Liberty Tree

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To be or not to be ...

Constitutional

Part III

By Dick Greb

In this current series I'm examining the pernicious — but widely held — position promoted throughout the Tax Honesty movement that I've dubbed 'technical constitutionality.' The central tenet of that position is that the income tax laws are constitutional because Congress wrote them such that citizens are not made subject to the tax except in special circumstances, but concealed that fact behind any number of technicalities which various patriots have claimed to uncover over the decades. Yet there is very little agreement between said patriots on what this hidden mechanism for citizen non-taxability actually is, and in fact, many of their theories on the issue are mutually exclusive. About the only thing that those who believe in the constitutionality of the tax laws (who I will call the "*cons*") can agree on is that they are constitutional *only because* they exclude the citizen. That is, if citizens were taxed the way the government tries to convince the public that they are, then most cons would wholeheartedly agree that the laws were *un*constitutional, thereby in effect converting them into "*uncons*." As you will see, this is an important point.

In part one, we found that technical constitutionality provides no rational basis as an incentive for Congress to exclude the citizens from the income tax, because there is no circumstance in which it could benefit the government. If a citizen were to challenge the constitutionality of the enforcement of the tax against himself, then technical constitutionality is certainly no defense against the challenge. In fact, it would be just the opposite. It would be an admission that he was correct, not to mention that it would entail admitting to the fraud perpetrated against him (and everyone else). Indeed, the government's only option is to argue the constitutionality of the tax *as it is applied to that challenger*, thereby denying the existence of any technical subtleties that exclude him from its operation. And if the courts were willing to collude with the prosecutors to uphold the tax against such a challenge on the basis of (nudge, nudge, wink, wink) *unrevealed* technicalities, then the charade becomes totally unnecessary anyway. As long as the government can count on the collusion of the courts (and they do pay their salaries, after all), it's much easier to simply apply the tax to the citizenry — whether that be constitutional or not — and let the courts uphold it.

In part two of this series we looked at the comments of Representative Cordell Hull, who authored a bill to extend the tax on "doing business" as a corporation to individual citizens as well. He declared that his 'golden rule' of taxation was to "require [*every American citizen*] annually to pay a tax, measured by a fair and just proportion of his net gains."[1] The definition of 'doing business' for purposes of the tax was "***everything*** about which a person can be employed; ***all activities*** which occupy the time, attention, and labor of persons ***for the purpose of a livelihood or profit***."[2] Thus Hull, as well as the three out of every four of the rest of the Representatives who voted to pass this bill, explicitly did not intend to exclude citizens from this tax. And the fact that this bill was the immediate forerunner of the income tax enacted October 3, 1913, which was also passed by these same Representatives, shows that the latter tax was likewise not intended to exclude citizens.

The most important point for the health of the

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1. Congressional Record — March 16, 1912, page 3498. Emphases added and internal citations omitted throughout.
2. *Ibid.*, p. 3500.

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tax movement in my opinion is to recognize the simple fact that there is ***nothing*** to support the theory that Congress intended to exclude the citizens from being taxed, nor that the Supreme Court ever considered such taxation of citizens to be unconstitutional *per se*. Therefore, any theory that involves hidden sections or deceptive definitions, or concealed adhesion contracts or anything other than the fact that all three branches of our government believe that income taxes on citizens (and everyone else for that matter) are proper and necessary and highly desirable, is simply a waste of time and energy. Its existence ends up acting as a drain on available resources, which could otherwise go into productive channels. The bottom line is that 'technical constitutionality' is nothing but an illusion. Unfortunately, it's an illusion that has caused, and continues to cause, immense harm to the Tax Honesty movement. And that's what I want to cover in this installment.

What's the harm in a little make-believe?

As just mentioned, a significant amount of damage to the movement occurs as a result of dissipation of effort and resources. Many patriots over the years have claimed to discover the hidden mechanism by which Congress secretly excluded the citizens from taxability. And they are often able to convince others to join their 'camps' and adopt their ideas. Yet, since very few of these patriots agree on what the hidden mechanism is — and in fact, many of their positions are mutually exclusive — the result is any number of camps that are at best simply at odds with the rest, but at worst, actively opposing each other.

