LIBERTY TREE

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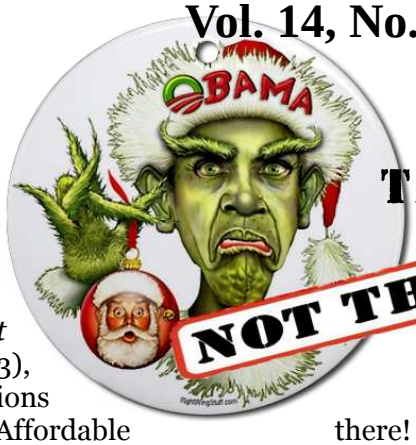

THE COMMERCE CLAUSE, NOT THE Santa Claus

The ObamaCare cases, Part II

By Dick Greb

Last month we started our examination of the Supreme Court decision in *National Federation of Independent Business v. Sebelius*, (No. 11–393), which challenged certain provisions of the Patient Protection and Affordable Care Act (P.L. 111–148). We saw that the impetus for Congress forcing everyone to purchase health insurance was a problem caused by its own prior interference in the free market — that is, by forcing hospitals to provide health services to people who couldn't afford such services. The costs of these services were shifted to insurance companies (and other *paying* customers of the hospitals), who in turn distributed them throughout their insurance pools. Obviously, the effect of this cost-shifting is that the price of health care increases for everyone — except those who get the services for free. And of course, this is the heart of the problem: since *some* people are getting their health care services for free, *other* people are going to have to pay for them. Thus the whole issue boils down to which people are going to be the ones forced to pay. And Congress has decided that *everyone* should pay,[1] by forcing them all into the insurance pools.

By now, you're probably thinking, "Just hold on there! I can't find any power delegated to Congress by the Constitution that would allow them to force everybody to purchase products they don't want." And of course, you'd be right. But the government, finding itself forced by the court challenges to find constitutional authorization to enact PPAC, cast about and finally decided that the Commerce Clause authorized it. Well, either that or the taxing power — but, definitely one or the other. You read that right. The government was so sure that the Constitution granted them the power to socialize the entire health care field, that it needed to argue *two different theories* as to the origin of that power, so that the black-robed liberty thieves could use the one they liked best to uphold the act. This makes it rather obvious that Congress never considered whether it had the legitimate power to enact PPAC before it did so, but, as usual, it simply does whatever it wants and leaves it up to Justice Department lawyers to find justification for their actions later, if the need arises.

The Commerce clause — the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes" given in Article 1, § 8, clause 3 — is extremely popular with Congress, based on the number of laws it enacts attributed to that purpose. Of course, the Supreme Court has contributed greatly to the abuse of that power over the years, as Chief Justice Roberts admits in the case at hand:

> The path of our Commerce Clause decisions has not always run smooth, but ***it is now well established that Congress has broad authority under the Clause***. We have recognized, for example, that "the power of Congress over interstate commerce ***is not confined*** to the regulation of commerce among the states," but extends to activities that "have a substantial effect on interstate commerce." Congress's power, moreover, is not limited to regulation of an activity that by itself substantially affects interstate commerce, but also extends to activities that do so only

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1. Again, everyone except those who are actually receiving the services!

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when aggregated with similar activities of others. ***Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways*** to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product.[2]

Notice Justice Roberts confesses that the Supremes have conspired with Congress to usurp powers never delegated to them, by establishing through their decisions an "expansive scope" to the "broad authority" of the Commerce Clause. The court has "recognized" that Congress' power "*is not confined to the regulation of commerce among the states*," despite the fact that that is *precisely* the limit established by the Constitution itself (ignoring for now commerce with foreign nations and Indian tribes). It's no surprise really — since these judges are hand-picked by the government on the basis of their likelihood to rule in its favor — that they consistently expand governmental power, each new encroachment justified by the judicial precedents upholding prior encroachments.[3]

It must be understood that this is nothing but a backdoor method of amending the Constitution without having to go through the rigorous amendment process required by Article 5 — in other words, without getting the consent of the people. If the founders intended that Congress should have the power to regulate activities that "substantially affect interstate commerce," then surely they would have included that phrase in the grant of power, rather than relying on future judges to expand the power by implication. Conversely, since they didn't see fit to include it, then the presumption should be that it wasn't granted. Certainly, there's no doubt in my mind that the founding fathers never envisioned the commerce clause to include restricting a farmer's ability to grow food for his own family's consumption, as the Supremes allowed in *Wickard v. Filburn*, 317 U.S. 111 (1942).[4]

On March 3, 1817, while serving as President, James Madison vetoed a bill appropriating funds "for constructing roads and canals, and improving the navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defense."[5]

