

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

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PART II¹

3. JUDICIAL METHOD IN CONSTITUTIONAL ADJUDICATION

(a) *Legalism or Policy*

In the preceding sections of this paper I have sketched the salient features of the High Court and the Supreme Court in terms of their attitudes towards the exercise of judicial review. A central proposition asserted was that the Supreme Court was, by comparison, *timorous*, in its deference to the legislative judgment, and *parsimonious*, in its reluctance to pass upon constitutional questions. And these characteristics I attempted to account for, in part, in terms of a history of political disquiet concerning the institution of judicial review, and of intellectual doubts of its wisdom and propriety, neither being part of the High Court's inheritance in Australia. Turning now to the courts' conception of the considerations relevant to the task of constitutional adjudication, something of a paradox appears. For while timorousness and parsimony distinguish the Supreme Court's attitude to the exercise of judicial review, the polar characteristics of boldness and scope mark its appraisal of the factors deemed relevant in measuring the reach of the constitutional command. And while the High Court is relatively undisturbed by compunctions over venturing to grapple with constitutional questions and checking the legislative judgment, it has been conservative and restrictive in appraising the criteria of constitutional adjudication.

Common ground in the conception of the judicial method in interpreting the Constitution is the verbal recognition that the task is not altogether responsive to the traditional methods and techniques of the common law in construing legislative language. Marshall's famous *dictum* that 'we must never forget that it is a constitution we are expounding'² was early echoed in the words of O'Connor J. that 'it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the

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² *McCulloch v. Maryland* (1819) 4 Wheaton 316, 407; 4 L. Ed. 579.

varying conditions which the development of our community must involve'.³ Certainly the founders (or some of them) were conscious, while in the act of drafting the Constitution, that the High Court would necessarily become an active partner in shaping its meaning rather than a passive organ interpreting its language.⁴ Indeed, an argument advanced against allowing appeals to the Privy Council was that that tribunal had manifested in its interpretation of the Canadian Constitution a 'rigid adherence to what is literal, as though they were interpreting simply an Act of Parliament, rather than by a regard for those great constitutional principles which throw light upon and assist in the efficient interpretation of a Constitution'.⁵

But while the need for interpreting a constitution in a large spirit in which the techniques of statutory interpretation are not wholly apposite was and is recognized in the traditions of both courts, the implications of that proposition upon the art of adjudication have not been viewed in the same way. Thus Dixon C.J., while approving the language of O'Connor J. just quoted, as a statement of 'the principles of constitutional interpretation which this Court adopted early in its history and from which, I believe, it has never intentionally departed'⁶ and counselling avoidance of 'pedantic and narrow constructions',⁷ has insisted at the same time that:

the court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other, and that it has nothing whatever to do with the merits or demerits of the measure. Such a function has led us all I think to believe that close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is any-

³ *Jumbunna Coal Mine v. Victoria Coal Miners' Association* (1908) 6 C.L.R. 309, 367-368.

⁴ '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, Storey, 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 Australian Federal Convention, Third Session, Melbourne, 20 January to 17 March, 1898*, i 283. See the curious but revealing observation of Sir John Downer, *ibid.*, 275: 'With them [the High Court judges] rest the interpretation of intentions which we may have in our minds, but which have not occurred to us at the present time.'

⁵ Mr Symon in *Official Record of the Debates of the Australian Federal Convention, Third Session, Melbourne, 20 January to 17 March, 1898*, i 344. His retort to the delegate who stated that the judges of the High Court 'are just dropping the feeding bottle' in rebuttal of his point that they were better equipped than the Privy Council to deal with their problems is a classic repartee which deserves preserving. Remarkd Symon: 'Then if they are just dropping the feeding bottle—a not inapt expression—they will be dropping it for the Judges of the Privy Council to take it up, and I should prefer those who have escaped from that condition to those who are just entering upon it.'

⁶ *Bank of N.S.W. v. The Commonwealth* (1948) 76 C.L.R. 1, 332.

⁷ *Australian National Airways Pty Ltd v. The Commonwealth* (1945) 71 C.L.R. 29, 85.

thing else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.⁸

While Dixon C.J. has conceded that the purpose and nature of 'constitutional checks and guarantees makes it inevitable that they will not be capable of the objective treatment characteristic of the administration by courts of private law',⁹ it is nevertheless to the 'strict logic and the high technique of the common law', to 'fixed concepts, logical categories and prescribed principles of reasoning'¹⁰ that the judicial method in constitutional adjudication should conform. There would probably be little disagreement that in this Dixon C.J. speaks substantially for his colleagues and fairly describes the judicial method of the High Court.

It is difficult to describe a theory of judicial method which would gain universal acceptance among Supreme Court Justices for all kinds of constitutional questions or to describe one pattern of method which would fairly characterize the Court's approach to constitutional adjudication at all periods and for all issues. It is possible to say, however, that the method and criteria of constitutional adjudication advanced by Dixon C.J. would find little acceptance in the contemporary Supreme Court.¹¹ In the United States 'legalistic' has become an opprobrious adjective. Fixed concepts and logical categories have come to be regarded as chimeras concealing the true springs of motivation of decision making. And least of all in interpreting the Constitution can linguistics and logic serve the dynamic function of preserving the constitution of an earlier generation as a workable instrument of contemporary government. While the purely personal value choices of the judges are no less deemed irrelevant and improper in deriving constitutional meaning, a pragmatic evaluation of alternatives in light of the ethos of the Constitution in the context of new and ever-changing challenges is a difficult but inevitable ingredient of the process of judicial review. Strictly legalistic techniques, therefore, must be subordinated in favour of a sophisticated use of the world of fact; of sociology, economics,

⁸ Remarks of Dixon C.J. on being sworn in as Chief Justice, (1952) 85 C.L.R. xi, xiii-xiv. These words are quoted along with lines from Magna Carta in the frontispiece of Dr Wynes' treatise, *Legislative, Executive and Judicial Powers in Australia* (2nd ed. 1956). I take it there is warrant, therefore, for treating the idea as central.

⁹ Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal* 468, 471.

¹⁰ *Ibid.*, 469.

¹¹ '... in matters of federal law, we have in Australia adhered more to the older tradition. Notwithstanding the great similarity in our institutions, there is, I believe, in the outlook of American lawyers and of Australian lawyers upon federal law and the functions of the highest courts a perceptible difference. I feel that in Australia we look upon the problems with which the High Court deals from a much more legalistic point of view than that which is now currently adopted by lawyers towards similar problems with which the Supreme Court of the United States deals.' Dixon, 'Address at the Annual Dinner of the American Bar Association' (1942) 16 *Australian Law Journal* 192, 194.

political theory and history. Holmes, the pragmatist, enunciated what has become the prevailing view when, in sustaining the validity of a treaty governing a matter about which the federal government would have been otherwise unable to legislate, he stated:

... when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.¹²

(b) *An Epitome—Defining State Power in Interstate Commerce*

This contrast between what may be termed a legalistic, as opposed to a policy or interest-balancing, interpretation has been noted and effectively described by Australian commentators.¹³ It will serve present purposes best simply to epitomize the contrast, by observing the way in which the two courts have dealt with facets of a basic problem of federalism—defining the tolerable limits of disparate state regulation of interstate activities. There is a difference, of course, in the constitutional bases for the restriction upon state power. In Australia the restriction derives directly from section 92 providing that trade, commerce and intercourse among the states shall be absolutely free, which has been interpreted as a restriction upon both Commonwealth and state power. In the United States the restriction was developed as a negative implication from the paramount grant of power in Congress over interstate commerce. Both doctrines, however, confront the courts with the same competing considerations and pressures inherent in a federal structure and call for their accommodation in a workable system.¹⁴ Moreover, the textual setting in

¹² *Missouri v. Holland* (1920) 252 U.S. 416, 433-434; 64 L. Ed. 641.

¹³ Sawyer, 'Constitutional Law' in Paton (ed.), *The Commonwealth of Australia* (1952) 52-69; Sawyer, 'The Supreme Court and the High Court of Australia' (1957) 6 *Journal of Public Law* 482; Stone, 'A Government of Laws and Yet of Men, The Australian Commerce Power' (1950) 25 *New York University Law Review* 451. See also McWhinney, 'Judicial Positivism in Australia' (1953) 2 *American Journal of Comparative Law* 36; Holmes, 'Evidence in Constitutional Cases', and comments by Dr Coppel, Associate-Professor Sawyer, and Mr Phillips in 'Proceedings of the Sixth Legal Convention of the Law Council of Australia' (1949) 23 *Australian Law Journal* 235, 238, 240, 242.

¹⁴ The difference is stressed in the joint majority opinion of Dixon C.J. and McTiernan and Webb JJ. in *Hughes and Vale Pty Ltd v. N.S.W.* (No. 2) (1955) 93 C.L.R. 127, 174.

which the problem is posed is not too dissimilar for purposes of comparing method, whatever may be true of result. Certainly once section 92 is interpreted to permit some regulation and some taxation, the distinctiveness in the textual setting of the problem becomes less significant. The problem is inevitably twofold in both systems: (1) determining what constitutes the interstate commerce which falls within the protection; and (2) defining the protection afforded.

The approach of the High Court to the first problem has been through 'the use of the Aristotelian distinction between essentials and incidentals (accidents)'.¹⁵

If some fact or event or thing which itself forms part of trade, commerce or intercourse or forms an essential attribute of that conception (essential in the sense that without it you cannot bring into being that particular example of trade, commerce or intercourse among the States) is made the subject of the operation of a law which by reference to it or in consequence of it imposes some restriction or burden or liability, it does not matter how circuitously it is done or how deviously or covertly. . . . But generally speaking, it will be quite otherwise if the thing with reference to or in consequence of which the law operates or which it restricts or burdens is no part of inter-State trade and commerce and in itself supplies no element or attribute essential to the conception. It will not be enough that it affects something which, because it is a *sine qua non* to the existence of some subject of the freedom which s. 92 guarantees, has a consequential effect on what might otherwise have been done in inter-State trade.¹⁶

This conception, of course, posits the existence of a sharply defined line marking off the beginning and the ending of an interstate movement which is ascertainable by testing for the existence of the essential features of the conception of interstate commerce. For example, a Sydney commission agent sold apples which had been shipped to him by a Tasmanian producer under a commission-sale arrangement. The Court upheld the application to this sale of a New South Wales regulation fixing maximum commission rates on the ground that interstate commerce had come to an end before the sale.¹⁷ In *Wragg's Case*, Sydney importers of Tasmanian potatoes resold them in New South Wales. Some importers did not take the potatoes into store but sold them ex-wharf, delivery being taken by the purchaser at the wharf. The Court upheld the application of the New South Wales maximum price regulations.¹⁸ Dixon C.J., for the majority, stated the governing propositions: Economic interdependence between

¹⁵ Derham, 'The Second Hughes and Vale Case' (1956) 29 *Australian Law Journal* 476, 485. In the following discussion of section 92 I have drawn upon this study of Professor Derham's as well as one by Mr Ross Anderson, 'Recent Trends in the Federal Commerce Power and Section 92' Part II (1955) 29 *Australian Law Journal* 276.

¹⁶ Dixon C.J. and McTiernan, Webb and Kitto JJ. in *Grannal v. Marrickville Margarine Pty Ltd* (1955) 93 C.L.R. 55, 78.

¹⁷ *Grannal v. Kellaway & Sons Pty Ltd* (1954) 93 C.L.R. 36.

¹⁸ *Wragg v. N.S.W.* (1953) 88 C.L.R. 353.

interstate and domestic trade cannot affect 'the legal distinction which the Constitution itself makes'. What is indispensable to the interstate transaction is within section 92, as, for example, the possession by the importer. Any sale or other disposition by the importer, however, forms part of the domestic trade of the state into which section 92 cannot be pushed on the ground that interstate transportation depends upon it.

The law restricting the price is not one operating in reference to or in consequence of any matter or thing itself forming part of trade, commerce or intercourse among the States. It does not limit the legal freedom to import potatoes or to contract to buy them for shipment from Tasmania. Its operation is to create conditions of trade in potatoes within New South Wales which react on the economic, not the legal, capacity of the trader desiring to import Tasmanian potatoes. The economic consequences which it may have upon interstate trade may well be serious, but that is a different thing from interference by law or government action with the freedom which s. 92 confers. When it is said that s. 92 gives protection against restrictions upon trade, commerce and intercourse among the States which are direct as distinguished from laws or governmental acts which involve some indirect or consequential prejudice, it is this kind of thing that is contemplated.¹⁹

The same method is used to delineate the beginning of an interstate transaction. In the *Margarine Case*²⁰ the Court held beyond the protection of section 92, a New South Wales law which imposed restrictions upon and required a licence for the production of margarine as applied to a producer of margarine for interstate (as well as intra-state) shipment. In the principal opinion, Dixon C.J. reasoned that the crucial factor was that the law 'was not upon the freedom of trading in the commodity among the states but upon bringing it into existence'²¹ and it would be immaterial that the motive was to join in a conspiracy with other states to curtail trade in margarine to protect the butter industry. Production is necessary for interstate trade, but it is not an essential attribute of that conception. Fullagar J., concurring, pointed out that,

The activity for which immunity is claimed is the manufacture of margarine. It is impossible to say that this activity possesses the character of interstate trade or commerce, and that is the end of the case. . . . Section 92 protects only activities which themselves possess the character of interstate trade, commerce or intercourse.²²

¹⁹ *Ibid.*, 387.

²⁰ *Grannal v. Marrickville Margarine Pty Ltd* (1955) 93 C.L.R. 55.

²¹ *Ibid.*, 76.

²² *Ibid.*, 81-82. A 'realist' may see the motivation of these apparently dogmatic and narrow restrictions upon the interstate commerce immunized by s. 92 in a desire to facilitate the power to govern these transactions. Before the *Hughes & Vale Cases* it was most uncertain what, if any, kind of regulation of interstate commerce would escape the prohibition of s. 92. Some support for this view may be found in the relatively liberal interpretation of s. 51 (i) giving Parliament power to make laws with respect

The task of defining the protection afforded interstate commerce has tended to be dealt with along comparable lines. It follows from the rationale and holdings of the foregoing cases that where the restriction impinges upon an aspect of the transaction which is not of the essence of its interstate character, section 92 has no effect regardless of the seriousness of the practical economic consequences which the particular restriction may be expected to produce upon interstate commerce. The point clearly appears in an early dissenting opinion of Dixon J.²³ which has become the accepted view:²⁴

The expression 'trade, commerce, and intercourse among the States' describes a section of social activity by reference to special characteristics. The freedom it gives plainly relates to those characteristics. It is only where they are present that the activity is to be absolutely free. It appears to me to be natural to understand a freedom that is so given as referring to restrictions or burdens imposed in virtue of those characteristics upon the presence of which the grant of immunity is based. . . . Very many of the difficulties which have been felt as to a logical application of the words 'absolutely free' to inter-State trade, commerce and intercourse, disappear, I think, if it is recognized that it is a freedom from restrictions or burdens which have reference to one or other of the distinguishing features which form the basis of the immunity. Thus a deserting husband might be arrested under a law of a State notwithstanding that his destination lay over the border. But if the State law made his liability to arrest depend not on the fact of desertion but upon his attempting to leave the State, I should think that s. 92 would invalidate it. In the first case, his inter-State journey might be interrupted but only as a consequence produced by a law which had no reference to any aspect of trade, commerce and intercourse among the States. In the other case, the State boundary is adopted by the law as the limit of the deserting husband's movement; the inter-State character of his flight is made the reason for his detention.

A law of a State forbidding the mixing of straw chaff with hay chaff would be perfectly good even if such a mixture were desired or required for an inter-State commercial dealing; but, if the law simply penalized the sale of such a mixture, it could not extend to sales made for delivery across the inter-State boundary. The first law applies independently of any quality which goes to constitute inter-State trade, the second depends for its application upon an essential ingredient of commerce, sale . . .

