The Voluntaryist

Whole Number 104 *"If one takes care of the means, the end will take care of itself."* **June 2000**

The "Not-So" Sweet Air of Legitimacy

By Charles L. Black, Jr.

[Editor's Note: Although I disagree with the basic premise of the author (that we need a government), I have chosen to publish his article because it explains why governments need legitimacy, and, in particular, how the Supreme Court contributes to the legitimacy of the U.S. government.]

The French priest's writings were well enough known in New York for the press to have turned out to interview him. His steamer slid past the Narrows and up the Bay toward the North River. He gazed at the skyline, inhaling deeply, as so many have done at that moment. Perhaps it occurred to his quick Gallic mind that this spontaneous reaction had furnished him with his own best metaphor; perhaps, with an equally Gallic sense for the artistic gesture, he had planned it that way. He turned back to the reporters. "It is wonderful," he said, "to breathe the sweet air of legitimacy!"

I can't find the newspaper account of this; I don't remember the priest's name, and the substance of his saying seems to fall between the planks of indexing. It is possible the story has undergone some transformation in my mind. But it is substantially true, and it sums up for me one of the chief excellences of the American polity. ...

You breathe the sweet air of legitimacy in a country in which it occurs to almost nobody, of whatever class or interest, even to think that a question might exist whether this government is the government, or whether its actions, right or wrong, are the actions of genuine authority. Let me make it very clear that "legitimacy," as I am using it and will use it hereafter, has nothing to do with approval of the government or its measures. A man may greatly dislike all the measures his government has taken for twenty years, and still regard it as the legitimate government, to which he owes loyalty as a citizen. He may even thoroughly dislike its total form, preferring a monarchy though forced to live under a republic, and still acknowledge, perhaps even without thinking much about it, that the government he dislikes is legitimate.

It is easy to see why a French visitor savored in our air a sweetness to which he was unaccustomed. Since her first Revolution, France has been unable to establish an absolutely settled consensus on a genuine legitimacy. There have always been powerful and articulate groups who attacked any government, not on the ground alone that its policies were misguided or wicked, or even on the ground that it was defective in structure and ought to be reformed, but on the absolutely fundamental ground that it had no standing to govern at all.

The several overt discontinuities in government which this state of affairs doubtless contributed to producing are not the greatest evils that can be charged, with good plausibility, to the default of legitimacy. The mere existence of a real and substantial doubt as to the legitimacy of a government must surely enfeeble it and strip it of moral force, even while the lack of anything better keeps it going a while longer. A government, once doubt of its legitimacy spreads, must justify itself as a mere expedient, and can call for support only from those to whom its continued enjoyment of power seems expedient at the time. It cannot command the wholehearted attachment of those who disapprove of what it is doing, or of what it seems likely to do in the foreseeable future. Loyalty, without which there can be no strength in a political body, becomes a provisional virtue, tainted with reasonable question, something it is possible, in patriotic good faith, to argue about and qualify. I cannot pose as an expert on French politics, but it seems to me these possibilities have been realized in modern French history.

What is the received status, as to legitimacy, of the government of the United States? I have taken no poll, but I would suggest, for confirmation or denial out of the reader's own experience and sense of communal feeling, that if you asked a number of people in this country whether they thought the present government had standing to govern, few of them would understand what you meant. Probably most of them would take it that you were asking for their opinion on the incumbent President and his entourage. A philosophic handful might think you were opening a discussion of the question whether any government is rightful, as against the anarchistic thesis. To very few, I should think, would it occur that you were asking whether this government, as a constitutional structure, was authentic and of right.

The question seems unreal to us, and discussion of an unreal question is difficult or impossible. But some assertions can be pretty confidently made, mostly of a negative character. Our imaginations are never teased, when we become dissatisfied with governmental actions, by such questions as whether the monarchists may not be right after all, or whether the Bonapartists may have a pretty good case. We do not at all look on the Government of the United States as deriving its claims upon us from doubtful arguments, which necessarily become less appealing as we grow dissatisfied with governmental policies; we hold to account the people who man our government for the time being, but our loyalty to the constitutional system sounds to an altogether different and deeper level. We have managed, on the whole, to effect a clear separation between discontent with the actions of government and doubts about the authority of government and its claim on our loyalty.

