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JUDICIAL REVIEW OR GOVERNMENT BY THE HIGH COURT

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1. *The Fact of Judicial Review*

The doctrine of judicial review enables the High Court to sit in judgment on the Act of its otherwise equal companion in government, Commonwealth Parliament. The Court thereby substitutes its opinion for Parliament's opinion on the validity of a federal Act. I can find no constitutional basis for such a doctrine.[1]

That basis might be sought in covering clause V of the Constitution together with s.73(ii), or in s.74, or in s.76(i). Covering clause V[2] is concerned with the subsequent (binding) effect of the Constitution and of a federal law made thereunder "on the courts, judges and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State". Clause V is not concerned with the antecedent character of the federal law, namely, its validity. For the clause does not tell us who is to decide that Parliament's Act is a law "under the Constitution", or what is the same thing, the clause does not indicate who is to authenticate a legislative Act as law. Perhaps Parliament, a sovereign body, itself is to verify its Act as law by the very fact that it enacts. Perhaps some other body, such as the High Court or an *ad hoc* arbitrator, is to certify the Act as law. Clause V is not concerned with the identity of this certifying body.

Even if it was concerned with that identification, "the courts, (and)

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[1] For that matter I can find no satisfactory basis for judicial review either by the United States Supreme Court or by the Canadian Supreme Court either in the United States Constitution of 1789 or in the British North America Act of 1867.

[2] Perhaps *Baxter* v. *Commissioners of Taxation* (N.S.W.) (1907) 4 C.L.R. 1087 at 1125 suggests c. V as the basis, when it parallels c. V with art. VI §2 of the United States Constitution and asserts that the latter article is the basis for the United States doctrine of judicial review.

judges" in clause V do not find in the clause an authority issued peculiarly to them to review Parliament's Acts if only because the clause is also addressed to "the people". High Court judges cannot build their judicial review on clause V alone for it does not refer to these judges. At best one could add Constitution s.73(ii) to clause V and reason as follows: whatever powers of judicial review are given by clause V to State courts or judges must be found also in the High Court's appellate jurisdiction when it takes an appeal under s.73(ii) from one of these State courts or judges. However, even conceding that State courts and judges can find some foothold for judicial review in clause V and making no less a concession to the High Court through the medium of s.73(ii), we still have not provided a basis for judicial review by the High Court exercising its original jurisdiction.

Turn now to s.74 of the Constitution. That section conditionally bars appeals to the Privy Council from a High Court decision on any question "as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States . . . ." Abstractly s.74 contemplates the High Court deciding that Commonwealth Parliament can exercise a given power up to a certain point; beyond that point State Parliaments can exercise their powers. Concretely s.74 envisages the High Court in these cases declaring that a particular exercise of Commonwealth Parliament's power, that is a particular Commonwealth Act, is law. But s.74 says nothing about a High Court decision on Commonwealth power when its exercise does not affect the limits of State powers. Thus the basis for judicial review by the High Court is not to be found in s.74 in the following examples: territorial laws built on ss.52(i), 122 . . . federal jurisdiction laws authorized by ss.76, 77 . . . laws under s.96 making conditional grants to States . . . Commonwealth laws said to transgress the constitutional prohibition in s.92. Accordingly, s.74 cannot be the foundation for a universal doctrine of judicial review by the High Court.

The last section which could be suggested as such a constitutional basis is s.76(i). Its weakness is immediately apparent: it is not even addressed to the High Court; moreover, it is merely a discretionary power. Section 76(i) is a legislative grant to Commonwealth Parliament which thereby may make laws conferring original jurisdiction on the High Court in any matter arising under the Constitution or involving its interpretation. In fact Commonwealth Parliament has exercised this power fully in the Judiciary Act 1903, s.30(a). In theory the latter section need never have been enacted and could be repealed. Then s.76(i) of the Constitution does not inculcate a necessary doctrine of judicial review by the High Court.

Absent constitutional authority for judicial review, is justification found in general reasoning? For example, could we take for our major premise the once[3] accepted role of the court as the interpreter of the law of the land?[4] This role is the starting point for the early Australian constitutional texts,[5]

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[3] "Once" accepted, because protective clauses which prevent curial review of administrative decisions are quietly attempting to erode the court's traditional function; on the High Court's recognition of such clauses, see *R.* v. *Hickman; ex p. Fox and Clinton* (1945) 70 C.L.R. 598 at 614-17.

[4] A Diceyan corollary characteristically expounded by Isaacs, J. *Ex p. Walsh and Johnson; in re Yates* (1925) 37 C.L.R. 36 at 79; see also Williams, J. in *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (1944) 69 C.L.R. 185 at 218 and in *Minister of State for the Army* v. *Dalziel* (1944) 68 C.L.R. 261 at 308.

[5] Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 791; Harrison Moore, *Commonwealth of Australia* (2 ed. 1910) 361.

as it was the starting point for Hamilton in the Federalist[6] and for Marshall in *Marbury* v. *Madison*,[7] both of whom reasoned along the following lines. The court is the traditional interpreter of law in the community. The Constitution, of course, is (fundamental) law, and one assumes that it likewise is to be interpreted by the court. Suppose the court is presented with the Constitution and a Congressional Act which, so the court imagines, conflicts with the Constitution. The court in its role of interpreter must determine for itself which is to be law. If the court on its interpretation of the Constitution thinks that the Congressional Act is at variance with the fundamental Constitution, the court can only declare that the Congressional Act is not law.

