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Driving the Conversation:

Sept. 18 2009: Healthcare: Is "mandatory insurance" unconstitutional?

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Roger Pilon, Vice President for Legal Affairs, Cato Institute:

Is it unconstitutional for Congress to mandate that individuals buy health insurance or be taxed if they don't? Absolutely – if we lived under the Constitution. But we don't. Today we live under something called “constitutional law” – an accumulation of 220 years of Supreme Court opinions – and that “law” reflects the

Constitution only occasionally.

Whole treatises could be, and have been, written on the subject, so I'll make just a few quick points here. The Constitution was written and ratified not simply to authorize and institute but to limit government as well. Indeed, that's the main reason for having “a constitution” – a compact between the people and the governors they authorize to act under it, who take an oath to abide by its provisions. Congress has only 18 enumerated powers or ends. Moreover, the exercise of those powers – and those of the states after the Civil War Amendments were ratified – are further limited by our rights, both enumerated and unenumerated. Under our Constitution, most of life was meant to be lived in the private sector. Only a few things – like law enforcement and national defense – were “socialized.”

The big change came during the New Deal when the Supreme Court, after Roosevelt threatened to “pack” it with six new members, began rewriting the Constitution – not through the amendment process but by standing certain provisions on their head. It was nothing less than a bloodless constitutional coup, as recognized even by those who supported it. (Many liberals today, including many here at Politico Arena, argue otherwise, but their arguments can't pass the straight face test. Rexford Tugwell, one of the principal architects of the New Deal, put it best: “To the extent that these [New Deal policies] developed, they were tortured interpretations of a document intended to prevent them.”)

So today, under the Commerce Clause, Congress can regulate virtually anything. Likewise with taxing, spending, and redistributing under the so-called General Welfare Clause. Yet as Madison, Jefferson, and others noted early on, in response to Hamilton's Report on Manufactures, if Congress can do anything it wants under those two clauses alone, what was the point of having enumerated its other powers?

Thus, **in their piece** in this morning's Wall Street Journal, Rivkin and Casey make absolutely telling policy

points – ObamaCare won't work, for example, unless everyone is forced in (and even then it's likely to go broke). But under modern "constitutional law" the Court isn't likely to resist the scheme on constitutional grounds. Still, I take hope from the rising political opposition we're seeing to ObamaCare. Have you noticed how often the protesters talk about how we've lost our constitutional moorings? If you haven't, you've been watching and reading the "mainstream media." And on that, see the full-page ad in today's Washington Post. We're heading toward two Americas, all right: one that's paying attention to what's going on; the other that's burying it's head in the sand.

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