Now this legitimation of a government is not a thing that happens all at once, nor is it a thing with respect to which we could look to find either a single simple cause or a rectilinear path of development. Back of our legitimacy lies more than a century and a half of immediately relevant historical background, against the deeper perspective of millennia of human political experience. The work and thought and blood of our ancestors, and, in a broader sense, of all the peoples of the past, have gone into the

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The "Not-So" Sweet Air of Legitimacy: How Judicial Review Contributes to the Legitimacy of the U.S. Government

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product. And we have had good luck, too—or that soliciting more than good luck which the Founders invoked in the Declaration, and which Lincoln saw moving even among the horrors of civil war. It is possible, nevertheless, to sketch the skeleton that has supported the flesh. And I propose in this chapter to discuss that governmental device which seems to me to have been of prime importance in giving structure to the feeling of legitimacy which the French visitor admired and so obviously envied.

I start with the axiom that a government cannot attain and hold a satisfactorily definite attribution of legitimacy if its actions as a government are not, by and large, received as authorized. Despite its plausibility, this proposition doubtless rests on psychological rather than on purely logical grounds. It is barely possible, as a matter of sheer logic, to conceive of people's feeling that the government under which they lived was a rightful government, but that a great many of its most important governmental acts were usurpative and unempowered. A government, whatever might be the outcome of refined semantic analysis, is actually conceived of by its citizens as more than the sum of its actions. But I suggest that, as a matter of human psychology, it is quite unthinkable that such a tension could long maintain itself unresolved. Immediate and particular actions are what the citizen sees and feels, and if he believes these to be, in great part, unauthorized, lacking the character of authentic governmental acts, mere wrongs committed by persons in power, then I submit that he cannot long retain the feeling that the government itself is legitimate.

If this is true, then one indispensable ingredient in the original and continuing legitimation of a government must be its possession and use of some means for bringing about a consensus on the legitimacy of important governmental measures.

No government can avoid this problem. At the very least, there must be a consensus on forms—on the steps that must be taken to distinguish and authenticate the exercise of governmental power. These steps may be simple: "What the Chief says twice, with his headdress on, is the law." They may be intricate, as are the steps by which an Act of Parliament becomes such. Always, the presupposition of the merely formal requirement is that there are no substantive limitations on government; whatever meets the formal test is authentic and of right.

In other cases, the problem is complicated by the fact that substantive limitations are built into the theory on which the government rests. The example of most interest to us is, of course, the government of the United States. Whatever else may be said about the intention of the Framers, there can be no question whatever that this is the kind of government they intended to found. The powers of the branches of government were enumerated, and it would be pretty hard to see this enumeration as merely playful, or as an elaborate hoax. But if there were any doubt on this score, one might turn to the explicit limitations, worded as such, both in the constitutional text and in some of the Amendments. Perhaps more important (for we are talking about the generation of a conviction of governmental legitimacy among the people) the conception of our government as one of limited powers is and since the beginning has been at the very center of American political belief. It is an essential part of the picture the American has of his government.

Now some may feel it to be unfortunate that this should be so. And they can point to at least one country where it is not so, and where, nevertheless, civilized life is possible on very good terms, and personal freedom flourishes at least as healthily as here. I am referring, of course, to Great Britain, where there prevails no conception of limitation on governmental powers, where the observance of due formality is all that is needed to establish a governmental act as authentic, and where purely political controls, in the narrow sense, serve quite well to bring about many of the effects we have attained or sought by means of our conception of limitation.

> "No country can assign a cop to monitor every citizen's behavior, so most law observance has to be voluntary, ..."
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> —WALL ST. JOURNAL Editorial, Sept. 21, 1994, p. A14.

It is unnecessary at this point to discuss whether, in mechanical disregard of national character and history, we might at some time have transplanted, or might still transplant, this system and its associated way of thought to our side of the Atlantic. What is to be stressed is the naturalistic fact that we have now and always have had a government squarely based on the theory of limitation. For any organ of government, and for all of them together, some actions are empowered, while others are not. To ask whether we could have gotten along if this concept had not been built into our system is to step from history into that genre of science-fiction which explores the hypothesis of alternative possibility-tracks. The would-be writer of such a story would have a hard time making it plausible, for it seems flatly impossible that, in 1787 or at any time reasonably near thereto, consensus could have been established on a general government in our territory on any other basis than that of limited powers. Such a government could not, for example, have been a federal government, for the mere fact of federalism automatically puts limitations on both the central and the component sovereignties.