But this reasoning slides too easily from the acknowledged role of courts in ordinary circumstances to the unproved role of courts in a federation. Ordinarily, it is true, the court does interpret the law and apply its interpretation to the particular parties before it. Throughout the legislative Act has persisted as law and parliamentary sovereignty may not be offended by its judicial spokesman. In a federal polity, on the other hand, when the court interprets the law of the Constitution and thereupon declares that a federal Act is not law, the legislative Act has not survived as law and parliamentary sovereignty may well be offended by its judicial executioner.

This dire consequence from the role of courts as law-interpreters need not have worried Hamilton and Marshall had they been realists enough frankly to admit that in a federation while the three arms of government are equal sovereigns the judicial arm is more sovereign than its equals. That is to say, the documents of Commonwealth Parliament do not carry their own imprimatur as do High Court decrees; its legislative Acts remain inchoate until they pass the scrutiny of the High Court whose judgments by contrast do not await legislative approval. The High Court is thus a co-ordinate legislator and our polity is a judicial-legislative government.

Judicial government by the High Court has been openly acknowledged at least by some observers from time to time. For instance, Inglis Clark wrote: ". . . the judiciary substantially decides the question whether particular enlargements of the body of law by which the people living under the Constitution are to be governed shall take place" and "A nation's judiciary is, next to its legislature, the most potent and influential organ of its national life in the formative period of its national consciousness . . . ."[8] The minority members in the 1929 Royal Commission complained:

> . . . the Constitution depends upon the trend of thought of the individuals who for the time being form (the High Court). . . . We believe that the authority of the Commonwealth Parliament as a law-making body has been impaired by the paramount and incalculable power of the High Court in its capacity as arbiter of the powers, and that the responsibility of Parliament and of the Cabinet have been lessened accordingly.[9]

And even Isaacs, but only when a Founding Father, descended to a little bit

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[6] Hamilton begins his reasoning with the following premise: "(t)he interpretation of the laws is the proper and peculiar province of the courts", *Federalist* No. 78 (Modern Library 1937, 506).

[7] Marshall's key passage is short: "(i)t is emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule" *Marbury* v. *Madison* 5 U.S. (1 Cranch) 137 at 177 (1803).

[8] *Studies in Australian Constitutional Law* (2 ed. 1905) 24, 357.

[9] *Report of the Royal Commission on the Constitution* 1929, 245.

of realism: ". . . 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."[10]

By contrast, such a blunt admission of judicial government would never have been made by Hamilton or Marshall[11] or by members of the High Court who hold fast to the illusory dichotomy that legislators make law, judges declare law.[12] In summary, we may deduce the doctrine of judicial review from the role of courts as law-interpreters, but we should honestly add that, of course, courts are really law-makers.

Taking another course in general reasoning, we could imply a "business efficacy" in the Federal venture. If Commonwealth Parliament itself is to decide on the validity of its actions, the Constitution would read as Parliament read it. Such a reading would presumably be to the detriment of the other parties to the Federation, the States, and the Federal balance would be thrown out. Speaking of the continuing Federal balance, the High Court drew its own conclusion:

> (t)he conception of independent governments existing in the one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of the governments were placed in the federal judicature.[13]

Underlying this course of reasoning is the postulate "*nemo debet esse judex in propria causa*". I suppose we cannot deny this postulate simply because it is a fact that human nature (here, as manifest in Commonwealth Parliament) tends towards self-favouritism if not towards self-aggrandizement. But it is only an unproved postulate, and in any case, the conclusion that the Federal Judicature should be the arbiter to preserve the Federal balance is not inevitable. Conceivably the parties to the Federation might appoint their own arbitrator.

The last two supports for judicial review by the High Court have been based on general reasoning, implications and postulates, not on constitutional provisions or principles — hardly the kind of basis one would expect for such a pervasive and fundamental doctrine as judicial review.

I will turn now to the High Court discussions on the doctrine. In the first reported case in which the Court declared that a federal (Conciliation and Arbitration) Act was not law, the Court was warned by counsel of the gravity of the undertaking.[14] Before striking down Parliament's Act the Court made the following announcement: "If . . . that instrument (the Constitution) does not confer the power (which Commonwealth Parliament

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[10] Sir Isaac Isaacs, *Records of the Debates of the Australian Federal Convention*, 20 Jan.-17 Mar. 1898, 283.

[11] See Hamilton, *Federalist* No. 78 (Modern Library 1937, 504). Marshall, *Wayman* v. *Southard* 23 U.S. (10 Wheat.) 1 at 46 (1825).

[12] *Bank of New South Wales* v. *The Commonwealth* (1948) 76 C.L.R. 1 at 252; *Federated Engine Drivers and Fireman's Association of Australia* v. *Colonial Sugar Refining Co. Ltd.* (1916) 22 C.L.R. 103 at 123; *R.* v. *Barger* (1908) 6 C.L.R. 41 at 64: "Our duty is to declare the law as we find it, not to make new law." *Cf. R.* v. *Davison* (1954) 90 C.L.R. 353 at 369-70.

