LIBERTY TREE

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By Dick Greb

STEERING CLEAR OF THE CONSTITUTION, PART III

"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.

In the January 2009 edition, we began to discuss how the Supreme Court has established precedents conducive to ignoring the questions raised by constitutional challenges. Next we will more closely examine the "rules" they've established for that purpose.

The most well-known list of Supreme Court "rules" for guiding decisions on constitutionality was laid out by Justice Brandeis in *Ashwander v. Tennessee Valley Authority* in 1936; he described 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]

Avoidance a 'cardinal principle'

Of the eight rules for avoiding constitutional questions discussed by Justice Brandeis in *Ashwander*, the two of most interest are:

> "4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. …
> 7. When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

Rule 4 is the embodiment of the

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Adopt A HOST

Work on restoring America to the principles of Liberty through talk radio continues at a furious pace at Liberty Works Radio Network. A deal to lease two AM radio stations, broadcasting to Tuscaloosa, Ala.; Columbus, Miss.; and Chattanooga, Tenn., is on the table, and LWRN is working hard to get our talk show hosts on the air. With a little more effort and funds, LWRN fiduciary John Kotmair believes LWRN can be broadcasting in just a few weeks, and LWRN plans to restream the audio over the internet as soon as it is broadcasting over the air.

"We have one thousand (FRNs) over the lease fee pledged by individuals and hosts. We are still seeking more pledges and hosts to cover expenses," says Kotmair. Additional expenses are expected to

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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.

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"avoid whenever possible" principle. Even when a constitutional question is properly presented, the court will still refuse to decide it if *any* other possible grounds can be found. (So much for checks and balances!) If the courts don't want to decide some constitutional issue, all they have to do is find (or fabricate, if necessary) some technicality by which they can dispose of the case. And anyone that has had to jump through the myriad hoops inherent in a trial knows there's no shortage of technicalities to trip over. The end result of this practice is — and indeed, must be — that violations of the constitution will *always* persist for extended periods of time. In fact, they may never get corrected. A greater travesty is that the courts also give weight to the fact that laws have been in effect for long periods of time.

> **"The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.** —*Justice Brandeis of the Supreme Court*"

TIME amends the Constitution?

A good example of this is *Frothingham v. Mellon*,[2] where the court justifies ruling against Harriet Frothingham, suing as a taxpayer of the United States against the federal Maternity Bill — which appropriated grant money to states that would comply with its conditions — since "the effect of the appropriations complained of will be to increase the burden of future taxation and thereby take her property without due process of law." Justice Sutherland says: "The right of a taxpayer to enjoin the execution of a federal appropriation act, ***on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this court. In cases where it was presented, the question has either been allowed to pass*** **sub silentio** ***or the determination of it expressly withheld.*** … ***It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention***, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for nonfederal purposes have been enacted and carried into effect." Here again, Sutherland talks out of both sides of his mouth. First, he explains that the Supreme Court has either *expressly* or *implicitly*[3] withheld determination of the question of whether a taxpayer can sue to enjoin unconstitutional appropriations by Congress. Then he uses that lack of precedence (*i.e.,* case law) as a reason to disallow Frothingham's suit. And he does so even while shamelessly admitting that Congress has enacted many laws misappropriating public funds for "non-federal purposes." (So much for checks and balances!) Eventually, we reach the point where "laws have for so many years ***been acted on as valid and constitutional we do not think it proper to express an opinion upon it***," as Chief Justice Roger Taney said in *U.S. v. Ferreira*, 54 U.S. 40, 52 (1851). In other words: you have no right to bring such a suit, because the Supreme Court has refused to determine whether or not you have the right.

The secret: 'construe' means 'rewrite'

Brandeis' rule 7, however, really shows the lengths to which the courts will go to avoid deciding constitutional issues. It is, in essence, nothing more than judicial legislation. It is presumed that Congress writes laws so that the common man can understand what is required or forbidden by them. If a person can't understand a law, then he can't form the requisite intent to violate it — *i.e.*, willfulness — and the law is void for vagueness. This need for prior notice is one aspect of due process of law. So, if a judge interprets the law to mean anything other than what Congress meant, then he is usurping legislative power by rewriting the law.

An interesting case of this type of legislating from the bench is *Trinity Church v. U.S.* (1892),[4] of which many readers have probably heard. In that case, Justice Brewer gave a long exposition of the religious underpinning of the founding and early development of the United States. He did this to justify rewriting a law that forbade the importation of foreigners on a labor contract, so as to allow for the importation of a *minister* from England. In doing so, he overturned the decision of the lower court which recognized that: "where the

2. 262 U.S. 447, 487 (1923).
3. *Sub Silentio.* Under silence; without any notice being taken. (Black's Law Dictionary, 6th Ed.
4. 143 U.S. 457, 516 (1892)

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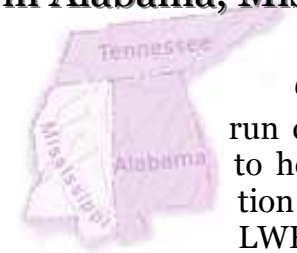
Liberty Works near ready to broadcast in Alabama, Mississippi, Tennessee



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run close to 3,000 per month, so to help with these costs, in addition to joining LWRN Fellowship, LWRN is encouraging folks to "adopt a host" by sponsoring one hour or more of their chosen host's program per month, at 20 FRNs per hour.