Now, for a government based on the theory of limited powers the problem of the legitimation of governmental action is one of special difficulty. Where, as in Britain, the

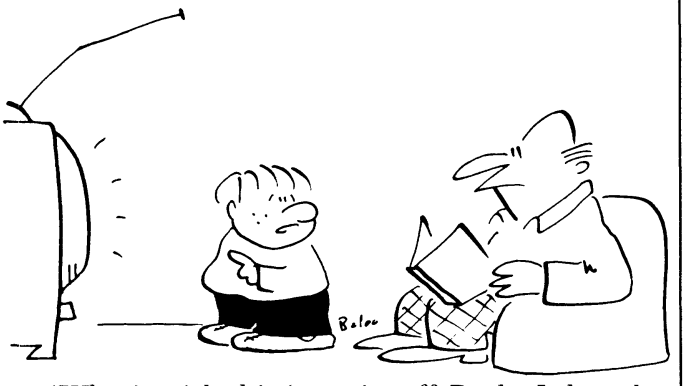
following of due form is enough, it is a relatively simple matter to ascertain whether due form has been followed. And it puts no substantial strain on government, works no shrinkage in the substance of its powers, to keep well within due form. But the government of limited powers has problems of an altogether different order of magnitude.

First, and perhaps most important, the fact of limitation itself generates doubt and debate on the legitimacy of particular actions. In Britain, no one can argue that a particular measure oversteps the bounds of Parliament's power, for the plain reason that there are no such bounds; an argument of that form is impossible. Where, on the other hand, limitations are built into government and into the theory underlying government, it is certain that particular interests will from time to time discern in the limitations a forbidding of some action to which they are about to be subjected. No matter what the nature of the limitations may be, such claims will always arise, for there will be a borderline somewhere. Given the theory of limitation, these claims cannot be brushed aside as political solecisms, but must be met and answered in some fashion.

Secondly, it is to be expected (and certainly is true in the case of our Constitution) that the language in which limitations on government are expressed will be broad, and hence will invite competing constructions, supported in entire good faith. This breadth of language is not accidental. It is inherent in the very concept of limitation, for, paradoxically, a limitation which is specific often fails effectively to limit. Our Bill of Rights, for example, prohibits the imposition of "cruel and unusual" punishments. It would have been possible to omit the general phrase, and to list the punishments specifically forbidden. But it is plain that such a technique would have failed to implement the purpose behind the provision, for if a government were specifically shut off from nose-docking and boiling in oil, it could surely find some punishment equally cruel that was not on the list.

To look at the matter from another side, the affirmative powers of government, to which it is confined, must also be expressed in general, and hence in vague, language. Here again there is no question of intellectual sloppiness; it is impossible to calculate or list, in advance, the concrete and specific measures which a government is to be authorized to take, and if you tried to do so you would unquestionably leave out some that were vital. So constitutional draftsmen, in granting powers as well as in limiting them, are driven, whether they like it or not, to do their work in relatively imprecise language. And it is inevitable that such language will lend itself to conflicting interpretations.

Nor is there any easy and general "rule of construction" or "presumption" to guide us. Presumably, those who set up our government intended it to have wide and significant powers; if they had not, they would hardly have gone to the trouble of setting it up. This would suggest that the resolution of doubtful cases should be in government's favor. But it is equally clear that the limitations on government were to be taken very seriously indeed, and this would suggest that in a doubtful case involving these limitations governmental action is to be looked on as illegitimate. Both the commerce clause and the free speech amendment have claims on broad construction. Even more: the concept of limitation inheres not only in prohibitory language but also in the positive grants of power; it lays down as a prime political postulate that the government is not to travel outside its allocated spheres, however wide these may be. But if it is vital that government have adequate power, and vital that it not exceed its power, it is certain that there must be a borderland, and that no general rule of construction can solve the questions arising in this borderland.



"What's with this 'taxes' stuff, Dad—I thought the government gave people stuff."

Thirdly (and this is beyond question the most delicate point), the resolution of doubts as to the legitimacy of governmental action must be undertaken, and bindingly effected, by the government itself. There is no other viable possibility. The alternatives may be briefly stated: judgment by an outsider, and individual judgment by the people and institutions subject to the exercise of the disputed power of government. There is no outsider to judge, and nobody would stand for his judging if there were. The other alternative has been seriously, even passionately put forward, in a limited form, but it seems plain (to cite the classic example) that if South Carolina is to decide whether Congress is empowered to levy a protective tariff, while Massachusetts comes to an opposite decision, we have neither a nation nor a government. Yet there is, in the referral of decision on governmental power to the government itself, a flavor of setting up a party as judge in his own cause. There must always be something of a miracle, as well as much sound political intuition and wisdom, in the overcoming of this difficulty, and what must be looked for is success in satisfactory measure, rather than complete success.

