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In Search of Limiting Principles: The Eleventh Circuit Invalidates the Individual Mandate in *Florida v. U.S. Department of Health and Human Services*

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IN SEARCH OF LIMITING PRINCIPLES: THE ELEVENTH CIRCUIT INVALIDATES THE INDIVIDUAL MANDATE IN *FLORIDA v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES*

Abstract: On August 12, 2011, the U.S. Court of Appeals for the Eleventh Circuit held in *Florida v. U.S. Department of Health & Human Services* that Congress exceeded its power under the Commerce Clause and Necessary and Proper Clause by requiring individuals to purchase health insurance as part of the Patient Protection and Affordable Care Act. In reaching its holding, the Eleventh Circuit rejected the Government’s argument that the individual mandate is a necessary and proper means for implementing its larger regulation of health insurance markets. Yet, this Comment argues that the Eleventh Circuit’s exacting review of Congress’s findings and underlying policy judgments, if adopted by the Supreme Court, may significantly constrain Congress’s power to craft a novel solution to a complex regulatory challenge.

INTRODUCTION

On March 23, 2010, following nearly a year of debate in Congress and decades of political wrangling over proposals for universal health care, President Obama signed into law the Patient Protection and Affordable Care Act (“Affordable Care Act” or “Act”).¹ The Act seeks to achieve universal access to health care by increasing eligibility for government programs and expanding access to private health insurance markets.² To encourage near-universal coverage, the Act—with limited exceptions—requires citizens to maintain insurance and insurers to accept all enrollees.³ The battle over this unprecedented federal regulation of health care and health insurance markets immediately shifted to

¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Healthcare and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010); see Robert Pear & David M. Herszenhorn, *Obama Hails Vote on Health Care as Answering “The Call of History,”* N.Y. TIMES, Mar. 21, 2010, at A1.

² See Tom Baker, *Health Insurance, Risk, and Responsibility After the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1580–93 (2011).

³ See 26 U.S.C.A. § 5000A (West 2011) (effective Jan. 1, 2014); 42 U.S.C.A. § 300gg-1 (West 2003 & Supp. 2011).

the courts.⁴ States and individuals throughout the nation brought facial challenges to the Affordable Care Act, claiming that, among other things, the Act's individual mandate is an impermissible exercise of legislative power under the Commerce Clause⁵ as enhanced by the Necessary and Proper Clause.⁶

The Act is Congress's solution to a complex market failure.⁷ In 2008, the Congressional Budget Office estimated that forty-five million Americans were uninsured and projected that conditions would continue to deteriorate.⁸ Consequently, in its legislative findings, Congress reasoned that ethical and legal obligations to provide emergency health care to uninsured result in the uncompensated consumption of health care services.⁹ Indeed, Congress found that, in 2009, forty-three billion dollars in uncompensated health care costs were shifted to other payers, translating to an average increase of one thousand dollars in premiums for a family health plan.¹⁰ Meanwhile, health care costs have grown to nearly eighteen percent of gross domestic product.¹¹

Part I of this Comment reviews Congress's efforts to expand access to health insurance markets.¹² Part I then briefly describes the divergent outcomes in two courts of appeals concerning the constitutionality of the individual mandate as a necessary and proper means for carrying into execution Congress's larger regulation of health insurance markets.¹³ Part II surveys U.S. Supreme Court decisions interpreting the reach of the Necessary and Proper Clause.¹⁴ It then examines the 2011 decision of the U.S. Court of Appeals for the Eleventh Circuit in *Florida v. U.S. Department of Health & Human Services*, including the

⁴ Warren Richey, *Attorneys General in 14 States Sue to Block Healthcare Reform Law*, CHRISTIAN SCIENCE MONITOR (Mar. 23, 2010), <http://www.csmonitor.com/USA/Justice/2010/0323/Attorneys-general-in-14-states-sue-to-block-healthcare-reform-law>.

⁵ U.S. CONST. art. I, § 8, cl. 3.

⁶ *Id.* art. I, § 8, cl. 18; *see, e.g.*, *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1240–41 (11th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3297 (U.S. Nov. 14, 2011) (No. 11-398); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 533–34 (6th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3065 (U.S. July 26, 2011) (No. 11-117).

⁷ *See generally* Sherry A. Glied, *Health Insurance and Market Failure Since Arrow*, 26 J. HEALTH POL. POL'Y & L. 957 (2001) (describing market failures in health insurance markets).