> The legislative powers vested in Congress are specified and enumerated in the eighth section of the first article of the Constitution, and ***it does not appear that the power proposed to be exercised by the bill is among the enumerated powers***, or that it falls by any just interpretation with the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the Government of the United States.
> ***The power to regulate commerce among the several States" can not include a power to construct roads and canals, and to improve the navigation of water courses in order to facilitate, promote, and secure such commerce without a latitude of construction departing from the ordinary import of the terms*** strengthened by the known inconveniences which doubtless led to the grant of this remedial power to Congress. [6]

Madison — who took notes of the proceedings throughout the convention and is regarded as the Father of the Constitution — can surely be considered a reliable source of reference to the meaning of the Constitution. So, when he says that neither the commerce clause (nor any other provision) authorizes the construction and improvement of the instrumentalities of interstate commerce, we would do right to believe him. And if improvement of the actual channels by which interstate commerce flows be beyond the power granted, then how much more so for the regulation of an activity which "affects interstate commerce ... only when aggregated with similar activities of others?"[7] Madison recognized the advantages to the general prosperity from the planned improvements, but he also understood that the proper method of providing for them was "by a resort for the necessary powers to the same wisdom and virtue in the nation which established the Constitution in its actual form and providently marked out in the instrument itself a safe and practicable mode of improving it as experience might suggest" — that is, by the amendment process.

Professor Randy E. Barnett performed an in-depth analysis of the Commerce Clause which was published in the Winter 2001 edition of the *University of Chicago Law Review*. He looked at every instance of the use of the term "commerce" in the Constitution itself and in the convention, in the ratifying conventions of the states, in contemporary dictionaries, and in the Federalist Papers. His conclusion states:

> "Commerce" means the trade or exchange of goods (including the means of transporting them); "among

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2. All quotations are from the *National Federation of Independent Business v. Sebelius* case unless otherwise noted. Likewise, unless noted, all emphases are added, and internal citations may be removed for clarity.
3. For an analysis of this piece-meal process with respect to warrantless searches, see my article, "In their own words: Oppression on the installment plan" in issue #247 of Reasonable Action.
4. In fact, such sophistry likely has them spinning in their graves so hard that our nation's energy needs could probably be supplied for decades simply by harnessing them to a generator.
5. This bill, officially titled "An act to set apart and pledge certain funds for internal improvements," was known as the "Bonus Bill of 1817."
6. The complete text of Madison's veto can be found at: www.constitution.org/jm/18170303_veto.htm
7. The word "substantially" used by the court is one of those vague subjective terms which mean whatever judges want it to mean at any given time.

... Governments are instituted among Men, deriving their just powers from the ***consent of the governed****, ...*

... [The King of Great Britain] has ***combined with others to subject us to a jurisdiction foreign to our constitution****, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:*

... all political connection between [these United Colonies] and the State of Great Britain, is and ought to be totally dissolved;

... as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. **— Declaration of Independence, 1776**

A growing threat

In 2001, the *Princeton Project on Universal Jurisdiction* published a paper entitled "The Princeton Principle on Universal Jurisdiction."[1] The paper defines "universal jurisdiction" as "criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction." The paper further declares that universal jurisdiction is necessary to try crimes "under international law" such as piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide, and torture ... and any other "crimes under international law."

The elites' push for world government, it seems, has many intellectual toad-eaters rapaciously eager to develop the rationalizing 'groundwork' for the overthrow of traditional jurisdictional principles. Most Americans have no idea such groundwork is being laid — in fact, most would be hard-pressed to articulate a definition of "jurisdiction" or explain its importance and limits.

In recent years, over 70 DHS "Fusion Centers" have been put in place, ostensibly to 'share information' between the DOJ, CIA, FBI, U.S. Military, and state and local governments. In reality, they are designed to support the combination of state, local, and federal police units into one federalized 'force' against the people. The need for Americans to discern proper from improper jurisdiction is rapidly becoming critical, since the repeated usurpations of proper jurisdiction can only evince the same aim today as they did in the 1700s — to reduce the people to a state of slavery and oppression.

Power, authority, force

The CJS[2] of 1947 informs us that the term jurisdiction is derived from the Latin *juris* and *dico*, and means "I speak by the law." As applied to a state or a nation, "jurisdiction signifies the authority to make, declare, and execute laws; the right to apply the law to acts of persons; the power to declare and enforce the law. "

Webster's 1828 American Dictionary states that "Jurisdiction, in its most general sense, is "the power to make, declare or apply the law;" and "the right of administering justice, through the laws, by the means which the laws have pro-

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1. See lapa.princeton.edu/publications.php to download the paper. The working group was sponsored by such organizations as the International Commission of Jurists; the project chair, Stephen Macedo, was a Laurance S. Rockefeller Professor of Politics who was asked to chair the group by Dean Michael Rothschild of the Woodrow Wilson School of Public and International Affairs.
2. *Corpus Juris Secundum*, a legal encyclopedia.