Intricate and perplexing, then, are the problems that confront the government of limited powers, as it faces the task of maintaining among its citizens an adequately strong feeling of the legitimacy of its measures, of their authentic governmental character as distinguished from their debatable policy and wisdom. But the price of failure may be very high. For it is inherent in government that it must continually generate discontent. Its business, in all its branches, is to mediate and judge contradicting claims. The bungled mediation may leave one group howling in rage and pain, but even the brilliantly successful mediation may leave all sides grumbling over the half loaf. In this situation, the absence of the feeling of legitimacy may set up a vicious circle. First, discontent is likely to be greater if the disappointed group can plausibly believe that the action they object to was not only unwise and wrong but also completely unauthorized and usurpative. Most of us know, whether or not we choose to admit it, that a fair and wise decision is not always to be looked for,

but we are especially outraged if what we think to be an unfair or an unwise decision is imposed on us forcefully by someone whom we believe to have had no power over the matter at all. But the expression of these feelings, and their support by argument, must in turn weaken the public feeling that the actions of government are, even if unwise, legitimate governmental actions, and the ground is even better prepared for the next occasion on which someone vents his disappointment by attacking the legitimacy of a governmental measure.

In the end, I think, the supreme risk run is that of disaffection and a feeling of outrage widely disseminated throughout the population, and loss of moral authority by the government as such, however long it may be propped up by force or inertia or the lack of an appealing and immediately available alternative. Almost everybody, living under a government of limited powers, must sooner or later be subjected to some governmental action which as a matter of private opinion he regards as outside the power of government or positively forbidden to government. A man is drafted, though he finds nothing in the Constitution about being drafted, and though he knows there was no draft when the Constitution was adopted, or for a long lifetime thereafter. A farmer is told how much wheat he can raise; he believes, and he discovers that some respectable lawyers believe with him, that the government has no more right to tell him how much wheat he can grow than it has to tell his daughter whom she can marry. A man goes to the federal penitentiary for saying what he wants to, and he paces his cell reciting, thoughtfully but not without a certain glaze in his eyes, "Congress shall make no law abridging the freedom of speech." A couple who sincerely and plausibly believe that the Constitution placed religion outside the power and concern of government find that their child is being subjected to "Bible reading" in the public school he attends, and that part of the taxes they pay go, in indirect ways, to subsidize religious instruction. A businessman is told what price he can ask, or must ask, for buttermilk.

> "No matter who gets elected, the 'government' always gets in."

The danger is real enough that each of these people (and who is not of their number?) will confront the concept of governmental limitation with the reality (as he sees it) of the flagrant overstepping of actual limits, and draw the obvious conclusion as to the status of his government with respect to legitimacy. It is tempting to follow the fashion and say that we cannot afford, in the world of today, that kind of wreckage of the moral authority of government. But of course we couldn't afford it in the world of any day. The task of persuading the greater part of our people that the principles of governmental limitation have been adhered to, notwithstanding differences of private opinion, is and always has been one of great urgency.

The problem, as I indicated above, never can have a complete solution. But we have solved it in satisfactory measure. Let me make concrete the manner in which we have solved it, by presenting a simplified and in itself hypothetical illustration, suggested by one aspect of an early leading case.

The Constitution gave Congress the power to "regulate Commerce with foreign Nations, and among the several States...." One of the earliest exercises of this power consisted in the passage of certain laws regulating the navigation of vessels. It was objected that "commerce" (Latin *commercium*, the exchange of merchandise) referred only to the trading of goods, and not at all to the movement of ships. Navigation, to modernize the argument somewhat, was not itself commerce, but was only something connected with commerce. Congress had been given no power to regulate anything but commerce itself. Hence, it was said, general regulations of shipping were invalid, being outside the powers of the new government as enumerated in the Constitution.

This was not a frivolous argument, or one that imported bad faith on its face. It presents a genuine problem in constitutional interpretation; its disposition presents a genuine problem with respect to the obligations of loyalty and obedience.

Let us put ourselves first in the position of the man who honestly believes that Congress, in regulating navigation, has traveled outside the scope of its powers. And let us suppose that there is no regular way in which he can present this claim to somebody who is empowered to decide it and to act on that decision, so that all that remains to one who transgresses the new statute is arrest and trial on the issue of factual guilt, before a court confined to dealing with the latter issue alone. What are the obligations of our conscientious believer in the proposition that Congress has gone further than it was authorized to go?