⁸ CONG. BUDGET OFFICE, KEY ISSUES IN ANALYZING MAJOR HEALTH INSURANCE PROPOSALS 1 (2008).

⁹ *See* 42 U.S.C.A. § 18091 (West Supp. 2011).

¹⁰ *Id.*

¹¹ *Id.*

¹² *See infra* notes 17–31 and accompanying text.

¹³ *See infra* notes 32–43 and accompanying text.

¹⁴ *See infra* notes 44–59 and accompanying text.

court's refusal to uphold the individual mandate as an essential component of Congress's larger regulatory scheme.¹⁵ Finally, Part III argues that the Eleventh Circuit's reexamination of the factual basis for the individual mandate departs from rational basis review, thereby undermining Congress's power to set social welfare policy.¹⁶

I. THE AFFORDABLE CARE ACT: A COMPREHENSIVE SOLUTION TO A COMPLEX MARKET FAILURE

A. Congress's Comprehensive Regulatory Solution

The Affordable Care Act spans thousands of pages and enacts a comprehensive scheme to reform health care and health insurance markets.¹⁷ The Act relies on several interdependent mechanisms to promote universal access to health care and to control rising health care costs.¹⁸ First, the Act provides tax incentives to encourage small employers to purchase health insurance for their employees and requires that large employers provide coverage.¹⁹ Second, the Act establishes state-run marketplaces for health plans called Exchanges to allow individuals and small groups to leverage their collective buying power.²⁰ Third, the Act expands eligibility for Medicaid to provide uniform government-sponsored health care coverage to the poor.²¹

Additionally, the Act seeks to foster access to private health insurance markets by banning certain insurance industry practices designed to minimize insurance risk.²² For example, the Act proscribes denying coverage for pre-existing conditions.²³ Congress eliminated these practices by imposing two requirements on insurers.²⁴ First, the Act's guaranteed issue provision requires health plans to accept all enrollees re-

¹⁵ See *infra* notes 60–74 and accompanying text.

¹⁶ See *infra* notes 75–89 and accompanying text.

¹⁷ See Baker, *supra* note 2, at 1580–93.

¹⁸ See *id.*

¹⁹ 26 U.S.C.A. §§ 45R, 4980H (West 2011).

²⁰ See 42 U.S.C.A. § 18031 (West Supp. 2011).

²¹ See 42 U.S.C.A. § 1396a(a)(10)(A)(i)(VIII) (West 2003 & Supp. 2011) (expanding Medicaid eligibility to individuals with family incomes below 133% of the federal poverty level); see also Sara Rosenbaum, *Realigning the Social Order: The Patient Protection and Affordable Care Act and the U.S. Health Insurance System*, 7 J. HEALTH & BIOMEDICAL L. 1, 16–17 (2011) (noting that this reform “closes Medicaid’s last remaining coverage gap for the poor”).

²² See 42 U.S.C.A. § 18091(a)(2)(J) (West Supp. 2011).

²³ 42 U.S.C.A. § 300gg-3 (West 2003 & Supp. 2011).

²⁴ See Petition for Writ of Certiorari, *Florida*, 648 F.3d 1235 (No. 11-398), 2011 WL 5025286, at *2–4.

ardless of age, gender, or health status.²⁵ Second, the community rating requirement prohibits insurers from charging higher premiums to individuals based on such factors as claims experience, medical history, or genetic information.²⁶ Collectively, these reforms are designed to expand access to health care coverage and to reduce the cost-shifting externality caused by the uncompensated consumption of health care services.²⁷

To compensate for the inclusion of riskier enrollees and to eliminate incentives for individuals to forgo purchasing health insurance until they need care, Congress imposed an individual mandate, requiring “applicable individual[s]” to obtain “minimum essential coverage” or pay a penalty.²⁸ The individual mandate works in tandem with the guaranteed issue and community rating reforms to expand coverage while

²⁵ See 42 U.S.C.A. §§ 300gg-1(a), 300gg-3, 300gg-4(a).

²⁶ *Id.* § 300gg(a)(1). In a community-rated market, insurers charge all individuals covered under a specific plan the same premium without regard to gender, health status, or other factors. See Mark V. Pauly, *The Welfare Economics of Community Rating*, 37 J. RISK & INS. 407, 407–08 (1970). Premiums are based on the risk factors of the entire population covered by the plan, rather than those of any single individual. *Id.* Consequently, the cost of covering higher-risk individuals (e.g., the elderly and chronically ill) is subsidized by lower-risk individuals (e.g., the young). See Roger L. Pupp, *Community Rating and Cross Subsidies in Health Insurance*, 48 J. RISK & INS. 610, 610–11 (1981). The Act implements a system of adjusted community rating whereby an insurer may, within limits, vary the community rate based on age, tobacco use, and geography. See 42 U.S.C.A. § 300gg(a)(1).