But see Windeyer, J.'s late protest that the common law is not "a body of rules waiting always to be declared and applied . . . (this) overlooks the creative element in the work of the courts", *Skelton* v. *Collins* (1966) 39 A.L.J.R. 480 at 496.

[13] *R.* v. *Kirby; ex p. Boilermakers' Society of Australia* (1956) 94 C.L.R. 254 at 267-68.

[14] *The Federated Amalgamated Government Railway and Tramway Service Association* v. *The New South Wales Railway Traffic Employees Association* (1906) 4 C.L.R. 488 at 490-1, 509, *arguendo.*

asserts its right to exercise), we are bound to refuse to give any effect to the attempted legislation."[15] The source of the Court's duty was not disclosed. *Baxter*[16] was the next case in which the High Court referred to its role of scrutineer of Parliament's Acts. The Court observed generally that from the necessity of the case there should be an arbiter between the two Governments in a federation; such an arbiter in United States was found in the Supreme Court. Moreover, art. VI §2 of the United States Constitution authorized judicial review. The Commonwealth Founding Fathers, aware of the function of the Supreme Court in United States, proceeded to set up a counterpart to that Court when they created the High Court, which similarly reviewed constitutionality. Furthermore, *Baxter* concluded, English law has always acknowledged the power of any court to examine the Acts of a legislature of limited jurisdiction. Then, the source of the doctrine of judicial review was discovered in the necessity of the case, United States precedent and precedent in English law.

Especially in *Communist Party* the High Court reviewed its role of judicial reviewer of Parliament's Acts. The various Justices simply accepted that role as a fact:

> . . . there are those, even today, who disapprove of the doctrine of *Marbury* v. *Madison*, and who do not see why the courts, rather than the legislature itself, should have the function of finally deciding whether an Act of a legislature in a Federal system is or is not within power. But in our system the principle of *Marbury* v. *Madison* is accepted as axiomatic.[17]

Baxter, discussed above, suggested the only compelling "reason" why the function of judicial reviewer has been assumed by the High Court—history. The Commonwealth Founding Fathers were aware that that role had been played by the United States Supreme Court since *Marbury* v. *Madison*; see, for example, Isaacs' observation given above. They were also aware that that role was taken by other existing courts: for example, the Judicial Committee of the Privy Council invalidated Acts of (inferior) Colonial legislatures and the New South Wales Supreme Court reviewed the Acts of the (co-equal) New South Wales Parliament.[18] And so the Fathers likewise intended the High Court to sit in judgment on the Acts of its companion in government, Commonwealth Parliament, although they omitted to express their intention in a constitutional provision.

Thus, the best that I can offer as a basis for judicial review by the High Court is the historic practice of the United States Supreme Court, the Privy Council and pre-Federation Colonial courts. The constructionist will

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[15] *Ibid.* at 534.

[16] *Baxter* v. *Commissioners of Taxation* (N.S.W.) (1907) 4 C.L.R. 1087 at 1111, 1112, 1113, 1125—*Baxter* itself dealt with the invalidation of a State statute, not a Commonwealth Act. The necessity of the case was also invoked by the Privy Council in *James* v. *The Commonwealth* (1936) 55 C.L.R. 1 at 43: " 'The established Courts of Justice, when a question arises (in regard to a Constitution) whether the prescribed limits have been exceeded, must of necessity determine that question.' "

[17] *Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1 at 262, and see, e.g., 185-7, 193, 211, 221, 222, 272-3. Other statements of the fact of judicial review appear in *Hughes and Vale Pty. Ltd.* v. *State of New South Wales (No. 2)* (1955) 93 C.L.R. 127 at 165; *Australian Apple and Pear Marketing Board* v. *Tonking* (1942) 66 C.L.R. 77 at 103-4, 106; *Attorney-General (Vict.)* v. *The Commonwealth* (1935) 52 C.L.R. 533 at 566.

[18] Harrison Moore, *Commonwealth of Australia* (2 ed. 1910) 358-61. Quite early when debating the proposed provisions for the Judiciary Act, 1903, which established the High Court, the parliamentarians assumed that that Court would interpret the Constitution, Sawer, *Australian Federal Politics and Law 1901-1929* (1956) 24; and see 57 for the views of the "Australian Founders".

not be very happy with my offering, especially if I remind him of such cases as *Boilermakers*,[19] *Porter*[20] and *In re Judiciary*[21] where the whole thrust of the case is to read the Judicature Chapter in the Constitution with exactitude and as an exhaustive specification of the High Court's powers. So read, the doctrine of judicial review is absent in terms; and there is no satisfactory foothold for an implication. The constructionist would be even less happy with my offering of history if I slyly recalled the Privy Council's advice to constitutional exegetes:

> (t)he true test must, as always, be the actual language used. Nor can any decisive help here be derived from evidence of extraneous facts existing at the date of the (Constitution) Act of 1900; such evidence may in some cases help to throw light on the intention of the framers of the statute, though that intention can in truth be ascertained only from the language used.[22]

Still, what was introduced by history has now been sanctified by prescription. Parliament and people throughout this century have tacitly acquiesced in the role assumed by the High Court in the government of the Commonwealth.