I would find it hard to think of a convincing argument, other than the one of sheer personal expediency, to dissuade him from violating the statute, or even from helping a man who had violated it to make good his escape. He may not choose to make an issue, or he may not have the courage. But why, as a matter of political morality, should he respect a purported law which he sincerely believes is being enforced against him and others in total disregard of the principle of governmental limitation? Most likely, he would obey and resent, cherishing no good opinion of the legality or legitimacy of the government that had so treated him.

But when we put ourselves in the position of Congress and the enforcing officers, the perspective utterly changes. They have behaved impeccably. Congress, honestly believing it has the constitutional power to regulate navigation, and honestly believing such regulation to be necessary for the public good, would actually be derelict in its duty if it refused to pass the law.

Now this is an undesirable situation if ever one was. Government on the one hand, and the citizen on the other, have been driven in a corner where each party is behaving with decency and honor, but where conflict is nevertheless inevitable. Of course, given enough patrol boats, government wins, at least on the surface and for the time being. But the settlement of the problems of government in that way is not only uneconomic but also quite unpromising (as I have suggested above) for the long future. Sometimes it cannot be avoided, but its avoidance where possible is the prime mission of sound political organization.

Now one party or the other could simply back down. Congress could say: "Rather than be forced into going to war with decent mariners who honestly believe we are acting outside our powers, we'll surrender our own principles and our own views of public need, and refrain from regulating navigation." This sounds good; it sets vibrating the monochord of "moderation," a word today much

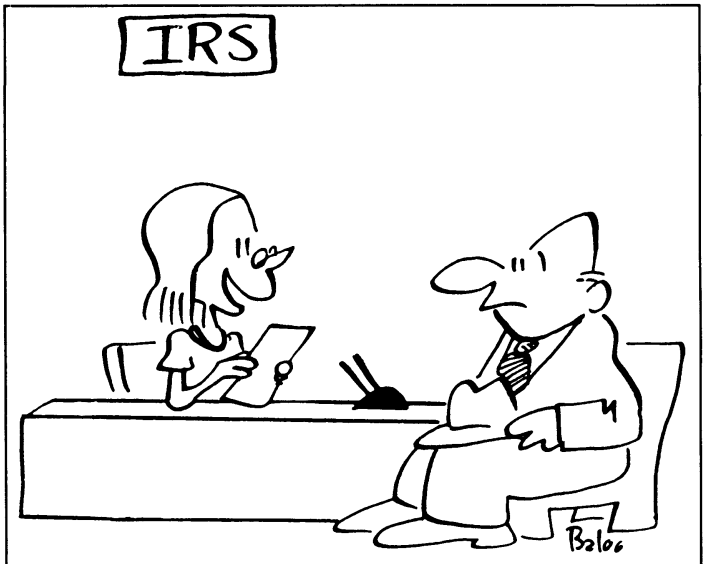
affected. The trouble with it is that, if Congress had taken that position, we would have had no navigation laws, and we badly needed navigation laws. Besides that, the Congressional reading of the word "commerce," as including navigation, was probably better supported than the narrower reading, so that the "moderate" view would have entailed the foregoing of a vitally needed governmental measure in deference to a probably false constitutional theory.

The main point of the last paragraph may be generalized. A government possessing limited powers that are expressed in imprecise language (and we have seen above that they have to be expressed in such language) cannot afford to confine itself to the undebatable core of meaning of the language used. If it does so consistently, it will constrict its powers into a narrow compass, certainly narrower than was intended, too narrow for effective governmental functioning. To expect that government will do this, when it believes that a broader interpretation is correct and when necessity is pressing it to use the power it believes itself to possess, is to look for the impossible. Thus government is virtually sure to exercise power in debatable ground.

Another solution would be for the shipowner to back down. Let him say, "I will let Congress judge its own powers; that is my duty as a good citizen." This is a tempting alternative; he is one against many. But when the case is generalized, this solution is less appealing. For if such a conception of good citizenship actually prevailed, there would be an end of the notion of limitation of powers. To avoid the results discussed above, the backing-down would have to be complete, with obliteration even of resentment, and of the feeling that Congress has acted in disregard of the cardinal principle of limitation. And that is more than can be expected. This solution violates the conditions of the problem, for it assumes that attachment to the principle of limitation on government is slight and shadowy, and that never has been true in the United States.