Consider this in the context of the movement as a whole. As with any other 'cause,' there are only so many people who will care enough to ever become actively involved. Behind this smallest group though, there will often be a larger group who will provide support — financial and otherwise — to the active participants. This group will likely include family, friends and acquaintances of the inner group. Beyond these two groups are those who support the cause in *theory*, or in *spirit*, but do not contribute to it, and then those who neither support nor oppose the cause. Beyond that are the mirror image groups who oppose the cause.

A house divided

The point is that there are only a finite number of people available to effect the goals of the cause. So, consider a situation where there were just two *camps*, which espoused mutually exclusive mechanisms of untaxability. It's easy to see that these two groups would necessarily be working at cross-purposes to each other. In other words, much of each camp's limited resources would be expended countering the effects of the other camp. This while the ultimate goal of both camps is actually the same — ending income taxes on citizens. What a waste!

Throw in a third camp and now each has the effects of *two* other camps to counter. And on and on it goes. The more camps, the more slices that must be cut from the same pie (that is, from the finite number of people willing to get involved), meaning each slice will need to be made smaller to accommodate them all. And at the same time that the slices get smaller, the number of 'erroneous' effects that will need to be countered gets larger. The situation hardly improves even when the camps are somewhat in harmony, because each will still use some part of its limited resources duplicating the efforts of the others to some degree.

You should be able to see that this diffusion of effort and resources is a direct result of the idea of technical constitutionality, which by its nature virtually guarantees that there will be many different theories of how it all works. And if you've honestly considered the information I've presented in this series, you should now be able to recognize that those theories have no basis in reality. Thus, the situation is even worse than the examples given above. While the efforts of the Tax Honesty movement are indeed being dissipated by the factionalization of the whole, the greatest damage is being done because *all of these technical constitutionality theories are false in the first place*.

Courting disaster

Naturally, the impact of this situation is huge, and manifests itself in a number of ways. The first one to consider is what happens in the courts. It's certainly no secret that the Tax Honesty movement has had very little success in court. Of course, with the corruption that exists in our judicial system, that's no real surprise. Yet, pleas of corruption are too often used to avoid any examination into the viability or correctness of the position being asserted, and so become nothing more than a mask to cover an invalid position. But incorrect positions don't deserve to prevail, and it's

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not corruption when they don't. And every lost case becomes yet another precedent for the next person to overcome.

That being said, the movement has had some success in certain cases, but most of those dealt with procedural problems within the actions taken by the Internal Revenue Service. Certainly the IRS makes many mistakes — intentionally or not — and challenges on those grounds should, and often do prevail. These wins are sometimes shown as proof of effectiveness, but by neglecting to distinguish the nature of the cases, the extent of said effectiveness can be exaggerated.

The other category of cases where there has been a few wins — but very few, to be sure — deal with so-called *Cheek* defenses. These types of cases arise as a defense to willful failure (to file or pay) charges, and their sole purpose is to negate 'willfulness' which is an essential element of those crimes. I discussed such cases in depth back in 2013, so I won't go through it all again here, but it would probably be beneficial to go back and read the article as a refresher.[3] There are two main points to be considered in such cases: first, a win by means of a *Cheek* defense *will* prevent conviction, but such wins are increasingly less likely as time goes on. This is because the second point is that the defense is most often based on the premise that you had a good-faith — albeit a *mistaken* — belief that the laws did not apply to you, and juries become harder to convince that someone could still believe positions that have lost in the courts so many times before. So, even in the slim chance that you do win, that result in no way supports the truth of the underlying belief. In fact, many times the defendant *stipulates* going into the trial that the belief was indeed mistaken.