2. *The Limits of Judicial Review*

So much for the fact of judicial review by the High Court. What is its extent? its limits on the one hand, its reach on the other?

A common justification for judicial review drawn from general reasoning is built on the interpretative role of the court. This role was the starting point for Hamilton as it was for Marshall. The latter explained: "(t)hose who apply the rule to *particular cases*, must of necessity expound and interpret that rule."[23] In the early days the High Court referred to Marshall's doctrine and added on its own account: "(s)uch questions (of conflict between Acts and the Constitution) must certainly arise under a federal Constitution and must be determined by the Courts before which they are raised."[24] That is to say, the court interprets law—and declares validity—in order to dispose of the dispute brought before it and then only to the limited extent necessary to dispose of the particular dispute. Not that I wish to imply that the High Court can only review constitutionality in a dispute where there is a *lis inter partes*. For the Court could pass on validity in such unilateral proceedings as applications for maintenance or guardianship of infants.[25] When I elliptically speak of dispute-settlement as a basis for judicial review I wish to emphasize a two-fold limit to judicial review: (a) that it is the party who incites judicial review which otherwise remains dormant; and (b) that it is the party who gives particularity to the review.

The United States Supreme Court usually adds a corollary to its assertion of judicial review, namely, "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied".[26]

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[19] *Attorney-General (Cth.)* v. *The Queen* (1957) 95 C.L.R. 529 (P.C.) and *R.* v. *Kirby; ex p. Boilermakers' Society of Australia* (1956) 94 C.L.R. 254 (H. Ct.).

[20] *Porter* v. *The King; ex p. Yee* (1926) 37 C.L.R. 432.

[21] *In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257.

[22] *James* v. *The Commonwealth* (1936) 55 C.L.R. 1 at 44.

[23] *Marbury* v. *Madison* 5 U.S. (1 Cranch) 137 at 177 (1803)—emphasis added.

[24] *Baxter* v. *Commissioners of Taxation (N.S.W.)* (1907) 4 C.L.R. 1087 at 1125.

[25] See *R.* v. *Davison* (1954) 90 C.L.R. 353 at 368; and *cf. In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257 at 266-7.

[26] Matthews, J., *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emigration* 113 U.S. 33 at 39 (1885); and see *United States* v. *Raines* 362 U.S. 17 at 20-1 (1960).

In the first reported case in which the High Court refused to allow as law an Act of Commonwealth Parliament, the Court conceded that it would not decide the validity of such an Act "except in a litigation between parties in which the point is necessarily and distinctly raised".[27] Much later the High Court has repeated this limiting rule in judicial review: it is "necessary to decide such a (constitutional) question in order to do justice in the given case and to determine the rights of the parties".[28] (More generally the High Court has spelt out an analogous limitation from Constitution ss.75, 76, which literally speak of a "matter" before the Court exercising original jurisdiction. A "matter" presupposes "some immediate right, duty or liability to be established by the determination of the Court . . . (not) abstract questions of law without the right or duty of any body or person being involved".[29])

Apart from the dispute-settlement argument there is another good reason for this first limit to judicial review. Each judicial declaration of invalidity of a Commonwealth Act subjects the avowed sovereignty of Commonwealth Parliament to the High Court, a consequence which I suppose the community should not lightly suffer if elected government is considered better than a judicial oligarchy. This subjection of Parliament is lessened not only if such declarations are avoided unless imperatively demanded for the settlement of a dispute[30] but also if such declarations are then confined to the particular dispute before the court. Other operations and other applications of the Commonwealth Act survive.

To illustrate my point, it seems to me that most members of the High Court in *Chapman* v. *Suttie*[31] exceeded the above limit on judicial review. The Court was asked to censure a Victorian statute under which a purchaser of a firearm must first show the vendor his authority to purchase which he had secured from the Victorian Commissioner of Police. The Commissioner had an absolute discretion to give or withhold his permission to purchase. An out-of-State purchaser without this permission bought firearms from a Victorian vendor. The latter incited the Court to strike down the statute under s.92 of the Constitution. Now this particular Victorian vendor before the Court had not proved that his purchaser had in fact sought permission from the Police Commissioner and had in fact been refused permission on grounds inconsistent with s.92 freedom. That is to say, the Act as applied to the particular party before the Court may not have offended s.92. Then, to settle the particular dispute before it the Court may not have been required to pass on constitutionality. Nevertheless most of the members of the High Court threw out the Act of the Victorian Parliament.

On the other hand, the Court in *Swift Australian Co. (Pty.) Ltd.* v. *Boyd*

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[27] *The Federated Amalgamated Government Railway and Tramway Service Association* v. *The N.S.W. Railway Traffic Employees Association* (1906) 4 C.L.R. 488 at 495.

