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## Gene Healy: Obamacare is unconstitutional

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Examiner Columnist  
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As Harry Reid's health care bill moves to the Senate floor, the debate over Obamacare finally begins in earnest. Shouldn't the Constitution be part of that debate? By what authority, after all, could Congress force all Americans to buy health insurance?

In a recent press release, House Speaker Nancy Pelosi, D-Calif., argues that constitutional objections to the individual mandate are "nonsensical," because "the power of Congress to regulate health care is essentially unlimited." We eagerly await your orders, ma'am!

Pelosi is wrong, but that doesn't mean the court can be counted on to strike down Obamacare. Legislators have an independent obligation to consider the constitutionality of the laws they're debating -- and the individual mandate is flagrantly unconstitutional.

In answer to the question "by what authority?" Reid's bill offers the Commerce Clause -- the go-to provision for friends of federal power. That clause gives Congress the power "to regulate Commerce ... among the several states."

It was a modest measure designed to regularize cross-border commerce and prevent interstate trade wars -- so modest, in fact, that Madison described it in the Federalist as a clause that "few oppose, and from which no apprehensions are entertained."

The Founders would have worried more had they known that the Commerce Clause would eventually become a bottomless fount of federal power. In 1942's *Wickard v. Filburn*, the court held that the Commerce Power was broad enough to penalize a farmer growing wheat for his own consumption on his own farm.

That farmer, Roscoe Filburn, ran afoul of a New Deal scheme to prop up agricultural prices. The fact that he wasn't engaged in interstate commerce -- or commerce of any kind -- was quite beside the point. If "many others similarly situated" engaged in the same behavior, it would substantially affect interstate commerce, and frustrate Congress' designs.

In its "Findings" section, Reid's bill hits all the jurisprudential buzzwords: The individual mandate "substantially affects interstate commerce," and regulates "activity that is commercial and economic in nature." Activity like standing around without health insurance? Apparently so.

Yet, as the Congressional Budget Office noted in a 1994 evaluation of Clintoncare, an individual mandate would be "unprecedented. ... The government has never required people to buy any good or service as a condition of lawful residence in the United States."

Even the Supreme Court ought to recognize the "you exist, therefore you're regulated" rationale as a bridge too far. But court-watchers have learned never to underestimate the justices' creativity in inventing new rationalizations for constitutionalizing the unconstitutional.

If the court eventually has to rule on the mandate, don't be surprised if the rationalization goes something like this: "Encouraging" people to buy a product is really nothing new. Wickard shows that Congress can use the Commerce Power to force people to carry out transactions they'd rather avoid.

After all, what the Department of Agriculture bureaucrats really wanted in that case was to get farmer Filburn, and others like him, to buy wheat on the open market.

In *Gonzales v. Raich* in 2005, the court reaffirmed Wickard, noting that "Congress can regulate purely intrastate activity ... if it concludes that failure to regulate" would frustrate the comprehensive regulatory scheme Congress has in mind.

The individual mandate surely counts. Since Obamacare also bars insurers from denying coverage for pre-existing conditions, without a requirement to purchase insurance, the healthy would have an incentive to drop their coverage, and enter the market only when they got sick.

But members of Congress swear an oath to uphold the Constitution -- not the court's funhouse-mirror version of it.

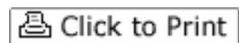
Supporters of national health care are counting on congressmen not to take that obligation very seriously. Their attitude toward the rule of law echoes that famously expressed by FDR in 1935. Trying to push through a key New Deal measure, Roosevelt wrote to an important congressman: "I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation."

Barack Obama fancies himself Roosevelt reincarnated; in this, at least, he has a legitimate claim to FDR's legacy.

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