In my *Cheek* article, I pointed out that the black-robed liberty thieves have historically pigeon-holed *Cheek* defenses into the restrictive area of *textual* inapplicability of the laws — that is, the laws do not apply to the defendant because *the text of the law somehow excludes or exempts them*. In other words, they were effectively limited to mistaken beliefs of technical constitutionality. On the other hand, the Supremes explicitly rejected any argument that claimed the inapplicability of the laws because they were believed to be unconstitutional, despite having said back in 1886:

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; ***it is, in legal contemplation, as inoperative as though it had never been passed.***[4]

However, in his separate opinion concurring in judgment, Justice Scalia denounced the position espoused by the majority:

> It seems to me that today's opinion squarely reverses that long-established statutory construction when it says that a good-faith erroneous belief in the unconstitutionality of a tax law is no defense. ***It is quite impossible to say that a statute which one believes unconstitutional represents a "known legal duty***."[5]

Scalia also mentioned in the course of oral arguments that he wasn't the only Supreme to hold that view:

> ***[L]ike some of the other justices, I don't see the basis for drawing that line.***
>
> But you don't — you don't stop short of saying that belief that the Supreme Court has misinterpreted the statute is — is not a good-faith defense. Suppose he doesn't think that the Constitution entitles him to say that wages are not income, but that simply ***the Supreme Court got it wrong when it said that under the Internal Revenue Code wages are*** not [sic] ***income and said, you know, gee, the Supreme Court said that, but they misinterpreted the statute***.[6]

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3. See "On the other Cheek" in the March 2013 issue of Liberty Tree: https://tinyurl.com/2crqbfmj..
4. *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).
5. *Cheek v. U.S.*, 498 U.S. 192, 207 (1991).
6. *Cheek v. United States*, United States Supreme Court Official Transcript (October 3, 1990), 1990 WL 601341, at page 11. Bear in mind that since this is a transcript, "--" indicates a pause, so the repetition seen afterward is simply a result of that common habit when speaking off the cuff.

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Unfortunately, nobody ever took up the mantle and pursued the chance to establish the proper expanded understanding of 'known legal duty.' By the time I wrote about it in 2013, only Scalia and Kennedy remained on the bench, and now both of them are also gone. So, whatever "other justices" Scalia spoke of above, they're history now too. Nevertheless, Scalia's acknowledgment that a good-faith belief in unconstitutionality mitigates willfulness remains just as true as ever. And so, it may still be possible to get a favorable ruling from the present court, but going in with the knowledge that at least one of the nine was on your side died with Antonin Scalia.

"Truth has a sharp and uncomfortable edge, but in the long run it is more useful than the comforts of illusion." — *unknown*

The real point to this discussion of the *Cheek* case is to recognize that the government, in arguing it and others like it, have steered such defenses away from true (and therefore viable) positions — unconstitutionality of the law, for example, or previous wrong decisions of the courts, and towards false (and thus, unviable) positions based upon technical constitutionality. Coincidence? I think not. But more on that later.

Now, although at the time I wrote the *Cheek* article I was already aware of the problems with technical constitutionality — as well as various 'non-taxability' theories which are off-shoots of it — it didn't occur to me then that technical constitutionality was actually the narrow classification into which the court was corralling such defenses. That recognition didn't come to me until I was writing this article. But I did recognize that since *Cheek* defenses depended on being able to convince a jury of a good-faith belief in non-taxability, presenting rebuttals to the various theories could undermine someone's ability to be convincing. Therefore, I held my tongue. But, it turns out there's really never a good time to disabuse people of long-held beliefs. Yet ultimately, at some point it must be done, because as has been said, "Truth has a sharp and uncomfortable edge, but in the long run it is more useful than the comforts of illusion."

In further installments, we'll continue with our examination of the different ways that the erroneous theory of technical constitutionality has impaired — and continues to impair — the effectiveness of the ultimate goals of the Tax Honesty movement. We'll also ponder a bit on some possible origins of the theory, so you won't want to miss the rest of this series. Stay tuned.

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