

JUDICIAL REVIEW IN THE HIGH COURT AND THE UNITED STATES SUPREME COURT

By SANFORD H. KADISH*

PART I

'We are taking infinite trouble to express what we mean in this Constitution; but as in America so it will be here, that the makers of the Constitution were not merely the Conventions who sat, but the Judges of the Supreme Court. Marshall, Jay, Story, and all the rest of the renowned Judges, who have pronounced on the Constitution, have had just as much to do in shaping it as the men who sat in the original Conventions.' Sir Isaac Isaacs, *Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 20 January to 17 March, 1898* i, 283.

It would scarcely occur to anyone to write a paper comparing the functioning of the Supreme Court of the United States with that of the Supreme Court of Judicature in England or the Supreme Court of New Zealand or the highest national appellate court of any number of countries. If one were to set about comparing these judicial institutions with equivalent American institutions one would be likely to look to the highest appellate courts of the larger American states. Yet in Australia the obvious counterpart of the United States Supreme Court is the High Court. That this is so, of course, reflects the fact that in fundamental respects these two courts are more than courts; that they have roles to play in the processes of government quite distinct from those of traditional common law courts. In sum, in the non-derisive and pure sense of the term, both institutions are, in part at least, political¹ as well as legal institutions.

In the pages that follow I would like to explore the ways in which these courts in conception and operation resemble each other in respect of the distinctiveness of the roles they play as instruments of political government; and to discuss and attempt to account for some notable differences in the ways in which they have performed their common functions, including, in the order of discussion, (1) attitudes toward the exercise of the function of judicial review, as reflected in the degree of deference to the legislative judgment and the philosophy and technique of avoidance or deferment of constitutional adjudication; (2) characteristic differences in assessment of considerations

* B.S.S. (City College of New York), LL.B. (Columbia); Professor of Law in the University of Utah; Fulbright Visiting Professor, University of Melbourne, 1956.

¹ Since American and Australian state courts also exercise the power of judicial review of legislation, they also have 'political' functions. But what accentuates the 'political' function of the High Court and the Supreme Court is their position at the apex of the federal judicial system.

relevant in the process of passing upon constitutional questions; and (3) accommodations evoked between the courts and the other branches of government and the attitudes of their respective publics.^{1a}

1. THE COMMON ROLES

The central fact out of which have arisen the peculiar political roles of the High Court and the Supreme Court is that both governments are founded upon the principles of constitutionalism and federalism. In both countries the institutions of the national government derive their authority and their limitations from a written and self-contained source of law, the constitution, which serves not only authoritatively to distribute power among governmental agencies created for this purpose, but to render the pattern of governmental power permanent and stable. To be sure, the nature of the legal authority of the two constitutions has been differently viewed, the Australian Constitution having the authority of just another British Parliamentary Act and not, as the American constitution, that of a compact or grant of power by the people.² But while this has had some significance (as will later be observed) on the High Court's approach to constitutional interpretation, the implication of this proposition that theoretically the British Parliament could repeal the Constitution has not undermined its character as the permanent source of fundamental law and political power. Of the essence of this principle of constitutionalism is the principle, accepted equally in both countries, that no branch of government may exercise power not authorized by the constitution or exclusively delegated to a different branch or explicitly denied it.

Superimposed upon the principle of constitutionalism is the principle of federalism. The constitution not only creates reservoirs of national governmental power and distributes such power among the branches of government, but marks out as well the lines of authority of a multiplicity of lesser governmental units defining what power belongs exclusively to the national government, what is reserved for the states, what may be exercised by either, and the consequence of the exercise of the power by both. It furnishes as well rules to govern the relationship of states among themselves and with the national government, and, as it imposes express prohibitions upon

^{1a} No reader interested in these matters should fail to consult two first-rate contributions by Australian authors: Sawyer, 'The Supreme Court and the High Court of Australia' (1957) 6 *Journal of Public Law* 482, and Cowen, 'A Comparison of the Constitutions of Australia and the United States' (1955) 4 *Buffalo Law Review* 155.

² Sir John Latham, 'Interpretation of the Constitution' in Else-Mitchell (ed.), *Essays on the Australian Constitution* (1952) 1, 5: 'Accordingly it is quite plain that the Commonwealth Constitution derives its force from the fact that it is a statute which was enacted by a legislature which had power to make laws for Australia. Theoretically that legislature can at will abolish or alter the Constitution.'

the exercise of power by the national government, it also imposes prohibitions upon the exercise of state power.

The implications of the foregoing characteristics of a system of government so far as concerns the federal judiciary, and ultimately the highest federal court, are quite plain. In effect constitutionalism imposes a rule of law upon the exercise of political power and federalism magnifies the relationships subject to that rule.³ While it is not beyond conceiving that a constitutional federation should not repose in the federal judiciary the function of interpreting and applying this rule of law, the unlikelihood of the prospect is evidenced by the experience of such governments, in all of which this function is reposed in the federal judiciary.⁴ The logic behind the judicial exercise of this function *vis-à-vis* the exercise of power by the national government may be a degree less compelling than *vis-à-vis* the exercise of state power. One federation, Switzerland, a lone exception, while providing for this judicial supervision over state (cantonal) laws relies exclusively upon popular referenda to effectuate the rule of law so far as concerns the exercise of federal legislative power.⁵ And it was Justice Holmes who observed: 'I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperilled if we could not make the declaration as to the laws of the several states.'⁶ But this is merely to say that a unitary government without the rule of law in this area of government is potentially viable, while a federal system without it is not. In both instances it is fair to say that if the rule of law is to serve as such rather than as an admonitory exhortation, it is inevitable that the function of applying and interpreting that rule must be reposed in the judicial system, which, in a federal system, must be that of the federal government.⁷

³ Cf. Sir Owen Dixon, 'Address at Annual Dinner of the American Bar Association' (1942) 16 *Australian Law Journal* 192, 193: 'We all accept without question the Anglo-American conception of the rule of law. . . . It is a conception that belongs only to the common law, by which it has been preserved and transmitted. It is a conception without which the theory of a rigid constitution could never have grown and that theory is indispensable to federalism.'

⁴ E.g., in addition to Australia and the United States, Canada, Western Germany, Switzerland. Bowie and Friedrich, *Studies in Federalism* (1954) 106 ff.

⁵ *Ibid.*

⁶ *Collected Legal Papers* (1920) 295-296.

⁷ Cf. *Kirby v. The Queen; Ex parte The Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, 267. Judge Learned Hand while rejecting the logical compulsion of judicial review over the acts of the national legislature as a deduction from the structure of the constitution, views it as 'a practical condition upon its successful operation'. The two alternatives he finds prohibitive; i.e., either the decision of the first department of government before which an issue arose should be conclusive whenever it arose later; or, each department should be free to decide constitutional questions for itself. The first alternative would have made Congress substantially omnipotent; the latter would have resulted in a multiplicity of governments working against one another. He justifies employing the power of judicial review in deference to these considerations as follows: 'For centuries it has been an accepted canon in interpretation of documents to interpolate into the text such provisions, though not expressed, as are essential to prevent the defeat of the venture at hand; and this

2. EXERCISING THE POWER OF REVIEW

(a) *The Imprint of History*

At this point a paradox appears. If, as I have argued, the function of judicial review was an inevitable consequence of the fact that both countries were founded upon constitutionalism and federalism one would expect that the authority to exercise this power would have been expressly provided for. Yet this is not the case in either constitution. On its face the United States Constitution leaves the issue undetermined. The records of the Constitutional Convention contain considerable discussion of the issue but leave debatable the intent of the framers toward the courts' assuming this function.⁸ The Constitution vests the judicial power of the United States in one Supreme Court and in such inferior courts as Congress should establish.⁹ That

applies with especial force to the interpretation of constitutions, which, since they are designed to cover a great multitude of necessarily unforeseen occasions, must be cast in general language, unless they are constantly amended. If so, it was altogether in keeping with established practice for the Supreme Court to assume an authority to keep the states, Congress, and the President within their prescribed powers. Otherwise the government could not proceed as planned; and indeed would almost certainly have foundered, as in fact it almost did over that very issue.' *The Bill of Rights* (1958) 14-15.

⁸ Mason and Beane offer the following account of the consideration of this issue by the framers. 'At one point it was proposed that each House of Congress might, when in doubt, call upon the judges for an opinion as to the validity of national legislation. Madison said that a "law violating a constitution established by the people themselves would be considered by the judges as null and void." More than once it was suggested and urged with persistence that Supreme Court justices be joined with the Executive in a council of revision, and empowered to veto Congressional legislation. Certain delegates objected to this proposal, contending that the Justices would have this power anyway in cases properly before them. Any such provision would be objectionable as giving the Court a double check. It would compromise "the impartiality of the Court by making them go on record before they were called in due course, to give . . . their exposition of the laws, which involved a power of deciding on their constitutionality." Other members of the Convention expressly denied that the Justices would sit in judgment as to acts of Congress. In the end the power of judicial review was not expressly granted.' *American Constitutional Law* (1954) 6. For a full-dress analysis see Beard, *The Supreme Court and the Constitution* (1912). Professor Hart has concluded that judicial review was certainly intended. 'Professor Crosskey and Judicial Review' (1954) 67 *Harvard Law Review* 1456, 1475 ff. Judge Learned Hand, however, has concluded that the legislative intent is in doubt. In spite of authority which I am certainly not qualified to challenge, I cannot, however, help doubting whether the evidence justifies a certain conclusion that the convention would have so voted, if the issue had been put to it that courts should have power to invalidate Acts of Congress. *Op. cit.* 6-7. Hamilton in the *Federalist Papers* obviously believed the power of judicial review existed and made the argument to support it. *Federalist Papers* No. 78. But his argument was put not upon the text of the Constitution, but upon the implications to be drawn from the function of courts to construe and apply statutes. A contemporary scholar has ventured the heretical doctrine that judicial review of congressional Acts, with a narrow exception was in fact not intended. Crosskey, *Politics and the Constitution in the History of the United States* (1953) ii, 1007: 'So, taking into account all the several kinds of evidence thus far examined, the situation seems very clear: judicial review was not meant to be provided generally in the Constitution, as to Acts of Congress, though it was meant to be provided generally as to the Acts of the states, and a limited right likewise was intended to be given to the Court, even as against Congress, to preserve its own judiciary prerogatives intact'. For an overwhelming assault on this view, see Hart, 'Professor Crosskey and Judicial Review', *supra*.