[28] *Lambert* v. *Weichelt* (1954) 28 *A.L.J.* 282 at 283; and see *Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1 at 276 ". . . it is only in litigation between parties that the Court may decide whether Commonwealth legislation is valid"; *Graham* v. *Paterson* (1950) 81 C.L.R. 1 at 15 . . . determine constitutionality for "a particular case before the Court"; *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (1939) 61 C.L.R. 735 at 773; *R.* v. *Macfarlane; ex p. O'Flanagan and O'Kelly* (1923) 32 C.L.R. 518 at 574 . . . the Court assumes constitutionality "until we find that justice cannot be done in a case before us" without deciding constitutionality.

[29] *In Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257 at 265, 267.

[30] See *Attorney-General (N.S.W.)* v. *Brewery Employees Union of New South Wales* (1908) 6 C.L.R. 469 at 553-4, 590.

[31] (1963) 110 C.L.R. 321. Dixon, C.J. alone at 325, 332, 333, insisted that the claimant for s.92 freedom must prove that in this case there had been an actual infringement of freedom.

Parkinson[32] was more alert to the constitutional application of the challenged statute to the particular case before the Court. The complainant there alleged a s.109 inconsistency between a Queensland Act on slaughtering of poultry and a Commonwealth law on slaughtering for export. Descending to the details of the dispute which it was asked to settle, the High Court pointed out that only 5% of the complainant's poultry in fact went into export. Then, to settle that particular dispute the Court need not and did not pass on the constitutionality of the Act of the Queensland Parliament.

The rigour of this limit of judicial review to particular cases is relaxed by the High Court in two ways. Firstly, a declaration of right action may secure a pronouncement on validity at large, unrelated to a particular dispute to be settled by the Court. For example, the Attorney-General for Victoria was able to procure from the Court a general imprimatur on the Commonwealth Marriage Act so that the Attorney-General through the Court might "set at rest as soon as may be doubts (arising out of the questioned Marriage Act) which may now or years hence affect or attend the title to proprietary rights".[33] Secondly, while it is basically true that the Court decides constitutionality to settle an instant case only, subsequent parties with an identical case (if there is such a thing) would be foolhardy to test the Court's appraisal of their own case. Once the Court has given a ruling for a particular case that rule will not be "ripped up every time there is a prosecution under the provisions"[34] of the law ruled on, for instance.

The first limit to judicial review by the High Court allows the review only on the motion of a party, and then only for the settlement of the particular case brought into the Court. The second limit is concerned with the party's standing or his interest in the subject matter of the proceedings. When asking any court for relief the claimant must first point to a "material interest . . . directly affected"[35] by the Act he challenges; he must single out an interference with *his* liberty or private rights.[36] Moreover, such a complainant will be heard by the court only to the extent of his standing, that is, only to the extent that his interest is affected;[37] he will, however, be further heard if he can establish that the operation of the challenged Act that does not affect him is inseverable from that operation which does affect him.[38] Thus the extent of a party's standing and the first limit to judicial review are matched: both are concerned with the constitutionality of Commonwealth Parliament's Act only as applied to the particular case before the Court.

Once again, the second restriction on judicial review, the doctrine of *locus standi*, is loosened in a certain case. A State Attorney-General is conceded standing to challenge a Commonwealth Act before the High Court merely if that Act "extends to, and operates within, the State whose interest he represents",[39] or "whenever his public is or may be affected by what he says is an

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[32] (1962) 108 C.L.R. 189, e.g., at 195 and 198, 202 and 203, 210 and 214.

[33] *Attorney-General (Vict.)* v. *The Commonwealth* (1962) 107 C.L.R. 529 at 539 and see 530, 531, paras. 1, 3.

[34] *Cf. Breen* v. *Sneddon*; *Martin* v. *Sneddon* (1961) 106 C.L.R. 406 at 414; *cf.* also *Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1 at 276.

[35] *British Medical Association* v. *The Commonwealth* (1949) 79 C.L.R. 201 at 257; and see *Attorney-General (N.S.W.)* v. *Brewery Employees Union of New South Wales* (1908) 6 C.L.R. 469 at 491, 519, 554.

[36] *London Passenger Transport Board* v. *Moscrop* (1942) A.C. 332 at 344; see also *Attorney-General (Vict.)* v. *The Commonwealth* (1945) 71 C.L.R. 237 at 277.

[37] *Real Estate Institute of N.S.W.* v. *Blair* (1946) 73 C.L.R. 213 at 227; *cf. British Medical Association* v. *The Commonwealth* (1949) 79 C.L.R. 201 at 257.

[38] *Andrews* v. *Howell* (1941) 65 C.L.R. 255 at 277, 279.

[39] *Attorney-General (Vict.)* v. *The Commonwealth* (1935) 52 C.L.R. 533 at 556—

ultra vires act on the part of the Commonwealth".[40]

Having already forged the weapon of judicial review of Congressional Acts,[41] Marshall proceeded to curtail its use in deference to Congressional sovereignty, more precisely in deference to Congress' discretion to select its own means (within a judicial confine) to accomplish legitimate ends. For example, Congress chose to incorporate a national bank as its means of conducting United States banking business. Perhaps such incorporation was not absolutely necessary but at least it was a (judicially) appropriate means selected by Congress. Accordingly, the Supreme Court refused to review those means.