. . . given an act or transaction which falls within the conception of trade, commerce or intercourse among the States and a restriction or burden operating upon that act or transaction, it appears to me that

to interstate trade and commerce. See Anderson, 'Recent Trends in the Federal Commerce Power and Section 92' (1955) 29 *Australian Law Journal* 276, 277. As Professor Sawyer observes, 'Nothing in the semantic structure of s. 92 requires that the denotation of "trade, commerce and intercourse among the States" should be narrower than the denotation of the subject of power in s. 51 (i), and the decision to narrow the protection is a policy one'. Sawyer, *Australian Constitutional Cases* (2nd ed. 1957) 327.

²³ *Gilpin Ltd v. Commissioner for Road Transport (N.S.W.)* (1935) 52 C.L.R. 189, 205-206.

²⁴ *Hughes & Vale Pty Ltd v. N.S.W. (No. 1)* (1954) 93 C.L.R. 1; [1955] A.C. 241.

it must be an infringement upon the absolute freedom guaranteed by s. 92 unless the restriction or burden is imposed in virtue of or in reference to none of the essential qualities which are connoted by the description 'trade, commerce and intercourse among the States'.²⁵

The point was developed in *Hughes & Vale Pty Ltd v. N.S.W.* (2)²⁶ in which the N.S.W. Transport (Co-ordination) Act 1931-1951 was invalidated because 'its cardinal provision (s.12) goes to the very essence of the inter-State transaction and forbids it, that is unless licensed'. On the other hand, section 92 does not bar a state from imposing restrictions upon 'the incidents of the transaction which do not necessarily give it the character of trade, commerce or intercourse or of an inter-State transaction' so long at least as it does not impose a real impediment. Thus, for example, restrictions upon hours of travel, prescribed emergency equipment, driver relief, traffic flow and the like are not upon essential attributes of the conception of interstate trade and hence, and so long as they do not impose any real obstruction to trade, as hours of travel so limited as to make transportation impossible, are valid as *regulations* of incidents of interstate trade.²⁷

Of the numerous Supreme Court cases dealing with the definition of activities which fall within the scope of interstate commerce and hence qualify for the protection against state regulation implied from the Commerce Clause's grant of paramount authority to Congress, it will serve present purposes to discuss two, *Baldwin v. Seelig, Inc.*²⁸ and *Hood & Sons, Inc. v. Du Mond*.²⁹ These cases deal with problems and exemplify modes of approach which afford some basis of comparison with the High Court decisions just described.

Baldwin v. Seelig concerned the validity of New York laws which prohibited the sale within the state of milk purchased by New York dealers from out-of-state producers at prices below the minimum price set for local purchases. The contention advanced by New York was that while New York could not lay the prohibition upon the interstate purchase by New York dealers, it could prohibit the resale within New York of milk which had become the property of the New York dealers. This would appear to be fundamentally the proposition adopted by the High Court—the latter sale in New York was not essential to the concept of interstate commerce. Justice Cardozo rejected the contention relying upon the economic effect of the regulation, the intent of the framers and the grand design of the Constitution which he concluded would be imperilled by sus-

²⁵ See Prof. Sawyer's critical observations in Sawyer, *Australian Constitutional Cases* (2nd ed. 1957) 269.

²⁶ (1955) 93 C.L.R. 127, 150 (opinion of Dixon C.J. and McTiernan and Webb JJ.).

²⁷ *Ibid.*, 162-163.

²⁸ (1935) 294 U.S. 511; 79 L. Ed. 1032.

²⁹ (1949) 336 U.S. 525; 93 L. Ed. 865.

taining the regulation—considerations of dubious relevance in the High Court's announced framework of decision-making in this area. He stated, in language frequently relied upon in subsequent decisions:

Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. . . . Imposts or duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. I, s. 8, clause 3. 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business. . . .' Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. We are reminded in the opinion below that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation'. Farrand, *Records of the Federal Convention*, vol. II, p. 308; vol. III, p. 478; the *Federalist*, No. XLII; Curtis, *History of the Constitution*, vol. I, p. 502; *Story on the Constitution*, s. 259. If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation. . . . The Constitution . . . was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.³⁰

The Court applied this reasoning to New York sales of milk bottled in New York as well as milk still in the original container in which imported, stating:

What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. . . . The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended.³¹

Hood & Sons, Inc. v. Du Mond concerned a New York regulation converse to that invalidated in *Baldwin v. Seelig*. A licence was denied to a Massachusetts milk distributor for an additional receiving depot

³⁰ 294 U.S. 511, 521-523.

³¹ *Ibid.*, 527. In *Henneford v. Silas Mason Co.* (1937) 300 U.S. 577; 81 L. Ed. 814, Justice Cardozo for the majority was confronted with the validity of a state use tax imposed on the use of articles purchased in another state. While the tax was upheld, justification was not found in the incidence of the tax upon an activity not essential to the concept of interstate commerce, but on the effect of the tax which served only to put imported articles on an equality with local products which, unlike imported articles, were subject to an equivalent sales tax.

in New York to purchase more milk from New York producers on the ground, *inter alia*, that it would tend to destructive competition. In *Baldwin v. Seelig*, New York had argued that the regulation fell upon an activity subsequent to the interstate transaction, the resale in New York; here it argued that the regulation fell upon an activity prior thereto, the purchase and receipt of milk before it is shipped out. The contention was rejected in a majority opinion by Justice Jackson, relying upon *Baldwin v. Seelig*, positing the economic consequences of the regulation in the light of the documented intent of the framers of the Constitution as the governing consideration.

These decisions found that a sale subsequent to the interstate transaction and a purchase prior thereto were within the area of interstate commerce protected by the Commerce Clause, and invalidated the state regulation of these activities. The predominant Supreme Court doctrine, however, does not require that the latter proposition follow from the former. In determining what state regulations of interstate commerce may survive a Commerce Clause challenge, the Court has tended to follow the doctrine propounded in *Cooley v. Port Wardens*,³² in 1852, requiring a judicial balancing of the conflicting interests of national uniformity and local concern.³³ The prior doctrine, as expressed, for example, in the Licence Cases,³⁴ resembled the prevailing High Court approach in that whether state laws were sustainable depended on whether they must be assigned to the permitted category of 'health and safety measures' or the forbidden one of 'regulations of commerce'. Concerning these categories, Professor Freund has remarked: 'Only when it was recognized that they [state regulations] were both, and that satisfactory classification depended on a weighing of consequences, on a judgment as to the balance of national burden and local benefit, was the foundation

³² (1852) 12 Howard 299; 13 L. Ed. 996.

³³ In a way this statement oversimplifies a rather complex development in American constitutional law. See Dowling, 'Interstate Commerce and State Power' (1940) 27 *Virginia Law Review* 1. The dissents of Justices Frankfurter and Black in *Hood v. Du Mond*, *supra*, trace the development of this principle. The majority opinion in that case itself was regarded by the dissenters as a departure from the balance-of-interests doctrine in favour of an absolute prohibition against any state burden. If it was, the subsequent decision in *Cities Service Co. v. Peerless* (1950) 340 U.S. 179; 95 L. Ed. 190 indicates it was as temporary as prior departures, e.g., *Di Santo v. Pennsylvania* (1927) 273 U.S. 34; 71 L. Ed. 524. In the *Cities Service Case* the Court upheld an Oklahoma regulation of the minimum wellhead prices applicable to gas taken from a particular natural gas field, including that gas (which proved to be 90 per cent of the total) purchased for interstate transportation and sale. The Court found the state's interest in 'preventing rapid and uneconomic dissipation of one of its chief natural resources' more weighty than the concededly 'strong national interest in natural gas problems'. The Court stated that 'in a field of this complexity with such diverse interests involved, we cannot say that there is a clear national interest so harmed that the state price-fixing orders here employed fall within the bar of the Commerce Clause'. (*Ibid.*, 188.) *Hood v. Du Mond* was distinguished on the ground that the regulation there at issue discriminated against interstate commerce.

³⁴ (1847) 5 Howard 504; 12 L. Ed. 256.

laid for a viable course of decision.³⁵ Whether the course of decision has proved viable or not can be debated; but that the Supreme Court has taken that course of decision is quite clear.

When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved.³⁶

The relative legalism of the High Court epitomized in these commerce cases is a reflection of a disposition to consider proper, and ultimately necessary, the application to constitutional adjudication of the traditional methods of the common law. The interest-balancing, and broadly evaluative approach of the Supreme Court, on the other hand, appears to reflect a contrary premiss. This contrast in first principles is reflected in several other phases of constitutional judicial method: the use of evidence; the significance of *travaux préparatoires*; and the force of *stare decisis*.

(c) Constitutional Facts

It would be incorrect to say that the High Court has been insensitive to the relevance of factual determinations or has not in decisions of importance canvassed matters of fact in reaching con-

³⁵ Freund, 'A Supreme Court in a Federation: Some Lessons From Legal History' (1953) 53 *Columbia Law Review* 597, 613.

³⁶ *Parker v. Brown* (1943) 317 U.S. 341, 362; 87 L. Ed. 315. Frankfurter J. has described the working of this principle in an illuminating footnote in his dissenting opinion in *Hood v. Du Mond* (1949) 336 U.S. 525, 568-569, n. 2: 'Every case determining whether or not a local regulation amounts to a prohibited "burden" on interstate commerce belongs at some point along a graduated scale. . . . [At] one end are the tax cases; since a State has other sources of revenue, the need for a tax "on" interstate commerce is hard to justify. It is to be expected, therefore, that State revenue laws should constitute the largest group of laws invalidated as "burdening" commerce. And so they do. [Citing cases.] Yet there has been an increasing recognition of the States' interest in seeing that interstate commerce "pays its way", and a consequent disposition to classify the object of the tax as intra-state. [Citing cases.] By the same principle, a regulation which makes a good deal of trouble for an interstate railroad must be struck down in the absence of any very convincing showing that the regulation is a reasonable response to a serious local need. [Citing cases.] But a more impressive showing of such a contribution on the one hand and a less persuasive demonstration of inconvenience on the other has brought about the opposite result. [Citing cases.] Where motor carriers are concerned, a State is regarded as having a proprietary interest in its highways which justifies a generally more aggressive assertion of its self-interest. [Citing cases.] And the protection of its own citizens through maintenance of high standards of business dealing by such regulations as those involved in *California v. Thompson* 313 U.S. 109; *Union Brokerage Co. v. Jensen* 322 U.S. 202; and *Robertson v. California* 328 U.S. 440, is a matter of local concern that has been given almost as much latitude as the protection of health. [Citing case.] But at the opposite extreme from revenue measures, perhaps, is control of the transportation of intoxicating liquor, in the name of which quite confining hobbles have been put upon interstate commerce and sustained under the Commerce Clause, without resorting to the Twenty-first Amendment. [Citing cases.]'

stitutional decisions. It is a fairer approximation to the truth that the High Court has not as consistently and actively as the Supreme Court recognized the need for determinations of fact; nor has it been as insistent upon the submission of the full factual background prior to decision. In part, of course, this difference is attributable to the more restrictive view of the High Court concerning the relevance of economic and social facts in constitutional adjudication. To the extent that adjudication is governed by strictly legalistic conceptions, there is less occasion to examine legislative facts of this character. This is not to say that such facts are always irrelevant. In the *Bank Nationalization Case*³⁷ evidence of the operation of banking activities in Australia was presented through affidavits of both sides as bearing upon whether a bank nationalization act was within various heads of Commonwealth power; and in the *Capital Issues Case*³⁸ evidence in the form of a statement of the Commonwealth Treasurer was before the Court bearing upon the relation of a law imposing restrictions on the raising of private capital to the defence power. Indeed, in commonly quoted comment, Dixon J. observed that 'if the form of the power makes the existence of some special or particular state of fact a condition of its exercise, then, no doubt, the existence of that state of fact may be proved or disproved by evidence like any other matter of fact'.³⁹ Ordinarily, however, as Dixon J. goes on to observe, where factual circumstances are urged as demonstrating a connection between a challenged act and a head of power . . . the Court does not go beyond matters of which it may take judicial notice. This means that for its facts the Court must depend upon matters of general public knowledge.⁴⁰ The limitations of an exclusive reliance upon judicial notice, *viz.*, that crucial matters of fact may be beyond general public knowledge⁴¹ and that there is no knowing what facts the different Justices will take notice of, have been pointed out by Australian commentators.⁴² It has in addition the effect of precluding judicial access to the materials on the basis of which Parliament acted—materials comparable to the congressional hearings and debates and committee reports typically actively considered by the Supreme Court—in view of the traditional rules dealing with legislation which preclude judicial notice of such material.

Another obstacle, practical rather than dogmatic, to the full can-

³⁷ *Bank of N.S.W. v. Commonwealth* (1948) 76 C.L.R. 1.

³⁸ *Marcus Clark & Co. Ltd v. Commonwealth* (1952) 87 C.L.R. 177.

³⁹ *Stenhouse v. Coleman* (1944) 69 C.L.R. 457, 469.

⁴⁰ *Ibid.*

⁴¹ See Isaacs J. in *Holland v. Jones* (1917) 23 C.L.R. 149, 153: 'The basic essential is that the fact is to be of a class that is so generally known as to give rise to the presumption that all persons are aware of it. This excludes from the operation of judicial notice what are not "general" but "particular" facts.'

⁴² See, *e.g.*, Holmes, 'Evidence in Constitutional Cases' (1949) 23 *Australian Law Journal* 235.

vassing of relevant facts is the procedural setting in which a great number of important constitutional matters is presented to the Court, *viz.*, through a statement of claim by a person entitled to sue seeking a declaration of invalidity and an injunction against the defending governmental officials, state or Commonwealth, enforcing the disputed act. The common practice in recent years has been for the defending government thereupon to demur to the statement of claim,⁴³ thus presenting the issue of law to the High Court.⁴⁴ While this procedure makes for an expeditious determination of the constitutional issue, it poses the issue in the abstract rather than in the light of a concrete factual setting and minimizes the extent to which matters of underlying legislative fact may be presented to the Court.⁴⁵ Although this difficulty is primarily attributable to the preferred techniques and attitudes of counsel (there is no compulsion to demur or not to plead in addition, and leave to plead further and to present further facts after a demurrer is overruled can always be sought)⁴⁶ it would appear within the Court's power to insist on a proper factual presentation if it were so minded.⁴⁷

⁴³ See Rules of Court, High Court of Australia, Order 26 (Statutory Rules 1952, No. 23).

⁴⁴ See Hutley, 'Procedure and Pleading' in Paton (ed.), *The Commonwealth of Australia* (1952) 190 n. 45 where some twenty examples of this procedure since 1941 are cited.

⁴⁵ See *Ibid.*, 190-191: 'A good example of the unsatisfactory working of this device is provided by the case of *Victorian Chamber of Manufactures and Others v. The Commonwealth* [(1943) 67 C.L.R. 413]. In this case the validity of the National Security (Industrial Lighting) Regulations was in issue. The regulations gave the Minister for Labour and National Service power to prescribe interior lighting standards for industrial premises. The only Commonwealth power which could be invoked to sustain this regulation was the defence power, and the Court was unanimous in overruling a demurrer to the statement of claim. Latham C.J., who in general took a liberal view of the constitutional power of the Commonwealth, said: "No doubt good lighting is conducive to industrial efficiency, and industrial efficiency is important for the purpose of the effective prosecution of the war. But the same might be said of any prescription of standards in factory conditions, or of almost any other conditions affecting human life and well-being." To uphold the regulations it would have been necessary to bring before the Court evidence specifically connecting the alterations to industrial lighting with the war effort. As the Commonwealth did not do this, it may be that the evidence was not available or did not exist, but if it did, the Court could not deal with the question properly without having it before it. The Commonwealth could have pleaded to the statement of claim as well as demurred, but it did not do so. In the result, the whole issue was disposed of without the Court having before it evidence of the relation of industrial lighting to the war and war production, a relationship which no Court could have within its general knowledge.' For other examples of the narrowing effect of the demurrer technique see *Commonwealth v. Australian Shipping Board* (1926) 39 C.L.R. 1; *Gonzwa v. Commonwealth* (1944) 68 C.L.R. 469.

