recommendations regarding procedures to be followed by Federal agencies in adopting regulations which may expressly or impliedly preempt State laws.[29]

For these efforts to be successful more extensive discussion and dialogue about the benefits of cooperative federalism is required and more specific guidance should be developed regarding how to best allocate responsibilities between the Federal Government and the States. One current project which may contribute to these efforts is the establishment of a Federalism and State Law Committee by the Uniform Law Commission.

The Committee, working in cooperation with the National Governor's Association and other state government organizations, has launched an effort to focus Federal and State attention on these important issues. Other participants in this effort are the Council of State Governments, the Center for State Courts, the National Association of Attorneys General, the National Council of State Legislatures, and other state government organizations.

One important focus of the efforts of the Uniform Law Commission and its partners is to develop a set of principles of "cooperative federalism."[30] These principles will articulate the importance of maintaining a healthy balance of Federal and State responsibilities, the costs and harms associated with the failure to do so, and will stress the importance of cooperative action by all participants in the political process to achieve these objectives.

The principles will further attempt to define the respective roles of Federal and State government, and of other participants in this process, and articulate more specific criteria and standards for the allocation of responsibilities between the Federal Government and the States.

Hopefully, principles of this type, developed without reference to specific policy decisions, will provide useful guidance in resolving questions about how best to balance Federal and State responsibilities, both with respect to healthcare legislation, and in other areas. ◆

More information about these activities is available at the Web Site of the Uniform Law Commission at www.nccusl.org. This article is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting an attorney.

One important focus of the efforts of the Uniform Law Commission and its partners is to develop a set of principles of "cooperative federalism."

FOOTNOTES

1. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Texas v. White*, 74 U.S. 700, 725 (1869); Tafflin v. Levitt, 493 U.S. 455, 458 (1990); and *Lane County v. Oregon*, 74 U.S. 71, 76 (1869).

2. Sandel, Michael J., *Justice: What's the Right Thing to Do?* (2009) at 218-219.

3. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985).

4. The irony of this collision is that the individual mandate at issue is a product of a compromise that sought to provide affordable care within an existing free market structure of private insurance, as opposed to a government-funded (through taxes) health insurance or health care system. In fact, the mandate at issue was sought by the insurance industry to facilitate its ability to provide coverage for pre-existing conditions and for premiums based upon community rating. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 547 (6th Cir. Mich. 2011)

5. *Florida v. United States HHS*, 648 F.3d 1235 (11th Cir. Fla. 2011) *cert. granted* 181 L. Ed. 420 (U.S. 2011). The pending appeal raises another challenge relevant to federalism. The state plaintiffs argue that the Act's expansion of the Medicaid program violates an asserted limitation on Congress's power under the Spending Clause. The Eleventh Circuit holds — contrary to decisions in some other Circuits — that the Tenth Amendment prohibits the Federal Government from imposing conditions on federal aid to the States that are so onerous as to compel the States to enact policies or programs Congress is without the power to enact directly, but the Eleventh Circuit also holds that the expansion of Medicaid under the Act does not violate that limitation. *Florida*, 648 F.3d at 1263-69. The Supreme Court directed briefing and argument on this issue as well as the challenge to the individual mandate.

6. There are other reasons less directly related to individual liberty that support the delegation of decision-making to the States, such as allowing decisions to be made at the level of government closest to the activity at issue.

7. *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (cert. petition on hold).

8. *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. Mich. 2011) (cert. petition on hold).

9. *Florida*, 648 F.3d at 1271, 1293 and 1302-1303 (Slip Op. at 73, 126 and 147-148); *Seven-Sky v. Holder*, 2011 U.S. App LEXIS 22566 at *41.

10. *Florida*, 648 F.3d at 1269 (Slip Op. at 68-69); *Thomas More Law Ctr.*, 651 F.3d at 541-543; and *Seven-Sky v. Holder*, 2011 U.S. App LEXIS 22566 at *41.

11. *Florida*, 648 F.3d at 1270 and 1277 and *Thomas More Law Ctr.*, 651 F.3d at 541-543.

12. "…We are not persuaded that the formalistic dichotomy of activity and inactivity provides a workable or persuasive enough answer in this case. Although the Supreme Court's Commerce Clause cases frequently speak in activity-laden terms, the Court has never expressly held that activity is a precondition for Congress's ability to regulate commerce — perhaps, in part, because it has never been faced with the type of regulation at issue here." *Florida*, 648 F.3d at 1286.

13. *Florida*, 648 F.3d at 1287; *Thomas More Law Ctr.*, 651 F.3d at 547-549 and *Seven-Sky v. Holder*, 2011 U.S. App LEXIS 22566 at *42-48.

14. *Florida*, 648 F.3d at 1293-1296 and 1299-1303.

15. *Florida*, 648 F.3d at 1299-1300.

16. *Florida*, 648 F.3d at 1293.

17. *Florida*, 648 F.3d at 1284.

18. *Florida*, 648 F.3d at 1284.

19. 317 U.S. 111, 63 S. Ct. 82 (1942).

20. *Florida*, 648 F.3d at 1292.

21. *Florida*, 648 F.3d at 1292.

22. *Seven-Sky v. Holder*, 2011 U.S. App LEXIS 22566 at *50-51 and 54.

23. *Florida*, 648 F.3d 1361-1365.

24. The Supreme Court could sustain the Act by relying upon the taxing power or defer the issue based upon the Anti-Injunction Act.

25. *Hamilton v. Kentucky*, 251 U.S. 146, 156 (1919).

26. *South Carolina v. Baker*, 485 U.S. 505, 512 (1988).

27. Executive Order 12612, 52 F.R. 41685 (October 26, 1987); Executive Order 13132, 64 F.R. 43255 (August 10, 1999).

28. 74 F.R. 24963 (May 22, 2009).

29. Administrative Conference of the United States, Recommendation 2010-1, *Agency Procedures for Considering Preemption of State Law*, (December 9, 2010).

30. *See* http://www.nccusl.org/Committee.aspx?title=Federalism.