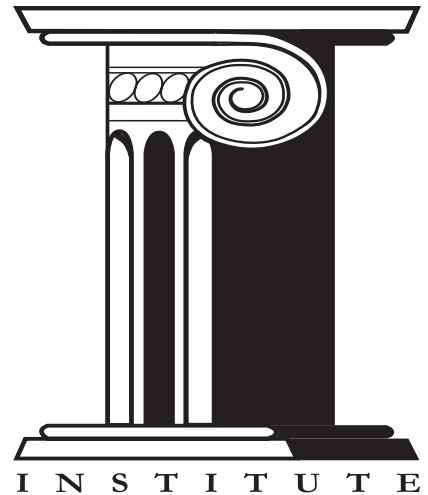


LIMITS



On Power and the Use of Coercion

Stop Taxmageddon Before it Hits

by Curtis Dubay

If you thought paying your taxes was painful this year, get ready for more heartache next year, when taxpayers could be on the hook for almost \$500 billion in higher taxes.

That's the size of "Taxmageddon."

Taxmageddon is the tax hike set to slam the economy and taxpayers on Jan. 1, 2013. It's made up of seven different categories of tax cuts set to expire, and six tax hikes from the health-care law set to kick in, as soon as the ball drops on New Year's Eve.

A tax increase the size of Taxmageddon for just one year is simply unprecedented. By comparison, the Affordable Care Act contained a huge tax

increase: \$502 billion over 10 years.

Taxmageddon's tab is \$500 billion just for 2013. Its size over 10 years would be off the charts! This fiscal cliff, as Federal Reserve Chairman Ben Bernanke called it, would deal a crippling blow to the already staggering economy. It would suck more than an extra 3 percent out of the private economy and give that money to Congress to spend less efficiently than the families and businesses that earned it. Thankfully Taxmageddon need not strike the wounded economy. There is time for Congress and President Obama to stop these economy-wrecking tax hikes. And the sooner they act, the better.

The families, businesses, and investors headed toward Taxmageddon want certainty that their taxes won't rise

steeply next year. And they want that certainty as soon as possible. That way they can start making plans for the future. The possibility of stinging tax hikes is a large part of the Washington-created uncertainty holding the economy back from full recovery. Congress and the President should start work now to free the economy from the weight of looming tax increases. Taxmageddon is a big tax hike, but how will it affect you? Every household in America would face an average tax increase of \$3,800.

A big portion of that increase will occur because the Bush tax cuts lowered all tax rates and put in place a new 10 percent bracket. They also doubled the Child Tax credit from \$500 to \$1,000. That all goes away if Taxmageddon happens — and

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Dr. Don Racheter,

President

John Hendrickson,

Editor

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Stop Taxmageddon Before it Hits by Curtis Dubay (continued from page 1)

Tax Day will be all the more painful for it. That's not all. You'll be much more likely to pay the alternative minimum tax, or AMT. This tax hike was only supposed to be paid by "the rich," but it is on track to fall heavily on middle-income families next year. Tax Day won't be the only day that is more painful should Taxmageddon occur. Every payday you'll see a smaller check because the payroll tax will rise and take a bigger bite out of your check. In total, because of the expiration of just these three tax policies, 70 percent of Taxmageddon would fall directly on middle — and low — income families.

And that figure only includes the direct hit you'll face. The health-care surtax on investment income and salaries over \$250,000 — which begins in 2013 along with five other tax hikes — will slow job creation because it will take away resources from businesses, investors, and entrepreneurs.

Other Taxmageddon tax hikes, such as the expiration of the "tax extenders," the rise of the death tax, and the end of 100 percent expensing for business investment, will do the same. That'll make it harder to find a job if you're out of work or to land a better job if you're looking

for a new opportunity. It will also make it harder to earn more at your current job, or earn a higher return on your retirement savings.