⁹ Constitution of the United States, Art. III, s. 1.

judicial power is defined as extending to cases arising under the Constitution and federal laws and treaties, and of admiralty and maritime jurisdiction, as well as to cases or controversies to which defined categories of persons or governments are parties.¹⁰ While it is provided in Article VI that the Constitution and federal laws and treaties made thereunder shall be the 'supreme law of the land' binding on the judges of every state, no explicit provision vests in the Supreme Court the final authority to invalidate acts of government, federal or state, which contravene it. The power of judicial review was left to be spelled out by the Court itself, as to congressional Acts in *Marbury v. Madison*¹¹ in 1803, and as to state Acts in *Fletcher v. Peck*¹² in 1810. In neither instance was the assumption of power universally approved; on the contrary it was accompanied by severe criticism. The violent political controversy it engendered between Federalists and Republicans, especially as to the power to declare state laws invalid, is a familiar story.¹³ Even down to recent times, especially when the Court in its decisions has run counter to a vigorous political tide, Marshall's thesis has been subjected to criticism and re-examination.¹⁴

The establishment of judicial review in Australia was accompanied by none of the travail which marked its reception in the United States. The controversy over its acceptance had been waged and resolved a century earlier in the United States. It is true that, curiously, no express provision for the exercise of this function by the High Court was made. Perhaps this was another product of a form-book attitude toward the American Constitution which the Australian founders occasionally exhibited.¹⁵ Or it may have been the result of a conscious choice to avoid the perils and pitfalls of drafting the necessary provision. In any event the founders left no doubt that the American tradition of judicial review was meant to be followed. The significant debates over High Court power centred rather over whether an appeal was to be permitted to the Privy Council, the function of final constitutional interpretation being assumed.¹⁶ Indeed, while those were heard from who feared the

¹⁰ *Ibid.*, Art. III, s. 2.

¹¹ (1803) 1 Cranch 137; 2 L. Ed. 60. ¹² (1810) 6 Cranch 87; 3 L. Ed. 162.

¹³ Warren, *The Supreme Court in United States History* (rev. ed. 1926) i, Chapters 5 and 8.

¹⁴ E.g., Boudin, *Government by Judiciary* (1932) i.

¹⁵ Cf., in regard to the diversity jurisdiction, Higgins J. in *Australian Temperance and General Mutual Life Assurance Society Ltd v. Howe* (1922) 31 C.L.R. 290, 330: 'We might think that the jurisdiction given in matters between residents of different states is a piece of pedantic imitation of the Constitution of the United States and absurd in the circumstances of Australia. . . .' See Cowen, 'Diversity Jurisdiction: The Australian Experience' (1955) 7 *Res Judicatae* 1; (1955) 4 *Utah Law Review* 480.

¹⁶ *Official Report of the National Australasian Convention Debates, Sydney, 2 March-9 April, 1891* 473-476. Sir John Downer expressed the fear that without an appeal to the Privy Council the High Court might unduly enlarge federal power as against the states as Marshall did in the United States. *Ibid.*, 476. Of course, the limited Privy

repetition in Australia of the precedent then recently inaugurated by the Supreme Court of broadly striking down legislative restrictions upon a *laissez-faire* economy, their view was reflected in the proposal not to abolish judicial review but to limit it so that only the Commonwealth and State Parliaments would be authorized to present constitutional questions to the High Court.¹⁷ Further, the language of the Constitution, while not explicit, left less room for doubt than the United States Constitution that judicial review was intended, both of federal and state acts. Section 74 makes an appeal to the Privy Council from a decision of the High Court on any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any state, or of any two or more states, discretionary with the High Court. This provision would be meaningless unless the High Court had the power to hear and determine such questions. So far as the authority of judicial review as to other kinds of constitutional questions is concerned, section 76, in authorizing Parliament to confer original jurisdiction upon the High Court in any matter arising under the Constitution, or involving its interpretation, 'impliedly acknowledges the function of the Courts'.¹⁸

This contrasting history of the establishment of judicial review is probably not without relation to the contrasting attitudes of the High Court and the Supreme Court towards the exercise of that function. Stated most generally the contemporary Supreme Court has manifested a self-consciousness in the face of this power which finds no parallel in the attitude of the High Court. This self-consciousness has manifested itself both in the reluctance of the

Council appeal that ultimately prevailed (requiring a High Court certificate in *inter se* constitutional questions as between the states or between the states and the Commonwealth) neatly precluded the Privy Council from exercising that very function. It is interesting to speculate whether, had that limitation not been imposed, the Privy Council would have functioned as Downer anticipated. The one *inter se* case which the High Court permitted to reach the Privy Council was decided in a way which sustains his view. *Colonial Sugar Refining Co. v. Attorney-General* (1913) 17 C. L.R. 644; [1914] A.C. 237. Compare the Privy Council's relative restrictive view of the 'incidental powers' provision (s. 51, para. xxxix) as compared with Marshall's spacious view of the analogous 'necessary and proper clause' of the United States Constitution (Art. I, s. 8) in *McCulloch v. Maryland* (1819) 4 Wheaton 316; 4 L. Ed. 579.

¹⁷ Mr Gordon of South Australia offered such a proposal. *Official Record of the Debates of the Australian Federal Convention, Third Session, Melbourne, 20 January to 17 March, 1898* ii, 1679. He observed during the course of the debate: 'I think it is monstrous that after the Federal Parliament has passed a law expressing the will of the majority of the people, or after a state Parliament has passed a law expressing the will of the majority of the people, any individual should be allowed to impugn it. . . . If anyone looks through the list of American decisions under the head of "legislature", he will see that no injustice would have been done, but that a great deal of justice would have been done, and a great deal of litigation saved, if this principle had been the law there.' *Ibid.*, 1681.

¹⁸ Sir Owen Dixon, 'Marshall and the Australian Constitution' (1955) 29 *Australian Law Journal* 420, 425. Also s. 109: 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.'

Supreme Court to exercise the function, and in the formulation of the limited scope of reappraisal of legislative judgments entailed in judicial review. I would not suggest that this is the only cause of this contrast, or that it is a sufficient cause. Indeed, in the course of this paper I want to draw attention to other cultural and institutional characteristics which lead to the same result. But that this history has some kind of causal relationship to the contrasting attitudes indicated is a suggestive hypothesis.

Marshall in *Marbury v. Madison* made the case for judicial review largely along the lines advanced earlier by Hamilton in the *Federalist Papers*¹⁹—by reasoning that it was an inevitable and logical implication of the judicial duty to apply and interpret the law. Marshall reasoned that constitutional limitations upon the power of the legislature are meaningless unless such limitations are recognized as rendering void ('not law') any legislative act repugnant to them. It is the province and duty of courts to say what the law is. Faced with a conflict between a law and the Constitution, in stating a rule of law the court must determine which of these conflicting rules governs the case, just as it does in deciding conflicts between earlier and later statutes and judicial precedents. Since the Constitution is superior to any conflicting act of the legislature the court in the process of adjudication must apply the former, thus invalidating the latter; otherwise the written constitution would be reduced to nothing. The conclusion is reinforced by the express language of the Constitution extending the judicial power to cases arising under the Constitution and in directing the judges to take an oath to support the Constitution. To the contention that the power of the Court to invalidate an act of another and coequal department of government distorts the constitutional scheme of separation of powers by making the judicial power superior to the legislative power, Hamilton had replied: 'Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter rather than the former.'

In 1825 Justice Gibson of the Pennsylvania Supreme Court availed himself of the dissenter's privilege to launch into what has become a classic essay controverting Marshall's arguments in support of the power of courts to declare Acts of Congress unconstitutional.²⁰ Con-

¹⁹ No. 78.

²⁰ *Eakin v. Raub* (1825) 12 Sergeant & Rawles' Reports (Pa.) 330, 343. Justice Gibson was prepared, however, to accept judicial review of state Acts: *ibid.*, 344-345, 355-356. The case is partially reported in Freund *et al.*, *Constitutional Law, Cases and Other Problems* (1954) 11.

ceding that the Constitution is the superior law and a repugnant Act must give way, he reasoned that it is fallacious to conclude that the judiciary has the power authoritatively to declare the repugnancy. The judiciary is given no more right to declare and correct mistakes of the legislature than the legislature is given that right with regard to decisions of the judiciary.

. . . in theory, all the organs of the government are of equal capacity or, if not equal, each must be supposed to have superior capacity only for those things which peculiarly belong to it; and as legislation peculiarly involves the consideration of those limitations which are put on the law-making power, and the interpretation of the laws when made, involves only the construction of the laws themselves, it follows, that the construction of the constitution, in this particular, belongs to the legislature, which ought, therefore, to be taken to have superior capacity to judge of the constitutionality of its own acts.²¹

The propriety of leaving the legislature to judge of the validity of its acts is attested to further by its political wisdom. While the judiciary is likely to act with greater deliberation, it is the legislature which is responsive to the people through the processes of representative government. ' . . . it is a *postulate* in the theory of government, and the very basis of the superstructure, that the people are wise, virtuous, and competent to manage their own affairs. . . .'²² Furthermore while errors of the judiciary are corrigible only by the cumbersome process of constitutional amendment, the errors of the legislature may be corrected in the next election. The denial of judicial review would not deny the people the advantages of a written and limited constitution. The value of such a constitution rests primarily in the moral and educational impact of an authoritative statement of first principles.

In the business of government a recurrence to first principles answers the end of an observation at sea, with a view to correct the dead-reckoning; and for this purpose, a written constitution is an instrument of inestimable value. It is of inestimable value also, in rendering its principles familiar to the mass of the people; for after all, there is no effectual guard against legislative usurpation, but public opinion, the force of which, in this country, is inconceivably great.²³

The courts are in no position to police the constitution effectively against the climate of public opinion :

Once let public opinion be so corrupt, as to sanction every misconstruction of the constitution, and abuse of power, which the temptation of the moment may dictate, and the party which may happen to be predominant will laugh at the puny efforts of a dependent power to arrest it in its course.²⁴

²¹ (1825) 12 Sergeant & Rawles' Reports (Pa.) 330, 350.

²² *Ibid.*, 355.

²³ *Ibid.*, 354.

²⁴ *Ibid.*

As for the judicial oath to defend the constitution,

it must be understood in reference to supporting the constitution, *only as far as that may be involved in his official duty*; and consequently, if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath.²⁵

In a curious way, while Marshall's decision has prevailed, his opinion has not. In terms of the course of constitutional adjudication the considerations advanced by Justice Gibson have, in a sense, won the day. At least so far as review of congressional Acts is concerned, what the Supreme Court has come to accept is the conclusion of Marshall that judicial review is the function of the courts and the reasoning of Gibson advanced to rebut that conclusion.²⁶ Stated less paradoxically the Court has been moved to undertake the task of judicial review, in respect of its approach to exercising that function when inescapable and to marking out the occasions when it will not do so, by the considerations advanced by Gibson for not exercising it all.

To cite the opinions of Justice Frankfurter is, in a way, to make the case by stating it, since he, above all, has been the consistent exponent of the principle of judicial passivism—the current term for the principle of deferring to the legislature to the utmost and avoiding passing upon constitutional questions except where judicial ingenuity offers no alternative. But it is also true that at least in the area of review of economic regulatory legislation, he speaks for the Court in articulating a view which the Court has consistently followed except for the fateful period from the end of the last century to the middle of the third decade of the twentieth when the Court undertook to constitute itself the conscience of Adam Smith. A look at his concurring opinion in *A.F. of L. v. American Sash & Door Co.*²⁷, a due process question, the kind in which the philosophy of judicial passivism has reached its peak, is revealing. Here the Court upheld the power of a state to make unlawful agreements whereby a person is

²⁵ *Ibid.*, 353.