So the situation is that government, having acted in entire good faith, must simply resort to naked force to coerce people who themselves are acting in good faith, merely because of an entirely permissible difference of opinion on the construction of an ambiguous word. To the man subjected to regulation, this is illegitimate action, an action of government lacking authorization, an exertion of mere brute strength. How long will he or his neighbors feel that they are breathing the "sweet air of legitimacy"?

And as government goes on, there are bound to be many of him. Congress may "lay and collect ... Duties ... to pay the Debts and provide for the common Defence and general Welfare...." Does this authorize a protective tariff on manufactures? The President may appoint officers. May he remove them? Congress may make laws "necessary and proper" for carrying its powers into execution. Does this include the chartering of a bank? Hundreds and hundreds of questions could be assembled, just as important and *prima facie* just as doubtful as these. These questions can have no simple and certain answers. Men of learning and good will may differ on them. And they must be solved, or government could not go on. I think it might be correct to say that something like half of the actions of Congress since the beginning have been of such a nature that some informed people could honestly believe them to be unempowered by the Constitution, or prohibited by it, while other informed people, with equal honesty, believed the opposite. I have stressed the peril this creates with respect to the attachment of the people to government, but there are other perils within government itself. There is the danger that government may cynically throw up its hands and forget the notion of limitation altogether ("You can't satisfy them, so why try—and besides, one opinion is just as good as another"). There is the opposite danger, that government may become excessively timid, anticipating constitutional objection, which could never be set at rest, to all vigorous action.



"Certainly this is a free country, sir.—You may pay by cash, check or money order."

What would be lacking, if no steps were taken and these perils became actual, would be the attitudes central to the feeling of legitimacy. On the part of the people: "This is our government. We will use every means to make it go in the ways we think it ought to go, or in the ways we want it to go. But we are satisfied, when it takes its course, that that course is the authentic course of our government." And on the part of government: "We are acting within established right, and can count on the support of the people."

Step by step, I have tried to show how a government founded on the theory of limited powers faces and must solve the problem of legitimacy—it must devise some way of bringing about a feeling in the nation that the actions of government, even when disapproved of, are authorized rather than merely usurpative. There are several hopeless ways to go about this, and just one, I think, that has some hope in it.

First, the determinations of Congress and the President could simply have been made final on all questions affecting their own power. I have already indicated the chief objection to that: It is wholly incompatible with the notion of limited power. It might have been acquiesced in, after a while, and a consensus reached on a British-style legitimacy, though conflicts between the President and Congress, and between the nation and the states, would have made that process a highly problematic one. In any case, it is not what happened, and I venture to say there is nothing in the history of this country to indicate it ever could have succeeded.

Trust could have been placed in "appeal to reason"; it could have been tried whether, in the end, people could

not be persuaded of the legitimacy of governmental actions by argument alone. This, we can say confidently, would have been doomed. First, there is no finite set of "constitutional questions"; each new period generates new ones, and they are always charged with emotion and tied in with deep political strivings. Secondly, there is no single "reasonable" view of any of the great questions of the Constitution, if by "reasonable" we mean "capable of being held, after mature reflection and study, by an intelligent and relevantly well-informed person." The test of this is objective. Such persons have, in fact, differed on all great constitutional questions—that is what made them questions. But even if we didn't know this as a fact, we'd know it must be so. Words, preeminently the great vague words of the Constitution, have no single fixed meaning, and had no single fixed meaning at the time of adoption. Difference of private opinion was and is inevitable.

The last expedient, the one that was partly planned and that partly happened, is the one suggested by all of human experience in dealing with disputes. Where consensus on the merits of a question cannot be attained, it is sometimes possible to get consensus on a procedure for submitting the question for decision to an acceptable tribunal. If this were not true, no baseball game could be played to the end.

The difficulty here, as we have already seen, is that, where the questions concern governmental power in a sovereign nation, it is not possible to select an umpire who is outside government. Every national government, so long as it is a government must have the final say on its own power. The problem, then, is to devise such governmental means of deciding as will (hopefully) reduce to a tolerable minimum the intensity of the objection that government is judge in its own cause. Having done this, you can only hope that this objection, though theoretically still tenable, will practically lose enough of its force that the legitimating work of the deciding institution can win acceptance. Reliance here must be on the common sense of the people, who may be expected to see that all has been done that can be done, in the nature of the case to ensure fair disposition of questions of governmental power.

