LIBERTY TREE

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STEERING CLEAR OF THE CONSTITUTION, PART II

By Dick Greb

Note: *In the November 2008 edition, we examined the "standing to sue" doctrine, which has proven a convenient way for courts to dismiss constitutional issues, most recently in cases questioning the constitutional fitness of presidential candidates Obama and McCain. Next we will examine how the courts have set precedents conducive to ignoring constitutional challenges.*

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, …" Article III, Section 2. Some may imagine federal courts are eager to rule in constitutional controversies. But in this series, we explore several ways in which federal courts, to the detriment of liberty and justice, often avoid making any decisions at all.

Americans are taught that their constitutional system is one in which the three branches of government — executive, legislative, and judicial — exercise separate enumerated powers and can challenge each other over unauthorized uses of power — the so-called "checks and balances." It was thought that men's ambition for power would lead them to jealously guard it from encroachments by others, thereby promoting a kind of safety for the masses, in that no one branch could become despotic because it would be "checked" by the others. But this only works when the pool of available power is limited. Inevitably, like-minded officials in government realize that it is more productive to share unlimited power than to compete for limited power. And that is the beginning of tyranny.

The Supreme Court in particular has a history of explicitly embracing this type of "sharing" rather than "checking" legislative or executive power, and for this purpose has developed a set of "rules" for guiding decisions on constitutionality. The most well-known list of these was laid out by Justice Brandeis in 1936; he described

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HOW I LEARNED TO BE LITTLE MORE THAN Helpless

Opinion by D. Stalwart

(If the following story sounds a bit like yours, rest assured it is not mere coincidence.)

I spent 12 years of my early life in a government reeducation camp.[1] There I learned all the important lessons of life — or rather, life as those in charge wanted me to understand it. I learned to fill out all paperwork given me as soon as I received it. I learned to speak, eat and recreate only when given permission or when demanded by an authority figure. I learned to avoid studying any one subject deeply or spending time in deep thought, because there is always another activity. I learned that because of the "checks and balances" of the American system, I lived in the best sort of self-correcting government system in the whole world(!). I learned that businesses were evil polluters and only government action could solve really big problems, like going to the moon, keeping peace on earth, and fixing the environment. But most of all, I learned I was *helpless* in the face of such problems, and the way to

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1. A.k.a. public school. ("Reeducation" and "brainwashing" are essentially synonymous.)

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them as "*a series of rules under which [the Supreme Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.*"[1]

> **Moreover, few propositions are better established than that constitutional adjudication *should be avoided wherever possible.***
>
> —*Ninth Circuit Court of Appeals*

AVOID *whenever possible*

The overall rationale of these rules is summed up in *Siler v. Louisville & Nashville Railroad Co.*:[2] "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." Just like with standing to sue doctrine, there are some valid reasons to support this policy. And similarly, those valid reasons eventually become secondary to the application of the policy itself. For example, notice the phrasing of the Ninth Circuit Court of Appeals in *Life Insurance Co. of North America v. Reichardt*:[3] "Moreover, few propositions are better established than that constitutional adjudication should be avoided *wherever possible*.." This paints a picture of a conscious effort to find a way to avoid dealing with constitutional questions, rather than simply seeing whether one of the conditions exist for declining to decide them. And of course, when it gets to that stage, these rules become just another tool of oppression.

Naturally, many cases presenting constitutional questions are challenges to laws enacted by the federal or state legislatures, so it is these types of cases which have spawned the policy of avoidance. Since the federal legislature and judiciary are coordinate (and supposedly *coequal*) branches of the same government, courts are reluctant to declare that the legislature has exceeded its authority. Justice Brandeis, just before laying out the rules of avoidance, explained this reluctance by quoting from Thomas M. Cooley's *Constitutional Limitations* (8th Ed., p. 332): "It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, *conscious of the fallibility of the human judgment*, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility."[4] So, in this case, Brandeis recognizes that judges, being mere mortals, might make mistakes, and therefore should decline to void laws if possible.