²⁷ See 42 U.S.C.A. § 18091. Indeed, the Government argued that it is “‘proper’ for Congress to take into account the societal judgment—reflected in state and federal law—that denying emergency care because the patient lacks insurance would be unconscionable.” Brief for the United States at 36, *Florida*, 648 F.3d 1235 (Nos. 11-11021 & 11-11067). But see Douglas A. Kahn & Jeffrey H. Kahn, Commentary, *Free Rider: A Justification for Mandatory Medical Insurance Under Health Care Reform?*, 109 MICH. L. REV. FIRST IMPRESSIONS 78, 80–81 (2011), <http://www.michiganlawreview.org/assets/fi/109/kahn.pdf> (challenging the view that the healthy cause an externality by not subsidizing the medical expenses of the unhealthy).

²⁸ 26 U.S.C.A. § 5000A (West 2011) (effective Jan. 1, 2014). Congress found that, without a minimum coverage provision, the guaranteed issue and community rating requirements would increase incentives for individuals to “wait to purchase health insurance until they needed care,” leading to adverse selection. See 42 U.S.C.A. § 18091(a)(2)(I). Adverse selection occurs when a pool of enrollees becomes increasingly high risk because individuals enroll only when they require medical care. See Peter Seigelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223, 1223 & n.1, 1224 (2004). The resulting premium increases lead to the flight of healthier policyholders to cheaper plans or to the ranks of the uninsured. See *id.* at 1223–24 & n.1. This process, called an “adverse selection death spiral,” continues until the health plan collapses under the weight of its high-risk and high-cost population. See Thomas Buchmueller & John DiNardo, *Did Community Rating Induce an Adverse Selection Death Spiral? Evidence from New York, Pennsylvania, and Connecticut*, 92 AM. ECON. REV. 280, 280 (2002).

broadening the risk pool, and thereby promotes economies of scale.²⁹ Indeed, Congress found that an individual mandate, together with its other insurance industry reforms, would expand access to private health insurance markets, resulting in a more efficient allocation of risk and lower premiums.³⁰ Thus, Congress concluded that the individual mandate was essential to its larger regulation of health insurance markets.³¹

B. *The Affordable Care Act and the Circuit Split*

On June 29, 2011, the U.S. Court of Appeals for the Sixth Circuit issued its opinion in *St. Thomas More Law Center v. Obama* affirming the district court's finding that the individual mandate is essential to Congress's larger regulation of health care and health insurance markets.³² Shortly thereafter and in contrast to the Sixth Circuit, the U.S. Court of Appeals for the Eleventh Circuit held in *Florida v. U.S. Department of Health & Human Services* that the individual mandate exceeded constitutionally imposed boundaries on the commerce power.³³ Among other things, the courts disagreed over whether it is appropriate for Congress to compel individuals to purchase health insurance to maintain the integrity of the Affordable Care Act's comprehensive regulatory scheme.³⁴

The court in *Florida* identified as a threshold question whether the subject matter of the regulation had a sufficient nexus to interstate commerce.³⁵ In striking down the individual mandate, the Eleventh

²⁹ See 42 U.S.C.A. § 18091(a)(2)(I)–(J). The guaranteed issue and community rating reforms ensure that coverage is issued to and made affordable for high-risk individuals. Baker, *supra* note 2, at 1597. Because these reforms require private insurers to accept losses on insurance contracts issued to high-risk individuals, Congress imposed the mandate to increase the overall size of the health insurance risk pool. See *id.* at 1586.

³⁰ See 42 U.S.C.A. § 18091(a)(2)(F), (I)–(J).

³¹ *Id.* § 18091(a)(2)(H). Critics note, however, that the individual mandate and its penalty do not apply to groups that contribute significantly to the cost-shifting problem, including undocumented aliens and those below the income tax filing threshold. See 26 U.S.C.A. § 5000A(d)(3), (e)(1)–(2). In addition, Congress may have dampened the coercive effect of the penalty by capping it at the average price of forgone coverage. See *id.* § 5000A(c). Indeed, the Eleventh Circuit found these criticisms persuasive. See *infra* notes 70–74 and accompanying text.

³² 651 F.3d at 545.