At present, several hosts are available for sponsorship. These include Brian Malatesta, Dave Buhlman, Larry Becraft, Tom Cryer, David Carmichael, and others. For information regarding each host, please visit the website at *www.libertyworksradionetwork.com* or call 410-857-5444 for more information.

Is there a talk-show host or potential talk-show host you think should be on LWRN? Are you willing to sponsor part or all of their programming? Please contact the office and let us know of any hosts you want to hear or are willing to sponsor. If you know the potential host personally or can contact them, please inform them of the LWRN opportunity and have them contact us. We want to put as many well-rounded, liberty-loving hosts on the air as possible so we can begin exposing government officials' lies and deceptions round the clock.

We are getting close, and it should not take too much more effort to put us over the top. Once we increase our audience, we surely will increase our numbers and political power.

Let's do it!

News from ...

Truth Attack

TA gearing up for Operation Stop Thief!

Get a "Mat-pack" by March 15, 2009 and participate in **Operation Stop Thief II**. All patriots, no matter their particular issues, are needed to awaken Americans to the IRS' illicit theft of American labor, says Atty. Tom Cryer. "**We only get this opportunity once a year. Please join in the fun!"**

The first operation, on April 15, 2008, saw 734 post offices attended by "Truth Troopers" who held "What Income Tax?" signs and handed out flyers letting last-minute tax filers know that there is a genuine issue over whether the IRS is telling America the truth about the income tax laws.

To join in the fun, register at www.truthattack.org. TA will email you a free materials packet with a checklist of preparations; tips and detailed instructions (including how to deal with postal employees, police, press and public); Do's and Don'ts; a sample press release and instructions on how to distribute it, and a flyer to copy and distribute. Free signs will be mailed by April 1, 2009.

Virginia DRIVER'S LICENSE

VINDICATION IN VIRGINIA

Six year battle against the SSN "requirement" results in "not guilty" verdict

Source: Christian Liberty News, 2/26/09

An otherwise sleepy Virginia District Court session was awakened a booming voice resonating classic American religious freedom. Attorney Herbert W. Titus of Chesapeake, Va., stated boldly, "For the sake of justice, the charge against my client should be dismissed." Titus explained to the Court that his client had a religious obligation to refrain from identifying herself with a social security number. She had made several attempts to renew her driver's license but her applications had been rejected because of her religious exercise.

Finally, armed with a Titus-drafted declaration of her religious convictions, and an application citing Virginia's Religious Freedom Protected code §57-2.02, she had surmounted the bureaucratic barriers she had fought for over six years. The DMV had accepted her application and allowed her to complete the tests required by Va. Code §46.2-300 and §46.2-325.

Meanwhile, the mild-mannered minister's wife and soccer mom of four still faced a possible jail sentence for having used an automobile in the ordinary course of her life[1] before the bureaucracy gave in. Titus described the diligent efforts she and her husband undertook to obtain a religious accommodation, and the number of times they had been rejected. After listening to the saga, reading the declaration provided to the DMV, and reading the recently enacted statute, the Judge said, "Counselor, I agree with you one hundred percent. I find the Defendant not guilty."

1. *The State calls this "driving without a license."*

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terms of a statute are plain, unambiguous, and explicit, the courts ***are not at liberty to go outside of the language to search for a meaning which it does not reasonably bear*** in the effort to ascertain and give effect to what may be imagined to have been or not to have been the intention of congress. Whenever the will of congress is declared in ample and unequivocal language, that will must be absolutely followed, and it is not admissible to resort to speculations of policy, nor even to the views of members of congress in debate, to find reasons to control or modify the statute." *U.S. v. Church of the Holy Trinity*, 36 F. 303, 304 (1888). Instead, Brewer declared: "It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil; and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, ***the act, although within the letter***, is not within the intention of the legislature, and therefore ***cannot be within the statute***."[5] In short, Brewer is saying that the law is not what Congress actually writes, it is whatever Brewer declares it to be. But if the law were written in such a way as to prohibit acts which could not validly be prohibited, then it was Brewer's duty declare the law invalid, not to alter its meaning to fit the circumstances before him.

... the idea of "judicial independence" can be seen for what it really is — independence from the will of the people whose interest it was created to protect.

The tricks of the trade

In the end, these rules, and the policies and practices which go with them, are part of the framework of judicial tyranny. Through them, courts justify their unwillingness to condemn the unconstitutional actions of Congress and the executive branch. And every time they fail to decide a constitutional issue, it becomes a reason not to decide the next one. Thus, the rules virtually guarantee that judges won't have to decide constitutional questions. This, in turn, reduces the level of disrespect that would otherwise rightly result from their inevitable approval of those few unconstitutional acts they can find no way to avoid.

Viewed in this light, the idea of "judicial independence" can be seen for what it really is — independence from the will of the people whose interest it was created to protect. It becomes instead a cornerstone of government's consolidation of all power to itself. A façade of independence to cover the naked fact that it is always the judge of its own cause, and so, will reliably legitimize its own violations and usurpations of constitutional protections and powers. With Liberty Works Radio Network on the air, we have the opportunity to raise the public's awareness of these tricks of the judicial trade, and how they are used to undermine their rights. This is the first step in implementing the solution to this problem — making judges accountable for their part in destroying our Liberty.

5. *Trinity Church v. U.S.*, at 516.