Come and hear information you can use!

GUEST SPEAKER AT SAVE-A-PATRIOT FELLOWSHIP

OCT 20th, 6:00 PM

12 Carroll Street, Westminster, MD 21157

RANDY SOWERS, farmer and co-owner of the successful South Mountain Creamery in Maryland, will share his experiences with the Maryland U.S. Attorney's Office, which forced him, through its federal asset seizure program, to give them $29,500 even though he had committed no crime. Although other Maryland farmers have been targeted in this federal money-making scam, Randy is the only one who has had the courage to exercise his First Amendment rights and spoke publicly about the treatment he received, according to *City Paper*. Come hear him tell his own story!

The South Mountain Creamery Logo.

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vided for that purpose. Jurisdiction is limited to place or territory, to person, or to particular subjects." Jurisdiction includes "the power of executing the laws and distributing justice, ... of governing or legislating, ... of exercising authority," but most importantly, it is also defined as "[t]he limit within which power may be exercised." For example, "The legislature of one state can exercise no jurisdiction in another."

Power, authority, right, and (en)*force* are repeatedly used to define *jurisdiction*, but the exercise of power and force is also said to be *limited* to particular places, persons, or subject matters.

Who then may exercise the power to declare and enforce the law over a given place, person or subject matter? Since all men are born equal in "respect of jurisdiction or dominion one over another;" as John Locke put it, all men enjoy the "equal right, that every man hath, to his *natural freedom*, without being subjected to the will or authority of any other man."[3] This is what the Founders meant by stating that "all men are created equal." Individuals have no natural right to dominate others. Taking such power by force or fraud is immoral and injust. But free persons may *consent* to the dominion of others over limited areas, in order to better protect their life, liberty, and property.[4] It is only this "consent of the governed" from which the Founders believed government can derive its "just powers," that is, its jurisdiction.

A foreign jurisdiction

In 1776, each colony chartered by the English Crown had its own legislative assembly and courts, which the Founders held to have proper jurisdiction to make laws concerning the people in their territory. No colony had any representatives in the British Parliament — just as U.S. territories have no representation in the U.S. Congress today. Yet they were still being "governed" by Parliament's acts, as approved by King George.

After the Seven Years' War (1756-63), Parliament decided to tax Americans more to pay for war debt — the Sugar Act of 1763 (tariff), the Stamp Act of 1764 (direct tax), the Townshend Acts beginning in 1767, and then the Tea Act of 1773, resulting in the infamous Boston Tea Party. After that, Parliament passed the Coercive Acts to shut down Boston, nullify the colony's charter, etc.

The Founders complained that the acts of Parliament were mere "pretended" legislation of a "jurisdiction foreign to our constitution," a jurisdiction "unacknowledged by our laws." Since Parliament did not represent the people within the colonies, it was a foreign jurisdiction with no legitimate claim to govern them.

We have now come full circle. Today, the federal government, busy shaping a "jurisdiction foreign to our constitution," passes volumes of "pretended" legislation to "govern" *us* without our consent.

3. Chap. VI, Sec. 54, Locke's *Second Treatise of Civil Government*, 1690.
4. See the article "Government? Agents!" at www.libertyworksradionetwork.com/jml/index.php/opinions/dick-greb.

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> the several States" means between persons of one state and another; and the term "To regulate" means "to make regular"—that is, to specify how an activity may be transacted—when applied to domestic commerce, but also includes the power to make "prohibitory regulations" when applied to foreign trade. In sum, ***Congress has power to specify rules to govern the manner by which people may exchange or trade goods from one state to another, to remove obstructions to domestic trade erected by states***, and to both regulate and restrict the flow of goods to and from other nations (and the Indian tribes) for the purpose of promoting the domestic economy and foreign trade.[8]

The Supreme Court itself predicted in 1888 the result of extending the term "commerce" beyond the intended meaning of "buying and selling and the transportation incidental thereto":

> If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock-raising, domestic fisheries, mining,—in short, every branch of human industry. *Kidd v. Pearson*, 128 U.S. 1, 21 (1888)

Since moving away from that limited meaning in the mid-1930's, the court's prediction has been proven correct. Congress now believes that it can forever control any object that ever enters into commerce (like firearms), or even objects that are merely like those that do (like the wheat in *Wickard*). But every now and then, our elected "representatives" bite off more than their typically willing accomplices on the bench are able to choke down, and surprisingly perhaps, the individual mandate provision of PPCA was one of those times. On the other hand, however, it's not as surprising in this case, because they had that second choice for upholding the provision — the power to tax! We'll pick up on that argument in the next installment.

8. "The Original Meaning of the Commerce Clause" (68 U. Chi. L. Rev. 101).