⁴⁶ See, e.g., *Crouch v. Commonwealth* (1948) 77 C.L.R. 339 in which the Commonwealth was given leave to plead further facts in the order overruling its demurrer.

⁴⁷ The High Court has in fact on occasion urged a fuller presentation of factual issues. In *Wilcox Moffin Ltd v. N.S.W.* (1951) 85 C.L.R. 488, 507, Dixon, McTiernan and Fullagar JJ. stated: 'Unfortunately the parties did not enter into formal or full proof of these and other matters which would have enabled us, at all events, to obtain an understanding which we felt more adequate of the real significance, effect and operation of the statutes, information of a kind that we have come to think almost indispensable to a satisfactory solution of many of the constitutional problems brought to this court for decision; though we are bound to say that it is not an opinion com-

The Supreme Court has long had experience dealing with matters of underlying social and economic fact in the process of judicial review. Certainly since the *Brandeis Brief*⁴⁸ such matters have received wide attention, partly as a result of the doctrines of constitutional interpretation which often (certainly in 14th Amendment cases) pose the issue of constitutionality in terms of whether the legislature has acted unreasonably or arbitrarily. The Court's attitude is exemplified in an American Bar Association address by Stone J. in 1928 in which he criticized the bar for failing to apprise the Court 'as to all phases of the particular social conditions affected, the evils supposed to originate in them, and the appropriateness of the particular remedy sought to be applied'. 'Intimate acquaintance with every aspect of the conditions which have given rise to the regulatory problems,' he admonished, 'are infinitely more important to the court than are the citation of authorities or the recital of bare formulas.'⁴⁹

Judicial notice has been the commonly used technique for justifying consideration of facts of this kind. But it has been a judicial notice an Australian lawyer would not recognize as belonging to the same species. In constitutional cases it is no longer a device ancillary to the actual introduction of evidence and confined to notorious and indisputable facts. It has become a major instrument through which the Court gains access to and deals with material of the most disputable character—social and economic facts and judgments.⁵⁰ And the Court has not confined itself to the researches of counsel.⁵¹ In the process of constitutional adjudication the Court has taken judicial

manding much respect among the parties to issues of constitutional validity, not even those interested to support legislation, who strange as it seems to us, usually prefer to submit such an issue in the abstract without providing any background of information in aid of the presumption of validity and to confine their cases to dialectical arguments and considerations appearing on the face of the legislation.' See also *Grannal v. Kellaway & Sons Pty Ltd* (1955) 28 *Australian Law Journal* 627, 628-629.

But see Coppel, replying to Holmes, 'Evidence in Constitutional Cases' (1949) 23 *Australian Law Journal* 235, 239: 'If you examine the cases which are referred to by Mr Holmes, you will find that in several of them, it was the Commonwealth upholding its own legislation which demurred and chose to have the validity of its own legislation or regulations determined upon that material and no more. It would be a very bold thing I suggest for the court to say to the Commonwealth, we are not going to have that, tell us more about it. It is contrary to one's notions of common law procedure at any rate, to have a litigant told that he must prepare a case and present it in a different way.'

⁴⁸ The written submission of Mr Brandeis as counsel in the case of *Muller v. Oregon* (1908) 208 U.S. 412; 52 L. Ed. 551 in which he broke tradition by presenting such material as analogous statutes, reports of legislative committees and other governmental agencies and the research of social scientists to uphold a state law imposing maximum hours of labour for women.

⁴⁹ See Stone, 'Fifty Years' Work of the United States Supreme Court' (1929) 8 *Oregon Law Review* 248, 259-260.

⁵⁰ See generally Davis, 'Judicial Notice' (1955) 55 *Columbia Law Review* 945.

⁵¹ See, e.g., Justice Brandeis' own research reflected in his dissenting opinion in *Truax v. Corrigan* (1921) 257 U.S. 312, 354; 66 L. Ed. 254.

notice of the relation of hours of work to female health,⁵² the nature of abuses in the employment agency business and the possible effects of maximum fee charges,⁵³ and the character and consequences of certain kinds of merchandising.⁵⁴ In two recent civil liberty cases of significance⁵⁵ the opinions of the various Justices range far and wide over questions of international relations, the historical development of Communist influence in foreign countries, the nature, aims and practices of Communism, and the contemporary state of the American mind.⁵⁶

Where judicial notice has been considered inadequate for the presentation of relevant underlying facts, the Court has sanctioned, and sometimes required, that a lower court make them the subject of evidence and findings. In *Borden's Farm Products Co. v. Baldwin*⁵⁷ the validity of a state law, which required milk sold under well-advertised trade names to be sold at a higher price than competing milk, was challenged as in violation of equal protection of the laws (14th Amendment). The trial court's sustaining of a motion to dismiss (demurrer) was reversed,⁵⁸ the Court remanding the case to the trial court for the purpose of taking evidence on particular trade conditions to permit an informed judgment on whether the act constituted an arbitrary classification.⁵⁹ A similar course has been followed in a substantial number of cases.⁶⁰ A recent and interesting use of trial court evidence-taking of constitutional facts occurred in several of the lower court cases which on appeal became known as the School Segregation Cases,⁶¹ in which the Supreme Court declared segregated education unconstitutional. Extensive evidence was taken from social scientists on the issue of the deleterious consequences on

⁵² *Muller v. Oregon* (1908) 208 U.S. 412; 52 L. Ed. 551.

⁵³ *Ribnick v. McBride* (1928) 277 U.S. 350; 72 L. Ed. 913.

⁵⁴ *Jay Burns Baking Co. v. Bryan* (1923) 264 U.S. 504; 68 L. Ed. 813.

⁵⁵ *Dennis v. United States* (1950) 341 U.S. 494; 95 L. Ed. 1137; *American Communication Ass'n, CIO v. Douds* (1950) 339 U.S. 382; 94 L. Ed. 925.

⁵⁶ Compare the refusal of the High Court in *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1 to deal with similar matters on the basis of judicial notice.

⁵⁷ (1934) 293 U.S. 194; 79 L. Ed. 281.

⁵⁸ In the light of the common practice in the High Court of posing constitutional issues through the demurrer technique, Justice Stone's concurring observation is interesting to record here: 'We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the question clearer.' *Ibid.*, 213.

⁵⁹ 'The principle that the state has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court. Still, the statute may show on its face that the classification is arbitrary, . . . or that may appear by facts admitted or proved. . . . But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings.' *Ibid.*, 209-210.

⁶⁰ See Annotation, 'Consideration of Extrinsic Evidence on Question of Constitutionality or Unconstitutionality of Statute' (1937) 82 L. Ed. 1244.

⁶¹ *Brown v. Board of Education* (1954) 347 U.S. 483; 98 L. Ed. 873.

the personality and learning potential of Negro children resulting from segregated education.⁶²

(d) *Travaux Préparatoires (Extrinsic Historical Aids)*

The intent of the constitution makers as expressed in statements or documents other than the constitutional text itself has been forbidden ground in Australia and an overploughed field in America. What difference it has ultimately made in the course of decision is harder to say.

The High Court's position is derived from the traditional British position with regard to parliamentary acts which excludes all legislative history, except prior forms of the act, in the process of interpretation. Since the Australian Constitution has the legal status of a parliamentary act rather than, as the American Constitution, a constituent act of the people, these exclusionary principles are made to apply.⁶³ The doctrine was asserted in Volume 1 of the Commonwealth Law Reports and has been adhered to with consistency; prior drafts of the Constitution in 1891, 1897, and 1898 may be searched to elucidate meaning,⁶⁴ but not the volumes of the debates at the constitutional convention or other contemporaneous indications of intent.⁶⁵ In a number of issues the interpretation evolved by the High Court might have been different had the Court been prepared to search the debates for the intent of the framers. The Court's difficulties in working out the meaning of 'duties of excise' forbidden to the states by section 90 might have been simplified and its interpretation somewhat different had the Court been prepared to examine and follow the intent reflected in the debates that the excise duties forbidden were those liable to interfere with Commonwealth tariff policy.⁶⁶ And certainly the interpretation of section 92 requiring interstate commerce to be absolutely free might have been affected. Historical research appears to indicate an inten-

⁶² See discussion of this evidence in Note, (1952) 61 *Yale Law Journal* 730, 735-738, nn. 25-35. The Supreme Court appeared to acknowledge the relevance of this evidence, although it chose to rest the principal basis for its decision on other considerations. See *Brown v. Board of Education*, *supra*, n. 61.

⁶³ See Part I of this article (1959) 2 *M.U.L.R.* 4, 5. The doctrine has not gone unchallenged. Mr Brennan in *Interpreting the Constitution* (1935) 13 criticizes as fictional the doctrine that 'the Constitution is a document evolved by the Imperial Parliament and imposed by its sovereign will on the people of Australia'. He points out that the Constitution was drawn by the Australian people through their representatives and was submitted to the Imperial Parliament only to obtain legal force; that the Australian representatives in London were instructed not to acquiesce even in minute alterations and that the few minor changes they nevertheless accepted (as appeals to the Privy Council) affected the Empire and not Australia. He concludes that 'the Constitution as a whole, as can be shown by a reference to its history, is the work of the people of Australia and not of the Parliament of Great Britain'.

⁶⁴ *Tasmania v. Commonwealth* (1904) 1 *C.L.R.* 329.

⁶⁵ *Municipal Council of Sydney v. Commonwealth* (1904) 1 *C.L.R.* 208.

⁶⁶ See Arndt, 'Judicial Review Under Section 90' (1952) 25 *Australian Law Journal* 667, 673.

tion to assuage the fears of free-trade New South Wales (that other protectionist states would erect barriers to trade) by expressly and emphatically prohibiting the restriction of trade among the states by customs and like imports imposed 'at the frontier'.⁶⁷ The High Court, however, has declined to avail itself of this history and has evolved interpretations of section 92—that it applies to the Commonwealth as well as to the states,⁶⁸ that it forbids non-discriminatory laws which operate to burden interstate commerce,⁶⁹ that it forbids bank nationalization⁷⁰—which would be hard to square with this history.

In the United States, while the significance of the intent reflected in materials outside the constitutional text has been variously viewed, no exclusionary rules have been evolved barring the Supreme Court from access to these materials. The pages of the United States Reports reveal frequent references to and extensive analyses of such extrinsic materials as the records of the constitutional debates, contemporary commentary, reflections of participants in the formation of the Constitution in the form of memoirs and letters, and debates in the state legislatures or conventions over ratification of the original Constitution or amendments thereto.⁷¹ The issue whether the due process clause of the Fourteenth Amendment, applicable to the states, absorbs the prohibitions of the first eight amendments (Bill of Rights), directed to the federal government, has largely turned into an historical debate between the majority and minority members of the Court, Black J., for the latter, having attached an Appendix to his dissent in *Adamson v. California*⁷² elaborately reporting and analysing the legislative history of the Fourteenth Amendment. Another and more recent manifestation of the Court's concern with such historical material appears in the School Segregation Cases.⁷³ After hearing the original argument of counsel the Court felt dissatisfied with their treatment of the intent of the framers of the Fourteenth Amendment as reflected in contemporaneous commentary and history. It therefore directed the parties and the United States Attorney-General to present this historical material on re-argument.

⁶⁷ The literature is reviewed in Stone, 'A Government of Laws and Yet of Men, Being a Survey of Half a Century of the Australian Commerce Power' (1950) 25 *New York University Law Review* 451, 460-464; (1950) *University of Western Australia Annual Law Review* 461. But see Sharwood, 'Section 92 in the Federal Conventions: A Fresh Appraisal' (1958) 1 *M.U.L.R.* 331.

⁶⁸ *James v. Commonwealth* (1936) 55 C.L.R. 1. Properly, this is a contribution of the Privy Council.

⁶⁹ *Hughes and Vale Pty Ltd v. N.S.W.* (No. 2) (1954) 93 C.L.R. 127.

⁷⁰ *Bank of N.S.W. v. Commonwealth* (1948) 76 C.L.R. 1.

⁷¹ See generally ten Broek, 'Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction' (1938) 26 *California Law Review* 287, 437, 664; (1939) 27 *California Law Review* 157, 399.

⁷² (1947) 332 U.S. 46; 91 L. Ed. 1903.

⁷³ *Brown v. Board of Education* (1954) 347 U.S. 483; 98 L. Ed. 873.

The theory and practice of the use of this material is another matter. There is first the question of what 'intent' means and how it is ascertained from conflicting evidence. On the issue of whether the Fourteenth Amendment embodies the Bill of Rights, for example, one may ask whose intent is determinative—those opposed or those in favour of the Amendment; those engaged actively in the debate, or those who passively cast their vote? As between Congress and the ratifying states and as among the ratifying states, whose intent is determinative? Such difficulties were recognized by the Court in the School Segregation Cases rather dramatically in view of its prior insistence upon a full historical inquiry into whether the Fourteenth Amendment was intended to abolish school segregation. After all the evidence was in, the Court's final word was:

This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States'. Their opponents, just as certainly were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.⁷⁴

But even when this difficulty is passed there remains the problem of whether a constitution ought to be confined in the 1950's to what the framers had in mind in 1789. The Supreme Court has taken differing views on this issue. On the one side may be found expressions of the need to expand and adapt 18th century concepts to modern problems and to avoid confinement to the necessarily narrower perspective of an earlier day.⁷⁵ In the School Segregation Cases, again, the Court, even after the recognition of the importance of the framers' intent, observed:

In approaching this problem, one cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.⁷⁶

⁷⁴ *Ibid.*, 489.

⁷⁵ See the observation of ten Broek, (1939) 27 *California Law Review* 399, 421: 'And thus the very realism of the doctrine of constitutional adaptability makes of the intent theory of constitutional interpretation, with its dogma of organic immutability and its retrogressive aspects, with its misapprehension of the facts of judicial operation and with its weakness of theory, one of the fundamental doctrinal fallacies of the Supreme Court of the United States.'

⁷⁶ *Brown v. Board of Education* (1954) 347 U.S. 483, 492-493.

And, of course, there is the famous observation of Holmes J.: 'The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.'⁷⁷ On the other hand, in perhaps a greater number of cases the Court has undertaken its forays into convention debates and proceedings, contemporaneous commentaries and the like on the premiss that the whole aim of constitutional construction is to discover the intent of the framers.⁷⁸ In the final analysis, whether the Court's practice of searching historical evidence for indications of intent is a significant factor in the decision-making is doubtful. In a few cases it appears controlling; in most it seems to be used to buttress a decision reached on other grounds, suggesting that it functions more as rhetoric than as ground for decision.

(e) *Stare Decisis*

The principle of *stare decisis* has without doubt had a greater influence upon the course of constitutional interpretation by the High Court than it has had upon the work of the Supreme Court. This is not surprising in view of the state of this doctrine in Australia and the United States in non-constitutional cases. While it remains in Australia one of the key principles of the common law, it has suffered a substantial waning in the United States under the influence of a more radical jurisprudential climate and the existence of a multiplicity of jurisdictions going their separate ways in developing common law conceptions free from the integrating and unifying influence which is exerted by the general appellate jurisdiction of the High Court over state courts. The High Court has never considered itself legally bound by its prior decisions, but it has tenaciously adhered to the position that it would as a matter of sound policy follow prior decisions unless 'manifestly wrong'.⁷⁹ Occasionally, some recognition is given to the consideration that in constitutional adjudication the doctrine might properly be applied with less rigour.⁸⁰ But in no sense has this consideration been articulated as persuasively or as radically as it has by Justices of the Supreme Court. The inelasticity of the Constitution, combined with the prevailing view that constitutional language must continually be adapted to social,

⁷⁷ *Missouri v. Holland* (1920) 252 U.S. 416, 433; 64 L. Ed. 641.