³³ 648 F.3d at 1311–13.

³⁴ See, e.g., Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 331 (1993) ("To carry a law or power into execution in its most basic sense means to provide enforcement machinery, prescribe penalties, authorize the hiring of employees, [and] appropriate funds. . . . It does not mean to regulate unenumerated subject areas to make the exercise of enumerated powers more efficient.").

³⁵ 648 F.3d at 1300–02.

Circuit held that Congress impermissibly relied on a “multi-step cost-shifting scenario” associated with the uninsured that would require a court to pile inference upon inference to sustain an unprecedented exercise of legislative power.³⁶ In contrast, the Sixth Circuit reasoned that individuals who self-insure³⁷ undermine Congress’s efforts to stabilize prices in the interstate health insurance market by satisfying their own demand for a commodity (i.e., health insurance) rather than resorting to the market.³⁸

Unlike the Sixth Circuit, the court in *Florida* declined to find that the individual mandate is essential to Congress’s larger economic regulation of health insurance markets.³⁹ According to the Eleventh Circuit, the “larger regulatory scheme” doctrine simply did not apply because Congress lacked the power to compel the purchase of health insurance.⁴⁰ The court reasoned that a blind application of the doctrine would amount to nothing more than a magic words test whereby Congress’s finding that a regulation is essential to a comprehensive regulatory scheme would “immunize[] its enactment from constitutional inquiry.”⁴¹ Furthermore, the court found that the individual mandate was not, in fact, essential to Congress’s larger regulation of the health insurance industry, but was merely designed to counteract the significant regulatory costs resulting from the Act’s elimination of medical under-

³⁶ *Id.* at 1302; *see also id.* at 1298 (describing Congress’s inferential chain of reasoning). *But see* Petition for Writ of Certiorari, *supra* note 24, at *22 (arguing that the “present premiums others pay must cover the risk of the uninsured” because the “uninsured . . . externalize the cost of their present medical risk to others every day, not at some indeterminate future time”).

³⁷ The Sixth Circuit defined self-insurance as the practice whereby “individuals make an assessment of their own risk and to what extent they must set aside funds or arrange their affairs to compensate for probable future health care needs.” *Thomas More*, 651 F.3d at 543. The court reasoned, however, that the self-insured continue to externalize costs on other payers. *See id.* at 545 (noting that the “high cost of health care means that those who self-insure, as a class, are unable to pay for the health care services that they receive”); *see also* Brendan S. Maher, *The Benefits of Opt-In Federalism*, 52 B.C. L. REV. 1733, 1741 (2011) (noting that “[i]ndividuals may lack the resources or training to appropriately plan for future needs”).

³⁸ *Thomas More*, 651 F.3d at 545; *see also* Wickard v. Filburn, 317 U.S. 111, 129 (1942) (observing that although a restriction on wheat consumption may have the effect of “forcing some farmers into the market to buy what they could provide for themselves,” all regulation “lays a restraining hand on the self-interest of the regulated” for the benefit of the community).

³⁹ 648 F.3d at 1307.

⁴⁰ *See id.* at 1307–08 (reasoning that the larger regulatory scheme doctrine did not apply where the “entire class of activity is outside the reach of congressional power”).

⁴¹ *Id.* at 1309.

writing.⁴² Such political considerations, the court explained, do not convert an unconstitutional regulation into an essential—and thereby constitutional—statutory fix.⁴³

II. THE PROPRIETY OF AN ECONOMIC MANDATE AS AN ELEMENT OF A LARGER REGULATION OF INTERSTATE COMMERCE

A. *The Consistent Judicial Interpretation of the Necessary and Proper Clause*

Nearly 200 years ago, Chief Justice John Marshall noted that the Federal “[G]overnment is acknowledged by all to be one of enumerated powers.”⁴⁴ Nevertheless, in defining the scope of congressional power under Article I, Chief Justice Marshall held that a government of enumerated powers must be “entrusted with ample means for their execution.”⁴⁵ Thus, the U.S. Supreme Court endorsed a broad reading of the Necessary and Proper Clause, which “makes clear that the Constitution’s grants of specific federal legislative authority are accompanied by broad power to enact laws that are ‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’”⁴⁶ Similarly, in 2010, in *United States v. Comstock*, the Supreme Court identified the relevant inquiry, under the Necessary and Proper Clause, as “simply ‘whether the means chosen are “reasonably adapted” to the attainment of a legitimate end under the commerce power.’”⁴⁷

Consequently, the Government has argued that even if the individual mandate is not an independently valid exercise of legislative power under the Commerce Clause, it is valid in combination with the

⁴² *Id.* at 1310 (concluding that “an individual’s uninsured status in no way interferes with Congress’s ability to regulate insurance companies”). The Act’s insurance industry reforms eliminate medical underwriting, the process whereby insurers accept enrollees and set premiums based on a prediction of future claims. See Susan Jaffe, *Health Policy Brief: Health Insurance Reforms 2*, HEALTH AFFAIRS (Oct. 21, 2009), http://healthaffairs.org/healthpolicybriefs/brief_pdfs/healthpolicybrief_12.pdf.