²⁶ Of course, this is only partially true. While judicial vetoing of congressional Acts is now a rarity it is still not the case that Congress is the sole judge of the constitutionality of its actions, unaffected by the Supreme Court. In the process of drafting legislation, Congress is enormously influenced by the Supreme Court's constitutional doctrine. Moreover, in the process of interpreting federal legislation, the Court in the effort to save the legislation or at least to avoid passing upon the constitutional question, has gone a long way in recasting the legislation along constitutional lines. See text *infra*, p. 28. In personal liberty cases there is indication of a resurgence of the judicial veto over federal Acts: e.g., *Watkins v. United States* (1957) 354 U.S. 178; 1 L. Ed. (2d) 1273 (congressional investigations); *Trop v. Dulles* (1958) 356 U.S. 86; 2 L. Ed. (2d) 630 (loss of citizenship); *United States, ex rel. Toth v. Quarles* (1955) 350 U.S. 11; 100 L. Ed. 8 (military jurisdiction over ex-servicemen).

²⁷ (1949) 335 U.S. 538, 542; 93 L. Ed. 222, 225. Cf. his judgment that the reasoning in *Marbury v. Madison* (*supra*, n. 11) 'is not impeccable and its conclusion, however wise, not inevitable', 'John Marshall and the Judicial Function' (1955) 69 *Harvard Law Review* 217, 219.

denied employment because of non-membership in a union as against the contention that it was a violation of due process to do so. While Justice Frankfurter deferred to Marshall in conceding that 'our right to pass on the validity of legislation is now too much part of our constitutional system to be brought into question',²⁸ he also deferred to Gibson. The function of legislating, he pointed out, is for legislatures 'who have also taken oaths to support the Constitution'. Further:

In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint. Because the powers exercised by this Court are inherently oligarchic, Jefferson all of his life thought of the Court as 'an irresponsible body' and 'independent of the nation itself'. The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace. Judges appointed for life whose decisions run counter to prevailing opinion cannot be voted out of office and supplanted by men of views more consonant with it. They are even farther removed from democratic pressures by the fact that their deliberations are in secret and remain beyond disclosure either by periodic reports or by such a modern device for securing responsibility to the electorate as the 'press conference'. But a democracy need not rely on the courts to save it from its own unwisdom. If it is alert—and without alertness by the people there can be no enduring democracy—unwise or unfair legislation can readily be removed from the statute books. It is by such vigilance over its representatives that democracy proves itself.²⁹

(b) *Reappraisal of Legislative Judgments*

It is always perilous to generalize about complex things. The attitude of distrust of judicial review with its consequence of intense reluctance to disturb legislative judgments is not manifested by all justices in the same degree. It may show up more sharply in some kinds of issues than others; more in due process questions, for example, than in reviewing the reach of explicit prohibitions, such as those against bills of attainder or *ex post facto* laws or against the imposition of certain taxes, or in dealing with the negative implication upon the states of the grant of the commerce power to Congress.³⁰

²⁸ (1949) 335 U.S. 538, 556-557; 93 L. Ed. 222, 233.

²⁹ (1949) 335 U.S. 538, 555-556; 93 L. Ed. 222, 232-233. Cf. *Summers*, 'Frankfurter, Labour Law and the Judge's Function' (1957) 67 *Yale Law Journal* 266, 277 to the effect that his statement of distrust for judicial power and deference to legislative judgment 'carry logically not only to the conclusion that the due process clause must go, but reach far beyond, almost to the brink of repudiating all judicial review of legislative action'.

³⁰ The court's elaborate re-evaluation of the reasonableness of state regulation affecting commerce has led Justice Black to accuse the court of playing the role of super-legislature. *Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761, 784, 788; 89 L. Ed. 1915, 1933, 1935 (dissenting opinion).

And even within the same kind of issue, due process, for example, it may vary depending upon whether personal liberties or property rights are involved.³¹ But that it is the major significant feature of the Supreme Court's overall approach to the exercise of its function of judicial review in many significant areas of adjudication is beyond question.

Occasionally the High Court has adverted to the delicate problem of separation of powers as it bears upon judicial review³² and expressions of a presumption of constitutionality, or something akin to it, sometimes appear, although without the vigour to be found in opinions of the Supreme Court.³³ But in no sense has the High Court manifested the acute disquiet in face of the political implications of judicial review shown by the Supreme Court.

When the High Court has departed from the view that legal characterization alone is sufficient to determine whether a federal Act is an Act with respect to a head of power the relative absence of qualms and reservations in the exercise of judicial review is apparent—the Court has at times exhibited a readiness to reappraise the

³¹ Until not long ago a majority of the Court subscribed to the 'preferred' status of the Bill of Rights, requiring a closer scrutiny of legislation in that area and a demand for a more persuasive legislative case than with issues affecting only property rights. See discussion in the several opinions in *Kovacs v. Cooper* (1949) 336 U.S. 77; 93 L. Ed. 513.

³² E.g., Fullagar J. in *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1, 262-263: 'It should be observed at this stage that nothing depends on the justice or injustice of the law in question. If the language of an Act of Parliament is clear, its merits and demerits are alike beside the point. It is the law, and that is all. Such a law as the *Communist Party Dissolution Act* could clearly be passed by the Parliament of the United Kingdom or of any of the Australian States. It is only because the legislative power of the Commonwealth Parliament is limited by an instrument emanating from a superior authority that it arises in the case of the Commonwealth Parliament. If the great case of *Marbury v. Madison* [(1803) 1 Cranch 137; 2 L. Ed. 118] had pronounced a different view, it might perhaps not arise even in the case of the Commonwealth Parliament; and there are those, even today, who disapprove of the doctrine of *Marbury v. Madison*, and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of a legislature in a Federal system is or is not within power. But in our system the principle of *Marbury v. Madison* is accepted as axiomatic, modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs.'

³³ E.g., Isaacs and Rich JJ. in *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd* (1918) 25 C.L.R. 434, 465: 'It is a cardinal rule of construction that all documents are to be construed *ut res valeat magis quam pereat*. . . . More cogent is that rule when we are considering whether the work of Parliament representing the will of the whole people shall be undone.' According to Sir John Latham, conceding this maxim of judicial conservatism, 'there cannot be said to be a presumption of validity.' 'Interpretation of the Constitution' in Else-Mitchell (ed.), *Essays on the Australian Constitution* (1952) 1, 7. It has been suggested that a presumption of validity arises where the enactment on its face bears a relation to a constitutional power, but not otherwise: Fullagar J. in *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1, 255. Also Nicholas, *The Australian Constitution* (1952) 319: '. . . the presumption of validity has seldom been recognized or applied.' But see Wynes, *Legislative, Executive and Judicial Powers in Australia* (2nd ed. 1956) 46: 'In construing an enactment the constitutional validity of which is in issue, the court will not hold it to be *ultra vires* unless the invalidity is clear beyond all doubt; the presumption is always in favour of validity. . . .'

legislative judgment characteristic of an earlier era in the development of the Supreme Court.

In the main the High Court has taken the view that whether a parliamentary Act is within its constitutional power is determinable by whether it deals with a subject matter with respect to which Parliament is empowered to legislate; 'whether the legislation operates upon or affects the subject matter, or . . . answers the description, and to disregard purpose or object.'³⁴ In a limited number of issues, however, the defence power being the major example, the Court has elevated the concept of purpose to determinative significance. Thus the test of constitutionality of a law which purports to rest upon the power to legislate 'with respect to the naval and military defence of the Commonwealth' is whether there is a purposive connection between the regulation and defence; 'a law with respect to the defence of the Commonwealth' is an expression which seems rather to treat defence or war as the purpose to which the legislation must be addressed.³⁵ But this inquiry is not for *factual* purpose, since 'the actual extrinsic motives and intentions of legislative authorities' are excluded from investigation. The ultimate criterion is rather a 'legal construction put on something done in fact', judgment being based upon 'the instrument in question, the facts to which it applies and the circumstances which called it forth'.³⁶ As Professor Sawyer has aptly pointed out, as a result,

The somewhat restricted terms of s. 51 (vi) . . . 'laws with respect to the naval and military defence of the Commonwealth', have been altered by judicial exegesis to read 'laws which in the opinion of the High Court can reasonably be thought conducive to achieving the purpose of defending the Commonwealth'.³⁷

While during actual hostilities the Court has been understandably reluctant to disturb the legislative judgment, it has on occasion done so. Thus regulations for controlling student entries at universities³⁸ and for prescribing improved standards of industrial lighting³⁹ were invalidated on the ground that their purposive connection with

³⁴ Dixon J. in *Stenhouse v. Coleman* (1944) 69 C.L.R. 457, 471.

³⁵ *Ibid.* Also Fullagar J. in *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1, 252-253. The now well-accepted doctrine was first enunciated in *Farey v. Burvett* (1916) 21 C.L.R. 433.

³⁶ Dixon J. in *Stenhouse v. Coleman*, *supra*, n. 34.

³⁷ Sawyer, 'Constitutional Law' in Paton (ed.), *The Commonwealth of Australia* (1952) 38, 53. This is strikingly similar to the characteristic Supreme Court formulation for determining the scope of a grant of federal power. Cf. Marshall C.J. in *McCulloch v. Maryland* (1819) 4 Wheaton 316, 421; 4 L. Ed. 579: 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional.'

³⁸ *The King v. University of Sydney* (1943) 67 C.L.R. 95.

³⁹ *Victorian Chamber of Manufactures v. Commonwealth* (1943) 67 C.L.R. 413.

defence was insufficient.⁴⁰ The reach of the defence power in the dislocations following hostilities (the so-called 'transitional defence' cases)⁴¹ furnishes clearer examples. The approach to these problems was stated by the High Court in 1949:

The sudden removal of all controls is not demanded by the collapse of enemy resistance. Given regulations or controls may no longer find a justification in the considerations which the active prosecution of the war supplied. Yet the very fact that the controls or regulations have been established may create a situation which must be maintained for a reasonable time while some other legislative provision is made. *But the Court must see with reasonable clearness how it is incidental to the defence power* to prolong the operation of a war measure dealing with a subject otherwise falling within the exclusive province of the States and unless it can do so it is the duty of the Court to pronounce the enactment beyond the legislative power.⁴²

Applying this principle the Court invalidated, as beyond the post-war defence power, laws governing female wages, petrol rationing and giving housing priority to veterans over civilians.⁴³ Without venturing to pass judgment on the merits or the respective techniques of constitutional adjudication, the cases contrast with the resolution of like problems in the Supreme Court where the momentum of hesitance in the exercise of judicial review led to a broad sustaining of similar legislation.⁴⁴ The point is not that the Supreme Court's criterion of constitutionality was far different from that of the High Court—both reduce to an evaluation of the reasonableness of the means chosen to attain a legitimate end. The point is rather that put adrift on the uncharted and unfamiliar sea of 'reasonableness' without the tradition of self-conscious restraint born of a history of political travail, the High Court's scrutiny of the legislative judgment has tended to be bolder and more rigorous.