⁷⁸ See, e.g., *Calder v. Bull* (1798) 3 Dall. 386; 1 L. Ed. 648; *Ex parte Crossman* (1925) 267 U.S. 87; 69 L. Ed. 527; *Williams v. United States* (1933) 289 U.S. 553; 77 L. Ed. 1372.

⁷⁹ *Tramways Case (No. 1)* (1914) 18 C.L.R. 54, 69; *Cain v. Mallone* (1942) 66 C.L.R. 10.

⁸⁰ See *Perpetual Executors and Trustees Ass'n of Australasia Ltd v. Federal Comm'r of Taxation* (1949) 77 C.L.R. 493, 496: 'It may be that considerations are present in constitutional cases, where Parliament is not in a position to change the law, which do not arise in other cases. In what I have said [about *stare decisis*] I make no reference to constitutional cases.'

economic and political developments have substantially muted the command of *stare decisis*. No one would be likely to make the error of attributing authorship to a High Court Justice of such statements as: 'The re-examination of precedent in constitutional law is a personal matter for each judge who comes along';⁸¹ or, '*Stare decisis* has . . . little place in . . . constitutional law'.⁸² While these pronouncements of Douglas J. may be more extreme than a majority of Supreme Court Justices would be prepared to accept, the same idea, stated less unorthodoxly, has been expressed by others. Taney C.J., for example, as early as 1849, stated that he would be quite willing 'that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported'.⁸³ Similar attitudes have been manifested by other Justices of commanding influence.⁸⁴ There have been, indeed, strongly-worded condemnations of what has been regarded as the Court's free-and-easy way with precedents.⁸⁵ In many instances, however, one is led to suspect that the motivation of these pronouncements is as much a substantive disagreement with the overruling authority as with the violation of the principle of

⁸¹ Douglas, '*Stare Decisis*' (1949) 49 *Columbia Law Review* 735, 736.

⁸² Douglas, *We the Judges* (1956) 429.

⁸³ Passenger Cases (1849) 7 Howard 283, 470; 12 L. Ed. 702.

⁸⁴ See Field J. in *Barden v. Northern P. R. Co.* (1894) 154 U.S. 288, 322; 38 L. Ed. 992: 'It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations.' Brandeis J. dissenting in *Burnet v. Coronado Oil and Gas Co.* (1932) 285 U.S. 393, 405, 406-408; 76 L. Ed. 815: '*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.' Reed J. in *Smith v. Allwright* (1944) 321 U.S. 649, 665; 88 L. Ed. 987: '. . . when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action, this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day.'

⁸⁵ 'The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only.' Roberts J. dissenting in *Smith v. Allwright* (1944) 321 U.S. 649, 669; 88 L. Ed. 987. 'Rightly or wrongly, the belief is widely held by the practicing profession that this Court no longer respects impersonal rules of law but is guided in these matters by personal impressions which from time to time may be shared by a majority of Justices. Whatever has been intended, this Court also has generated an impression . . . that regard for precedents and authorities is obsolete, that words no longer mean what they have always meant to the profession, that the law knows no fixed principle.' Jackson J. in *Brown v. Allen* (1953) 344 U.S. 443, 535; 97 L. Ed. 469. See Bischoff, 'The Role of Official Precedents' in Cahn (ed.), *Supreme Court and Supreme Law* (1954) 76.

stare decisis.⁸⁶ In so far as the issue turns on principle, the opposing view would appear to centre principally upon the political consideration of adverse public reaction to a too slight regard by the Court for its own pronouncements, rather than upon the integrity of the legal principle.⁸⁷

The record of overrulings in the two courts is consistent with the contrasting theoretical approaches to the principle of *stare decisis*. According to a 1948 survey of overrulings of constitutional determinations,⁸⁸ the Court has reversed itself directly (the list excludes cases distinguished away) some 35 times between 1844 and 1946. Since then there have continued to be overrulings of importance, including the notable decision in the School Segregation Cases in 1954⁸⁹ which reversed the separate-but-equal doctrine of *Plessy v. Ferguson*.⁹⁰ Some of the precedents overruled had been the law for substantial periods of time—*Collector v. Day*⁹¹ governed the immunity of federal employees from state income tax for 69 years before it was overruled in 1939;⁹² *Plessy v. Ferguson* had sanctioned the pattern of Negro segregation for 58 years; *Swift v. Tyson*⁹³ had fostered a federal common law in diversity cases for 96 years before being overruled by *Erie R. R. Co. v. Tompkins*.⁹⁴ The insurance business had been regarded as not within the commerce power for 76 years before the change.⁹⁵ At the other extreme are authorities

⁸⁶ I doubt if more than one or two instances can be found of a Supreme Court Justice embracing a constitutional principle he seriously disagrees with because of the compulsion of *stare decisis*. The concurring opinion of Frankfurter J. in *Morgan v. Virginia* (1946) 328 U.S. 373, 388; 90 L. Ed. 1317 is probably one such instance. He there stated: 'My brother Burton has stated with great force reasons for not invalidating the Virginia statute. But for me *Hall v. De Cuir*, 95 U.S. 485, is controlling. Since it was decided nearly seventy years ago, that case on several occasions has been approvingly cited and has never been questioned. Chiefly for this reason I concur in the opinion of the Court [invalidating the state statute].' Apart from such rarities the most one is likely to turn up are instances of passive acquiescence, the Justice manifesting a wait-and-see attitude pending reinforcements. See, e.g., Clark J. concurring in *Irvine v. California* (1954) 347 U.S. 128, 138-139; 98 L. Ed. 561: 'Had I been here in 1949 when *Wolf* [*Wolf v. Colorado* (1949) 338 U.S. 25] was decided, I would have applied the doctrine of *Weeks v. United States* 232 U.S. 383 to the states. But the Court refused to do so then, and it still refuses today. Thus *Wolf* remains the law and, as such, is entitled to the respect of this Court's membership. . . . Perhaps strict adherence to the tenor of that decision may produce needed converts for its extinction. Thus, I merely concur in the judgment of affirmance.' Compare the attitude of the High Court Justices discussed *infra*.

⁸⁷ See, e.g., Frankfurter J. dissenting in *Mahnich v. Southern Steamship Co.* (1944) 231 U.S. 96, 113: 'Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy.'; Hughes, *The Supreme Court of the United States* (1928) 52; Jackson J. in *Brown v. Allen*, *supra*, n. 85.

⁸⁸ Barnhardt, 'Supreme Court Reversals on Constitutional Issues' (1948) 34 *Cornell Law Quarterly* 55.

⁸⁹ (1954) 347 U.S. 483; 98 L. Ed. 873. ⁹⁰ (1896) 163 U.S. 537; 41 L. Ed. 256.

⁹¹ (1870) 11 Wall. (U.S.) 113; 20 L. Ed. 122.

⁹² *Graves v. New York* (1939) 306 U.S. 466; 83 L. Ed. 927.

⁹³ (1842) 16 Pet. (U.S.) 1; 10 L. Ed. 865. ⁹⁴ (1937) 304 U.S. 64; 82 L. Ed. 1188.

⁹⁵ *United States v. South-Eastern Underwriters* (1944) 322 U.S. 533; 88 L. Ed. 1440 overruling *Paul v. Virginia* (1868) 8 Wall. (U.S.) 168; 19 L. Ed. 357.

which were buried almost as they were born. The *Legal Tender Cases*⁹⁶ overruled *Hepburn v. Griswold*⁹⁷ 15 months after it had invalidated the legal tender act as applied to contracts prior to its passage;⁹⁸ in two more recent cases the Court allowed constitutional precedents to stand only until the following term when re-argument was ordered and an opposite decision reached.⁹⁹ In the vast majority of cases change in personnel rather than change of heart was responsible.¹

Three observations should be made concerning this record of apparent judicial instability. First, a large number, if not most, reversals had to do with differences in applying, as distinguished from interpreting, the Constitution; to adopt the language of Brandeis J., they concerned controversies 'over the application to existing conditions of some well-recognized constitutional limitation' rather than differences of the meaning of constitutional text.² This has certainly been true of the many cases overruled during the 'constitutional revolution' of the 1930's.³ Secondly, in many cases the final act of

⁹⁶ (1871) 12 Wall. (U.S.) 457; 20 L. Ed. 287.

⁹⁷ (1870) 8 Wall. (U.S.) 603; 19 L. Ed. 513.

⁹⁸ See Hughes, *The Supreme Court of the United States* (1928) 52: 'The decision [*Hepburn v. Griswold*] was by a bench of seven, and three Justices dissented. On the day that the opinion was delivered by Chief Justice Chase, President Grant nominated William Strong of Pennsylvania and Joseph P. Bradley of New Jersey to fill the two vacancies. The action of the Court, taken soon after their confirmation, in ordering a reargument of the constitutional question and then deciding that the legal tender act was constitutional, the two new judges joining with the three judges, who had dissented in the *Hepburn* case, to make a majority, caused widespread criticism. From the standpoint of the effect on public opinion, there can be no doubt that the re-opening of the case was a serious mistake and the overruling in such a short time, and by one vote, of the previous decision shook popular respect for the Court.'

⁹⁹ In *Jones v. Opelika* (1943) 319 U.S. 103; 87 L. Ed. 1290 the Court reversed by a 5-4 vote its position announced in (1942) 316 U.S. 584; 86 L. Ed. 1691 that licensing of disseminators of religious tracts was not a violation of the First Amendment. The new majority was created by the resignation of Byrnes J. and the appointment of Rutledge J. The first decision was announced on 8 June 1942. Byrnes J. resigned 5 October 1942. Rutledge J. was commissioned on 11 February 1943. Four days later the case was restored to the list for re-argument; a new decision was announced on 3 May 1943. A similar pattern was followed more recently. In 11 June 1956 a majority of five Justices upheld the extension of court martial jurisdiction to wives of servicemen abroad. *Reid v. Covert*; *Kinsella v. Krueger* (1956) 351 U.S. 470; 100 L. Ed. 1342. On 15 October 1956, Minton J., who voted with the majority, retired, and Brennan J. was appointed. On 5 November 1956, a rehearing was granted and on 10 June 1957 a new decision was granted reversing the earlier one, Brennan J. voting with the new majority. (1957) 354 U.S. 1; 1 L. Ed. 2d 1148. Since Harlan J. changed his position the result would have been the same even without the change in personnel.

¹ A conspicuous exception is *West Virginia State Board of Education v. Barnette* (1943) 319 U.S. 624; 87 L. Ed. 1628 in which three Justices (Black, Douglas, and Murphy) recanted from their approval of compulsory flag saluting of school children in *Minnersville School District v. Gobites* (1940) 310 U.S. 586; 84 L. Ed. 1375. Change of personnel contributed, Byrnes J. having been replaced with Rutledge J. See also *Reid v. Covert*, *supra*, n. 99.

² Dissenting in *Burnet v. Coronado Oil & Gas Co.* (1932) 285 U.S. 393, 405, 410; 76 L. Ed. 815. See Reed J., 'Stare Decisis in Constitutional Law' (1938) 35 *Pennsylvania Bar Association Quarterly* 131, 139-140.

³ Cf. Brandeis J. in *Burnet v. Coronado Oil & Gas Co.*, *supra*, 285 U.S. 393, 410-411: 'This is strikingly true of cases under the due process clause when the question is whether a statute is unreasonable, arbitrary or capricious; of cases under the equal protection clause when the question is whether there is any reasonable basis for the

overruling was not so much an abrupt break with the past as a logical culmination of a gradual process of erosion.⁴ For these reasons the instability and discontinuity have not been as great as would appear. Thirdly, as Douglas J. has convincingly demonstrated,⁵ the process of overruling has operated in almost every instance to correct mistakes rather than to make them. By and large the new decisions have been more consistent with the facts and values of the later eras. In virtually no instance (at least of an outright overruling) has the later decision been subsequently disturbed.

The record of the High Court is in sharp contrast to that of the Supreme Court. Beyond the classic *Engineers' Case*,⁶ which eliminated the principle of implied limitations upon Commonwealth power derived from judicially innovated theories of federalism, and rejected the doctrine of immunity of governmental instrumentalities, there is scarcely another significant instance of a High Court reversal of its prior constitutional decisions in a well established line of cases.⁷ This is not to suggest there have not been movement and change in the High Court. The traditional common law techniques of narrowing and distinguishing have often served where outright overruling would probably have been the preferred technique of the Supreme Court.⁸ It does, however, manifest a relatively firm commitment to the principle of *stare decisis*; and it demonstrates that the Court has found it possible to perform its role of interpreting the constitution through changing times withal.

Why this has proved possible for the High Court but not for the

classification made by a statute; and of cases under the commerce clause when the question is whether an admitted burden laid by a statute upon interstate commerce is so substantial as to be deemed direct. These issues resemble, fundamentally, that of reasonable care in negligence cases, the determination of which is ordinarily left to the verdict of the jury. In every such case the decision, in the first instance, is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the declaration of a rule of law.

⁴ Douglas J. in 'Stare Decisis' (1949) 49 *Columbia Law Review* 735, 747-748 discusses examples of this process.

⁵ *Ibid.*

⁶ *Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd* (1920) 28 C.L.R. 129.

⁷ But mention must be made of the recent *Boilermakers' Case* (*R. v. Kirby; Ex parte the Boilermakers' Society of Australia*) (1956) 94 C.L.R. 254 affirmed [1957] A.C. 288. The High Court invalidated provisions of the Conciliation and Arbitration Act which gave judicial powers as well as functions foreign to such power to the Commonwealth Court of Conciliation and Arbitration, despite the fact that for thirty years in many cases the High Court had clearly assumed the constitutionality of that institution's exercise of judicial functions. In none of those cases, however, was the constitutional issue raised. Dixon C.J. adverted to these cases, stating: '... the Court is not entitled to place very great reliance upon the fact that, in cases before it where occasion might have been made to raise the question for argument and decision, this was not done by any member of the Court and that on the contrary all accepted the common assumption of the parties and decided the case accordingly.'

⁸ See, e.g., *Australian National Airways Pty Ltd v. Commonwealth* (1946) 71 C.L.R. 29 for its treatment of the Transport Cases.

Supreme Court is interesting to consider. It may be that the High Court has not tended to fall into error in the first place to the same degree as the Supreme Court—certainly it has had less time to do so.⁹ It may also be due in part to the greater tolerance of the High Court to distinguishing precedents without demolishing them;¹⁰ combined with a lesser sense of political responsibility for the practical working out of the constitutional interpretation expounded. What may also contribute is the High Court's formulation of constitutional doctrine which rarely centres the determination upon factual judgments of 'reasonableness' or 'undue burden'; as I indicated, changes in such judgments have accounted for a large portion of Supreme Court overrulings. Whatever may be said of these speculative considerations one factor which has demonstrably contributed to the ability of the High Court to maintain its commitment to *stare decisis* has been the appellate authority of the Privy Council.¹¹ The existence of this superior appellate authority has mitigated the responsibility of the Court to correct its own mistakes. On several occasions the Court chose to adhere to prior High Court decisions while at the same time subjecting those cases to vigorous criticism.¹² The know-

⁹ A difference also is in the frequency of the recurrence of basic problems. Cf. Phillips, 'Trade, Commerce and Intercourse' in Else-Mitchell (Ed.), *Essays on the Australian Constitution* (1952) 226-227: 'There is no doubt that the continuous occurrence of problems before the Court in Washington term after term and year after year gives rise to an evolutionary flexibility in doctrine and concept which is, to say the least, not so natural in a court which is required to determine a fundamental issue at intervals of 15 or 20 years.'