> "When you undertake political action and support a candidate, and your guy wins, it means that instead of being sold out by someone you opposed, you will be betrayed by someone you supported."
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> —Ron Neff in THE LAST DITCH, Oct. 28, 1998, Box 224, Roanoke, IN 46783, p.15.

I would suggest that the first step is to give such a decision-making institution a satisfactory degree of independence from the active policy-making branches of government. It is in these that controversial exercises of governmental power will originate, and the umpire on questions of power must have such measure of detachment from them as will convince those whose claims are being decided that he is not practically, even though he may be theoretically, deciding his own case.

Secondly, I should want my umpire to be a specialist in tradition —not in sudsy, out-of-focus tradition, but in tradition's concrete minutiae and accurate ground plan. I would recognize that the decisions I was asking him to make were not open-and-shut arithmetic examples, soluble on the basis of precedent alone. But I would be sure that wiser and more acceptable work in deciding would be done by someone with respect for precedent, with an instilled feeling of responsibility to precedent, with a trained skill in following precedent—and in discerning when it ought not to be followed.

I would want to assure that my institution would be manned by people who had had training in the orderly presentation of evidence and argument, and who had absorbed the habit, through professional inveteration, of sifting carefully and then deciding firmly. I would want people who were experienced in the handling of masses of data of all sorts, people who were schooled to deal with little things carefully while keeping big issues clearly in sight. I should want people who were accustomed enough to the concept of attachment to a cause that it could be expected that, having been assigned the supremely important task of decision that I proposed giving them, they would perceive with clarity that they were now attached to the cause of learned and wise constitutional exposition, in the long-range interest, as best they could see it, of the whole people.

I have been using the plural, and of course we would want more than one man. It would obviously be prudent to reduce the risk of the impact of personal idiosyncracy by composing the tribunal of enough men to check one another, and to provide that institutional continuity through time which is vital to the establishment of independence and a sound tradition of work.

Finally, having set up these requirements, I would not be astounded, or overly disappointed, if the fact fell short sometimes of perfection. No institution can be as perfect, in men or work, as its ideal model, though the very mark of the truly living institution is that it has an ideal model which is always there nudging its elbow.

Now suppose such a body were set up, and given the task of deciding on the constitutional validity of measures taken by the active political departments. What would be the effect on the would-be violator of the navigation laws, when this body, umpiring, told him, "We have concluded that the navigation laws are a valid exercise of a power given to Congress"?

It would be touch and go. He might (like John C. Calhoun) scornfully point to the formal connection of the umpire with one of the parties, saying that nothing new had been added, that it was only proposed to validate the acts of one department of government by the decisions of another department of government. If this view prevailed, the whole device would have come to nothing, and I cannot think of another one so promising. We would have to say, "Very well, we must either give up, in effect, the notion of limited governmental power, or we must give up the thought of being a nation."

But he might, on the other hand, look to the substance and practicalities of the thing. He might say, "I see that you have done all you can to get me a right decision on my claim. I still think the decision is wrong. But the mode of decision was as fair as is humanly possible, under all the circumstances. And that is the most I can ask." Or, if he should still be a little too hot with the exaltation of battle, his friends might counsel with him, "Look, we agreed with you before. You were not getting a square shake. Like us, you were told that this is a government of limited powers, and then they tried to tell you that what that meant was that Congress was limited by its own interpretation of

the limits on itself—an insult to the intelligence as well as a breach of faith. But things are different now. This is the real world. There is no way to ascertain, finally and without possibility of error, whether 'commerce' means 'navigation.' The absolute best that any government can do is to choose men learned in our traditions and history, isolated by temperament and placing from the day-by-day flare-up of issues such as this, and dependent on nobody else in government, and then to let them decide. If you ask more than that, you ask the impossible."

What makes the final difference between success and failure of such a legitimating device, between its contemptuous rejection on theoretical grounds and its acceptance as being the substantial best that can be done toward following out in practice the principle of limitation of power? Who can tell? Something clicks into place. When you have done the best you can, it may be good enough. No tree knows whether it will bear fruit; its job is to stand up tall and wait.

In our history, it did work, in sufficient measure. The institution I have described is, as you will have perceived, a court, manned by skillful lawyers steeped in the judicial tradition, and, with the added caveat of imperfection, it is our own Supreme Court. Pretty clearly it had been foreseen by the Founders that the courts would decide "constitutional" questions where these arose in litigation. Surprising nobody, Congress and the Supreme Court early confirmed this understanding. And the Court took up the umpiring job.