The *Communist Party Case*⁴⁵ is a forceful instance of a refusal to accept a legislative factual judgment, especially for the contrast it suggests with *Dennis v. United States*⁴⁶ in which the Supreme Court

⁴⁰ Also *The King v. Commonwealth Court of Conciliation and Arbitration, ex parte Victoria* (1942) 66 C.L.R. 488 (regulations of state non-industrial employment not directly engaged in war effort held invalid); *id.*, (1944) 68 C.L.R. 485 (regulations of conditions of employment of women in such industries held invalid).

⁴¹ Sawyer, 'The Transitional Defence Power of the Commonwealth' (1949) 23 *Australian Law Journal* 255.

⁴² *The King v. Foster* (1949) 79 C.L.R. 43, 84. (Italics added.) ⁴³ *Ibid.*

⁴⁴ *Hamilton v. Kentucky Distillers Co.* (1919) 251 U.S. 146; 64 L. Ed. 194 (national prohibition law upheld, relation to war power being found in the purpose to conserve manpower and increase efficiency in military production); *Lichter v. United States* (1949) 334 U.S. 742; 92 L. Ed. 1694 (upholding law authorizing re-negotiation of war contracts to recapture excess profits); *Woods v. Miller* (1948) 333 U.S. 138; 92 L. Ed. 596 (upholding national rent control). Brabner-Smith, 'Concluding the War—The Peace Settlement and Congressional Powers' (1948) 34 *Virginia Law Review* 553.

⁴⁵ *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1.

⁴⁶ (1951) 341 U.S. 494; 95 L. Ed. 1137.

upheld similar, though distinguishable, legislation. The Communist Party Dissolution Act 1950 (Cth.), following a recital of facts to the effect that the Communist Party is a threat to the security of Australia by virtue of its aims and activities, provided for the dissolution of that party and the confiscation of its property. The recital of aims and activities included

The overthrow of established government in Australia by force, violence, intimidation and fraudulent practices, espionage and sabotage, and deliberate dislocation, disruption and reduction and retardation of production in industries vital to the security and defence of Australia.⁴⁷

If these facts were true, the Court made plain it would have upheld the law.⁴⁸ But since the law was not on its face a law with respect to the military or naval defence, it could not be otherwise sustained. Further,

there can be no presumption of the validity of [the Act], for the simple reason that there can be no presumption that the Australian Communist Party has done or is likely to do anything which would bring it within the defence power or the constitution-preservation power . . .⁴⁹

Nor could the recitals in the Act 'be regarded as affording even *prima facie* evidence of the truth of what is recited'.⁵⁰ The truth of the crucial constitutional facts, therefore, had to be proved *de novo* to the satisfaction of the Court. In the language of Williams J.:⁵¹

In order that section 4 of the *Communist Party Dissolution Act* could be authorized by the defence power, it must be proved that facts existed on 20 October 1950, which made it reasonably necessary in order to prepare for the defence of Australia that as a preventive measure the Australian Communist Party should be dissolved and its property forfeited to the Commonwealth.

Whether the facts could be proved to the Court by judicial notice or the tendering of evidence was a mooted issue, but the significant point is that because they were not proved the legislation failed.⁵²

A comparison with *Dennis v. United States*, the nearest American counterpart, can be misleading. While in this case leaders of the Communist Party were effectively prosecuted and the Court took expansive notice of the aims and activities of the Communist Party,

⁴⁷ *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1, 252, *per Fullagar J.* ⁴⁸ *Ibid.*, 261-262. ⁴⁹ *Ibid.*, 262. ⁵⁰ *Ibid.*, 263. ⁵¹ *Ibid.*, 223.

⁵² *Cf. ibid.*, 154, *per Latham C.J.* (dissenting): ' . . . it is not for a court (either at the present stage of these cases, or at any later stage) to ask or to answer the question whether or not it agrees with the view of Parliament that the Australian Communist Party and organizations and persons associated with it are enemies of the country. It is for the Government and Parliament to determine that question, and they have already determined it. Whether they are right or wrong is a political matter upon which the electors, and not any court, can pass judgment. The only question for a court, therefore, is whether the provisions of the Act have a real connection with the activities and possibilities which Parliament has said in its opinion do exist and do create a danger to Australia.'

the federal law upheld was not a stigmatization of a particular named organization, but a law prohibiting conspiracy to advocate forcible overthrow of government and related activities. The defendants received a judicial trial of their factual participation in this course of conduct. What the Court upheld was the law prohibiting this course of conduct, a law which there is little doubt would be upheld by the High Court.⁵³ What is striking in the High Court opinions so far as concerns the point under discussion is the attitude evinced toward legislative fact-finding. The court conceded that what Fullagar J. termed a *privilegium* (a disability upon a particular person) is not beyond legislative power, so long as the facts exist which connect it adequately with a constitutional head of power. Thus if the aims and activities of the Communist Party were as found by the Parliament the Act was constitutional. If a case of this sort were presented to the Supreme Court (as it may be under the Communist Control Act 1954 (U.S.A.))⁵⁴ precisely this proposition would probably be the crucial issue. To establish it would require running the formidable gauntlet of the due process clause, and the provision prohibiting Bills of Attainder, as well as the First Amendment. But if this were successfully accomplished, in all likelihood the case would be finished, because then the issue of the character of the Communist Party would constitute a constitutional fact, a determination of which the legislature made in the very process of its exercise of legislative power.⁵⁵ It is inconceivable that the Court would abandon its now well established principle of deferring altogether to the legislative judgment on such facts, short of a finding of utter arbitrariness.⁵⁶

I have been suggesting that the force of the history of the establishment of judicial review, as well, of course, as the forces themselves which accounted for that history, have a causal relation to the relative gusto (as compared to the timorousness of the Supreme Court) with which the High Court undertakes the task of measuring the legislative judgment against the Constitution. I do not mean to

⁵³ See Fullagar J. in reference to the activities attributed to the Communist Party by the Communist Party Dissolution Act 1950 (Cth.): 'That such activities could be the subject of valid Commonwealth laws could, one would think, not be doubted.' *Ibid.*, 252. Cf. *Adelaide Company of Jehovah's Witnesses v. Commonwealth* (1943) 67 C.L.R. 116.

⁵⁴ (1954) 68 Stat. 775; (1952) 50 U.S.C. §841.

⁵⁵ Freund, 'Review of Facts in Constitutional Cases' in Cahn (ed.), *Supreme Court and Supreme Law* (1954) 47-49.

⁵⁶ Cf. Brandeis J. in *O'Gorman and Young, Inc. v. Hartford Fire Insurance Co.* (1931) 282 U.S. 251, 257-258; 75 L. Ed. 324, 328: 'As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which the statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the State indicates that such evils did exist. The record is barren of any allegation of fact tending to show unreasonableness.'

suggest that this force is the sole causal factor or even that it is necessarily decisive. There are two other considerations which should be advanced at this point, even though I want to deal with them again later in connection with a discussion of the views of the two courts concerning the considerations relevant to the task of constitutional adjudication. One has to do with the High Court's conception of what is entailed in interpreting the constitution. If, for example, the Court sees the problem of determining whether a particular Commonwealth enactment is a law with respect to a constitutionally designated head of federal power, as a problem of strict legal characterization entailing no value judgments or appeals to general principles of government or policy,⁵⁷ then there is no occasion for a self-conscious and halting undertaking of the Court's function. Rather it is the occasion for the self-confidence that comes with the application of familiar and tested techniques. Certainly the Court is aided in maintaining this view by the absence of such American provisions as the 'due process' clause which offers no sure footing for strictly legalistic interpretation, although, as I will suggest later, its influence can be over-estimated.

Another factor tending to produce the contrast is the greater capacity of the High Court to accept the implications of the legal theory (I hesitate to say, fiction) of what is involved when the Court holds an Act unconstitutional. The notion is similar to that adumbrated by Hamilton in the *Federalist* in the language quoted above;⁵⁸ that the Court is a passive instrument merely giving effect to the will of the people expressed in the Constitution. Sir John Latham, for example, has put it that:

Common expressions such as: 'The Courts have declared a statute invalid,' sometimes lead to misunderstanding. A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour—but such a decision is not an element which produces invalidity in any law.⁵⁹

The view is not unlike that expressed by an American judge in a passage now more notorious than famous in the United States:

It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception-

⁵⁷ See, e.g., Latham C.J. in *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1, 153: 'It is not in my opinion a function of a court to determine whether legislation "goes too far" or "is incommensurate" or "is too drastic" or "is or is not reasonably necessary"'. The only function of a court when the validity of legislation is challenged as *ultra vires* the Commonwealth Constitution is to determine whether it is legislation "with respect to" a specified subject matter.' ⁵⁸ *Supra*, p. 10.

⁵⁹ *South Australia v. The Commonwealth* (1942) 65 C.L.R. 373, 408. Cf. Griffith C.J. in *The King v. Barger* (1908) 6 C.L.R. 41, 64: 'Our duty is to declare the law as we find it, not to make new law.'

tion. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.⁶⁰

Obviously judges holding this view are in a position to utter constitutional pronouncements with less self-consciousness than is likely for those tormented by the eighteenth century *dictum* of Bishop Hoadley that, 'Whoever hath an absolute authority to interpret written or spoken laws; it is he who is truly the lawgiver to all intents and purposes and not the person who wrote or spoke them'.

(c) *To Judge or Not to Judge*

The keener sensitivity of the Supreme Court to the 'great gravity and delicacy' of the function of judicial review is manifested as well in its formidable armoury of doctrines calculated to avoid the exercise of the power. The doctrines of avoidance stem both from the constitutional limitation to a case or controversy as well as from an exercise of policy as to the matters within the Court's jurisdiction, although it is frequently difficult to know in which category a particular doctrine belongs. The scope, philosophy and motivation for these restrictive doctrines have been stated in a luminous passage by the late Justice Rutledge:

... this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications . . . arose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. U.S. Const. Art. 3. The same policy has been reflected continuously not only in decisions but also in rules of court and in statutes made applicable to jurisdictional matters, including the necessity for reasonable clarity and definiteness, as well as for timeliness, in raising and presenting constitutional questions. . . . The policy, however, has not been limited to jurisdictional determinations. For, in addition, 'the Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, non-adversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the

⁶⁰ Mr Justice Roberts in *United States v. Butler* (1936) 297 U.S. 1, 62-63; 80 L. Ed. 477, 486-487.

statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided.

Some, if not indeed all, of these rules have found 'most varied applications'. And every application has been an instance of reluctance, indeed of refusal, to undertake the most important and the most delicate of the Court's functions, notwithstanding conceded jurisdiction, until necessity compels it in the performance of constitutional duty.

Moreover the policy is neither merely procedural nor in its essence dependent for applicability upon the diversities of jurisdiction and procedure, whether of the state courts, the inferior federal courts, or this Court. Rather it is one of substance, grounded in considerations which transcend all such particular limitations. Like the case and controversy limitation itself and the policy against entertaining political questions, it is one of the rules basic to the federal system and this Court's appropriate place within that structure. . . .