¹⁰ See Douglas, 'Stare Decisis' (1949) 49 *Columbia Law Review* 735, 754: 'It is sometimes thought to be astute political management of a shift in position to proclaim that no change is under way. That is designed as a sedative to instill confidence and allay doubts. It has been a tool of judges as well as other officials. Precedents, though distinguished and qualified out of existence, apparently have been kept alive. The theory is that the outward appearance of stability is what is important. . . . But the more blunt, open, and direct course is truer to democratic traditions. It reflects the candor of Cardozo. The principle of full disclosure has as much place in government as it does in the market place. A judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe.'

¹¹ Leave to appeal must always be obtained from the Privy Council. In private law matters cases may be appealed to the Privy Council directly from the state courts from which an appeal lay at the time the Constitution was adopted, and from the High Court. In constitutional matters the appellate authority is more limited, though none-the-less real. Questions entailing the interpretation or application of the Constitution, being a matter of federal jurisdiction, may not be appealed from state courts to the Privy Council: Judiciary Act 1903-1950, s. 39 (2) (a). Such matters may be appealed from the High Court except if they involve questions of the power *inter se* of the States and the Commonwealth, or of the States themselves, in which case special leave of the High Court is required: Constitution, s. 74.

¹² *James v. Commonwealth* (1935) 52 C.L.R. 570 was a classic instance. Here a majority declined to hold that s. 92 bound the Commonwealth because of the clear contrary authority of *McArthur's Case (W. & A. McArthur Ltd v. Queensland)* (1920) 28 C.L.R. 530. At the same time Dixon, Evatt and McTiernan JJ. subjected that case to severe criticism. Another instance is *Hughes & Vale Pty Ltd v. N.S.W. (1)* (1953) 87 C.L.R. 49, 62 where Dixon C.J. carried on his assault on the validity of *The Transport Cases*, but voted in accordance with them. But see Knox C.J. and Isaacs and Starke JJ. dissenting in *McArthur's Case, supra*, (1920) 28 C.L.R. 530, 555.

ledge that the words of criticism might one day find a receptive ear on the other side of the world must have made adherence to a rejected precedent more tolerable.¹³ Indeed, in two significant instances the Privy Council responded sympathetically by adopting these statements as its own and setting aside the prior High Court authority.¹⁴

(f) *Causes and Conditions*

I have attempted to describe the salient respects in which the judicial method of the High Court in constitutional cases differs from that followed by the Supreme Court—adherence to legalism and the high technique, with the consequent attitudes toward assessment of factual considerations underlying legislation reviewed, *travaux préparatoires* and *stare decisis*. It is worth speculating for a moment concerning the causes and conditions which may have contributed to these differences in the discharge of a fundamentally identical function.

It has been suggested that one factor derives from differences in constitutional text.¹⁵ Interpreting and applying such provisions as those which prohibit laws abridging freedom of speech or which deprive persons of life, liberty or property without due process of law or of the equal protection of the laws, confronts the Supreme Court with a task fundamentally less amenable to strictly legal resolution than the problems of distribution of power among the States and Commonwealth which constitute the bulk of the High Court's constitutional work. The Bill of Rights and the due process clause, partaking more of the character of exhortations to a moral standard than of legal rules, call inevitably for the judicial evaluation of matters of sociology, economics and history in giving them meaning.¹⁶ They call for a striking of a balance between the demands of government and the demands of personal freedom in various guises, entailing judgments of fact and value outside the universe of discourse of the common law. It may be, therefore, that in rejecting

¹³ See, e.g., Starke J. in *James v. Commonwealth*, *supra*, n. 12, at 589: 'The case [*McArthur's Case*] has been acted upon for so long that this Court should now treat the law as settled. Its review should be undertaken, if undertaken at all, by the Judicial Committee.'

¹⁴ *James v. Commonwealth* [1936] A.C. 578 and *Hughes & Vale Pty Ltd v. N.S.W.* (1) [1955] A.C. 241. Both involved s. 92 and each constituted the kind of wholesale re-ordering of doctrine, enmeshed with overlays of inconsistencies and remarkable distinctions, which it has been the responsibility of the United States Supreme Court periodically to perform.

¹⁵ See, e.g., Dixon, 'Address at the Annual Dinner of the American Bar Association' (1942) 16 *Australian Law Journal* 192, 194.

¹⁶ Cf. Frankfurter, *Law and Politics* (1939) 13: '... these broad guarantees in favour of the individual are expressed in words so undefined, either by their intrinsic meaning, or by history, or by tradition, that they leave the individual Justice free, if indeed they do not actually compel him, to fill in the vacuum with his own controlling notions of economic, social, and industrial facts with reference to which they are invoked.'

constitutional provisions of this character, the framers made it possible for the High Court to remain more purely a court in the traditional sense.¹⁷ But there are limitations on the extent to which the differences in method can be explained by these differences in text. First, those few provisions of the Australian Constitution which are phrased with a Bill of Rights flavour, such as the guarantee of freedom of religion¹⁸ or the requirement that Commonwealth acquisition of property be on just terms,¹⁹ have not been approached substantially differently by the High Court.²⁰ Second, there are other provisions of the Australian Constitution which are phrased broadly enough to accommodate an economic or political philosophy—'peace, order and good government', 'absolutely free' trade. Indeed the case has been made that section 92 in particular has in fact been made to receive the content of an economic philosophy, just as the American due process clause, although without conscious recognition of that fact or of its implications upon the limitations of traditional common law techniques in constitutional interpretation. To quote Professor Freund:

In Australia, national enactments regulating monopolies and unfair trade practices do not run afoul of Section 92, though quotas and nationalization do. . . . Regulation which can be assimilated to the maintenance of a free field with no favor and to familiar categories of unfair competition seems to pass muster more easily than governmental restrictions on the quantity of goods or the kinds of firms entering the market, whether the constitutional issue relates to federalism or, as with us, to due process of law.²¹

Thirdly, the broadly evaluative, self-consciously interest-balancing approach of the Supreme Court has not been confined to the Bill of

¹⁷ Cf. *ibid.*, 16: 'The due process clause ought to go. . . . By eliminating this class of cases the Supreme Court would really be relieved of a contentiously political burden. It would free itself to meet more adequately the jurisdiction which would remain and which ought to remain.' The story of the Australian rejection of the due process clause is told in Mendelson, 'Foreign Reactions to American Experience with "Due Process of Law"' (1955) 41 *Virginia Law Review* 493-497.

¹⁸ S. 116. See also s. 117 prohibiting states from discriminating against the citizens of other states.

¹⁹ S. 51 (xxxii).

²⁰ S. 116: *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth* (1943) 67 C.L.R. 116, s. 51 (xxxii); *Grace Bros. Pty Ltd v. Commonwealth* (1946) 72 C.L.R. 269; *Bank of N.S.W. v. Commonwealth* (1948) 76 C.L.R. 1.

²¹ Freund, 'A Supreme Court in a Federation' (1953) 53 *Columbia Law Review* 597, 610-611. See also Stone, 'A Government of Laws and Yet of Men, Being a Survey of Half a Century of the Australian Commerce Power' (1950) 25 *New York University Law Review* 451, 453: 'Insofar as the Federal Government in Australia is a government of limited powers, many of the rights sanctified in the American Bill of Rights enter into constitutional determination by the judges; they represent received ideals which colour the judicial approach. A good illustration may be seen . . . in the judicial reading into the provision of s. 92 of the Constitution that commerce between the States shall be free of the ideal that restriction or destruction of the liberty of contract of interstate traders must be justified as a proper governmental function.'

Rights and due process provisions, but has characterized the Court's handling of such problems of governmental power distribution as marking the permissible limits of state regulation and taxation of interstate commerce.²²

Another contributing factor, almost surely, is the retention by the High Court on its lists of a far greater percentage of the stuff of traditional private law litigation than may be found on the Supreme Court's lists. The High Court, unlike the Supreme Court, functions as the ultimate general appellate court in Australia on all matters on appeal from state courts. As a result of this grant of jurisdiction it could hardly, even if it had been so minded, have effectively altered its character, as has the Supreme Court,²³ from a court for the resolution of matters of private concern to a tribunal for the adjudication of constitutional conflicts.²⁴ It continues to be both, with the majority of its business of the private law kind.²⁵ This circumstance may plausibly be surmised to have constituted an influence in the maintenance of the traditional common law techniques in the minority of cases in which constitutional issues are adjudicated.²⁶

²² See, e.g., *Southern Pacific Co. v. Arizona* (1945) 325 U.S. 761; 89 L. Ed. 1915; *Morgan v. Virginia* (1946) 328 U.S. 373; 90 L. Ed. 1317. These cases exemplify the basic frame of reference evolved by the Court in passing upon the validity of state regulations of interstate commerce; viz., a balance of the need for national uniformity against the needs of local police power. See discussion, *supra*, 134-137. The interpretation of the commerce clause from a limited grant of federal power to one co-extensive with the economic needs of the nation is another example. See *Wickard v. Filburn* (1942) 317 U.S. 111; 87 L. Ed. 122. The extension has not been through the process of analysis and definition, as it could have been so far as the constitutional text is concerned. Compare the interpretation of the equivalent clause in the Australian Constitution, s. 51 (i). See Wynes, *Legislative, Executive and Judicial Powers in Australia* (2nd ed. 1956) 298-324.

²³ See Part 1 of this article, (1959) 2 *M.U.L.R.* 4.

²⁴ See Frankfurter, 'The Supreme Court in the Mirror of Justices' (1957) 105 *University of Pennsylvania Law Review* 781, 792-793: 'The Court was of course from the beginning the interpreter of the Constitution and thereby, for all practical purposes, the adjuster of governmental powers in our complicated federal system. But the summary of the contemporaneous business before the Court that is reflected in written opinions statistically establishes these constitutional adjudications and kindred public law issues as constituting almost the whole of Supreme Court litigation.'

²⁵ According to Professor Sawyer, less than a fifth of the reported High Court decisions are concerned with constitutional interpretation. Sawyer, 'Judicial Power Under the Constitution' in Else-Mitchell (Ed.), *Essays on the Australian Constitution* (1952) 73. According to his tabulation of the fifty-seven decisions reported in *Argus Law Reports* in 1956, 'six mainly concerned the interpretation of the Constitution, seventeen mainly concerned the interpretation of Commonwealth legislation; and the remaining thirty-four involved no federal element, but concerned questions of the unenacted law and/or of interpretation of state statutes, and came on appeal from state supreme courts. The proportion of constitutional cases is often less, rarely more.' Sawyer, 'The Supreme Court and the High Court of Australia' (1957) 6 *Journal of Public Law* 402, 488. See the remarks of Dixon C.J. upon being sworn as Chief Justice, (1952) 85 *C.L.R.* xi, xiii: 'The High Court's jurisdiction is divided in its exercise between constitutional and federal cases which loom so largely in the public eye, and the great body of litigation between man and man, or even man and government, which has nothing to do with the Constitution, and which is the principal preoccupation of the court.'

²⁶ See Dixon, 'Address at the Annual Dinner of the American Bar Association' (1942) 16 *Australian Law Journal* 192, 194; Else-Mitchell, Introduction, Else-Mitchell (Ed.), *Essays on the Constitution* (1952) ix; Sawyer, 'The Supreme Court and the High Court

Another consideration of considerable importance is the personnel of the respective courts and the lawyers practising before them. The High Court has always been constituted of lawyers from the barrister side of the profession. The barrister is professionally committed to and deeply steeped in the methods of argument and analysis of the common law. Less so than the American lawyer, who typically combines solicitor and barrister functions, has he been professionally involved in the factual ramifications of the world of business and economics. And certainly less so than the occasional law professor who has made his way to the Supreme Court has he been attuned to the challenging currents of jurisprudential theories. The fact that it has been the barrister class which practises before the High Court and from the ranks of which High Court appointments are exclusively made, may well have had an impact on the legal method employed in constitutional cases.²⁷ Moreover, the barristers who have achieved appointment to the High Court have not in nearly so many instances as men appointed to the Supreme Court earned reputations and achieved substantial experience in the world of political or governmental affairs. Of the twenty-one Justices who have served on the High Court,²⁸ only eight had substantial political experience prior to appointment.²⁹ All such appointments were made prior to 1936 and the present Court includes none of them except McTiernan J.; apart from him it consists exclusively of former distinguished barristers or state Supreme Court judges.³⁰ By contrast, eleven of the eighteen Supreme Court Justices appointed since 1936 were relatively deeply involved in political or governmental activities prior to appoint-

of Australia' (1957) 6 *Journal of Public Law* 482, 488: 'It would probably be sufficient, without more, to explain why the Court has tended in greater measure than the Supreme Court to apply the dialectic methods and concepts of the common law to constitutional interpretation.'

²⁷ See Phillips, 'Trade, Commerce and Intercourse' in Else-Mitchell (Ed.), *Essays on the Australian Constitution* (1952) 210, 227: 'It [the wide extension of economic reasoning by the Supreme Court] accords with the wide horizons of commercial experience which American lawyers seem to scan, without flinching, more readily than those habituated to the tradition of English legal perceptions. Perhaps the differences may spring in part from the contrast in the functions of a separate Bar as compared with the partly legal partly commercial activities of the "corporation lawyer".' Sawyer, 'The Supreme Court and the High Court of Australia' (1957) 6 *Journal of Public Law* 482, 494: 'The High Court has appearing before it nearly all the time the same small group of extraordinarily able and experienced advocates, most of them Queen's Counsel. This preserves, if it does not increase, the bent towards a law of logical conceptions. An Australian barrister is even less likely than his American *confrère* to go after facts and social evaluations in the field. Indeed, it would be unethical for him to do so, since that would be a solicitor's job; but the solicitors are not the brains trust of the profession.'

²⁸ Excluding Piddington J. who resigned after appointment by the Executive Council but prior to taking up his duties.

²⁹ Griffith, Isaacs, Latham C.J.J. and Barton, O'Connor, Higgins, Evatt, McTiernan J.J.

³⁰ Dixon C.J. and Fullagar, Kitto, Taylor, Douglas Menzies and Windeyer J.J.

ment.³¹ The number would no doubt be higher were it not for the untypical policy of the Eisenhower Administration, evident subsequent to the appointment of Governor Warren as Chief Justice, to prefer lawyers with prior judicial experience to those with political or governmental backgrounds.³²

³¹ *Supreme Court Justices with Political or Governmental Experience Appointed Since 1936*

<i>Justice</i>	<i>Year Apptd</i>	<i>Apptd By</i>	<i>Political Involvement</i>
Hugo L. Black Stanley F. Reed	1937 1938	Pres. Roosevelt Pres. Roosevelt	U.S. Senator, 1929-1937. Member, Kentucky Legislature, 1912-1916; General Counsel Reconstruction Finance Corp., 1932-1935; Solicitor General of the U.S., 1935-1938.
William O. Douglas	1939	Pres. Roosevelt	Commissioner, Securities & Exchange Commission, 1934-1936, and Chairman, 1936-1939.
Frank Murphy	1940	Pres. Roosevelt	Mayor of Detroit, Michigan, 1930-1933; Governor General and High Commissioner to Philippines, 1933-1936; Governor of Michigan, 1936-1939; U.S. Attorney General, 1939-1940.
James F. Byrnes	1941	Pres. Roosevelt	U.S. Congressman, 1911-1925; U.S. Senator, 1931-1941.
Robert H. Jackson	1941	Pres. Roosevelt	General Counsel, Bureau Internal Revenue, 1934; Assistant Attorney General, U.S., 1936-1938; Solicitor General, U.S., 1938-1939; U.S. Attorney General, 1940-1941.
Harold H. Burton	1945	Pres. Truman	Member, Ohio Legislature, 1929; Mayor, Cleveland, Ohio, 1935-1940; U.S. Senator, 1941-1945.
Fred M. Vinson	1946	Pres. Truman	U.S. Congressman, 1923-1929, 1931-1938; Director, Office of Economic Stabilization, 1943-1945; Federal Loan Administrator, 1945; Director, Office of War Mobilization, 1945; Secretary of the Treasury, 1945-1946.
Tom C. Clark	1949	Pres. Truman	Attorney with Department of Justice in various capacities, 1937-1945; U.S. Attorney General, 1945-1949.
Sherman Minton	1949	Pres. Truman	Public Counsellor, Indiana, 1933-1934; U.S. Senator, 1935-1941; Administrative Assistant to President, 1941.
Earl Warren	1943	Pres. Eisenhower	District Attorney, Oakland, California, 1925-1939; Attorney General, California, 1939-1943; Governor, California, 1943-1953.