Will Congress and the president fix all this soon? One would hope. But recent experience indicates otherwise. They've developed the bad habit of delaying until the last possible minute the handling of pressing tax issues.

In 2010 they waited until the very end of December to stop the first expiration of the Bush tax cuts. In 2011 they waited until the last minute to put off the expiration of the payroll tax cut. Waiting until the bitter end would be a big mistake.

Besides the harm that uncertainty inflicts on the economy every day that Taxmageddon goes unfixed, the public's confidence in Washington is abysmally low.

Voters should be shown that Congress and the President actually can get important things done, even in an election year. Stopping a \$500 billion economy-crushing tax hike shouldn't be controversial. So why wait?

Curtis Dubay is a Senior Policy Analyst for Tax Policy at The Heritage Foundation.

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From Liberty to Leviathan in a Nutshell

by Roger Pilon

On Monday [March 26, 2012] the Supreme Court will begin hearing oral argument on the Patient Protection and Affordable Care Act (“Obamacare”), which will run for six hours over three days. Brought against the Obama administration by 26 states, the National Federation of Independent Business, and two individuals, *Florida v. Dept. of Health & Human Services* raises fundamental questions about the scope of Congress's powers, the powers reserved to the states, and the rights of individuals over their medical care. It is, without question, the most important case the Court has taken in decades.

Every court so far that has ruled against Obamacare has cited the promise of the Constitution's principal author, James Madison, that the powers of the new government would be “few and defined,” aimed mainly at securing liberty. That hardly squares with the act's mandate that every American buy government-approved health insurance or pay a hefty fee. Enacted pursuant to Congress's power to regulate interstate commerce, the mandate compels individuals to engage in commerce. Prior to the law's enactment, Congress's own lawyers called the mandate “unprecedented.” At oral argument in the courts below, the government's law-

yers have been unable to identify a single limit on Congress's commerce power.

As we watch the proceedings unfold, it's worth asking how we got to this point, where judges and lawyers split hairs over fine distinctions, as we'll see next week, yet often ignore the larger constitutional principles. The answer is quite simple: It took just three decisions — two in 1937, one in 1938 — to undermine the Constitution's design and turn it on its head, giving us modern “constitutional law” — not to be confused with the Constitution. Indeed, Obamacare's defenders often make the point themselves when they begin their arguments by saying “Since the New Deal” or “For the past 75 years.” The plain implication is that prior to that time, Congress had no such power. And it didn't. For 150 years both Congress and the Court understood clearly that federal regulatory and redistributive power was limited mainly not by the Bill of Rights but by the enumeration of Congress's 18 powers or ends, which left most power with the states or the people.

So what happened during the New Deal? Did we amend the Constitution, as we did after the Civil War when we made fundamental changes in federalism? Of course not: The New Deal constitutional revolution changed not one word in the document. What happened,

rather, was pure politics. Because the Supreme Court had ruled several of Franklin Roosevelt's New Deal schemes unconstitutional, he threatened to pack it with six new members after his landslide re-election of 1936. Congress balked, but the Court got the message. With just three decisions it shifted the Constitution's focus from liberty to Leviathan, launching us on the road toward ever-larger government — including, finally, Obamacare.

The first of the three seminal decisions was *NLRB v. Jones & Laughlin*, decided in April 1937. The issue in that case, as here, was the scope of Congress's power to regulate interstate commerce. At the Founding the commerce power generated little concern because it was understood by all as aimed mainly at checking state protectionist measures that had frustrated interstate commerce under the Articles of Confederation. Accordingly, Congress was authorized to regulate — or “make regular” — commerce among the states. Understood functionally, it was thus a power to secure liberty. But the cowed *Jones & Laughlin* Court read it as permitting Congress to regulate, for any reason, any activity that affected interstate commerce, which of course is virtually anything, especially if aggregated with other such activities, as the Court would

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hold in the infamous *Wickard v. Filburn* decision of 1942.

