LIBERTY TREE

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The ObamaCare cases, Part III

TAX AND SPEND

THE LOOPHOLE THAT SWALLOWED THE CONSTITUTION?

By Dick Greb

In the last installment of this series on ObamaCare, we saw that the Supreme Court decided that the individual mandate portion of the law — which requires everyone to either purchase health insurance or pay a penalty — was not authorized under the Commerce Clause. But the government prepared for such an eventuality by also arguing the power to enact such legislation under the taxing power. And despite the fact that the two arguments were based on opposing premises,[1] the court deems it to be "proper respect" for Congress to maintain a "general reticence to invalidate the acts of the Nation's elected leaders."[2] This reticence is a policy derived from the rather unrealistic "presumption that congress will pass no act not within its constitutional power."[3] The bottom line is that the Supremes will go to great lengths in order to declare every act of Congress constitutional, and will invalidate them only if they can't find any conceivable way to contort the grants of power in the Constitution enough to rationalize it.

In the present case, of course, the court had no real problem, since all the necessary groundwork had long been done. Just like with the commerce clause, the court has consistently construed the taxing power (Art. I, §8, cl. 1) in the most expansive sense possible. Chief Justice John Roberts sums up its attitude with this statement:

> Congress may also "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." **Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate.** The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control. *(p. 5)*

Notice that his mischaracterization of the grant as simply a power to "tax and spend" changes its nature from a specific grant to a virtually unlimited one. The fact of the matter is that this grant doesn't authorize *spending* whatsoever; it merely enumerates the *purposes* for which taxes may legitimately be imposed. Thus, it serves as a limitation on the power to tax, in that taxes for every other purpose are unconstitutional. And although the black-robed liberty thieves construe "provid[ing] for the common Defence and general welfare of the United States" as if it was a vast expanse of spending opportunities, in reality it's just a shorthand way of referring to the other powers enumerated in Article 1, § 8. The debts referred to are those authorized to be incurred by § 8, clause 2; the common defense refers to the powers authorized by clauses 10 through 16; and the general welfare refers to those authorized by clauses 3 through 9

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1. The commerce clause argument was based on the premise that the law required individuals to purchase health insurance, while the taxing clause argument was based on the premise that it didn't require such purchase, but only imposed a tax for not having done so.
2. *National Federation of Independent Business v. Sebelius* (No. 11–393) (hereinafter, "*NFIB*"). Unless otherwise noted, all emphases throughout are added, and internal citations may be removed for clarity.
3. *United States v. Harris*, 106 U.S. 629, 635 (1883). For more on this subject, see the series titled "Steering Clear of the Constitution" in *Liberty Tree* issues October 2008 and January and March 2009.
4. Clause 18, the "necessary and proper" clause, is also often improperly treated as a separate grant of power, but is really just the method prescribed for Congress to carry out its duties. Thus, Congress "maintains a Navy" by enacting the laws necessary for its maintenance, not by maintaining it through their own physical efforts. Likewise, it "collects taxes" by enacting the laws which authorize the executive branch to collect them, not by physically collecting taxes itself.

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WHO OWNS THE DISAPPEARING METAL?

Recently, several web sites reported that Treasury Secretary Timothy Geithner had announced pennies and nickels would be pulled from circulation beginning January 2013, with the implication that no new base-metal coins would be minted, and the market would soon be disadvantaged by rounded-off prices.

No such official statement could be found on the Treasury site, however, and some source articles for this "announcement" *dis*appeared from the web as quickly as they appeared. What *can* be found are statements by Geithner to Congress in February, along with Treasury reports and FY 2013 plans, which note that pennies and nickels, in their present composition, cost far more to make than their face value.[1] (Due to the Fed's turbo-theft of purchasing power through inflation).

The U.S. Mint is preparing a report for Congress, due mid-December, to show how changes in the coins' metal content could save Congress around 75 million frns, a drop in the bucket of U.S.-debt trillions. Congress already removed silver content from dimes and quarters after 1964, and most copper content from pennies after 1982. At a House subcommittee hearing November 29, it appeared Congress is now aiming to make coins from steel, aluminum, and (more) zinc (the current "copper" penny is actually 97.5 percent zinc).