A selective fallibility

However, that same fallibility is present in ***all*** judgments courts make, so why should constitutional judgments fare differently? And, given this recognition of judicial fallibility, why should prior decisions of judges be given any great weight? Appeals courts are hardly more willing to reverse a lower court's bad decision than to void a bad law.[5] Not surprisingly, the courts have also established a set of rules — in the form of review standards — for avoiding such reversals. Reducing the number of reversals serves to prop up the public's confidence in the judicial system by artificially making judges seem better — that is, smarter or less susceptible to error — than they really are. It's like a Wizard of Oz scenario. Too many reversals would be like Toto pulling back the curtain, letting people see that the wizard judges are just ordinary humans like the rest of us, subject to the same frailties and just as prone to mistakes. That doesn't create the sort of awe-inspiring reverence and unthinking acceptance for their decisions that judges prefer, and on which the confidence in our justice system largely depends.

The Court's practice of avoiding constitutional issues also serves to promote and maintain confidence in the legislative branch. And they use the same sort of shortsightedness to pull it off, by failing to acknowledge that same human fallibility in Congressmen. In *Adkins v. Children's Hospital of the District of Columbia*, 261 U.S. 525, 544 (1923), Justice Sutherland said: "The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. *The statute here in question has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity, and that determination must be given great weight.* This court … has steadily adhered to the rule that *every possible pre-*

1. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345 (1936). All emphases in this and other case quotations are added by the author.
2. 213 U.S. 175, 192 (1909).
3. 591 F.2d 499, 506 (1979).
4. *Ashwander, ibid.*
5. Interestingly, in *Ashwander*, the lower court had found that the power exercised by the Tennessee Valley Authority was not one granted to the federal government by the Constitution … but the Supreme Court reversed that decision.

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Truth Attack

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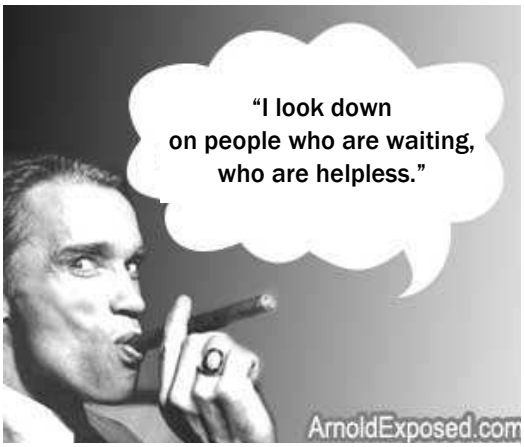
get things done right was to vote for good government officials and pay "my" taxes.

First, and most subtle lesson: governmental authority is good for you, and it is human authority figures that give you permission to exercise your freedoms. Second lesson: you are helpless — just vote and pay for government officials to solve your problems.

Revelations take time. Much later in life, I came to realize that voting is a relatively unimportant privilege in a republic, because my life, liberty and property *should be protected by the rule of law* no matter who holds public office. If my rights are always protected and the enumerated powers of the Constitution always limit government, why should I care who holds any actual office? Their actions, being confined to a few granted powers, should only minimally affect me.

Over time, however, I realized a more shocking and paradoxical truth: the more We the People paid "our" taxes, the more freedom and property government took away. But these fledgling rebellious thoughts were soon strangled, because I also learned, through that other great reeducator, the media, that anyone who refused to pay their "fair share" could be jailed or lose property. Every spring, IRS propaganda drilled me to submit my paperwork. And if the media didn't highlight enough "examples" of tax "criminals," my fellow internees (a.k.a. friends and neighbors) freely kept me "informed" that before IRS power, I was *little more than helpless*.

'Learned helplessness'. In 1967, American psychologist Martin Seligman accidentally discovered the psychological phenomenon of "learned helplessness." In his experiment, two dogs were yoked together and given electric shocks. One of each pair was able to press a lever to stop the shocks for itself and its partner, and eventually that dog "learned" that pressing the lever stopped the shocks. But to the yoked dog without a lever, it seemed that the shocks ended at random.



The attitude of the elite.

Seligman then tested the dogs in a shuttle-box apparatus, where they could escape electric shocks by jumping over a low partition. A majority of the dogs who had had no control over a lever, and thus had previously "learned" that nothing they did affected the shocks, simply lay down passively and whined — even though, had they tried, they could have easily escaped.