The irony should not be missed: A power intended by the Framers to free commerce is today used by countless unaccountable regulators to hobble it — for ends limited only by the political imagination. Still, in 1995, for the first time in 58 years, the Court put a brake on Congress's commerce power. In *United States v. Lopez* the Court said that only activities that were “economic” could be regulated under the commerce power. Yet here, not buying insurance is neither an activity nor, accordingly, economic activity.

The second decision — *Helvering v. Davis*, upholding the Social Security Act — came down a month later. At issue was the scope of Congress's power to tax under the so-called General Welfare Clause. Once again the New Deal Court turned the original understanding on its head. As Madison and others had made quite clear, Congress had the power to tax only for its authorized ends, as enumerated in the Constitution. *Helvering* held instead that Congress had an independent power to tax and spend for the general welfare,

quite apart from those limited authorizations. That rendered those enumerations and the careful work of the Constitutional Convention completely superfluous, of course, since money can accomplish anything, as Madison had noted. Thus was born Congress's modern, boundless redistributive power.

This matters for the Obamacare litigation in two ways. Some read the penalty for not buying insurance as a tax and hence as justified under Congress's now-limitless taxing power, in which case the Anti-Injunction Act might be read to preclude all of this litigation until the tax takes hold down the road. Only one court below has bought that argument, so it's not likely to fly here. More important, by threatening to withhold state Medicaid funds, the act employs Congress's taxing power to try to compel states to expand their Medicaid rolls and coverage, raising serious federalism questions that the Court reached out on its own to consider, even though the parties had not asked it to. The issue here, in a nutshell, is whether Congress can indirectly compel states to do what it cannot directly compel them to do.

The New Deal's constitutional revolution was completed in 1938 in one of the Court's most celebrated decisions, *United States v. Carolene Products*. Having opened the floodgates for the modern regulatory and redistributive state, the Court

had to remove a final impediment to that state's programs by reducing the rights we exercise in “ordinary commercial transactions” — property and contract rights; economic liberties — to a second-class status. It did so by articulating two levels of judicial review: “strict scrutiny” for laws implicating “fundamental” rights like speech and voting; little or no scrutiny for laws implicating other, “economic rights.” Subsequent courts would have a field day with those subjective distinctions, invented from whole cloth to permit federal power and programs to expand.

There were important decisions portending this revolution, of course, and others refining it over time, but those three brought about the structural change that has given us the “constitutional law” we live under today. Except for rare decisions like *Lopez* in 1995, which only tinkered around the edges, courts have been loath to return to the actual Constitution. That has left the political branches free to be the ultimate source of the problem of ever-growing, unconstitutional government.

But the ball is now plainly in the Supreme Court, which can rule that this act constitutes, in the words of U.S. District Court Judge Roger Vinson, “a bridge too far.” The Court itself, of course, cannot roll back the New Deal — the parade of horrors Obamacare's defenders imagine — nor need it. It can rule simply

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Yearning for Normalcy

by John Hendrickson

William F. Buckley, Jr., the founder of *National Review*, famously stated that the magazine “stands athwart history, yelling stop,” in regard to the advancement of modern liberalism and progressivism in both domestic and foreign policies, which was symbolized by the dominance of New Deal liberalism in post-war society.¹ Today, the need to “stand athwart history, yelling stop,” may be even more vital in regard to the current policy problems confronting the nation. The United States is at a critical crossroads and it is crucial that the nation return back to traditional constitutional principles in facing the challenges ahead. As Patrick J. Buchanan wrote in *Suicide of a Superpower: Will America Survive to 2025?*

We have entered an era of austerity and retrenchment unlike any this generation has ever known. But not only is it in the realm of economics and politics that America appears in a downward spiral. Socially, culturally, morally, America has taken on the aspect of a decadent society and a declining nation.²