Thus it seems certain that, one way or another, *current* pennies and nickels will be soon disappearing: either banks will collect them and return them to the Mint, or, just as in 1965, when base-metal coins replaced silver, people will begin to hoard old coins for their melt value and trade with newer, cheaper coins.[2]

You can alter your own money ...

Congress has passed laws regarding altering or melting coins owned by the public. One of these is arguably constitutional, the other is blatantly *un*constitutional. Title 18 U.S.C. § 331 states that "Whoever fraudulently alters, defaces, mutilates, impairs, diminishes, falsifies, scales, or lightens any of the coins [of the U.S. Mint], ... or fraudulently possesses, passes, utters, publishes, or sells [such altered coins] ...knowing[ly]" may be fined, or imprisoned for not more than five years, or both. The terms "fraudulently" and "knowing" convey that the law penalizes a type of counterfeiting, since the crime involves the element of deceitful representation to another.[3] The U.S. Treasury admits this only "means that you may be violating the law if you change the appearance of the coin and fraudulently represent it to be other than the altered coin that it is."[4] This is an (albeit backhanded) acknowledgement that the metallic money in your possession is in fact yours, and you may do anything you want with it, short of representing that it is *some other type* of current coin in an economic transaction.

... but you can't melt your own money?

Congress has also passed an oppressive, unconstitutional 'law,' however, at 31 U.S.C. § 5111(d):

> (1) The Secretary may prohibit or limit the exportation, melting, or treatment of United States coins when the Secretary decides the prohibition or limitation is necessary to protect the coinage of the United States.
> (2) A person knowingly violating an order or license issued or regulation prescribed under paragraph (1) of this subsection, shall be fined not more than $10,000, imprisoned not more than 5 years, or both.

In addition, metal melted in violation of this 'law' is made forfeit to the United States.

Congress here has unconstitutionally delegated its plenary legislative power to the Treasury Secretary, an unelected official who can unilaterally *impose* or *repeal* his own terms at will. On the unconstitutionality of such delegations, see last month's *Liberty Tree*. Secondly, Congress only has power to "coin Money" and "regulate the Value thereof" in Art. 1, Sec. 8, Cl. 5. The only power at its disposal to "protect" the coinage of the U.S., then, is to ensure that the Money the Mint coins is exactly of the Value it has set, and to punish counterfeiting. Congress was granted no power to control coined money in the possession of others.

Nevertheless, the Treasury Secretary has now purportedly forbidden the *owners* of certain coins from melting their own property during three periods, including the present. From 1967 through 1969, it was declared that melting silver coins would be punished by fines and imprisonment;[5] from 1974 through 1978, it was declared that melting pennies would be so punished,[6] and from April 2007 to the present, 31 CFR Part 82 has declared melting one- and five-cent coins is forbidden.

The first two times Treasury forbade melting of personal property, it claimed that "the obvious necessity for making [the prohibition] effective immediately" made it "impracticable, unnecessary, and contrary to the public interest" to conduct a notice and public comment period. The diktat contained not even a hint of what said necessity might be, nor how the public's interest was served by the rush. In contrast, the present prohibition was put in place well before the public was aware that inflation and mortgage derivative games were causing an 'economic (banker) crisis' which only the public's funds ('bailouts') could allegedly fix. For the first time, Treasury made a proposal and accepted public comments before issuing its final regulation.[8]

Some commenters raised the issue of the law's unconstitutionality, stating that coins are personal property, and "Treasury does not have the authority to regulate

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1. At least twice as much.
2. This is Gresham's law at work ("Bad money drives out good").
3. Congress has the power to "provide for the Punishment of counterfeiting the ... current Coin of the United States," Art. 1, Sec. 8, Cl. 6.
4. http://www.treasury.gov/resource-center/faqs/Coins/Pages/edu_faq_coins_portraits.aspx
5. Federal Register, Vol 32, No. 98, p. 7496.
6. Federal Register, Vol. 39, No. 76, p. 13881.
7. It should be noted that this 2007 prohibition lends some weight to the belief that the entire 2008 'crisis' was not only foreseen, but set in motion by the banking institutions themselves beginning in 2007.
8. See Federal Register, Vol. 72, No. 72, p. 18880.