The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system.⁶¹

To some degree similar restrictive doctrines have been recognized by the High Court.⁶² That court early interpreted the grant of judicial power over designated 'matters' in much the same manner as the Supreme Court interpreted the grant of jurisdiction over designated 'cases and controversies' in the American Constitution; *i.e.*, as requir-

⁶¹ *Rescue Army v. Municipal Court of Los Angeles* (1947) 331 U.S. 549, 568-571; 91 L. Ed. 1666, 1677-1679. Frankfurter, 'Marshall and the Judicial Function' (1955) 69 *Harvard Law Review* 217, 234: 'Mr Justice Brandeis made a fair estimate in saying that by applying its restrictive canons of interpretation, the Court has in the course of its history "avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander v. T.V.A.* (1936) 297 U.S. 288, 346.'

⁶² *Cf.* Starke J. in *Deputy Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty Ltd* (1939) 61 C.L.R. 735, 773: 'One cannot but be impressed, as Higgins J. said in *Attorney-General (N.S.W.) v. Brewery Employees' Union of N.S.W.* [(1908) 6 C.L.R. 469, 590], "with the wisdom of the practice, so well established in the Supreme Court of the United States, never to decide against an Act as unconstitutional except 'in the last resort and as a necessity in the determination of a real, earnest and vital controversy between individuals': *Chicago & Grand Trunk Railway Co. v. Wellman* [(1892) 143 U.S. 339, 345; 36 L. Ed. 176, 179]. Nothing would tend to detract from the influence and the usefulness of this court more than the appearance of an eagerness to sit in judgment on Acts of parliament, and to stamp the Constitution with the impress which we wish it to bear. It is only when we cannot do justice, in an action properly brought, without deciding as to the validity of the Act, that we are entitled to take out this last weapon from our armoury": *cf. Carter v. Carter Coal Co.* [(1936) 298 U.S. 238, 325; 80 L. Ed. 1160, 1196].'

ing a justiciable controversy. Invalidating an Act which purported to authorize the court to grant an advisory opinion the Court stated:

... we do not think the word 'matter' in section 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the court.⁶³

The declaratory judgment procedure authorized in both systems has not detracted from the integrity of that principle,⁶⁴ although it has been given a more liberal interpretation by the High Court.⁶⁵ The High Court likewise has imposed other restrictions upon the occasion for constitutional adjudication comparable to those found in the United States: that questions of constitutionality will not be considered unless necessary to the disposition of the legal rights of the parties;⁶⁶ that constitutional pronouncements will not be broader than necessary to dispose of the case;⁶⁷ that 'only those whose rights are infringed and not strangers are entitled to challenge the validity of legislation';⁶⁸ that 'mere possibility or risk of future interference with a plaintiff's rights' is not 'an appropriate basis for the exercise of the

⁶³ *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 265. This was in accord with evidence of the intent of the framers who manifested some concern with the term 'matter' in that it might be construed to permit presentation of abstract political questions. Their final judgment that the term was sufficiently explicit was thus confirmed by the High Court. *Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 20 January to 17 March, 1898*, 1, 319-320. For an exposition of the comparable American doctrine see *Muskrat v. United States* (1911) 219 U.S. 346; 55 L. Ed. 246. The doctrine is not binding on the state courts, some of which are authorized to render advisory opinions. See, e.g., *Wyman v. De Gregory* (1957) 137 Atlantic Reporter 2d 512, 516-517 (N.H. Sup. Ct.). [1680.]

⁶⁴ *Rescue Army v. Municipal Court* (1947) 331 U.S. 549, 572-573; 91 L. Ed. 1666.

⁶⁵ See generally Foster, 'The Declaratory Judgment in Australia and the United States' (1957) 1 *M.U.L.R.* 207 and (1958) 1 *M.U.L.R.* 347.

⁶⁶ E.g., *Attorney-General (N.S.W.) v. Brewery Employees' Union of N.S.W.* (1908) 6 C.L.R. 469, 491; *Universal Film Manufacturing Company (Australasia) Ltd v. New South Wales* (1927) 40 C.L.R. 333.

⁶⁷ E.g., *British Medical Association v. Commonwealth* (1949) 79 C.L.R. 201.

⁶⁸ Starke J. in *The Real Estate Institute of N.S.W. v. Blair* (1946) 73 C.L.R. 213, 226; *Victorian Chamber of Manufactures v. Commonwealth* (1943) 67 C.L.R. 335 (plaintiff association has no standing to challenge regulations affecting rights of its members); *Anderson v. The Commonwealth* (1932) 47 C.L.R. 50. See generally Wynes, *Legislative, Executive and Judicial Powers in Australia* (2nd ed. 1956) 587-589 and cases cited. Recently the Supreme Court has evidenced an untypical willingness to bypass the principle precluding litigants from relying on constitutional rights not personal to them where other considerations were deemed sufficiently weighty. 'The principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court': *National Association for Advancement of Colored People v. Alabama* (1958) 78 Sup. Ct. 1163, 1170. Thus an association was recognized as having standing to raise the constitutional rights of its members in defence of its refusal to turn over its membership lists to state authorities: *National Association for Advancement of Colored People v. Alabama*, *supra*; and a white defendant was permitted to raise the issue of the constitutional rights of the Negro purchaser of his home in defence against a suit for damages for breach of a restrictive covenant not to sell to Negroes: *Barrows v. Jackson* (1953) 346 U.S. 249; 97 L. Ed. 1586. In the latter case the Court stated ((1953) 346 U.S. 249, 257) that 'reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by

jurisdiction to make a declaratory decree'.⁶⁹ Still, against this background of similarity of approach it may be ventured that the Supreme Court has perfected the art of postponing decision to a higher degree, both in more vigorously applying the doctrines shared in common and in developing new ones.

The rigour of the rules requiring standing to sue and even, in a way, of the principle which precludes advisory opinions on abstract questions, is diluted by the well-settled doctrine permitting the Attorney-General of a state to challenge the constitutionality of a Commonwealth law in an original suit in the High Court,⁷⁰ and the Commonwealth Attorney-General to do the same with a challenged state law.⁷¹ The theory, as put by Williams J. in the *Pharmaceutical Benefits Case*, is that:

The legislative powers conferred upon the Commonwealth Parliament by the Constitution are limited to the specific powers therein enumerated. In so far as they extend they are plenary in the fullest sense of the word, and are binding upon Australians because they are citizens of the Commonwealth. But Australians are also citizens of a State. Beyond the legislative field which the Parliament of the Commonwealth is entitled to occupy in the exercise of these powers . . . the Parliaments of the States, and those Parliaments alone, have the power to bind the citizens of a State by legislation. The citizens of each State have . . . a collective public right to complain if the Parliament of the Commonwealth exceeds its legislative powers and purports to bind them by laws which it has no authority to make. . . . If legislation of the Parliament of the Commonwealth is of such a nature that it purports to interfere with the private rights of individuals as such, or such individuals suffer special damage peculiar to themselves, such individuals can sue as individuals, but if the relief or advantage claimed is of such a nature that it does not specifically affect them as individuals but only as members of the general public, then the Attorney-General is a necessary party to the action.⁷²

the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained.' See also *Joint Anti-Fascist Refugee Committee v. McGrath* (1951) 341 U.S. 123; 95 L. Ed. 817.

⁶⁹ Taylor J. in *Australian Boot Trade Employees' Federation v. The Commonwealth* (1954) 90 C.L.R. 24, 53. See Kitto J., *ibid.*, 49: 'So far as I am aware it has never been held that a person's apprehension that, if he does an act which in the future he may desire to do, he will be charged with an offence and will be put to trouble and expense in establishing a constitutional answer to the charge, affords by itself any ground for an injunction'; and cf. *United Public Workers v. Mitchell* (1947) 330 U.S. 75; 91 L. Ed. 754, where the same principle was asserted as a rule of jurisdiction rather than as a rule of discretion.

⁷⁰ *Attorney-General (N.S.W.) v. Brewery Employees' Union* (1908) 6 C.L.R. 469; *Attorney-General (Vict.) v. Commonwealth* (1945) 71 C.L.R. 237. The principle originated in a unitary state, England, in the case of *Dyson v. Attorney-General* [1911] 1 K.B. 410.

⁷¹ *Commonwealth v. Queensland* (1920) 29 C.L.R. 1.

⁷² *Attorney-General (Vict.) v. Commonwealth* (1945) 71 C.L.R. 237, 276-277. Whether it is the rights of the public or of the Crown which the Attorney-General represents strikes an American observer (or this one) as an inconsequential, though diverting, issue, at least so far as concerns the issue under discussion. See Wynnes, *Legislative, Executive and Judicial Powers in Australia* (2nd ed. 1956) 588-589.

This procedure constitutes the vehicle through which a substantial volume of constitutional litigation is handled. Its effect is at once to facilitate early dispositions of constitutional issues,⁷³ to give emphasis to the political function of judicial review over its theoretical secondary function as an inevitable accompaniment to disposing of issues in a private litigation,⁷⁴ and, by conceding standing in the respective Attorney-Generals where, in some instances, no private person would have standing, to increase the occasions for constitutional adjudication. The doctrine contrasts sharply with the view maintained by the Supreme Court, exemplified in *Massachusetts v. Mellon*⁷⁵ in which the state of Massachusetts brought an original suit in the Supreme Court against federal officers seeking a determination of invalidity of the National Maternity Act 1921 (U.S.A.) which authorized federal appropriations to co-operating states to further the health of mothers and infants. The theory of the State was that it represented its collective citizenry in their right to be free of the imposition of invalid federal legislation, a theory comparable to that accepted in the High Court. A unanimous court repudiated the doctrine stating:

Ordinarily, at least, the only way in which a state may afford protection to its citizens . . . is through the enforcement of its own criminal statutes, where that is appropriate, or by opening its courts to the

⁷³ Cf. Jackson, *The Struggle for Judicial Supremacy* (1941) 305-306: 'It [the Supreme Court] has a philosophy that while it has a duty to decide constitutional questions, it must escape the duty if possible. An eminently qualified and not unfriendly authority writes [Frankfurter, *Law and Politics* (1939) 25]: "But the Court has improved upon the common law tradition and evolved rules of judicial administration especially designed to postpone constitutional adjudications and therefore constitutional conflicts until they are judicially unavoidable. The Court will avoid decision on grounds of constitutionality if a case may go off on some other ground, as, for instance, statutory construction."

"The Court has thus evolved elaborate and often technical doctrines for postponing if not avoiding constitutional adjudication. In one famous controversy, involving a conflict between Congress and the President, the Supreme Court was able until recently to avoid decision of a question that arose in the First Congress. Such a system inevitably introduces accidental factors in decision making. So much depends on how a question is raised and when it is raised."

Nevertheless, Mr Frankfurter thought this prolonged uncertainty less harmful than "the mischief of premature judicial intervention". By the latter he thinks the "Court's prestige within its proper sphere would be inevitably impaired".