⁴³ *Florida*, 648 F.3d at 1310.

⁴⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).

⁴⁵ *Id.* at 408; accord *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 118–19 (1942) (holding that where Congress has the authority to enact a regulation of interstate commerce, “it possesses every power needed to make that regulation effective”).

⁴⁶ *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *McCulloch*, 17 U.S. at 413, 418); see also *McCulloch*, 17 U.S. at 421 (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited . . . are constitutional.”). Thus, Chief Justice Marshall held that the word “necessary” does not mean absolutely necessary. See *McCulloch*, 17 U.S. at 413–15.

⁴⁷ 130 S. Ct. at 1957 (quoting *Gonzales v. Raich*, 545 U.S. 1, 37 (2005) (Scalia, J., concurring)).

Necessary and Proper Clause as an appropriate means for carrying into execution Congress's larger economic regulation of health insurance markets.⁴⁸ Moreover, in *Comstock*, the Court held that the choice of means for carrying into execution an enumerated power is primarily left to the discretion of Congress.⁴⁹ In its legislative findings, Congress concluded that without an individual mandate, the guaranteed issue and community rating reforms would create an incentive for individuals to forgo purchasing health insurance until they required care.⁵⁰ Thus, the Government contends that striking down the mandate would "leave a gaping hole" in the Act's comprehensive scheme, leading to the eventual collapse of private health insurance markets.⁵¹

This argument prevailed in *Thomas More*, when the Sixth Circuit concluded that the individual mandate is essential to Congress's larger regulation of health insurance markets.⁵² There, the court found that even if the act of self-insuring were not economic activity with a substantial effect on interstate commerce, Congress could impose an individual mandate to maintain the integrity of its comprehensive scheme.⁵³ Moreover, the court held that Congress need only have a rational basis for concluding that failure to impose an individual mandate—along with its other insurance industry reforms—would undercut its overlying economic regulatory scheme.⁵⁴ According to the court, Congress rationally concluded that leaving the self-insured outside federal control would undermine its efforts to broaden the risk pool.⁵⁵ Therefore, the Sixth Circuit held that the Necessary and Proper Clause granted Con-

⁴⁸ See Brief for the United States, *supra* note 27, at 32, 43–44 (arguing that "Congress is not regulating inactivity as such, but as an aspect of its regulation of active participation in the health care market" (citation omitted) (internal quotation marks omitted)).

⁴⁹ *Comstock*, 130 S. Ct. at 1957; *Champion v. Ames (The Lottery Case)*, 188 U.S. 321, 355 (1903) (holding that Congress has "a large discretion as to the means that may be employed in executing a given power").

⁵⁰ 42 U.S.C.A. § 18091(a)(2)(I) (West Supp. 2011).

⁵¹ See Brief for the United States, *supra* note 27, at 28.

⁵² 651 F.3d 529, 545–47 (6th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3065 (U.S. July 26, 2011) (No. 11-117).

⁵³ See *id.* at 545 (noting that the Supreme Court has held that Congress can regulate non-commercial intrastate activity if it concludes that it is necessary in order to regulate the interstate market (citing *Raich*, 545 U.S. at 18)).

⁵⁴ See *id.* at 545–47; see also *id.* at 557 (Sutton, J., concurring) ("The basic policy idea, for better or worse (and courts must assume better), is to compel individuals with the requisite income to pay now rather than later for health care.").