³² In addition to Chief Justice Warren, President Eisenhower has appointed John Marshall Harlan, a prominent corporation lawyer with one year's experience on the United States Court of Appeals; William J. Brennan, Justice of the New Jersey Supreme Court, 1952-1956; Charles E. Whittaker, Judge of the United States District Court, 1954-1956, and of the United States Court of Appeals, 1956-1957; and Potter Stewart, a Judge of the United States Court of Appeals, 1954-1958. The latter, however, is widely

4. THE COURTS, THE GOVERNMENT AND THE PUBLIC

The High Court and the Supreme Court, while independent branches of the government, are at the same time weak and, in a sense, dependent. The executive appoints their personnel; the legislature appropriates funds and holds their appellate jurisdiction in its hands. They have no physical power to enforce their mandates, but must rely on the executive. They function in the area of political decision-making only passively, in the context of a case or controversy, and only indirectly, through formulating principles to decide the issues in a particular lawsuit.³³ Their influence upon the course of government, therefore, must be accounted for in their moral force, in their stature and prestige and general acceptance as authoritative spokesmen of 'the law'. De Tocqueville made the observation in the last century that the power of the Supreme Court 'is the power of public opinion'.³⁴ Justice Frankfurter made it again more recently when he asserted that 'the confidence of the people is the ultimate reliance of the Court as an institution'.³⁵ A comparative treatment of the functioning of the High Court and the Supreme Court, therefore, which omitted some consideration of the reception of the work of these institutions by the public and the other branches of government would miss the heart of the matter.

Compared with the political travail of the Supreme Court the acceptance of the functioning of the High Court in its over half a century of adjudication has been tranquil and complete.³⁶ This certainly has not been owing to a relative inactivity by the High Court in exercising the power of judicial review. While it may not be true,

identified as an active Republican and served as Cincinnati City Councilman and Vice-Mayor prior to his first judicial appointment.

The present Attorney General, William P. Rogers, has outlined the method of selecting federal judges under the Eisenhower administration. Rogers, 'Judicial Appointments in the Eisenhower Administration' (1957) 41 *Journal of the American Judicature Society* 38. When a vacancy occurs many recommendations are submitted to the Department of Justice, including those from United States Senators. At the same time the department 'through bar groups and government sources' undertakes its own survey of candidates. The weeding out process is carried out by the Justice Department under the following standards affirmed by the President:

(1) Outstanding position as lawyer and leader in candidate's own community; (2) Youth and physical vigour; (3) Prior judicial experience; (4) 'The recognition of the American Bar Association'. When a candidate has been chosen his name is referred to the American Bar Association for its study and recommendation and to the Federal Bureau of Investigation for a full security clearance. Following these investigations, the Attorney General makes his recommendation to the President.

³³ See Jackson, *The Supreme Court in the American System of Government* (1955) 10-11.

³⁴ De Tocqueville, *Democracy in America* (Bowen edition, 1862), i, 9.

³⁵ Frankfurter, 'The Supreme Court in the Mirror of Justices' (1957) 105 *University of Pennsylvania Law Review* 781, 796.

³⁶ See Bailey, 'Fifty Years of the Australian Constitution' (1951) 25 *Australian Law Journal* 314, 332-333; Sawyer, 'The Supreme Court and the High Court of Australia' (1957) 6 *Journal of Public Law* 482, 500; Sawyer, *Australian Federal Politics and Law, 1903-1929* (1956) 328-330.

as has been said of the United States, that, 'scarcely any political question arises in the United States which is not resolved sooner or later into a judicial question',³⁷ we have been assured by one of Australia's foremost students of the subject that: 'High Court decisions, like those of the Supreme Court, have had an important impact on political policies, and have frustrated plans of governments drawn from every major party.'³⁸ Professor Sawyer has counted sixty-one Commonwealth statutes which were wholly or partly invalidated by the Court between 1903 and 1956,³⁹ including such recent significant political measures as the Labour Government's health⁴⁰ and bank nationalization schemes,⁴¹ and subsequently the move by the other side of the political fence to outlaw the Communist Party.⁴² The favourable public reception of these judicial interpositions is revealed in the subsequent defeat of the Labour Party and the popular rejection of a constitutional amendment to undo the Court's decision in the *Communist Party Case*. A similar pattern of bold assertion followed by popular acceptance, if not approval, occurred in the early years of the Court's work.⁴³ The issues of the power of States and Commonwealth to interfere with each other's activities, and of the demarcation between Commonwealth and state legislative powers, were warmly debated political issues in the first decade of this century. The Court, relying not on the compulsion of specific textual language but on political theories of the nature of Australian federalism, purported to resolve these issues by evolving the doctrine of implied immunity of instrumentalities,⁴⁴ on the one hand, and the doctrine of implied prohibitions of Commonwealth power,⁴⁵ on the other. But neither the importance of the doctrines asserted to contemporaneous political programmes nor the fact that the Court itself subsequently divided over these issues caused the Court as an institution to suffer sharp political attacks. Instead the reaction was directed at specific amendments of the Constitution, which, incidentally, either failed at proposal to Parliament, or failed to carry at

³⁷ De Tocqueville, *Democracy in America* (Bowen edition, 1862), i, 357.

³⁸ Sawyer, 'The Supreme Court and the High Court of Australia' (1957) 6 *Journal of Public Law* 482, 500.

³⁹ *Ibid.*, 483.

⁴⁰ *Attorney-General (Vic.) v. Commonwealth* (1946) 71 C.L.R. 237; *British Medical Association v. Commonwealth* (1949) 79 C.L.R. 201.

⁴¹ *Bank of N.S.W. v. Commonwealth* (1948) 76 C.L.R. 1.

⁴² *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1.

⁴³ See Sawyer, *Australian Federal Politics and Law, 1901-1929* (1956) for a discussion of the politically significant decisions of the High Court during the period of each Parliament, from the first to the eleventh in 1929.

⁴⁴ *D'Emden v. Pedder* (1904) 1 C.L.R. 91 (state stamp tax on receipt given for Commonwealth salary invalidated); *Federal Amalgamated Government Railway and Tramway Servants Association v. N.S.W. Traffic Employees Association* (1906) 4 C.L.R. 488. (Vesting of Commonwealth court with jurisdiction over state industrial employees invalidated.)

⁴⁵ *Peterswald v. Bariley* (1904) 1 C.L.R. 497. (Announcing doctrine that express grants of Commonwealth power must be narrowly construed to preserve reserved power of the states.)

the polls.⁴⁶ Neither were the popular repercussions great when the Court chose in the *Engineers' Case*⁴⁷ in 1920 to go beyond the necessities of the case to overrule both well established conceptions—implied immunity and implied prohibitions—thereby opening the way for extension of Commonwealth power.⁴⁸ Whether the reasons for this relatively acquiescent political reception of the Court's role in matters of government is due to a 'lucky accident', as Professor Sawyer concludes,⁴⁹ or to the efforts of the Court to eschew the wide view and confine itself closely to strict legal reasoning, or to some combination of factors, the experience of the Supreme Court has been quite otherwise.

The most recent instance of denunciation and diatribe directed against the Supreme Court has no doubt reached Australian readers. It cannot have escaped American readers. In the last several terms the Court has had occasion to assert the invalidity of a spate of state and federal actions in areas in which convictions ran deep in various segments of the population. In 1954 the Court, overruling a fifty-odd-year-old precedent, held unconstitutional the segregated public education of Negroes,⁵⁰ thereby earning a hostility on the part of the advocates of American 'apartheid' rivalled in acerbity and violence only by that engendered in the abolitionists by the *Dred Scott* decision⁵¹ a century earlier. Subsequently, mainly in the October 1956 Term, the Court in several notable decisions responsive to the interests of individual liberty, invalidated or severely limited programmes for dealing with subversives or criminals. It asserted the applicability of the First Amendment as a restraining influence upon state⁵² and federal⁵³ legislative investigations; reversed a conviction of Communist Party leaders under the Smith Act;⁵⁴ restricted state power to refuse membership in the bar on the basis of past Communist Party membership or beliefs;⁵⁵ restricted the authority of the executive to discharge employees for security reasons;⁵⁶ and invalidated the discharge of a college professor for invoking the privilege

⁴⁶ See Sawyer, *Australian Federal Politics and Law, 1901-1929* (1956) 98-100, 143-144, 170-171.

⁴⁷ *Amalgamated Society of Engineers v. Adelaide Steamship Co.* (1920) 28 C.L.R. 129.

⁴⁸ But see the caustic attack, reminiscent of current American Supreme Court diatribes, in Brennan, *Interpreting the Constitution* (1935) 14-15.

⁴⁹ Sawyer, 'The Supreme Court and the High Court of Australia' (1957) 6 *Journal of Public Law* 482, 501.

⁵⁰ *Brown v. Board of Education* (1954) 347 U.S. 483; 98 L. Ed. 873.

⁵¹ *Dred Scott v. Sandford* (1857) 19 Howard 393; 15 L. Ed. 691. See Bischoff, 'One Hundred Years of Court Decisions: Dred Scott After a Century' (1957) 6 *Journal of Public Law* 411.

⁵² *Sweezy v. New Hampshire* (1957) 354 U.S. 234; 1 L. Ed. 2d 1311.

⁵³ *Watkins v. United States* (1957) 354 U.S. 178; 1 L. Ed. 2d 1273.

⁵⁴ *Yates v. United States* (1957) 354 U.S. 298; 1 L. Ed. 2d 1356.

⁵⁵ *Konigsberg v. State Bar of California* (1957) 353 U.S. 252; 1 L. Ed. 2d 810; *Schwartz v. Board of Bar Examiners* (1957) 353 U.S. 232; 1 L. Ed. 2d 796.

⁵⁶ *Service v. Dulles* (1957) 354 U.S. 363; 1 L. Ed. 2d 1403.

of self-incrimination before a federal committee.⁵⁷ As a result of these and similarly oriented decisions the voices of the supporters of vigorous programmes against subversives and the criminally accused were added to those of the Southern opposition. These groups have led a violent campaign against the Court, some of the flavour of which is apparent in such statements as these:⁵⁸ Senator Byrd accused Warren C.J. of 'doing more to destroy the form of government we have in this country than has any Chief Justice in the history of the United States'; a federal district court judge labelled the Court 'a hierarchy of despotic judges that is bent on destroying the finest system of government ever designed' and accused it of 'construing the Constitution so as to make it a protective shield for the criminally disposed and disloyal elements in our population'; the Georgia legislature passed a resolution calling for the impeachment and removal of seven justices because they 'are guilty of attempting to subvert the Constitution of the United States, and of high crimes and misdemeanors in office, and of giving aid or comfort to the enemies of the United States. . . .' Even the American Bar Association could not be moved to repudiate this hysterical criticism; and as august a body as the Conference of Chief Judges (of state courts) voted 36 to 8 to approve an elaborate and acutely critical examination of the Court's recent decisions in the area of federal-state relations, the central theme of which was that the Court 'has tended to adopt the role of policy maker without judicial restraint'.⁵⁹ An unusually large volume of legislative proposals to limit the power of the Court accompanied these criticisms.⁶⁰ One approach was through the exercise of the power to make exceptions to the appellate jurisdiction of the Supreme Court.⁶¹ Senator Jenner, for example, introduced a Bill⁶² which would in effect deprive the Court of jurisdiction to review any case where there was called into question the validity of Congressional investigations or contempt convictions arising therefrom;⁶³ any executive action designed to eliminate federal employees in the interest of national security;⁶⁴ any state action designed to

⁵⁷ *Slochower v. Board of Education* (1956) 350 U.S. 551; 100 L. Ed. 692.

⁵⁸ See Pollack, 'The Supreme Court Under Fire' (1957) 6 *Journal of Public Law* 428, 429-430.

⁵⁹ Full text reported in *U.S. News and World Report*, 3 Oct. 1958, at 92-102.

⁶⁰ See Elliot, 'Court-Curbing Proposals in Congress' (1958) 33 *Notre Dame Lawyer* 597.

⁶¹ U.S. Constitution, Art. III, s. 2. Parliament has a similar power over the High Court's appellate jurisdiction. Australian Constitution, s. 72. This power has long been recognized as sufficient to enable Congress to take away 'bit by bit, all the appellate jurisdiction of the Supreme Court of the United States'. Roberts, 'Now Is the Time: Fortifying the Supreme Court's Independence' (1949) 35 *American Bar Association Journal* 1, 4. It was successfully used once for political purposes in the reconstruction era following the Civil War, *Ex parte McCordle*, (1869) 7 Wall. (U.S.) 506; 19 L. Ed. 264.

⁶² S. 2646, 85th Congress, 1st Session (1957).

⁶³ Aimed at *Watkins v. United States* (1957) 354 U.S. 178; 1 L. Ed. 2d 1273.

⁶⁴ Aimed at *Service v. Dulles* (1957) 354 U.S. 363; 1 L. Ed. 2d 1403 and *Cole v. Young* (1956) 351 U.S. 336; 100 L. Ed. 1396.

control subversive activities;⁶⁵ any school programme concerning subversive activities in the teaching body;⁶⁶ and any action of any state authority pertaining to admission to the bar.⁶⁷ An amended version of this Bill, retaining only the last mentioned restriction on the Court's jurisdiction and otherwise directing itself to legislative changes designed to undo the effect of specific decisions of the Court, was favourably recommended by the Senate Judiciary Committee, but failed of an enactment after the opposition succeeded in rallying its forces.⁶⁸ While these measures attracted the greatest attention, other anti-court measures were also proposed designed to accomplish the same objective less directly, as by limiting the term of office of Supreme Court Justices or imposing judicial service as a condition of eligibility.⁶⁹

These recent developments are not unique. They have their parallels in virtually every generation of American history. Periodically the dominant social, economic or political issues of the era become focused in cases brought to the Court for adjudication. And in each instance the decisions of the Court draw the fire of the groups adversely affected. The current controversy derives from the Court's adjudications in one of the crucial issues of the post-World War II period—the accommodation of individual liberty with the demands of the 'garrison state'.⁷⁰ The previous major Supreme Court crisis derived from its obstructive decisions in the early 1930's which blocked legislative efforts to deal with the major crisis of that era, the economic survival of American capitalism. The Roosevelt court-packing proposal focused the controversy at that time, although there were other major constitutional and legislative attacks under consideration as well.⁷¹ It would unduly and unnecessarily extend

⁶⁵ Aimed at *Pennsylvania v. Nelson* (1956) 350 U.S. 497; 100 L. Ed. 640.