"Must we choose between "premature judicial intervention" on one hand and "technical doctrines for postponing if not avoiding constitutional adjudication" on the other? If that were our choice I would think Mr Frankfurter had chosen wisely. But need we be gored by either horn of such a dilemma? Can we not establish a procedure for determination of substantial constitutional questions at the suit of real parties in interest which will avoid prematurity or advisory opinions on the one hand, and also avoid technical doctrines for postponing inevitable decisions? Should we not at least try to lay inevitable constitutional controversies to early rest? Query whether the Attorney-General's suit is the procedure Mr (later Justice) Jackson sought?"

⁷⁴ In *Attorney-General (Vict.) v. Commonwealth*, *supra*, nn. 70 and 72, the fact that the Commonwealth Act had not yet even been proclaimed was held not to require dismissal of the Victorian Attorney-General's suit to test its constitutionality since, as stated by Williams J., ". . . we were informed by counsel for the defendants that it will be proclaimed at the beginning of next year, and that in the meantime the necessary preliminary steps are being taken so that it may then be brought into effective operation." *Ibid.*, 278.

⁷⁵ (1923) 262 U.S. 447; 67 L. Ed. 1078.

injured persons for the maintenance of civil suits or actions. But the citizens of Massachusetts are also citizens of the United States. It cannot be conceded that a state, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof. While the State, under some circumstances, may sue in that capacity for the protection of its citizens (*Missouri v. Illinois*, 180 U.S. 208, 241),⁷⁶ it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government.⁷⁷ In that field it is the United States, and not the State, which represents them as *parens patriae*, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.⁷⁸

An effective principle of avoiding or deferring judicial review, fashioned of what the Supreme Court conceives to be basal requirements of a viable federal system, concerns review of constitutional decisions by the state courts. 'Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the Constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them.'⁷⁹ Based upon this precept an important body of doctrine has evolved: that the Supreme Court will not review the state court's determination of federal, including, of course, constitutional issues if its judgment can be sustained on independent state grounds;⁸⁰ nor

⁷⁶ State of Missouri held to have standing to sue Illinois in original suit in Supreme Court as representative and defender of the individual rights of its inhabitants not to have their health and comfort threatened by Illinois' Mississippi River drainage project. While jurisdiction was not rested on a claim that the acts of Illinois violated the Constitution, there would appear no reason why a like suit based on such a claim would not be equally justiciable. To this limited extent, the Australian doctrine finds a parallel in the United States. See *Tasmania v. Victoria* (1935) 52 C.L.R. 157.

⁷⁷ But see *Georgia v. Pennsylvania Railroad Co.* (1945) 324 U.S. 439; 89 L. Ed. 1051.

⁷⁸ *Massachusetts v. Mellon* (1923) 262 U.S. 447, 485-486; 67 L. Ed. 1078, 1084. Of course a state may have standing to sue the federal government (*Missouri v. Holland* (1920) 252 U.S. 416; 64 L. Ed. 641; *New York v. United States* (1946) 326 U.S. 572; 90 L. Ed. 326); or another state (*Pennsylvania v. West Virginia* (1923) 262 U.S. 623; 67 L. Ed. 143) when it seeks vindication of a right belonging to itself as a quasi-sovereign rather than to its citizens. And cf. *Hopkins Savings Association v. Cleary* (1935) 296 U.S. 315; 80 L. Ed. 251, where the Wisconsin State Banking Commission attacked the validity of a federal Act authorizing state building and loan associations to become federal associations by a majority vote of its shareholders without the consent of the state. Here the Court permitted the state to sue as *parens patriae* since the state was suing 'to protect the interests of its citizens against the unlawful acts of corporations created by the State itself'. For an illuminating treatment of state standing to sue in an original action in the Supreme Court, see Hart and Wechsler, *The Federal Courts and the Federal System* (1953) 251-258. Whether the device of a *parens patriae* suit by a state Attorney-General can be used to avoid the difficulty of lack of standing of an individual to challenge a general appropriation measure is uncertain. It has been argued both ways. Cf. Wynes, *op. cit.* (n. 72), 588 (Yes); Sawyer, *Australian Constitutional Cases* (2nd ed. 1957) 504 (No). The *Pharmaceutical Benefits Case*, *supra*, n. 72, did not present the issue since there the Act created rights and duties upon persons as well as authorized appropriations.

⁷⁹ Hughes C.J. in *United States v. Bank of New York and Trust Co.* (1936) 296 U.S. 463, 479; 80 L. Ed. 331, 339.

⁸⁰ *Herb v. Pitcairn* (1945) 324 U.S. 117, 125-126, 89 L. Ed. 789, 794-795. This is so even if the state court purported to decide a constitutional issue and decided it erroneously.

will it entertain a constitutional point other than that properly raised in the state court.⁸¹ Comparable principles have not been evolved in Australia. On the contrary, decisions of the state Supreme Courts are reviewed as those of any inferior jurisdiction in the same judicial hierarchy; which, of course, is precisely what they are in virtue of the High Court's broad appellate jurisdiction, unconfined, as is the Supreme Court's to federal questions,⁸² but extending to all matters of state as well as federal law.⁸³ As a consequence there is

Smith v. Adsit (1873) 16 Wallace 185; 21 L. Ed. 310; *Radio Station WOW, Inc. v. Johnson* (1945) 326 U.S. 120, 129; 89 L. Ed. 2092, 2100. 'We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its views of federal laws, our review could amount to nothing more than an advisory opinion.' *Herb v. Pitcairn* (1945) 324 U.S. 117, 126.

⁸¹ *Dewey v. Des Moines* (1899) 173 U.S. 193, 197-198; 43 L. Ed. 665, 666; *Wilson v. Cook* (1946) 327 U.S. 474, 483; 90 L. Ed. 793, 801; *Flournoy v. Wiener* (1944) 321 U.S. 253; 88 L. Ed. 708. But see *Terminiello v. Chicago* (1949) 337 U.S. 1; 93 L. Ed. 1131. Of course, the fact that the issue relied on was not explicitly considered in the opinion of the state court does not preclude review. In that event whether the Supreme Court will entertain the claim depends upon whether the record shows that the federal claim was adequately presented to the state court according to its practice and procedure. Stern and Gressman, *Supreme Court Practice* (2nd ed. 1954) 82-91; Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*. (Wolfson and Kurland ed. 1951) ss. 66-72, 75, 79, 82.

⁸² The statutes defining the appellate jurisdiction of the Supreme Court over state courts within the constitutional grant (Art. III, s. 2—'all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority') have been consistently construed as limiting the Supreme Court 'to the consideration of the federal questions named in the Constitution'. *Sauer v. United States* (1907) 206 U.S. 536, 546-547; 51 L. Ed. 1176, 1181-1182. The view was early rejected that the existence of a federal question in the state court record is enough to give the Supreme Court appellate jurisdiction over the whole case, so as to empower it to decide every question which the record presents, whether of local or federal law. *Murdock v. Memphis* (1875) 20 Wallace 590; 22 L. Ed. 429.

An interesting consequence is that while prior to the Civil War there was very little direct constitutional adjudication of the scope of federal power, a sizable body of such doctrine was indirectly worked out in the process of determining whether matters were within the federal jurisdiction. See Hart, 'The Relations Between State and Federal Law' (1954) 54 *Columbia Law Review* 489, 503-504.

It should be stated that in so far as the High Court's original jurisdiction is concerned (s. 76 (i), matters 'arising under this Constitution, or involving its interpretation'; s. 76 (ii), matters 'arising under any laws made by the Parliament'; s. 75 (i), matters 'arising under any treaty') the similar problem of delineating the scope of federal jurisdiction (what constitutes 'arising under') has been faced by the High Court. Here the High Court has been solicitous of preserving the jurisdiction of the state courts. *Australian Commonwealth Shipping Board v. Federated Seamen's Union of Australasia* (1925) 36 C.L.R. 442; *Miller v. Haweis* (1907) 5 C.L.R. 89; Wynes, *op. cit.* (n. 72), 616 ff. Unlike the situation in the United States an assertion of constitutionality is a basis of federal jurisdiction. The High Court has decided that once it obtains original jurisdiction by virtue of the existence of a constitutional issue, it has jurisdiction to decide all other issues, federal or state, necessary for complete adjudication. See Starke J. in *Carter v. Egg and Egg Pulp Marketing Board (Vici.)* (1942) 66 C.L.R. 557, 587. Cf. *Murdock v. Memphis*, *supra*.

⁸³ Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 737-738; Sir Owen Dixon, 'Address at the Annual Dinner of the American Bar Association' (1942) 16 *Australian Law Journal* 192, 194. Compare with U.S. Const., Art. III, s. 2, *supra*, Constitution of the Commonwealth of Australia, s. 73 giving the High Court jurisdiction to hear appeals, *inter alia*, '(i) Of any Justice or Justices exercising the original jurisdiction of the High Court: (ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council.'

absent the strong jurisdictional compulsion to ensure that state courts have first fairly passed upon the federal question and while, as a matter of policy drawn from the implications of federalism, the High Court might have insisted that the state court first face the federal issue, it has not done so. Indeed, the situation is quite the other way. In pursuance of its authority over the exercise of federal jurisdiction in courts other than the High Court,⁸⁴ Parliament has provided that 'any cause or part of a cause arising under the Constitution or involving its interpretation which is at any time pending in any court of a State may be removed into the High Court under an order of the High Court.'⁸⁵ The order is discretionary except when application is made by the Attorney-General of the Commonwealth or of a state in which case removal is mandatory. Further in the event of an *inter se* constitutional question arising in a state court, it is the duty of that court to proceed no further in the case, the cause being automatically removed to the High Court.⁸⁶ It will be observed that there is no requirement that the state court first be given an opportunity to pass upon the constitutional issue, or, at least, to pass upon the adequacy of an independent state ground to decide the cause. Since state courts are barred from considering *inter se* questions and may decide other constitutional issues only on sufferance of the High Court, it is fair to say that they are effectively by-passed as significant tribunals for the adjudication of constitutional issues.⁸⁷ (Ironically, the motivation for this distribution of jurisdiction so far as *inter se* questions are concerned was to prevent the High Court suffering precisely such a fate as a result of direct appeals from the state courts to the Privy Council.)⁸⁸

Another technique of avoiding, or at least postponing, tests of constitutional power, which operates after the review of a case is undertaken rather than before, is the interpretation of the Act in question in such a way as to preclude the constitutional issue from

⁸⁴ Constitution of the Commonwealth of Australia, s. 77.

⁸⁵ Judiciary Act 1903-1950, s. 40 (Cth.).

⁸⁶ *Ibid.*, s. 40A. S. 38A makes the High Court's jurisdiction over *inter se* matters exclusive.

⁸⁷ Congress has on at least one occasion (Emergency Price Control Act 1942 (U.S.A.): (1942) 56 Stat. 23; (1952) 50 U.S.C. §901) excluded state courts from passing upon constitutional issues. The Supreme Court upheld the power of Congress to do so. *Yakus v. United States* (1944) 321 U.S. 414; 88 L. Ed. 834; *Bowles v. Willingham* (1944) 321 U.S. 503; 88 L. Ed. 892.