⁵⁵ See *id.* at 545–47.

gress the power to impose an individual mandate as an essential component of its comprehensive scheme.⁵⁶

Critics of the individual mandate, however, note that the Necessary and Proper Clause requires that federal statutes also employ “proper” or “appropriate” means to regulate interstate commerce.⁵⁷ Thus, although the individual mandate may survive the deferential means-end test applied in *Comstock*, a court must also consider whether the regulation is consistent with the “letter and spirit of the constitution.”⁵⁸ Otherwise, as the Eleventh Circuit warned, application of the larger regulatory scheme doctrine may permit Congress to assume a general police power.⁵⁹

B. *The Eleventh Circuit Challenges the Necessity and Propriety of the Individual Mandate*

Although the Government’s argument prevailed in *Thomas More*, in *Florida*, the Eleventh Circuit noted the individual mandate’s “far-reaching implications for our federalist structure.”⁶⁰ According to the court, the Constitution must not be construed to grant to Congress a general police power traditionally reserved to the states.⁶¹ Moreover, the court noted, the individual mandate is an unprecedented exercise of federal legislative power because it seeks to regulate those who have not entered the stream of commerce by forcing market entry.⁶² Therefore, the court found that although the mandate is an “expedient solution to pressing public needs,” it nevertheless lacks judicially enforceable limits and thus threatens our dual system of government.⁶³

⁵⁶ See *id.*; see also *id.* at 564 (Sutton, J., concurring) (noting that “courts do not apply strict scrutiny to commerce clause legislation and require only an appropriate or reasonable fit between means and ends” (internal quotation marks omitted) (citing *Comstock*, 130 S. Ct. at 1956–57)).

⁵⁷ Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & LIBERTY 581, 621 (2010) (citing *McCulloch*, 17 U.S. at 421).

⁵⁸ *McCulloch*, 17 U.S. at 421; see also Lawson & Granger, *supra* note 34, at 271 (stating that the clause safeguards unenumerated individual rights by requiring “executory laws to be both necessary and proper” (footnote omitted)).

⁵⁹ *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1309 (11th Cir. 2011), cert. granted, 80 U.S.L.W. 3297 (U.S. Nov. 14, 2011) (No. 11-398).

⁶⁰ *Id.* at 1282.

⁶¹ *Id.* at 1284 (citing *United States v. Morrison*, 529 U.S. 598, 618 (2000)).

⁶² See *id.* at 1291–92. But see *Thomas More*, 651 F.3d at 559–60 (Sutton, J., concurring) (stating that “[l]egislative novelty typically is not a constitutional virtue,” but that the “substantial-effects doctrine invites, rather than discourages, unconventional laws, making it difficult to draw conclusions from a legislative effort to shoehorn a new policy initiative into such a capacious theory of federal power”).

⁶³ *Florida*, 648 F.3d at 1312–13.

Thus, in applying federalist principles as a substantive check on the Necessary and Proper Clause, the court noted that the structural limits imposed by federalism were designed to safeguard individual liberty.⁶⁴ Although eschewing formalistic distinctions, the court found that empowering Congress to mandate the purchase of health insurance from private corporations would impermissibly confer a general police power on the federal government.⁶⁵ Therefore, the court concluded that even if the individual mandate is essential to avoid the adverse selection phenomenon engendered by Congress's overlying economic regulatory scheme, Congress may not properly exercise this power.⁶⁶

The Eleventh Circuit, however, did not directly address whether the Tenth Amendment's reservation of residual power "to the people" is an independent substantive limit on congressional power.⁶⁷ Rather, the court noted that laws regulating the health of citizens fall within a zone of traditional state concern.⁶⁸ Accordingly, the individual mandate is beyond the scope of Congress's delegated powers and thus improperly regulates individual behavior.⁶⁹

Additionally, the Eleventh Circuit challenged Congress's finding that the mandate is, in fact, essential to its comprehensive scheme.⁷⁰ According to the court, the numerous exemptions to the individual mandate and its penalty⁷¹ undercut Congress's efforts to cure the adverse

⁶⁴ See *id.* at 1284.

⁶⁵ See *id.* at 1312–13; see also *id.* at 1351 n.14 (Marcus, J., dissenting) (stating that the majority "suggest[s] that the individual mandate is a 'bridge too far' . . . not because it constricts the inactive, but rather for some inchoate reason stated at the highest order of abstraction").

⁶⁶ See *id.* at 1309–10; see also *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1297 (N.D. Fla. 2011), *aff'd in part, rev'd in part*, 648 F.3d 1235 (11th Cir. 2011) (noting that the Government's proposed application of the Necessary and Proper Clause would "enabl[e] Congress to pass ill-conceived, or economically disruptive statutes, secure in the knowledge that the more dysfunctional the results of the statute are, the more essential or 'necessary' the statutory fix would be").

⁶⁷ See *Florida*, 648 F.3d at 1303, 1313 n.129.