⁶⁶ Aimed at *Slochower v. Board of Higher Education* (1956) 350 U.S. 551; 100 L. Ed. 692.

⁶⁷ Aimed at *Schware v. Board of Bar Examiners of New Mexico* (1957) 353 U.S. 232; 1 L. Ed. 2d 796 and *Konigsberg v. State Bar of California* (1957) 353 U.S. 252; 1 L. Ed. 2d 810.

⁶⁸ See the statements in opposition from state bar associations, distinguished judges and lawyers and law teachers contained in Appendix E of the Minority Report, Committee of the Judiciary, Report to Accompany s. 2646, Report No. 1586, 85th Congress, 2nd Session. The American Bar Association likewise opposed limitations upon the Supreme Court's jurisdiction. *Ibid.*, 37-38.

⁶⁹ See Elliot, *supra*, n. 60 at 602-605 where these proposals are surveyed.

⁷⁰ Lasswell, *The Analysis of Political Behavior* (1948) 146; Miller, 'The Constitutional Law of the Security State' (1958) 10 *Stanford Law Review* 620.

⁷¹ See Elliot, *supra*, n. 60 at 605-606: '... from May 7, 1935, to August 20, 1937, no less than 33 proposed constitutional amendments were introduced, each of which would, in one way or another, have affected the Supreme Court's membership or its powers to declare laws unconstitutional. Sixteen of the measures, or nearly half, were introduced in the first three months of 1937. Among the 33 proposals, those having an imminent bearing on the Supreme Court's authority ranged from outright prohibition of the Court's power to declare laws unconstitutional to affirmative protection of its composition and membership. The spectrum in between included proposals to require the Court to render advisory opinions on the constitutionality of act of Congress, measures that would make laws held unconstitutional by the Supreme Court

the length of this discussion to demonstrate by other historical examples what has been already competently demonstrated⁷²—that the Court has periodically come under violent attack from groups adversely affected by its constitutional pronouncements; that it has never been able for sustained periods to disengage itself from contemporaneous political storms; that not only the particular decisions of the Court, but the manner of its exercise of the power of judicial review, indeed the very existence of the power, has been recurrently subject to critical public scrutiny. It must also be said, however, that in every instance the Court has succeeded in weathering the storm, at least so far as concerns its legal power and institutional status.

Some American students sympathetic to the Court, impressed with the regular recurrence of this criticism and the political embroilment of the Court, tend to accept this history resignedly as 'no more than the price we pay, and . . . expect to pay, for a representative form of government'.⁷³ But the escape of the High Court of Australia, exercising the function of judicial review in the context of a no less representative form of government, from anything like the same public and legislative attacks, commands attention to the particular qualities of the functioning of the Supreme Court which may have contributed to its experience in this respect. Here we reach the level of unverifiable surmise. The explanation may reside partly in the differing judicial methods in constitutional adjudication. A court which at least on the face of things confines itself to a detached assertion of legal principles derived and applied through the analytical and definitional legalisms of the traditional common law is plainly less of a natural political target for public and political criticism than one which typically embraces a frankly evaluative and interest-balancing approach as an inevitable derivative of its constitutional function. It may also be partly a concomitant of the conditioning of the American public to regard its judicial institutions, not as a thing apart, but as just another governmental institution—after all, political activity is generally a practical condition of judicial office and the state judiciary is typically obliged to run for office and stand for re-election at the expiration of their terms. It may, on the other hand, be due to the fact that the Supreme Court has been in business

valid if re-enacted by Congress, or if either re-enacted by Congress or approved by the electorate, and proposals to require a two-thirds vote of the Court in order to declare a law unconstitutional.'

⁷² See Warren, 'Legislative and Judicial Attacks on the Supreme Court of the United States' (1913) 47 *American Law Review* 1, 161; Warren, *Congress, The Constitution and the Supreme Court* (Rev. ed. 1935); Warren, *The Supreme Court in United States History* (1926); McGowan, 'The Supreme Court in the American Constitutional System, The Problem in Historical Perspective' (1958) 33 *Notre Dame Lawyer* 527.

⁷³ Elliot, 'Court-Curbing Proposals in Congress' (1958) 33 *Notre Dame Lawyer* 597, 611. See also McGowan, 'The Problem in Historical Perspective' (1958) 33 *Notre Dame Lawyer* 527, 538.

for three times as long as the High Court through periods of political *sturm und drang* not yet paralleled in Australian history. Whatever may be said of these general observations it is possible to demonstrate more particular characteristics of the functioning of the Supreme Court as an institution which almost certainly have contributed to the severity of the Court's predicament. I have reference to the process of judicial appointment, the nature of opinion writing, intra-Court controversies and attitude to precedent.

The calculated appointment of Justices expected to cast their vote along the lines desired by the President has occurred rarely. In several instances in which it has occurred it has provoked a contrary vote by the appointed Justice.⁷⁴ More typical are appointments made out of regard to the general background and philosophy of the Justice with the view of creating a judiciary sympathetic to the immediate legislative programme of the administration.⁷⁵ Where many judicial decisions are avowedly made ultimately on the basis of social judgment and philosophical orientation, this is only to be expected and, indeed, may well be justifiable despite the inevitable scepticism it tends to create of a detached and disengaged judiciary.⁷⁶ However, the political aspects of Supreme Court appointments have been emphasized and dramatized by the Senatorial participation in the nomination process. The constitutional veto power of the Senate over presidential appointments combined with the absence of a system of responsible government has served to open the selection of Justices to public scrutiny. Public hearings customarily follow the nomination of candidates in which members of the Senate Judiciary Committee publicly explore the suitability of presidential appointments. At least in modern times, senatorial participation has been of limited significance; since 1894 on only one occasion has the Senate refused to confirm.⁷⁷ The chief function of these senatorial investiga-

⁷⁴ Chief Justice Chase dissented from a decision upholding the constitutionality of the Legal Tender Act, supported by the President who appointed him and the party of which he was a member. *Legal Tender Cases* (1871) 12 Wallace 457; 20 L. Ed. 287 U.S. Justice Holmes disappointed President Theodore Roosevelt's expressed expectations when he dissented from the majority opinion upholding the government's trust-busting efforts. *Northern Securities Co. v. United States* (1904) 193 U.S. 197. Sawyer, *Australian Federal Politics and Law, 1901-1929* (1956) 105-106 contains an account of an attempt by the then Prime Minister, Mr Hughes, to plumb Mr Piddington's views on 'Commonwealth versus State rights' prior to appointment. Hughes got the answer he wanted, but Piddington resigned his appointment without sitting, partly as a result of that incident.

⁷⁵ It was not to be expected that any of President Roosevelt's appointees would vote to strike down his New Deal measures; nor did it turn out to be the case.

⁷⁶ See de Tocqueville, *Democracy in America* (Bowen edition 1862) 192: 'The Federal judges must not only be good citizens, and men possessed of that information and integrity which are indispensable to magistrates, but they must be statesmen, wise to discern the signs of the times, not afraid to brave the obstacles which can be subdued, nor slow to turn away from the current when it threatens to sweep them off, and the supremacy of the Union and the obedience which is due to the laws.'

⁷⁷ Judge J. J. Parker in 1930. See Harris, *The Advice and Consent of the Senate* (1953) 127.

tions has been to open still one more window into the not strictly judicial aspects of the nation's highest court.⁷⁸ Since the inquiries, sometimes hostile and bitterly political, offer an occasion for intense public examination of the politics and personalities of those who will constitute the Court, they serve as an additional factor tending to deny the Court the esteem of a disembodied and disengaged institution which the High Court in far greater measure enjoys among the population.⁷⁹

The form of judicial expression has also contributed to the quality of public reception of the Courts' work. The High Court has followed the English practice of separate opinions by each member of the Court.⁸⁰ Since Marshall C.J. persuaded his colleagues to abandon it⁸¹ the *seriatim* opinion has not been used, as such, by the Supreme Court. Instead a joint opinion, the 'opinion of the Court', is written for the majority group, the minority group writing separate opinions as the occasion requires. Both techniques contrast with the single opinion of the Privy Council. In recent years, however, the in-between joint opinion of the Supreme Court has come to resemble more and more the *seriatim* opinions of the High Court. Of the total number of opinions written during each of the past half-dozen terms, forty to fifty per cent have been concurring or dissenting opinions.⁸² There

⁷⁸ See Frank, 'The Appointment of Supreme Court Justices: Prestige, Principles and Politics' [1941] *Wisconsin Law Review* 172, 343, 461.

⁷⁹ Another factor, related to the appointment process, is the indigenous institution of interim appointments. These temporary appointments are invited by the Constitution which, while vesting the Senate with a veto power of presidential judicial appointments, authorizes the President to fill temporary vacancies until the end of the next session of the Congress: Art. II, s. II. When the President employs this power to fill vacancies during Congressional recess or pending Senatorial action on his nomination the result is a judge compelled to adjudicate under the scrutiny of a Senate empowered to terminate his short judicial career if displeased with his decisions. This follows from the settled interpretation that the principle of life tenure (Art. III) does not apply to appointments so made. Such appointments are common on the lower court level. Until recently it has been rare that a Supreme Court Justice received such an appointment and even rarer that he sat on the Court prior to confirmation. However, currently Warren C.J. and Brennan J. served for approximately three months pending confirmation during which time they were subjected to considerable public and Congressional cross-examination. See Note, 'Recess Appointments to the Supreme Court—Constitutional But Unwise?' (1957) 10 *Stanford Law Review* 124.

⁸⁰ See Paton and Sawyer, 'Ratio Decidendi and Obiter Dictum' (1947) 63 *Law Quarterly Review* 461.

⁸¹ See Beveridge, *Life of John Marshall* (1919) iii, 15.

⁸² *Numbers of Opinions Written by the Supreme Court and Justices, 1951-1956 Terms*

	Total Written Opinions	Opinions of the Court	Concurring Opinions	Dissenting Opinions
1956 Term	216	115	18	83
1955 Term	170	94	21	55
1954 Term	144	82	15	47
1953 Term	151	78	16	57
1952 Term	231	110	32	89
1951 Term	182	90	19	73

(Data compiled from statistical summaries in yearly reviews of work of the Supreme Court in (1957) 71 *Harvard Law Review* 85; (1956) 70 *Harvard Law Review* 83; (1955) 69 *Harvard Law Review* 119; (1954) 68 *Harvard Law Review* 96; (1953) 67 *Harvard Law Review* 91; (1952) 66 *Harvard Law Review* 89.)

were dissents written in seventy-one per cent of the cases disposed of with full opinion during the October 1956 Term; forty-one per cent in the 1955 Term; sixty per cent in the 1954 Term; seventy-two per cent in the 1951 Term.⁸³ To refer to specific examples which give life to these figures, in the controversial *Steel Seizure Case*⁸⁴ an inability to agree on the constitutional principles involved in the seizure by the President of most of the nation's steel mills resulted in the submission of seven opinions—one Court opinion, five concurrences and one dissent. *Brown v. Allen*,⁸⁵ a recent case dealing with the use of *habeas corpus* to review constitutional defects in state criminal trials, produced five opinions in a bewildering pattern of partial dissents and partial concurrences. Instances of this kind of total inability to agree have become almost proverbial.⁸⁶ It is significant that the Court in its most recent pronouncement on the School Segregation issue called particular attention to the unanimity of its original decision as well as subsequent decisions in the area of school segregation despite the appointment of three new Justices.⁸⁷

⁸³ *Ibid.* It should be observed, however, that there has been a large degree of unanimity in the disposition of numerous cases without opinion, as, for example, dismissals for want of a federal question.

⁸⁴ *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579; 96 L. Ed. 1153.

⁸⁵ (1953) 344 U.S. 443; 97 L. Ed. 469.

⁸⁶ See Marsh, 'Mr Dooley Discovers a Unanimous Dissent', Nov.-Dec. 1957, *Case and Comment*, 8, commenting on *Rogers v. Missouri Pacific Railroad Co.* (1957) 352 U.S. 500; 1 L. Ed. 2d 493.

'Everyone of them dissented,' said Mr Dooley. 'It was unanimous.'

'They's nine jedges on that coort, and everyone of them dissented—including me brother Brennan, who wrote the opinion they're all dissentin' from . . .'

'How's come?' asked Hennessy.

'Well, pinitratin' all the joodicial gobbley-dook, it's like this: Rogers was workin' on the tracks of the Missouri Pacific and he fell off a culvert; the jury gave him damages but the Supreme Coort of Missouri took them away.'

'Then the Supreme Coort of the United States listened to the loiyers' argyments and gave Rogers his money back again. Me brother Brennan is supposed to tell the reasons why—at three hundred fifty two U.S. five hundred, which sounds like the odds against anyone but a Philadelphia loiyer understandin' the case.

'But Felix says "Brennan, me boy, we shoodn't have took this case in the first place, we shoodn't have decided it in the second, and we shoodn't be ladlin' out the railroad's money anyway—it ain't becomin' to this high coort" . . .'

'Then Harlan, J., says "Ye're half right, Felix, but ye're wrong there where ye say we shoodn't decide the case; but I dissent from me brother Brennan givin' him the money, too."

'And thin Brennan says "Ye're half right too, Harlan, and I agree with your Part I 'except insofar as . . .'

'And so Brennan signed Harlan's dissent from Brennan's own opinion, and so did Warren, Black, Douglas and Clark, JJ., the same ones who signed Brennan's opinion in the first place.'

'I täl ye, Hennessy, it's a demoralizin' situation. Here's the highest coort in the land, and they're all half right but none of them are all right, and they're tellin' on each other at that.'

⁸⁷ 'The basic decision in *Brown* was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed.' *Cooper v. Aaron* (1958) 27 U.S. Law Week 4001, 4006.

While the traditional *seriatim* opinion in England and Australia has inevitably increased the element of uncertainty in knowing what the law is, it has apparently not had the effect of shaking confidence in the existence of the law to be known. Such being the imperiousness of institutions, however, the growing approximation of Supreme Court opinion writing to that of the High Court has served to lend credence and support to the view that decisions turn upon the personal predilection of the individual Justices, political, social and moral, and hardly, if at all, on any principles capable of rational generalization. The proposition that adjudication is a product of the personality and philosophy of the adjudicator finds support in the public view in the tendency to a multiplicity of concurring and dissenting opinions. Certainly the tendency to separate opinion writing can be explained and defended on other grounds; explained, for example, as the result of the Court's restriction of the cases it will hear to only a small number of the most difficult and division-provoking kind; defended on the basis of the need to preserve significant points of difference.⁸⁸ But the public tends to accept it as proof of the proposition that the Supreme Court regards constitutional law as a matter for the particular taste of each Justice.⁸⁹ As observed by Learned Hand J., "This is disastrous because disunity cancels the

⁸⁸ See Kurland, 'The Supreme Court and the Attrition of State Power' (1958) 10 *Stanford Law Review* 274, 277. Commenting on Schwartz, *The Supreme Court* (1957) Professor Kurland comments: 'Professor Schwartz' plea for the delusive certainty that unanimous opinions appear to afford is, I think, similarly wanting in merit. Of course, he is not saying that the questions presented to the Court are not difficult and complex, or that different Justices cannot honestly disagree. He is saying, rather, that the conflict of views among the Justices ought to be hidden from the lower courts, the bar, the public, and the press. It is not really certainty for which he seeks, but the preservation of the myth, the destruction of which was Mr Justice Holmes' contribution to Anglo-American jurisprudence. To put his thesis in his own words, Professor Schwartz says: "But even the Apollo at Delphi could not long retain the allegiance of men if it spoke with utterly inconsistent voices." Certainly it is not the role of the Supreme Court to behave like the Delphic oracle; there is no greater reason why it should appear to behave like such an unreasoning body.'

⁸⁹ 'It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that, in constitutional cases, unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences.