⁸⁸ Any appeal directly from a state court to the Privy Council would have the effect of circumventing the constitutional compromise which required High Court approval before an appeal on such a question could be taken from the High Court. This happened in *Webb v. Outrim* [1907] A.C. 81, in which the Privy Council on appeal directly from the Victorian Supreme Court overruled the High Court's decisions which had evolved an implied immunity of instrumentalities doctrine as between states and Commonwealth. The decision was somewhat unsuccessful, the Parliament adding ss. 38A and 40A to the Judiciary Act to make sure it would never happen again, and the High Court treating it as if it never did happen anyway by promptly reaffirming its prior decisions. *Baxter v. Commissioners of Taxation* (1907) 4 C.L.R. 1087.

arising. Certainly the High Court as well as the Supreme Court would decline to pass upon the validity of an Act which the legislature did not enact; this would be to render the advisory opinion which both courts have rejected. It follows that neither court would pass upon the validity of an Act on the assumption that it meant something other than what the court construes it to mean. But how far will the court permit itself to be influenced in ascertaining the meaning of a statute by a desire to avoid a construction which would impose the duty of deciding a serious constitutional question? Given the wider range of considerations which the Supreme Court has permitted itself in the process of statutory interpretation, as compared with the High Court's narrower concern with textual exegesis, it is not surprising that the Supreme Court has gone farther in this direction in its quest for the prudent judgment. In a long line of cases the Supreme Court has asserted and acted upon a principle which elevates the consideration of avoiding constitutional issues almost to the level of meaning and intent in the process of statutory interpretation.⁸⁹ Sometimes, in terms of what is left of the original statutory scheme after the application of this principle, the statute might just as well have been invalidated. In this sense the technique amounts to an indirect and less offensive mode of judicial review. In one case a criminal statute proscribing contributions or expenditures by labour unions in connection with elections at which federal candidates are to be voted for was held inapplicable to the expenditures entailed in the publication and distribution of a union newspaper containing a statement urging members to vote for a certain congressional candidate, on the ground that the expenditures involved were not the kind of expenditures prohibited by the statute.⁹⁰ In another recent case⁹¹ the Court,

⁸⁹ E.g., Taft C.J. in *Richmond Screw Anchor Co. v. United States* (1928) 275 U.S. 331, 346; 72 L. Ed. 303, 308: 'It is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality.' Also Stone J. in *Lucas v. Alexander* (1929) 279 U.S. 573, 577; 73 L. Ed. 851, 854 and Hughes C.J. in *Crowell v. Benson* (1932) 285 U.S. 22, 62; 76 L. Ed. 598, 619. The conceptual justification sometimes given is that it is a fair inference that Congress intended to legislate in conformity with the Constitution rather than in violation of it, since 'it is always to be presumed the legislature designed the statute to take effect, and not to be a nullity.' Cooley, *Constitutional Limitations* (8th ed. 1927) 376. But this is based on the unlikely assumption that Congress clearly knows what no one else does—what Acts the Supreme Court will uphold and what it will invalidate.

⁹⁰ *United States v. C.I.O.* (1948) 335 U.S. 106; 92 L. Ed. 1849. 'If §313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.' (1948) 335 U.S. 106, 121; 92 L. Ed. 1849, 1861. Cf. Rutledge J., dissenting, (1948) 335 U.S. 106, 130; 92 L. Ed. 1849, 1865: 'By reading them [the expenditures charged] out of the section, in order not to pass upon its validity, the Court in effect abdicates its function in the guise of applying the policy against deciding questions of constitutionality unnecessarily. I adhere to that policy. But I do not think it justifies invasion of the legislative function by rewriting or emasculating the statute. This in my judgment is what has been done in this instance.'

⁹¹ *United States v. Rumley* (1953) 345 U.S. 41; 97 L. Ed. 770.

to avoid grave free speech questions, construed a congressional resolution authorizing a committee to investigate 'lobbying activities' as not authorizing inquiry into the mass distribution of literature to members of the public urging support of certain legislative programmes, despite considerable evidence that Congress envisaged lobbying as including precisely this kind of activity. It sufficed for the Court that such an interpretation 'is not barred by intellectual honesty. So to interpret is in the candid service of avoiding a serious constitutional doubt. "Words have been strained more than they need to be strained here in order to avoid that doubt."' ⁹²

Two other doctrines, not developed by the High Court, mark the Supreme Court's reluctance to pass upon constitutional questions and carry out the pattern of its distinctive view of the exercise of the power of judicial review. I refer to the doctrine of 'political questions' and the principle of selective review made possible by the Court's discretionary control over its appellate list.

The Court and its chroniclers have struggled hard to define what constitutes a 'political question'.⁹³ For our purposes it can be defined in terms of its consequences, as a kind of constitutional controversy which the Court candidly declines to entertain because, for one reason or another, it is deemed better to have it decided by another branch of the government. In deference to the principle, the Court has put beyond judicial cognizance whole provisions of the Constitution, e.g., Article IV, section 4, that 'The United States shall guarantee to every state in the union a Republican form government. . . .'⁹⁴ Likewise insulated from judicial review have been the fundamental constitutional issues of the right to vote in federal elections as that right has been diluted by grossly unfair legislative districting (gerrymandering) making the vote of one in a sparsely settled district

⁹² (1953) 345 U.S. 41, 47; 97 L. Ed. 770, 776, *per* Frankfurter J. In *United States v. Harriss* (1954) 347 U.S. 612; 98 L. Ed. 989 the Court applied similar principles to save the Federal Lobbying Act against a serious charge of unconstitutional vagueness in a criminal statute. Jackson J., dissenting, was moved to remark: 'The clearest feature of the Court's decision is that it leaves the country under an Act which is not like any Act passed by Congress. Of course, when such a question is before us, it is easy to differ as to whether it is more appropriate to strike out or to strike down. But I recall few cases in which the Court has gone so far in rewriting an Act.' (1954) 347 U.S. 612, 633; 98 L. Ed. 989, 1004-1005. See also *Peters v. Hobby* (1955) 349 U.S. 331; 99 L. Ed. 1129 and *Kent v. Dulles* (1958) 78 Sup. Ct. 1113.

⁹³ Frank, 'Political Questions' in Cahn (ed.), *Supreme Court and Supreme Law* (1954) 36: 'It is, measured by any of the normal responsibilities of a phrase of definition, one of the least satisfactory terms known to the law.' See Dodd, 'Judicially Non-enforceable Provisions of Constitutions' (1931) 80 *University of Pennsylvania Law Review* 54; Post, *The Supreme Court and Political Questions* (1936).

⁹⁴ *Luther v. Borden* (1849) 7 Howard 1; 12 L. Ed. 581 (whether a state government is the established one and is 'republican' in form is a political question); *Pacific States Telephone and Telegraph Co. v. Oregon* (1912) 223 U.S. 118; 56 L. Ed. 377 (whether a government which permits the initiative and referendum is 'republican' in form is a political question). Another example is Art. IV, s. 2, clause 2 requiring one state to surrender to another a fugitive from justice. The Court has held this to be 'merely declaratory of a moral duty'. *Kentucky v. Dennison* (1861) 24 Howard 66; 16 L. Ed. 717.

equivalent to the votes of several in a more populated district.⁹⁵ The Court has, in addition, invoked the doctrine to decline passing on a variety of issues: whether a congressionally proposed amendment had lost its vitality through lapse of time and hence could not be ratified by a state legislature;⁹⁶ whether a treaty had been broken;⁹⁷ whether a vessel is immune from suit as one owned by a foreign sovereign, when the State Department so certifies.⁹⁸ The conceptual theory behind this doctrine is as difficult to pin down as its definition. It has variously been justified in terms of the requirements of the principle of separation of powers; of avoiding the futility and impossibility of adjudicating a controversy in the absence of relevant legal considerations, or where enforcement is beyond the competence of a court of law; of preserving the right of the people to decide certain issues themselves.⁹⁹ That it is a hoary device¹ to ensure what the Court deems a *prudent* exercise of judicial review is clear.²

No comparable body of doctrine has been evolved by the High Court, though whether this is because the opportunity has not arisen or because of the High Court's differing conception of 'prudence', or indeed, because prudence would not be regarded by the High Court as a permissible consideration in the exercise of a constitutional responsibility, it is not possible to say. The case of *Attorney-General (N.S.W.) v. Trethowan*³ suggests that it is probably not simply the first. In 1929 the New South Wales Parliament amended its constitution to prohibit abolition of the Legislative Council except by a Bill which, prior to presentation to the Governor for Royal Assent, should be approved in a popular referendum. It was further provided that this amendment could not be altered except by a similar procedure. A subsequent attempt to abolish the Legislative Council and repeal this amendment by a procedure not in accordance with these requirements was met by a successful suit in the New South Wales Supreme Court for a declaration of invalidity and an injunction preventing parliamentary officers from presenting the Bill

⁹⁵ *Colegrove v. Green* (1946) 328 U.S. 549; 90 L. Ed. 1432 ('of a peculiarly political nature and therefore not meet for judicial determination'); *South v. Peters* (1950) 339 U.S. 276; 94 L. Ed. 834.

⁹⁶ *Coleman v. Miller* (1939) 307 U.S. 433; 83 L. Ed. 1385.

⁹⁷ *Ware v. Hylton* (1796) 3 Dall. 199.

⁹⁸ *Ex parte Peru* (1943) 318 U.S. 578; 87 L. Ed. 1014.

⁹⁹ Post, *The Supreme Court and Political Questions* (1936) 98-124.

¹ The principle was articulated as early as *Marbury v. Madison* (1803) 1 Cranch 137, 166-167; 2 L. Ed. 60, 67.

² John P. Frank in a suggestive analysis has attempted to define the criteria of prudence, justifying refusal to entertain jurisdiction where: (1) there is a need for a quick and single policy; (2) only the legislature is capable of providing an effective solution; (3) another agency of government has clear and unequivocal responsibility to make the particular decision; or (4) the situation is unmanageable, because of expected lack of co-operation by other branches or popular outrage. Frank, *op. cit.* (n. 93), 38-40.