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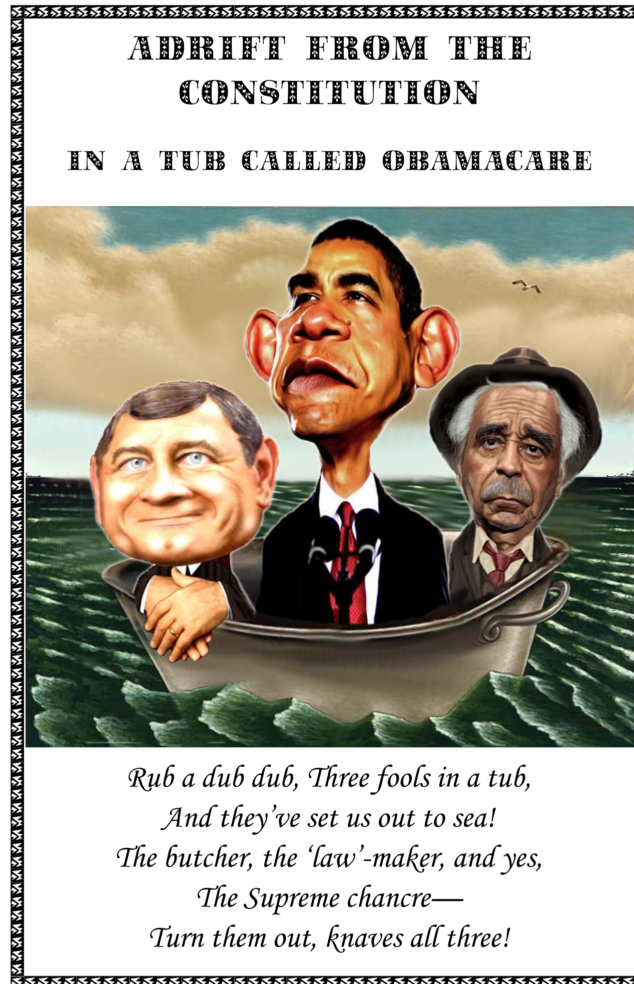
and 17.[4]

Lest you think this an unrealistic view of the Constitution, here's what James Madison had to say about the taxing power:

> Some, who have not denied the necessity of the power of taxation, have grounded a very fierce attack against the constitution, on the language in which it is defined. *It has been urged and echoed, that the power "to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare of the United States," amounts to an unlimited commission to exercise every power, which may be alleged to be necessary for the common defence or general welfare. ...* Had no other enumeration or definition of the powers of the congress been found in the constitution, than the general expressions just cited, the authors of the objection might have had some colour for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases. ... *But what colour can the objection have, when a specification of the objects alluded to by these general terms, immediately follows; and is not even separated by a longer pause than a semicolon? ... For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural or common, than first to use a general phrase, and then to explain and qualify it by a recital of particulars.* But the idea of an enumeration of particulars, which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity which, as we are reduced to the dilemma of charging either on the authors of the objection, or on the authors of the constitution, we must take the liberty of supposing, had not its origin with the latter.[5]



Rub a dub dub, Three fools in a tub,
And they've set us out to sea!
The butcher, the 'law'-maker, and yes,
The Supreme chancre—
Turn them out, knaves all three!

Clearly, unlike Justice Roberts, the 'Father of the Constitution' didn't consider the grant of taxing powers to be a legislative *carte blanche* for exerting influence over areas not otherwise within Congress' purview (through powers granted in other clauses). And following Madison's lead, we should recognize that the absurdity of Robert's position had not its origin with the authors of the constitution. Rather, it's a result of ignoring the limiting function of the enumerated purposes for which taxes may be imposed.

When you get right down to it, since those enumerated purposes encompass all the powers granted by Article I, § 8, they're really nothing more than the limits imposed by the delegation of specific powers in the first place. Congress has the authority to exercise the powers granted, and no others. It has the power to appropriate money (that is, "spend") only as is necessary and proper to put those powers into execution, and for no other purposes. Likewise, the power to tax is only authorized for the same reason, and for no others. Of course, Chief Justice Roberts is merely following the lead of an earlier Justice Roberts. In *U.S. v. Butler*, Justice Owen Roberts contrasts Madison's view of the taxing power with that of statist Alexander Hamilton:

> Since the foundation of the nation, sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same section; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. ... Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and *Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. ...* Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress. *It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. Butler*, 297 U.S. 1, 65 (1936)

So, as you can see, the sophistry is deep-rooted, and it's

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5. *The Federalist Papers*, #41.