'We find next that divisions in result on a five-to-four basis are quite frequent. We find further that, on some occasions, a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.' Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions, Conference of Chief Justices, 23 August 1958, as reported in *U.S. News & World Report*, 3 October 1958, at 92, 102.

See also Swisher, 'The Supreme Court—Need for Re-Evaluation' (1954) 40 *Virginia Law Review* 837, 848-849; Swisher, *The Supreme Court in Modern Role* (1958) Chapter VI; Schwartz, *The Supreme Court* (1957) 354; Jaffe, Foreword, 'The Supreme Court, 1950 Term' (1951) 65 *Harvard Law Review* 107, 113; Mishkin, 'Prophecy, Realism and the Supreme Court: The Development of Institutional Unity' (1954) 40 *American Bar Association Journal* 680.

impact of monolithic solidarity on which the authority of a bench of judges so largely depends'.⁹⁰

The effect of the fragmentation of the Court's opinions upon its prestige has been aggravated by the occasional personal and acrimonious character of the controversy among the individual Justices. Following the sustaining of Congressional legislation invalidating private 'gold clause' provisions,⁹¹ McReynolds J. amplified his dissent for the benefit of the press with the observation, 'The Constitution, as we have known it, is gone. This is Nero at his worst. It seems impossible to overestimate the result of what has been done here today . . . the impending legal and moral chaos is appalling'.⁹² The bitter controversy between Justices Black and Jackson over the former's participation in a case from which the latter believed he should have disqualified himself⁹³ and the alleged machinations of the former to undercut the latter's appointment as Chief Justice was spread on the Congressional Record in a letter written by Jackson J. to the Senate Judiciary Committee.⁹⁴ Further, the opinions themselves have sometimes carried the sting of scorn and disrespect, as, for example, Justice Jackson's observation in *Joint Anti-Fascist Refugee Committee v. McGrath*: 'The extravagance of some of the views and the intemperance of their statement may create a suspicion that the decision of the case does not rise above the political controversy that engendered it';⁹⁵ or Justice Rutledge's dissenting observation: 'No man or group is above the law. All are subject to its valid commands. So are the Government and the courts.'⁹⁶ Such evidences of personal acrimony add to the multiplicity of opinions in destroying the notion of an impersonal court dispassionately pronouncing the law. And the Court's dominant attitude to *stare decisis*, which has previously been described, operates in similar fashion.⁹⁷

⁹⁰ Hand, *The Bill of Rights* (1958) 72.

⁹¹ *Norman v. Baltimore* (1935) 294 U.S. 240; 79 L. Ed. 885; *Nortz v. United States* (1935) 294 U.S. 317; 79 L. Ed. 907.

⁹² Quoted in Bischoff, 'The Role of Official Precedents', in Cahn (Ed.), *Supreme Court and Supreme Law* (1954) 77.

⁹³ *Jewell Ridge Coal Corporation v. Local 6167, United Mine Workers of America* (1945) 325 U.S. 161, 897; 89 L. Ed. 1534.

⁹⁴ 92 *Congressional Record* 6724, 6725 (12 June 1946). The letter includes the following: 'It is high time that the stories of feuds cease to be mysteriously and irresponsibly fed out and that Congress have the facts. If war is declared on me I propose to wage it with the weapons of the open warrior, not those of the stealthy assassin. . . . There may be those who think it quite harmless to encourage the employment of Justices' ex-law partners to argue close cases by smothering the objections which the bar makes to this practice but in my view such an attitude would soon bring the court into disrepute. . . . However innocent the coincidence of these two victories at successive terms by Justice Black's former law partner, I wanted that practice stopped. If it is ever repeated while I am on the bench I will make my Jewell Ridge opinion look like a letter of recommendation by comparison. . . .'

⁹⁵ (1951) 341 U.S. 123, 183; 95 L. Ed. 817.

⁹⁶ *United Mine Workers v. United States* (1947) 330 U.S. 258, 385; 91 L. Ed. 884.

⁹⁷ See, e.g., Jackson J. in *Brown v. Allen* (1953) 344 U.S. 443, 535; 97 L. Ed. 469.

When it is old and well-established precedent which is overruled the reaction is likely to be that, 'Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy'.⁹⁸ When a recent precedent is the victim, on the other hand, it is likely to be that, 'Especially ought the Court not reinforce needlessly the instabilities of our day by giving fair ground for the belief that Law is the expression of chance—for instance, of unexpected changes in the Court's composition and the contingencies in the choice of successors'.⁹⁹

Considerations of the kind I have just briefly discussed have added to the more permanent influences in creating the impression in the public view of the Court as a passing and changing political organ rather than as an impartial institution of the law. These features of the Court's performance of its task have been deprecated by responsible critics as evidencing an unfortunate absence of a sense of institutional awareness. As Professor Jaffe has put it:

... perhaps the most general criticism that might be directed against it [the Supreme Court] is its relative lack of institutional awareness and pride. This manifests itself in a variety of ways. The number of concurrences and dissents, particularly to denials of certiorari, is far in excess of what appears to be needed to preserve essential and significant points of difference. As if to show that these differences are not the ineluctable promptings of intellectual integrity the opinions ring with a personal tone of charge and counter-charge, of points scored, of passion, predilection and horrid prophecy. One has so often the feeling that the vote of this or that justice is only remotely controlled by his apprehension of the legal issues and represents a judgment based on collateral considerations.¹

5. CONCLUDING OBSERVATIONS

To the extent that the central distinguishing characteristics of the Supreme Court's and High Court's discharge of the function of judicial review may be reduced to labels, it was suggested that in its approach to constitutional pronouncements the Supreme Court has been timorous in its deference to the legislative judgment and parsimonious in its use of the power of judicial review, while the High Court has been relatively bold in the former and uninhibited in the latter; in the matter of judging constitutional issues, once the obligation is assumed, the Supreme Court has been liberal in its appraisal of the governing criteria and ready candidly to move beyond

⁹⁸ Frankfurter J. dissenting in *Mahnich v. So. Steamship Co.* (1944) 321 U.S. 96, 115; 88 L. Ed. 561.

⁹⁹ Frankfurter J. dissenting in *United States v. Rabinowitz* (1950) 339 U.S. 56, 86; 94 L. Ed. 653. See Hughes, *The Supreme Court of the United States* (1928) 52.

¹ Jaffe, Foreword, 'The Supreme Court, 1950 Term' (1951) 65 *Harvard Law Review* 107, 113. See also to the same effect, material cited *supra*, 165, n. 89.

strictly legal considerations, while the High Court has adhered doggedly to the restrictive methods of the common law; and in the matter of public and governmental acceptance of its work and its role, the Supreme Court has been unable to escape periodic storms of opposition, while the High Court has. At this point, whatever paradoxes may have seemed to appear in this assortment of dominant characteristics become more understandable—there is an obvious interrelatedness between them. When the task of constitutional adjudication is viewed as simply the application of familiar and tested techniques, there is no compelling reason for scrupling to avoid constitutional issues beyond the common law requirements of justiciable controversies. To the extent, on the other hand, that that task is regarded as calling for judgments which could not be reached through common law modes of analysis, but dependent upon matters of social and philosophical orientation, there is considerable cause for reluctance to exercise the power of review, and, that failing, to defer far to the legislative judgment. First, a judiciary sensitive to the tenets of democratic representative government is likely to see those values thwarted in a zealous exercise of the review power. Matters of social, economic and value judgment are primarily the concern, after all, of the people's representatives and not of an appointed and life-tenured judiciary. Moreover, the habit of self-government and the legislative facing of responsibility make it desirable to minimize the occasions when the non-representative and non-governing department of government blocks the exercise of choice. Secondly, awareness of the delicate standing of the Supreme Court as resting upon its prestige and popular acceptance as the authoritative spokesman in matters of constitutional law compels practical consideration to the public reaction to excessive and seemingly unnecessary interference with the legislative will. Moreover, the interest-balancing and public policy approach of the Supreme Court make it peculiarly susceptible to political attack to the extent that such an approach makes it more difficult to hide behind the facade of a disengaged and disembodied oracle of the law. And the susceptibility is enhanced by the judicial vocabulary appropriate to the judicial function so viewed. 'Pith and substance', or the language of conceptual essences, do not furnish a likely vocabulary for political debate. 'Reasonableness', 'undue burden', 'balance of interests' and 'due process of law' do. The tumultuous crises of public opinion through which that Court has passed tends to make it acutely aware of the danger of what Hughes C.J. referred to as 'self-inflicted wounds'.² Being a ready bleeder, the Court is not to be expected to venture into battle when battle can be avoided.

² Hughes, *The Supreme Court of the United States* (1928) 50.

At this point some observations may be offered which go beyond description and explanation. What can be said evaluatively concerning the fundamentally contrasting views of the two courts with respect to the proper judicial method of constitutional adjudication? The legalistic approach of the High Court has been sharply criticized as both inappropriate and ultimately impossible. It is said to be inappropriate in the sense that the function of judicial review is inextricably bound up with the process of government and therefore is not properly exercised through the common law techniques of resolving private litigation,³ that a constitution as an enduring charter of government commands in the adjudicator an appraisal of the consequences of alternative constructions upon the constitutional scheme of government and an evaluation responsive to considerations of history and philosophy and value currents.⁴ It is said to be impossible in the sense that in the last analysis the High Court has indeed given consideration to these matters but has done so unconsciously or uncandidly; that the process of analysis and definition, however commanding of subsequent decisions once formulated, is at least in its original formulation no more than a way of explaining conclusions reached as the result of the operation of considerations not recognized as relevant and hence not fully and rationally appraised.⁵ As sharply criticized has been the broadly evaluative approach of the Supreme Court. The point is widely and recurrently made that for a court of law to depart from the tradition of the common law in pursuit of broad judgments of value and fact converts a legal institution into a political one; that a court, being a non-representative institution, ought not to force its policy judgments upon the properly political organs of government; moreover that to do so brings upon the law and the Court the disrespect which inevitably accompanies political involvement.

Choosing between these two alternative approaches to the function of judicial review is as unamenable to rational or dogmatic argument as choosing between alternative approaches to life itself. The choice turns upon an assessment of imponderables; it is the product of a commitment to a differently weighted set of ultimate goals. It is not a matter of whether a court should be either political or legalistic. No one doubts that the High Court and the Supreme Court are necessarily both. It is rather a matter of whether it ought properly to strive to be more of one or of the other. Moreover, looked at in

³ See e.g., Phillips, commenting on Holmes, 'Evidence in Constitutional Cases' (1949) 23 *Australian Law Journal* 235; *ibid.*, 242; Bailey, 'Fifty Years of the Australian Constitution' (1951) 25 *Australian Law Journal* 314.

⁴ See, e.g., Arndt, 'Judicial Review Under Section 90 of the Constitution, an Economist's View' (1952) 25 *Australian Law Journal* 706, 707.

⁵ See Sawyer, 'Constitutional Law' in Paton (Ed.), *The Commonwealth of Australia* (1952) 61, 75.

the large it may be that there really is little room for choice anyway. It may well be that the contrasting viewpoints and methods of the two courts are simply the products of differing histories, traditions, attitudes and national temperaments. In this sense each court is 'right' for its own national setting because it could not be otherwise—what 'is' is right.

This, of course, would not be true if it could be shown that one court was successful in discharging its institutional functions while the other was not. But this has not been so. Certainly the Supreme Court has been at the focal point of recurrent acrimonious political debate; and it may be that its failure to adhere to a 'strict and complete legalism' has been a contributing factor.⁶ But its institutional integrity has been maintained; in each historical instance the flare-up has died down without damage to the Court's constitutional authority.⁷ As for the total impact of the Court's adjudication it is of course true that its view has not always ultimately prevailed. But on only two occasions have its rulings been nullified by constitutional amendment.⁸ And while there have been fundamental alterations of constitutional precept by the Court itself, as in the application of the due process clause to economic regulatory legislation, these have not been frequent. The High Court has experienced as dramatic a 'revolution' in the *Engineers' Case*. The late Jackson J. observed that, 'In no major conflict with the representative branches on any question of social or economic policy has time vindicated the Court'.⁹

⁶ 'It may be socially useful to preserve a judicial technique which makes constitutional questions look as though they were ordinary questions of private law and which avoids making the process of deciding whether a statute is with respect to something look exactly the same as the process of deciding whether a man is committing a crime or whether he is entitled to damages in a workers' compensation case.' Sawyer, commenting on Holmes, 'Evidence in Constitutional Cases' (1949) 23 *Australian Law Journal* 235; *ibid.*, 241.

⁷ *Ex parte McCardle* (1868) 7 Wallace (U.S.) 506; 19 L. Ed. 264 may properly be regarded as an exception. Here the Congress withdrew jurisdiction to hear a pending appeal and the Court acquiesced. Instances of outright defiance of the Court exist, but they have been extremely rare and ultimately unsuccessful. Compare the resistance of the Executive and Chief Justice Toney's decision denying the power of the President to suspend the writ of *habeas corpus* (*Ex parte Merryman* 17 Federal Cases 144, No. 9, 487 [C.C.D. Md., 1861]) with the eventual triumph of the Court's limitations upon the military jurisdiction. (*Ex parte Milligan* (1866) 4 Wallace (U.S.) 2; 18 L. Ed. 281). The contemporary Southern resistance to the Court's desegregation decrees is another example, although so far the official opposition has been through legal manoeuvres rather than outright defiance. In any event it would scarcely be a gamble to predict ultimate compliance with the Court's orders.

⁸ The Fourteenth Amendment, making all persons born or naturalized in the United States, citizens of the United States, nullified *Dred Scott v. Sandford* (1857) 19 Howard (U.S.) 393; 15 L. Ed. 691. The Sixteenth Amendment, authorizing the income tax, nullified *Pollock v. Farmers' Loan & Trust Co.* (1895) 157 U.S. 429; 39 L. Ed. 759; (1895) 158 U.S. 601; 39 L. Ed. 1108. The Eleventh Amendment, withdrawing from federal jurisdiction suits by a citizen of one state against another state, constituted an alteration of the original text of Article III which defined the judicial power of the United States as embracing controversies 'between a state and citizens of another state'; the Supreme Court in accepting such jurisdiction in *Chisholm v. Georgia* (1793) 2 Dallas (U.S.) 419; 1 L. Ed. 440 was following the literal command of the Constitution.

⁹ Jackson, *The Struggle for Judicial Supremacy* (1941).

Certainly the statement has no application to state legislation; on the segregation issue, for example, it is beyond question that time is on the side of the Court. And as applied to Congress it is indeed an exaggeration. If time proves to vindicate Congress rather than the Court on such currently vital issues as freedom of speech and procedural due process, it is indeed a gloomy prophecy. It is therefore not possible to attribute greater 'success' to one or the other court in any meaningful sense.

In the matter of ultimately choosing methods in constitutional adjudication, Frankfurter J. has made the wise observation that the final problem is not choosing between resting decision on the personal and ungoverned choice of the Justice, on the one hand, or on sterile legalisms on the other, but on finding the basis for wise and informed decision-making within the framework of law. Perhaps along these lines both courts may learn from each other. Justice Frankfurter's words, therefore, may appropriately be invoked in conclusion:

For those wielding ultimate power it is easy to be either wilful or wooden: wilful, in the sense of enforcing individual views instead of speaking humbly as the voice of law by which society presumably consents to be ruled, without too much fiction in attributing such consent; wooden, in uncritically resting on formulas, in assuming the familiar to be the necessary, in not realizing that any problem can be solved if only one principle is involved but that unfortunately all controversies of importance involve if not a conflict at least an interplay of principles.¹⁰

¹⁰ Frankfurter, 'The Supreme Court in the Mirror of Justices' (1957) 105 *University of Pennsylvania Law Review* 781, 794.