³ (1931) 44 C.L.R. 394; affirmed by Privy Council, [1932] A.C. 526.

for Royal Assent without first submitting it to popular referendum. Not only did the High Court venture to adjudicate the issue, at this early stage, upholding the state court's declaration of invalidity, but it also inferentially sustained the injunction, thereby sanctioning a direct interference with the legislative process. One would suppose this case was a suitable occasion for the adumbration of a 'political question' philosophy, if the Court were so minded.⁴

Certainly one of the most distinctive attributes of the Supreme Court as an institution and directly involved with the policy of a parsimonious judicial review is the Court's discretionary control over its appellate list. Indeed, Justice Rutledge has viewed it as 'perhaps the most effective implement for making the policy effective'.⁵ The pattern of congressional control over the appellate jurisdiction of the Supreme Court from decisions of lower federal and state courts has evolved over the years to the point where the Court today is virtual master of the cases it will hear, even over those which come fully clothed with the attributes of justiciability.⁶ Originally motivated by the imperative need to relieve the Court of an increasing and impossible magnitude of work, matching the population and industrial expansion of the whole country, it has served to alter the fundamental character of the Court as a court, changing it from merely a final appellate authority to a 'tribunal of special resort for the settlement only of such questions as it deems to involve a substantial public concern'.⁷

Appeals as of right are limited to a narrow class of cases: from highest state courts where a federal Act is held unconstitutional or a state Act upheld;⁸ from any federal court where a federal Act is

4 '... the [Supreme] Court has never formally asserted any power to control the judgment of Congress or the President when they are called upon to consider constitutional questions as an incident of the discharge of their own functions'. Hart, 'Professor Crosskey and Judicial Review' 67 *Harvard Law Review* (1954) 1456, 1458. In *Hughes and Vale Pty Ltd v. Gair* (1954) 90 C.L.R. 203 the Court did decline to enjoin the presentation of an allegedly unconstitutional Bill of the Queensland Legislative Assembly for the Royal Assent. But, as Professor Cowen has observed, unlike *Trethowan* 'there was a speedy remedy available once the Act had received the Royal Assent.' 'The Injunction and Parliamentary Process' (1955) 71 *Law Quarterly Review* 336, 340. Dixon C.J., though for himself alone, cast doubt on the validity of the grant of the injunction in *Trethowan*, pointing out that the High Court had restricted the question before it to the validity of the Act in question and hence had not given consideration to the injunction issue. His explanation of the reason for the restrictive grant of review, however, is instructive: '... it was not because the court was of opinion that the decision of the Supreme Court on that point was right, but because it was thought inconvenient to allow a procedural question of that sort to intrude itself into such a matter calling for urgent and definite decision.' *Hughes and Vale Pty Ltd v. Gair* [1954] *Argus* 1093, 1094. It is most unlikely that the United States Supreme Court would have regarded this as a minor matter of procedure to be disregarded in order to decide the constitutional issue, however pressing.

⁵ *Rescue Army v. Municipal Court* (1947) 331 U.S. 549, 568; 91 L. Ed. 1666, 1678.

⁶ The story is told in Frankfurter and Landis, *The Business of the Supreme Court* (1928).

⁷ Schwartz, *The Supreme Court* (1957) 151.

⁸ (1948) 62 Stat. 929; (1952) 28 U.S.C. §1257.

held invalid in a suit to which the United States is a party;⁹ from federal courts of appeal where a state Act is invalidated.¹⁰ These tend to comprise no more than roughly eight *per cent* of the Court's list.¹¹ Moreover, while theoretically the Court is obliged to review these cases, something like half are disposed of on the basis of the appeal papers without oral argument or further briefing;¹² and in not a few cases the writ of error is summarily dismissed because, while falling within the category of appeals as of right, the constitutional question raised is not substantial.¹³ Apart from cases of original jurisdiction, which constitute a minute fraction of the Court's work,¹⁴ the remainder and great bulk of the cases brought to the Supreme Court for review are entertained only if the Court chooses, on the basis of its *certiorari* jurisdiction. The discretionary jurisdiction, in the exercise of which the Court is accountable to no one and reasons are not given, obviously constitutes a significant mechanism for keeping the Court's task within manageable proportions and permitting it to devote adequate time and energy to the serious cases accepted for review.¹⁵ But it has an equally consequential by-product—it affords

⁹ (1948) 62 Stat. 928; (1952) 28 U.S.C. §1252.

¹⁰ (1948) 62 Stat. 928; (1952) 28 U.S.C. §1254. There are in addition appeals as of right from federal courts in certain narrow situations. (1948) 62 Stat. 929; (1952) 28 U.S.C. §1253 (from three-judge federal district courts); (1948) 62 Stat. 989; (1952) 15 U.S.C. §29 (from ordinary district courts in certain anti-trust cases); (1948) 62 Stat. 989; (1952) 49 U.S.C. §45 (cases under the Interstate Commerce Act 1948 (U.S.A.)); (1948) 62 Stat. 844; (1952) 18 U.S.C. §3731 (under the Criminal Appeals Act 1948 (U.S.A.)); and a few others. See Stern and Gressman, *Supreme Court Practice* (2nd ed. 1954) 42.

¹¹ 139 cases out of an appellate list of 1645 in the 1957 term ('The Supreme Court, 1957 Term' (1958) 72 *Harvard Law Review* 77, 100, Table II); 121 cases out of an appellate list of 1514 in the 1956 term ('The Supreme Court, 1956 Term' (1957) 71 *Harvard Law Review* 85, 98, Table II); 121 out of 1468 in the 1955 Term ('The Supreme Court, 1955 Term' (1956) 70 *Harvard Law Review* 83, 100, Table II); 83 out of 1226 in the 1954 Term, ('The Supreme Court, 1954 Term' (1955) 69 *Harvard Law Review* 119, 203, Table II).

¹² See Douglas J., dissenting, in *Linehan v. Waterfront Commission* (1954) 347 U.S. 439, 439-440; 98 L. Ed. 826, 827: 'This case illustrates what I fear is a growing practice of the Court of diluting the Act of Congress which gives us jurisdiction of appeals. 28 U.S.C. §§1253, *et al.* The Congress carved out a group of cases, of which this is one, that comes here as of right and is not dependent, as are petitions for *certiorari*, on a vote of four Justices out of nine for an adjudication by the Court on the merits of the controversy. In recent years the Court has more and more dismissed or affirmed appeals, with no opportunity of counsel to make oral argument and without any opinion by the Court.'

¹³ See *Zucht v. King* (1942) 260 U.S. 174; 67 L. Ed. 194. The practice is governed by Rule 12 (1) of the Rules of the Supreme Court. For discussion see Note, 'The Substantial Federal Question' (1949) 62 *Harvard Law Review* 488.

¹⁴ 1 out of 1765 cases in the 1957 term; 3 out of 1670 cases in the 1956 term; 4 out of 1630 cases in the 1955 term; 0 out of 1352 cases in the 1954 term. Tables I of Notes in Volumes 69, 70, 71 and 72 *Harvard Law Review*, cited *supra*, n. 11.

¹⁵ Justice Frankfurter pre-eminently has been concerned with the effect of an oppressive burden of business upon the quality of adjudication. In his memorandum opinion in *Kernon v. American Dredging Co.* (1958) 78 Sup. Ct. 394, 407-408 he flatly declared that '... deliberate consideration and wise adjudication of cases that concededly ought to be reviewed here make a demand greater than the resources of time and thought possessed by this Court, no matter how ably constituted, reasonably afford. See *Ex parte Republic of Peru* 318 U.S. 578, 602-603; 87 L. Ed. 1014 (dissenting opinion).' The reference is to the following observation by Justice Frankfurter:

'To remit a controversy like this to the circuit court of appeals where it properly

the Court the widest possible range of choice for the exercise of a *prudently selective* judicial review.¹⁶ In the words of Justice Frankfurter

petitions may have been denied because, even though constitutional questions were raised, it seemed to at least six members of the Court¹⁷ that the issue was either not ripe enough or too moribund for adjudication; that the question had better await the perspective of time or that time would bury the question or, for one reason or another, it was desirable to wait and see; or that the constitutional issue was entangled with non-constitutional issues that raised doubt whether the constitutional issue could be effectively isolated; or for various other reasons not relating to the merits.¹⁸

The High Court has no such control over its list, the magnitude of its business never having created the occasion for such an innovation.¹⁹ In the first place, a substantial amount of its business, including constitutional adjudication, is constituted of cases in its original jurisdiction,²⁰ principally heard by single Justices and over which its discretion is obviously limited. In the second place, those appeals which require 'special leave' constitute a narrow class of cases—

belongs is not to be indifferent to claims of importance but to be uncompromising in safeguarding the conditions which alone will enable this Court to discharge well the duties intrusted exclusively to us. The tremendous and delicate problems which call for the judgment of the nation's ultimate tribunal require the utmost conservation of time and energy even for the ablest judges. Listening to arguments and studying records and briefs constitute only a fraction of what goes into the judicial process. For one thing, as the present law reports compared with those of even a generation ago bear ample testimony, the types of cases that now come before the Court to a considerable extent require study of materials outside the technical law books. But more important, the judgments of this Court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussions in Conference. Without adequate study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that mature and fruitful interchange of minds which is indispensable to wise decisions and luminous opinions. It is therefore imperative that the docket of the Court be kept down, that no case be taken which does not rise to the significance of inescapability for the responsibility intrusted to this Court.'

¹⁶ Only a small number of the petitions for *certiorari* are granted. Some 80-90 per cent are annually denied. To some extent the Court has indicated the considerations which guide it. Rules of the Supreme Court, Rule 38 (5). For a critical review of the Court's use of its discretion to avoid its responsibility, see the series of articles by Professor Harper and collaborator entitled 'What the Supreme Court Did Not Do in the — Term': 1949 term, (1950) 99 *University of Pennsylvania Law Review* 293; 1950 term, (1951) 100 *University of Pennsylvania Law Review* 354; 1951 term, (1953) 101 *University of Pennsylvania Law Review* 439; 1952 term, (1954) 102 *University of Pennsylvania Law Review* 427.

¹⁷ It has become established that it takes only a minority of four affirmative votes to grant a petition for *certiorari*. Stern and Gressman, *Supreme Court Practice* (2nd ed. 1954) 145-146.

¹⁸ Dissenting in *Darr v. Burford* (1950) 339 U.S. 200, 219, 227; 94 L. Ed. 761, 775, 779. The denial of a writ of *certiorari* imparts no expression of opinion on the merits or on the jurisdiction of the Court. *United States v. Carver* (1923) 260 U.S. 482, 490; 67 L. Ed. 361, 364; *Darr v. Burford*, *supra*.

¹⁹ Compare the figures in nn. 14, *supra*, and 20, *infra*. The physical task of a single national court for a population of ten million is obviously not comparable to that of one for a population of 170 million.

²⁰ The *Official Year Book of the Commonwealth of Australia*, No. 41 (1955) indicates the Court issued 151 writs in 1952 and 173 in 1953, as compared with having set down for hearing 113 appeals in 1952 and 124 in 1953.

where the amount in issue is under £1,500 or where the judgment appealed from is interlocutory.²¹ All other cases (except criminal cases for which special leave to appeal is always required)²² may be appealed as of right. Further, as has already been indicated, even where a case would otherwise require special leave, it is appealable in most cases as of right if it involves a constitutional question. In sum, the public implication of the Court's work has not, as has that of the Supreme Court, come to overwhelm its character as a court for private litigation of private rights—where the elements of justiciability exist it has no discretion to decline to adjudicate constitutional issues out of considerations of prudence.

(To be concluded)

²¹ Judiciary Act 1903-1955, s. 35 (Cth.).

²² *Ibid.*, s. 35 (1) (b).