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no surprise that Hamilton had a hand in undermining limits placed on the federal government by the Constitution.[6] This really is the heart of the matter. The Hamiltonian interpretation of the taxing clause brings virtually every subject within the power of Congress, because there can be no objective measure of the "general welfare" of the country. It becomes whatever Congress declares it to be — in other words, a mere matter of "public policy." And as our present-day Justice Robber — oops, Roberts — said: "we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them.[7] It is not our job to protect the people from the consequences of their political choices."

In *Butler*, the government actually made the argument that "Congress may appropriate and authorize the spending of moneys for the 'general welfare'; that the phrase should be liberally construed to cover anything conducive to national welfare; that *decision as to what will promote such welfare rests with Congress alone*, and the courts may not review its determination."[8] Yet, despite the broad reading of the taxing power, at least that court recognized that "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the federal government. ... [R]esort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible."[9] However, in *NFIB*, the court brushes *Butler* off as one of "[a] few of our cases [which] policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority. *More often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures.*"[10]

In other words, the Supremes now collude with Congress in usurping undelegated powers, by upholding legislation which is designed to regulate and control in areas "not intrusted to the federal government," so long as they frame such intrusion in the guise of a tax. It doesn't even matter whether the tax motive is secondary to the regulatory or other control motive. Justice Stanley Reed, in *U.S. v. Kahriger*,[11] after acknowledging the regulatory effect of a wagering tax, goes so far as to admit: "Nor is the tax invalid because the revenue obtained is *neglible*." So, no matter how little revenue is actually produced by a 'revenue measure,' it will be upheld as long as it can be characterized as a tax. And even though Roberts admits that the provision "is plainly designed to expand health insurance coverage,"[12] he decides to uphold the individual mandate of ObamaCare: "The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax."[13]

In doing so, he abandons an important principle upheld in *Butler*: "A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction *for the support of the government*. The word has never been thought to connote the *expropriation of money from one group for the benefit of another*."[14] Yet that is precisely what the individual mandate does: it expropriates money from one group — people who choose not to buy health insurance, and gives it to another group — those who receive health care that they can't pay for. But, rather than condemning the ObamaCare abomination as the legalized plunder that it obviously is, the liberty thieves instead chose to continue their relentless undermining of

6. It's also no surprise that Justice Joseph Story — who gave us the clearly unconstitutional doctrine of declaring mistrials in cases where juries could not come to a unanimous decision of guilt (so that the accused could be repeatedly retried) — would espouse Hamilton's naked power grab.
7. Unfortunately, with voting fraud being institutionalized through the use of unverifiable and easily manipulated electronic voting machines, the chances of throwing wayward incumbents out of office are continually growing slimmer.
8. *Butler*, at 64.
9. *Butler*, at 69.
10. *NFIB*, at 42.
11. 345 U.S. 22, 28 (1953).
12. *NFIB*, at 36.
13. *NFIB*, at 44.
14. *Butler*, at 61.

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what a person does with his or her own property." Treasury responded that money *is* the property of its bearer under common law, but "Congress has the power to regulate the coins and currency of the United States under Article I, section 8, clause 5." This is false: the power is only "to coin Money and regulate the Value thereof," thus Congress can only regulate the value (*e.g.* weight and composition) of coins. "Regulating" the actions of owners of *previously* minted coins has nothing to do with regulating the content of *current or future* coins.

Here's another Treasury whopper: the "interest" of the Federal Government "in ensuring that sufficient quantities of 5-cent and one-cent coins remain in circulation to meet the needs of the United States" outweighs any property rights. Yet since no concurrent law authorizes a prohibition on *hoarding or burying* old coins — an 'insufficiency' of coinage could still be assured.

It's more likely that the diktat re melting is meant to *discourage* folks from saving the better coins, so that Treasury can eventually collect and melt them itself. After all, federal agencies are exempt from the melting prohibition, and who knows — it could "save" the Secretary another few million frns for the bottomless debt bucket.