⁶⁸ *Id.* at 1305. For a thorough and nuanced analysis of how the Affordable Care Act is both federalism-respecting and boundary-shifting, see Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534, 582–94 (2011).

⁶⁹ See *id.* at 1306 ("Congress's encroachment upon these areas of traditional state concern is yet another factor that . . . strengthens the inference that the individual mandate exceeds constitutional boundaries.").

⁷⁰ See *id.* at 1309–11.

⁷¹ Several groups are not required to obtain minimum essential coverage. *E.g.*, 26 U.S.C.A. § 5000A(d)(2)(A) (West 2011) (effective Jan. 1, 2014) (religious objectors); *id.* § 5000A(d)(2)(B) (health care sharing ministry members); *id.* § 5000A(d)(3) (undocu-

selection and cost-shifting problems.⁷² In Addition, the court concluded that healthy individuals may opt to pay the relatively modest penalty and purchase insurance only when they get sick.⁷³ Therefore, the court claimed, Congress included a gaping hole in its own regulatory scheme, rendering the mandate unnecessary to its larger reform effort.⁷⁴

III. THE END OF RATIONAL BASIS REVIEW?: THE ELEVENTH CIRCUIT REVISITS THE FACTUAL FOUNDATION FOR THE INDIVIDUAL MANDATE

In *Florida*, the Eleventh Circuit struck down the individual mandate in an effort to enforce the outer limits of congressional power.⁷⁵ The court declined to endorse the Government's argument that the individual mandate is a necessary and proper exercise of legislative power.⁷⁶ Moreover, it rejected Congress's finding that the unique qualities of the health care market rendered the mandate an appropriate means to maintain the integrity of its overlying economic regulatory scheme.⁷⁷ Additionally, although it claimed to apply a presumption of constitutionality to an act of Congress, the Eleventh Circuit failed to identify administrable standards to assess the propriety of economic mandates.⁷⁸

Furthermore, the Eleventh Circuit embarked on an exacting review of Congress's underlying policy judgments.⁷⁹ For example, the court set aside Congress's finding that the individual mandate is essential to im-

mented aliens); *id.* § 5000A(d)(4) (prisoners). In addition, Congress exempted groups from the penalty. *E.g.*, *id.* § 5000A(e)(1) (individuals who cannot afford coverage); *id.* § 5000A(e)(2) (incomes below the tax filing threshold).

⁷² See *Florida*, 648 F.3d at 1310–11.

⁷³ *Id.* at 1311.

⁷⁴ *Id.* (stating that “to the extent the uninsureds’ ability to delay insurance purchases would leave a gaping hole in Congress’s efforts to reform the insurance market, Congress has seen fit to bore the hole itself”).

⁷⁵ See *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1311–13 (11th Cir. 2011), *cert. granted*, 80 U.S.L.W. 3297 (U.S. Nov. 14, 2011) (No. 11-398) (discussing the need for judicially enforceable limits on Congress’s enumerated powers); see also *United States v. Lopez*, 514 U.S. 549, 566 (1995) (noting that “Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the Judiciary’s duty to ‘say what the law is’” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1404 (1997) (noting that “an absence of judicial review . . . over federalism questions would abort the Framers’ design”).

⁷⁶ See *Florida*, 648 F.3d at 1307.

⁷⁷ See *id.* at 1295–97.

⁷⁸ See *id.* at 1284.

⁷⁹ See *id.* at 1281–82, 1298–1300.

plementing the Act's guaranteed issue and community rating reforms.⁸⁰ The court found that the individual mandate would, in fact, fail to solve the adverse selection problem because healthy individuals would choose to pay the penalty rather than enter the health insurance market.⁸¹ Based on these independent findings, the court then concluded that the mandate was actually intended to compensate insurance companies for the regulatory costs imposed by Congress's larger regulatory scheme.⁸²

Consequently, the Eleventh Circuit's reasoning in *Florida* undermines Congress's ability to balance competing economic and political interests in the legislative process.⁸³ In setting aside Congress's policy judgment that the individual mandate is essential to its larger regulation of health insurance markets, the court abandoned rational basis review.⁸⁴ The court noted that it was improper for Congress to mandate the purchase of health insurance based solely on the congressional finding that the integrity of the larger regulatory scheme depended on forcing consumers into a market.⁸⁵ Thus, the Eleventh Circuit rejected the view that Congress is the primary arbiter of what is necessary and proper.⁸⁶

Finally, the Eleventh Circuit's heightened standard of review, if adopted by the Supreme Court, may raise significant obstacles to Congress's future efforts to set social welfare policy.⁸⁷ Solutions to collective

⁸⁰ See *id.* at 1298–1300, 1309–10; see also *id.* at 1354–55 (Marcus, J., dissenting) (admonishing the majority for scrutinizing Congress's underlying policy judgments and factual determinations).