From the economy to the cultural war a significant philosophical divide exists between conservatives and liberals over

the direction and future of the nation. The economy represents one of many urgent issues facing the nation. The weak recovery from the “Great Recession” continues, while unemployment remains high and record numbers of Americans are relying on some form of government assistance. In addition, the policy uncertainty continues to cast a dark shadow over the economy. The official unemployment rate, as reported by the Bureau of Labor Statistics, currently stands at 8.1 percent, but as a recent editorial by *Investor’s Business Daily* reports, the actual unemployment rate is much higher at 11 percent.³ As *The Washington Times* argued:

The last time the employment figures looked this grim was more than 30 years ago when the nation was heading into a recession. Had the April dropouts been included in the official number, the unemployment rate would have risen instead of declined. If the official jobless figure were calculated based on the June 2009 employment participation rate, when the recovery officially began, unemployment would be more accurately pegged at 11 percent today.⁴

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Question of the Quarter:

Do you think lower tax rates are better or worse for the economy?

Send your thoughts on this issue to us at Public.Interest.Institute@LimitedGovernment.org or answer on-line at <http://www.LimitedGovernment.org/LIMJun2012.html>.

We may publish some of your ideas in the September 2012 issue of *LIMITS*.

In our last issue we asked readers if they thought the economy was in recovery?

Martin from Ottumwa responded by writing: "No, it is held up by federal spending...It is obvious our Legislators and President think they can borrow us to prosperity, but it will never happen."

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by
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In addition to the unemployment problem the nation faces a significant fiscal crisis which centers on our national debt, which is \$16 trillion and growing. Federal spending continues to grow with the government spending \$3.8 trillion this year plus running trillion-dollar deficits over the past few years. The government is spending about 25 percent of gross domestic product (GDP), and as Patrick Buchanan noted, “the national debt is surging to 100 percent of GDP, portending an eventual run on the dollar, a default, or Weimar-like inflation.”⁵

As Political Scientist John J. DiIulio, Jr., recently wrote in *National Affairs*:

Obviously, the past few years have involved some extraordinary spending measures at the federal level. In February 2008, the cost of the first recession related stimulus bill came in at \$124 billion over ten years. In October 2008, the tab for the Troubled Asset Relief Program came in at \$700 billion. In February 2009, the

American Recovery and Reinvestment Act authorized \$787 billion in spending over 11 years. All the while, GDP was barely growing. Thus by the end of 2010, the federal spending as a percentage of GDP had reached a post-war peak of more than 25 percent.⁶

The fiscal situation is especially made worse by the increasing cost of the entitlement programs of Social Security, Medicare, and Medicaid. These entitlement programs already consume a large portion of mandatory spending in the federal budget. As The Heritage Foundation explains:

Spending on the three largest entitlement programs — Social Security, Medicare, and Medicaid — will cause federal spending to grow from the historical average of 20 percent of the economy to nearly 35 percent by 2035. Spending on Social Security would increase from 4.8 percent of GDP in 2010 to 6.2 percent in 2035. Projections for Medicare and Medicaid spending nearly double in that time period, from 3.6 percent of GDP in 2010 to 7 percent by 2035 for Medicare and from 1.9 percent of GDP in 2010 to 3.9 percent in 2035 for Medicaid.⁷

Michael Tanner, a Senior Fellow at the Cato Institute, noted that “Social Security faces unfunded liabilities of more than \$15.8 trillion,” while Medicare faces a “budget shortfall of between \$50 and \$100 trillion, depending on which accounting measure is used.”⁸ Entitlement spending along with the massive increase in federal spending is at the heart of this fiscal crisis.