> (N)one can deny (that the challenged measure is) . . . an appropriate measure; and if it is, the degree of its necessity, as has been justly observed, is to be discussed in another place . . . to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.[42]

The High Court has likewise restricted its review of Commonwealth Parliament's Acts. The Court refuses to review an Act of Parliament merely because the challenger can show that the Act selects means which are not absolutely necessary to attain Commonwealth ends,[43] or which might have been less drastic,[44] or which might have been more effective in practice according to those subjected to them.[45] So long as the Court is satisfied that the means chosen by Commonwealth Parliament are (judicially) "reasonable", the Court will not review Parliament's Act simply because a challenger can suggest some alternative means or methods which Parliament might have used.[46]

Still, the question remains, what is the difference between statutory means not absolutely necessary to fulfil Parliament's ends (and so within the judicial instruction) and statutory means not reasonably necessary to fulfil Parliament's ends (and so outside the judicial instruction)? The difference is discussed below.

Finally, but less surely, out of deference to drafting difficulties and subsequent administrative difficulties, the High Court will not review some merely approximate or at least workable statutes. For instance, because of the mercurial variables involved in calculating a reasonable road maintenance charge to be exacted from inter-State (and intra-State) road hauliers, the Court has allowed the exacting Parliament to base its calculation on "general probabilities" and "general considerations",[47] such as "the likely average"[48] of vehicular loads. In these Acts "a fair degree of latitude must be allowed"[49] Parliament.

"accurately expressed", Dixon, J. in *Attorney-General (Vict.)* v. *The Commonwealth* (1945) 71 C.L.R. 237 at 272; and see 247-248, also approving the earlier case.

[40] *Ibid.* at 272 and see 276-7.

[41] In *Marbury* v. *Madison* 5 U.S. (1 Cranch) 137 at 177 (1803).

[42] *McCulloch* v. *Maryland* 7 U.S. (4 Wheat.) 316 at 423; see also 421 (1819).

[43] *British Medical Association* v. *The Commonwealth* (1949) 79 C.L.R. 201 at 274.

[44] *Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1 at 153; *Sloan* v. *Pollard* (1947) 75 C.L.R. 445 at 472; *Miller* v. *The Commonwealth* (1946) 73 C.L.R. 187 at 203.

[45] *Cf. Elliott* v. *The Commonwealth* (1936) 54 C.L.R. 657 at 684; and see *Marcus Clark & Co. Ltd.* v. *The Commonwealth* (1952) 87 C.L.R. 177 at 219, 256.

[46] *Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1 at 198, 223; *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1943) 67 C.L.R. 116 at 133-4; *Stemp* v. *Australian Glass Manufacturers Co. Ltd.* (1917) 23 C.L.R. 226 at 233; *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1908) 6 C.L.R. 309 at 320; and on appeal at 344, 357.

[47] *Armstrong* v. *State of Victoria (No. 2)* (1957) 99 C.L.R. 28 at 48, 83.

[48] *Ibid.* at 48.

[49] *Hughes and Vale Pty. Ltd.* v. *State of New South Wales (No. 2)* (1955) 93 C.L.R. 127 at 211.

Similarly, the legislature can prescribe road safety measures which are reckoned according to averages only, not according to the individual case.[50] In such laws also Parliament is permitted a discretion.[51]

Again, the enforcement of a health regulation may be effective only at the cost of slight but literal infringement of the Constitution; yet certainly one Justice would not have reviewed the regulation.[52] Because of the difficulty in enforcing taxation provisions, the High Court has let by some rather drastic and rather odd taxation Acts: the Commonwealth may seize prohibited imports which have evaded customs duty even though the goods have passed on to an innocent third party,[53] or the Commonwealth may punish the selling of methylated food or drink.[54]

Thus, the limits to the doctrine of judicial review by the High Court arise out of the following considerations: the justification of the doctrine in the court's role of dispute-settlement or the doctrine's effect on parliamentary sovereignty . . . the requirements of standing of the party seeking judicial review . . . legislative discretion in choosing means to fulfil its ends . . . administrative difficulty in drafting and enforcing law.

3. *The Reach of Judicial Review*

On the other hand, the reach of judicial review goes so far as to enable the High Court . . . to declare whether an Act of the Commonwealth Parliament offends a constitutional prohibition or exceeds a constitutional limitation . . . to declare whether the Act is relevant to one of the subject matters in the Commonwealth category of powers . . . to declare whether the means selected by Commonwealth Parliament are reasonable means . . . to declare that a Commonwealth Act seemingly not offending a constitutional prohibition or limitation "really" so offends or seemingly within the Commonwealth category of powers is not "really".

The High Court reviews Parliament's Act to declare whether the Act offends a constitutional prohibition such as s.92,[55] or exceeds a constitutional limitation such as that included within s.51(ii).[56] Usually the Court reviews the constitutionality of such an Act by isolating its direct legal effect.[57] For instance, the New South Wales prices regulation in *Wragg*[58] "directly" operated with respect to an in-State sale from Cameron & McFadyen Pty. Ltd. to its purchaser; and the regulation imposed a "legal" liability on Cameron if it exceeded the maximum price. Thus the direct legal effect of the Act under review fell on an in-State trader in his in-State trade. Then the Court refused to condemn the Act because of the constitutional prohibition in s.92 which in terms deals with trade among the States. Nor was there any use protesting to the Court that the regulation indirectly—that is, through Cameron's in-State

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[50] *Greutner* v. *Everard*; *Sloman* v. *Rowarth* (1960) 103 C.L.R. 177 at 187, 192.