⁸¹ *Id.* at 1310–11.

⁸² See *Florida*, 648 F.3d at 1310.

⁸³ See *Lopez*, 514 U.S. at 607 (Souter, J., dissenting) (stating that the “adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation . . . to judicial policy judgments”).

⁸⁴ See *Florida*, 648 F.3d at 1343–44 (Marcus, J., dissenting) (noting that “the majority’s searching inquiry . . . into whether the individual mandate fully solves the problems Congress aimed to solve, or whether there may have been more efficacious ways to do so, probes far beyond the proper scope of a court’s Commerce Clause review”); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 564 (6th Cir. 2011), *petition for cert. filed*, 80 U.S.L.W. 3065 (U.S. July 26, 2011) (No. 11-117) (Sutton, J., concurring) (noting that “[t]he courts do not apply strict scrutiny to commerce clause legislation and require only an appropriate or reasonable fit between means and ends” (internal quotation marks omitted)).

⁸⁵ See *Florida*, 648 F.3d at 1299–1300, 1309.

⁸⁶ See *id.* at 1313; see also Lawson & Granger, *supra* note 34, at 276 (arguing that the Necessary and Proper Clause “sets forth an objective standard by which the necessity and propriety of laws can and must be determined, and it gives no indication that Congress is the only entity authorized to make that determination”).

⁸⁷ See *Florida*, 648 F.3d at 1345 (Marcus, J., dissenting) (“Every new proposal is in some way unprecedented before it is tried. And to draw the line against any new congressional enactment simply because of its novelty ignores the lessons found in the Supreme Court’s

action problems may well depend on the development and implementation of novel regulatory schemes that include the use of economic mandates.⁸⁸ Thus, courts may also consider that the political process, rather than rigorous judicial enforcement of federalism principles, will vindicate individual liberty by shielding the people from unreasonable economic mandates.⁸⁹

CONCLUSION

The U.S. Supreme Court has granted review of the Eleventh Circuit's decision in *Florida*. Although the Court's resolution of the case will allow the Justices to expound on doctrinal federalism questions, the fate of the individual mandate will have a profound impact on the development of social welfare policy over the next several decades. As Congress undertakes necessary reforms to entitlement programs, vigorous judicial oversight of economic regulation could chill legislative innovation.

Therefore, in addition to addressing the application of the larger regulatory scheme doctrine to Commerce Clause challenges, the Court should more clearly define the judiciary's role as the guardian of our federalist system. If the Court opts to impose federalism-based limits on the Necessary and Proper Clause, then it must identify administrable standards to ensure appropriate deference to the judgment and expertise of the political branches. Finally, if the Court affirms the Eleventh Circuit, it must reconcile the Eleventh Circuit's exacting review of Con-

Commerce Clause cases."); *Thomas More*, 651 F.3d at 560 (Sutton, J., concurring) ("The substantial-effects doctrine invites, rather than discourages, unconventional laws, making it difficult to draw conclusions from a legislative effort to shoehorn a new policy initiative into such a capacious theory of federal power."); see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (describing the Constitution as a document "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs").

⁸⁸ See *Thomas More*, 651 F.3d at 560 (Sutton, J., concurring) (stating that the individual mandate may offer yet another example of a "policy necessity giving birth to an inventive (and constitutional) congressional solution"); see also Neil S. Siegel, *Free Riding on Benevolence: Collective Action Federalism and the Minimum Coverage Provision*, 75 LAW & CONTEMP. PROBS. (forthcoming 2012) (manuscript at 5), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843228 (stating that "constitutional authorization to issue economic mandates extends to situations in which 'inactive' individuals free ride off the contributions of others").

⁸⁹ See *Thomas More*, 651 F.3d at 566 (Sutton, J., concurring) ("Time assuredly will bring to light the policy strengths and weaknesses of using the individual mandate as part of this national legislation, allowing the peoples' political representatives, rather than their judges, to have the primary say over its utility."); see also THE FEDERALIST NO. 44, at 286 (James Madison) (Clinton Rossiter ed., 1961) ("[I]n the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers.").

gress's regulatory decision making with the presumption of constitutionality and rational basis review traditionally applied in such cases.

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