Since then, other psychologists have furthered this experimentation and concluded that humans learn helplessness in a similar manner. One aspect of this phenomenon is "vicarious" learning; in other words, people can learn to be helpless through *observing other persons encountering events outside their control*. It is this aspect of learned helplessness that the IRS relies on most. As people observe the assault on "tax defiers," they learn that there is nothing they can do to challenge the *status quo* or to control the IRS.

Helpless is as helpless does. Eventually, I was introduced to information the reeducation forces never meant me to find. Wading through the lies, I learned that to protect myself, I must educate myself on the law, the principles of Liberty, and on government methods for keeping us enslaved. I learned all this through the brave efforts of patriots who did not shirk their duty to speak publicly. I am indebted to their sacrifices.

But there isn't a day that goes by that I don't hear from patriots who, having learned such truths, are discouraged because no one in their family or immediate circle supports them. Although they may manage their personal life to minimize the damage government causes, they have come to believe they can do little about holding officials accountable or restoring our rights; they have "learned helplessness."

Such helplessness concedes victory to the reeducation forces; is that what we really want? Never forget that we learned the truth from those who went before, and that many after us or yet around us are ripe for the truth too (or else economic circumstances will drive them to it).

Let's give up on helplessness. Liberty Works Radio Network will give us — real patriots — a measure of *fighting back*. And the "low partition" patriots must jump over is just 27 cents a day. Shall we work every day to recruit new members, or shall we sink passively to the floor and whine like dogs? The choice is ours: be helpless, or help others.

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sumption is in favor of the validity of an act of Congress until overcome beyond rational doubt." In other words, Sutherland believed that the scrutiny of the legislators is a reasonable substitute for judicial scrutiny.

This sentiment is an echo of the dissenting opinion of Justice Miller in *Ex parte Garland*, 71 U.S. 333, 382 (1866): "In the case of an act of Congress, which expresses the sense of the members of a coordinate department of the government, *as much bound by their oath of office as we are to respect that Constitution, and whose duty it is, as much as it is ours, to be careful that no statute is passed in violation of it*, the incompatibility of the act with the Constitution should be so clear as to leave little reason for doubt, before we pronounce it to be invalid." So, the default is not *neutrality*, but a heavy *presumption of validity* for every law enacted by Congress. Thus, the mere fact that Congress passed a law establishes in the judge's mind a *prima facie* status of constitutionality.

And that's a big part of the problem. It isn't just the inherent human fallibility of Congress (as should be understood from Cooley's statement) that needs to be considered, but the possibility that those in Congress seek to unlawfully expand their control over the populace. Certainly, we shouldn't forget the adage that "power corrupts." It's especially critical in the context of our system of checks and balances. That system relies on each branch of government providing checks on the others, but what happens when they turn a blind eye to the usurpations of the others? Or worse, when two or more branches act in concert to oppress us?

'Limited' only by one's *implication*

Clearly, the judicial branch doesn't provide much check on the legislative branch. Consider this quote from Chief Justice Salmon Chase in *Hepburn v. Griswold*:[6] "We have already said, and it is generally, if not universally, conceded, that the government of the United States is one of limited powers, and that no department possesses any authority not granted by the Constitution. It is not necessary, however, in order to prove the existence of a particular authority to show a particular and express grant. … *It has been found, indeed, in the practical administration of the government, that a very large part, if not the largest part, of its functions have been performed in the exercise of powers thus implied.*" It sure doesn't bode well for the security of our liberty when a Chief Justice of the Supreme Court speaks approvingly of the fact that the *majority* of governmental action can only be linked to *implied* powers. Of course, Chase really means that it has been universally conceded *by the judiciary*, not by the people themselves. The fact that this proposition was already considered to be universally accepted in 1869 virtually guarantees it will never be changed.

In reality, the notion of implied powers is nothing more than a rationalization for rubber-stamping unconstitutional power grabs. In "The Anatomy of the State," Murray Rothbard explained that "the major historic function of judicial review" is as "a means by which the government can assure the public that its increasing powers are, indeed, 'constitutional.' … For if a judicial decree of 'unconstitutional' is a mighty check to government power, an implicit or explicit verdict of 'constitutional' is a mighty weapon for fostering public acceptance of ever-greater government power."

In the next installment, we'll take a closer look at some of these rules and how they are used by the courts to facilitate their *implicit* verdicts of constitutionality.

6. 75 U.S. 603, 613 (1869).