[51] *Ibid.* at 185, 187; *Kerr* v. *Pelly* (1957) 97 C.L.R. 310 at 321-2; *McCarter* v. *Brodie* (1950) 80 C.L.R. 432 at 496.

[52] Evatt, J. in *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (1939) 62 C.L.R. 116 at 147. Other Justices would have been stricter, see *Fergusson* v. *Stevenson* (1951) 84 C.L.R. 421 at 434.

[53] *Burton* v. *Honan* (1951) 86 C.L.R. 169, esp. at 178-9.

[54] *Griffin* v. *Constantine* (1954) 91 C.L.R. 136, esp. at 144.

[55] See *Breen* v. *Sneddon*; *Martin* v. *Sneddon* (1961) 106 C.L.R. 406 at 413.

[56] See *Australian Apple and Pear Marketing Board* v. *Tonking* (1942) 66 C.L.R. 77 at 106.

[57] E.g., *Wragg* v. *State of New South Wales* (1953) 88 C.L.R. 353 at 387, 398; *James* v. *Cowan* (1930) 43 C.L.R. 386 at 409.

[58] *Wragg* v. *State of New South Wales* (1953) 88 C.L.R. 353, esp. at 386-7, 398-9.

sale—affected a Tasmanian inter-State trader who was economically (though not legally) affected by the New South Wales Act.

Less frequently the High Court reviews an Act of Commonwealth Parliament by scrutinizing its indirect effect or its necessary effect. The Commonwealth Banking Act in *Melbourne Corporation*[59] directly imposed a liability on private banks if they conducted business for a State without first obtaining the Federal Treasurer's consent. Indirectly, that is through the operation of the Act on the private banks, the States were inhibited in their banking activities. Because of the latter indirect effect the Commonwealth Act was judicially stigmatized as a law which fettered State independence in a Federation.[60]

When the Court ekes out the necessary effect of a statute it adopts a similar method of review. In *Field Peas*[61] a Tasmanian merchant made inter-State contracts to sell field peas; to fulfil these contracts he made intra-State contracts with Tasmanian growers of peas. A Tasmanian Act directly and legally avoided the latter intra-State contracts only. Nonetheless, Dixon, C.J. was prepared to invalidate the Tasmanian statute under s.92 of the Constitution, although that constitutional prohibition literally deals with inter-State trade, because the statute "must"[62] affect the inter-State contracts of the Tasmanian merchant. Dixon, C.J. probably inferred this necessary effect of the Tasmanian Act from the context in which the legislature expected the Act to operate. For on three occasions[63] Dixon, C.J. pointed out that the Tasmanian field peas trade was almost wholly bent on export. Consequently, any Tasmanian Act which stopped the flow of field peas even intra-State necessarily stopped the flow of peas (overseas and) inter-State.

The High Court also reviews a federal Act to ascertain whether the Act deals with one of the subjects listed in the Commonwealth catalogue. Now the Constitution established a Parliament of the Commonwealth with specified grants on certain subject matters,[64] such as those enumerated in ss.51, 52, 76-78, 96, 122. The Commonwealth, therefore, or anyone else who wants to persuade the High Court that an Act of Commonwealth Parliament is law, must indicate some particular grant whose subject matter matches the subject matter in the Act.[65]

And thus arises the problem of characterization or the identification of subject matter in a Commonwealth Act. How does the High Court in its review of federal statutes ascertain the character or subject matter of a Commonwealth Act? Simply because the Act mentions "marriage" the Court does not necessarily turn up s.51(xxi) of the Constitution;[66] nor does the

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[59] *Melbourne Corporation* v. *The Commonwealth* (1947) 74 C.L.R. 31.

[60] *Ibid.* esp. at 84 and see also thereon *State of Victoria* v. *The Commonwealth* (1957) 99 C.L.R. 575 at 610. For an indirect offence against the constitutional limitation in s.51 (xxxi), see *Bank of New South Wales* v. *The Commonwealth* (1948) 76 C.L.R. 1 at 349-50. For instances of law which indirectly offended s.92, see *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (1953) 87 C.L.R. 1 at 36.

[61] *Clements and Marshall Pty. Ltd.* v. *Field Peas Marketing Board (Tas.)* (1947) 76 C.L.R. 401 at 409-10, and on appeal, *ibid.* at 429.

[62] See *ibid.* at 429.

[63] *Ibid.* at 420, 422, 423; Dixon, C.J. affirms this very fact again in *Egg Marketing Board* v. *Bonnie Doone Trading Co. (N.S.W.) Pty. Ltd.* (1962) 107 C.L.R. 27 at 37.

[64] *Attorney-General (Cth.)* v. *Colonial Sugar Refining Co. Ltd.* (1913) 17 C.L.R. 644 at 653-4; *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129 at 150, 153, 154.