The issue of high unemployment is directly tied to the national debt crisis. In addition, the increase in federal regulatory power and the future direction of health-care policy as related to the Patient Protection and Affordable Care Act is also placing an albatross on the economy. To make the issue worse, the nation is rapidly approaching the \$16.4 trillion debt ceiling limit and “the nation faces an unprecedented tidal wave of tax hikes on January 1, 2013.”⁹ Unless prevented by Congress, the nation will see an estimated \$500 billion across-the-board tax increase, which would cripple the economy and lead to economic disaster.¹⁰

These economic problems will not be easy to solve, and both President Barack Obama and Congressional Republicans have very different solutions. Nevertheless, policymakers must address these issues now or else face a significant crisis that is already leading Europe to the brink of collapse. Cutting government

spending will not be an easy process. As John J. DiIulio, Jr. wrote:

The fact is that most Americans, not to mention their elected leaders, at every level of government, are unwilling, except in the abstract, to entertain the idea of such cuts. We are nowhere near prepared to prescribe, much less to vote for and live with, the fiscal and programmatic equivalent of gastric-bypass surgery for big government. One key reason why we are unwilling to seriously reduce the size of our government is that its scope and reach are even bigger than the daunting spending figures suggest.¹¹

The New Deal influence is still heavy in the United States, just as the continual demand for the social welfare state in Europe has led to a rise of socialism in response to the untried policies of austerity. The current fiscal crisis demands that not only spending cuts, but entitlement programs be reformed.

A number of solid policy reforms are currently being offered from policymakers such as Representative Paul Ryan (R-WI), whose “Path to Prosperity” plan is probably the most famous Congressional budget proposal, while Senators Pat Toomey (R-PA), Rand Paul (R-KY), Tom Coburn (R-OK), and Mike Lee

(R-UT), whose proposal modeled The Heritage Foundation’s plan “Saving the American Dream,” all offer solid fiscal solutions to solve the fiscal crisis and create economic growth.¹²

Americans are yearning, to borrow a phrase from President Warren G. Harding, for a return to normalcy. Returning to normalcy will take a policy approach which centers on the restoration of constitutional limited government. Republicans in Congress, along with bipartisan commissions such as the Simpson-Bowles Commission, have offered significant policy ideas that will return the nation back to fiscal stability. “An American economic collapse is not only predictable but also inevitable if we continue on our current course,” wrote Representative Steve King (R-IA).¹³

Endnotes:

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⁵Buchanan., p. 10.

⁶John J. DiIulio, Jr., “Facing up to big government,” *National Affairs*, No. 11, Washington, D.C., Spring 2012, p. 26.

⁷The Heritage Foundation, “Entitlements,” in *Issues 2012: The Candidates Briefing Book*, The Heritage Foundation, Washington, D.C., 2012, <<http://www.candidatebriefing.com/entitlements/>> accessed on May 17, 2012.

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¹⁰Ibid.

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¹³Steve King, “King op-ed in *Des Moines Register*: In 2012 election, you will decide America’s destiny,” Office of Representative Steve King, December 30, 2011, <http://steveking.house.gov/index.php?option=com_content&task=view&id=4334&Itemid=300100> accessed on May 17, 2012.

John Hendrickson is a Research Analyst with Public Interest Institute.

**Public Interest Institute
at Iowa Wesleyan College
600 North Jackson Street
Mount Pleasant, IA 52641-1328**

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that the Commerce Clause, even in conjunction with the Necessary and Proper Clause, does not authorize Congress to compel commerce so it can then regulate it. And it can rule also that Congress may not use its taxing power coercively against the states.

In the process, however, the Court must articulate the constitutional vision and principles we've so long abandoned, as the 11th Circuit Court of Appeals did when it ruled that Congress, in enacting this statute, had unleashed effectively unlimited

regulatory power, tantamount to the general police power the Framers left to the states, and in so doing had upset the balance between the federal and state governments that the Framers established for the purpose of securing our liberties.

It will then fall to the political branches to summon the will to begin, themselves, the long process of restoring constitutionally limited government — before our looming deficits and debt force that result, as they surely will if those branches refuse any longer to grasp the nettle.

Roger Pilon is Vice President for Legal Affairs at the Cato Institute and Director of Cato's Center for Constitutional Studies.

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