

## You Didn't Earn That

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What are the outer limits of the government's ability to take your assets or tell you what to do? I will address that question by looking at a few Supreme Court cases bearing on matters of taxation, pollution and property.

This year's big case on personal freedom, *National Federation of Independent Business v. Sebelius*, delivered a mixed message. The decision limited the federal government's reach into people's personal spheres (it can't force you to eat broccoli) but at the same time reinforced its power to tax.

Robert Levy, a scholar of constitutional law and the chairman of the conservative Cato Institute, finds in the decision something to reassure lovers of freedom, even though it upheld an intrusive law. Justice John Roberts made it clear, Levy says, that taxes (as opposed to fines) can't be coercive. A \$2,085 tax for not buying health insurance is constitutionally tolerable; a \$2 million tax would not be.

So long as a tax is aimed at getting revenue rather than forcing people to do something, though, it can be pretty stiff. The question presents itself: Just how draconian can a tax be? Would a 100% marginal tax rate survive a constitutional attack? Levy thinks it would.

A scary thought, given that the philosophy that the government owns your income, and by its good graces grants you the right to keep some of it, is pervasive in Washington, D.C.

This philosophy explains how institutions like the Tax Policy Center, a think tank run by Brookings and the Urban Institute, have come to describe targeted tax breaks, like the one for charitable donations, as "tax expenditures." Says William McBride, chief economist of the Tax Foundation (which is unsympathetic to high tax rates): "Generally anything that TPC writes about tax expenditures takes the position that the money rightfully belong to the government."

The Tax Policy Center is not out in left field on this point. Here's a telling comment from the president's State of the Union speech this year, about extending the Bush tax cuts: "Right now, we're poised to spend nearly \$1 trillion more on what was supposed to be a temporary tax break for the wealthiest 2% of Americans."

“Spend”?

Not even the most fervent of redistributionists is talking at the moment about a 100% tax bracket for millionaires. But the idea is not so farfetched. As recently as 1963 the top federal bracket was 91%, Levy notes, and nothing in the Bill of Rights stopped it.

Throw in state and local taxes that nowadays add up to more than 9% and you could have a confiscatory marginal tax rate. A deduction for state taxes would protect the taxpayer from a 100% combined rate. But evidently nothing in the Constitution compels Congress to allow such a deduction, since the alternative minimum tax, on the books for decades, doesn't have it.

The health care law upheld in June has a stiff marginal tax of sorts. It says that families with incomes up to 400% of the poverty level (that will come to approximately \$90,000 for a family of four) will get a subsidy, beginning in 2014, to keep their insurance cost at 9.5% of income. Above the cutoff there's no subsidy. Given present trends in insurance costs, the subsidy will be worth at least \$11,000. Thus, an \$85,000 family that adds \$10,000 of overtime to its work schedule would lose \$11,000. That's a 110% tax rate.

How about a 100% tax on retirement accounts? Could Congress confiscate IRA balances and turn them into government-sponsored annuities, as Argentina did? “I think the current court would say No,” says Levy. “But one change [of justices] on the court would make a difference.”

### **You Can't Breathe That**

For a long time, the law of pollution control didn't stray too far from the common law of nuisance, which provides a tort remedy for noxious emanations.

Then, in a 2007 case interpreting the Clean Air Act (*Massachusetts v. EPA*), federal power got a big expansion. The Supreme Court ruled 5-4 that carbon dioxide, the stuff we exhale, is a pollutant.

This gives the feds the power to shut down coal plants. They can use the statute to design automobiles. Can they use it to regulate breathing? Humans exhale 3 billion tons of CO<sub>2</sub> per year.

You could argue that the carbon atoms you breathe are innocent, having come (via food) from the atmosphere. But that's not true of the carbon burned to get that food into your mouth. Growing, shipping and storing food accounts for a seventh of U.S. energy consumption, according to the USDA. Food is sufficiently energy intensive that, if you walk to work instead of taking the bus, you are adding to global warming.

The way to stop exercise freaks from polluting the atmosphere is to levy a tax on carbohydrates. Taxes on sugar, junk food or soda have been tried or proposed in Europe, Washington State, New York City and Richmond, Calif. The federal government would be quite within its rights in imposing an excise on calories.

There already is an indirect federal tax on food: the ethanol fuel mandate. Proceeds are sent to wealthy Iowans in the form of inflated corn prices.

In short, whatever Justice Roberts said about your right not to eat broccoli, the government has a way to get pretty personal in its environmental enforcement.

### **You Don't Own That**

Does a deed make you the owner of your land? Or is your right to occupy it subordinated to society's needs?

An important case, decided in 1992, is *Lucas v. South Carolina Coastal Commission*. David Lucas wanted to build houses on his beachfront lots; the state wanted preserve the view and decreed the lots unbuildable.

The state would have had its way but for a provision in the Fifth Amendment forbidding the government to snatch property without paying for it. The U.S. Supreme Court ordered the state to either back off or compensate Lucas.

It looked like quite a victory for property owners. The 6-3 decision, however, hinged on the fact that Lucas's property value was not merely reduced but wiped out. Cities, states and the federal government can do a lot of damage to an owner without compensating him, so long as they leave behind at least a shred of value.

A government that wants to preserve an historic building or a wildlife refuge or a beautiful landscape has three choices. It can buy the property, making it a park; it can buy a conservation easement; or it can issue a decree, paying nothing. The third method is the most popular.

The decrees are handed down under the authority of a historic preservation commission or a zoning law or a wetlands regulation or the Endangered Species Act. It is a rare property owner who gets compensated.

A recent case in point involved the scenic views along the Hudson River. Wishing to preserve them but not lay out any cash, Rhinebeck, N.Y. decreed a 20-acre minimum lot size in that part of town.

Martin Sosnoff, a money manager and Forbes columnist, lives in the targeted area and joined neighbors in a court challenge to the zoning change. "It's basically a get-the-rich thing," he says. "Confiscation." Sosnoff and his fellow litigants lost in a lower court last year and then abandoned the fight. For Sosnoff

it was an academic fight anyway; he has protected his estate from future subdivision.

Robert Levy sits on the board of the Institute for Justice, a champion of property rights. I asked him if the institute might take up the cause against large-lot zoning. Not likely, he said: People with large tracts of land don't make sympathetic plaintiffs.

Most environmentalists, of course, would applaud Sosnoff's loss. Indeed, Rhinebeck's bold move might be a useful precedent for New York State if it wants to expand its Adirondack Park. Why bother to purchase new parcels, as it has been doing intermittently for a century? It could simply impose a 2,000-acre lot minimum.

*Resources:*

*Analysis of energy use in the U.S. food system [here](#).*

*Article on endangered species and the Fifth Amendment [here](#).*

*Supreme Court opinions on [beachfront development](#), [Obamacare](#), and [carbon dioxide](#).*

*Blog you should follow if you are upset by either of the last two decisions: [Coyote](#).*