Popular acceptance of this role was not a foregone conclusion. If it had not been forthcoming, no amount of theoretical or historical argument could have enabled the Court to fill this need. But acceptance did come, in sufficient amount and with sufficient reliability.

Now it will have been observed that I have described the function of the Supreme Court in a way which turns the usual account upside down. The role of the Court has usually been conceived as that of invalidating "hasty" or "unwise" legislation, of acting as a "check" on the other departments. It has played such a role on occasion, and may play it again in the future.

But a case can be made for believing that the prime and most necessary function of the Court has been that of *validation*, not that of invalidation. What a government of limited powers needs, at the beginning and forever, is some means of satisfying the people that it has taken all steps humanly possible to stay within its powers. That is the condition of its legitimacy, and its legitimacy, in the long run, is the condition of its life. And the Court, through its history, has acted as the legitimator of the government. In a very real sense, the Government of the United States is based on the opinions of the Supreme Court.

The man who thought "commerce" did not include "navigation" was doubtless wrong, in the sense that the preponderance of lexicographic, contextual, and sense-of-the-times evidence was against him. But neither naked force nor argument at large was a sufficient answer to his wrongness. He and many others like him, then and now, need to be given a chance to state and support their claim before someone empowered to pass on it, and able to pass on it on the basis of standards as objective and historic as the subject-matter honestly allows, and on the basis, where policy must enter, of a policy separated, as much as possible, from ephemeral party politics and constituency pressure. If this chance is given them, and the decision is (as it usually is) against them, enough of them will realize that they have been treated as fairly as possible for the legitimacy of the government to stand. At least that is the hope, and it seems to have been realized in our country.

> In 1922, when religious believers in provincial Shuya openly demonstrated against the seizure of church treasures, Lenin argued for massive retaliation. "The more of them we manage to shoot the better," he declared. "Right now we have to teach this public a lesson so that for several decades they won't even dare think of resisting." (quoted in John Keep, "The People's Tsar," *Times Literary Supplement,* April 7, 1995, p. 30).
>
> —from James C. Scott, SEEING LIKE A STATE (1998, p. 393)

I have suggested that the most conspicuous function of judicial review may have been that of legitimizing rather than that of voiding the actions of government. But one urgent warning must be added.

The power to validate is the power to invalidate. If the Court were deprived, by any means, of its real and practical power to set bounds to governmental action, or even of public confidence that the Court itself regards this as its duty and will discharge it in a proper case, then it must certainly cease to perform its central function of unlocking the energies of government by stamping governmental actions as legitimate. If everybody gets a Buck Rogers badge, a Buck Rogers badge imports no distinction. The Court may go thirty or forty years without declaring an Act of Congress unconstitutional; that means nothing, for it is scarcely to be looked for that Congress will pass any given annual or decennial quota of statutes that the Court will regard as invalid. But if it ever so much as became known—even as a matter of tacit understanding in the profession and on the Court, for such a secret could not be kept from the people—that the Court would not seriously ponder the questions of constitutionality presented to it and declare the challenged statute unconstitutional if it believed it to be so, then its usefulness as a legitimatizing institution would be gone.

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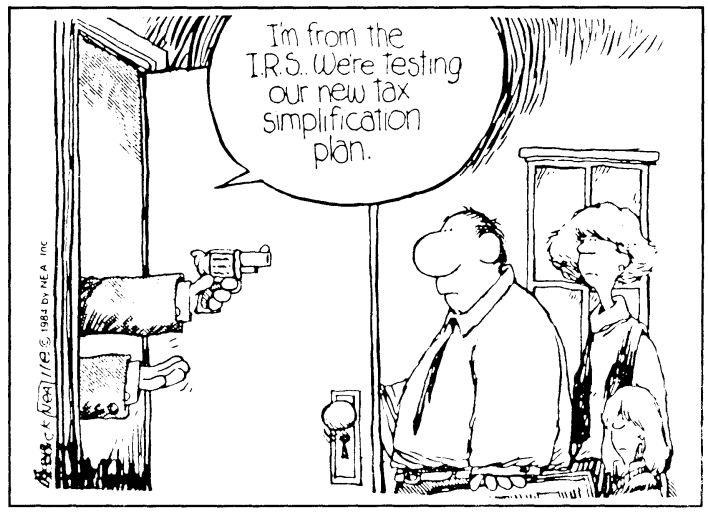

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