[65] *Ibid.*, at 154; and see *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co. Ltd.* (1913) 17 C.L.R. 644 at 653. The Court is merely concerned to find some authorizing grant; such a grant need not be the head of power which the Commonwealth statute by its title, preamble or terms intended to exercise, *Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1 at 269

[66] *Attorney-General (Vict.)* v. *The Commonwealth* (1962) 107 C.L.R. 529 at 549.

Court turn to s.51(xx) because the Act recites the phrase "foreign corporations and trading or financial corporations formed within the limits of the Commonwealth".[67] A provision that a will is revoked by the subsequent marriage of the testator is a law on wills,[68] and so is outside the Commonwealth list. A provision that a child is legitimated by the subsequent marriage of his parents is a law on marriage, and so is within the Commonwealth list.[69] How does the High Court so surely and so often divine all this?

Commonly the High Court begins its process of characterization by announcing that the Court seeks the direct legal effect of the Commonwealth Act[70] just as the Court isolated this effect as a criterion when it reviewed the Act to decide whether it offended some constitutional prohibition or exceeded some constitutional limitation. Expounding its criterion as used in characterization, the High Court explains:

> (t)he true nature of a law is to be ascertained by examining its terms and, speaking generally, ascertaining what it does in relation to duties, rights or powers which it creates, abolishes or regulates. The question may be put in these terms: "What does the law do in the way of changing or creating or destroying duties or rights or powers?"[71]

By recourse to this norm of the direct legal effect of the Commonwealth Act under review the Court is able to distinguish the subject matter of the Act from the antecedent motive or contemplated object of Parliament.[72] For instance, suppose the High Court reviews a progressive land tax Act. The Act directly imposes on landowners a legal liability to pay a tax in respect of land, whereas formerly they were under no such liability. Because of the direct legal effect of the Act introducing this change in the law, the statute is characterized as a tax. And because this statutory subject matter can be matched with the constitutional subject matter in s.51(ii) the statute is passed by the Court. On the other hand, because large landowners are now obliged to pay high taxes they may thereupon break up their estates. This ulterior consequence, indeed, may have been the object contemplated by Parliament.[73] Yet it is an indirect, non-legal consequence; it is not the kind

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[67] See *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (1909) 8 C.L.R. 330 at 410. Generally see *R.* v. *Barger* (1908) 6 C.L.R. 41 at 65, 73, 74-5 emphasizing substance rather than literal form of a Commonwealth law.

[68] So Windeyer, J. seems to suggest in *Attorney-General (Vict.)* v. *The Commonwealth* (1962) 107 C.L.R. 529 at 582.

[69] So held by majority, *ibid.*

[70] For instance, *ibid.* at 543, 552. *Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1 at 160, 272; *State of South Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373 at 424; *Huddart Parker Ltd.* v. *The Commonwealth* (1931) 44 C.L.R. 492 at 501; *Ex p. Walsh and Johnson; in re Yates* (1925) 37 C.L.R. 36 at 69, 116.

[71] Latham, C.J. *State of South Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373 at 424; and see Dixon, C.J. in *Attorney-General (Vict.)* v. *The Commonwealth* (1962) 107 C.L.R. 529 at 546 ". . . s.89 (of the Marriage Act) must change or affect the operation of State law"; Kitto, J. *ibid.* at 552 . . . consider the sections in "their purported legal operation, that is to say . . . the changes that they purported to make in the existing law".

However, the Court once invalidated a State Act because of its unpleasant economic consequences on uncooperative millers, not because of any legal liability imposed on the millers, *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (1937) 56 C.L.R. 390 at 399-400, 405, 412-13, 417, 420-21.

[72] Dixon, J. in *Melbourne Corporation* v. *The Commonwealth* (1947) 74 C.L.R. 31 at 79-80; Latham, C.J. *State of South Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373 at 424-5; Rich, J. and Dixon, J. in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1931) 46 C.L.R. 73 at 86, 103-4; *Huddart Parker Ltd.* v. *The Commonwealth* (1931) 44 C.L.R. 492 at 501, 515-16; Higgins, J. *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (1909) 8 C.L.R. 330 at 414-15. Generally *The Commonwealth* v. *Bank of New South Wales* (1949) 79 C.L.R. 497 at 636-7 (P.C.).

[73] *Cf. Grannall* v. *Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 55 at 78-9—on constitutional prohibitions, not characterization.

of statutory effect which characterizes the Commonwealth Act as a law with respect to aggregate estates, for example, and thus outside the Commonwealth catalogue.[74]

For all that, the High Court has on other occasions been willing to censure a Commonwealth Act because of its "ulterior objective", or because of what it achieves "in substance", or because of its "latent characteristics" and "secondary meaning", as is shown below. That is to say, the "direct legal effect" criterion is as compelling as the Court is willing to be compelled. At least I can say this much: more often than not the Court is guided in its characterization of Parliament's Act by the direct legal effect of the Act, which becomes law or not accordingly.

The norm "direct legal effect" seems to enable the High Court to mark off that one effect from a number of *successive* effects which is to characterize the Act under review. The Court, when it wants to, seizes the immediate legal effect and disregards an ulterior effect which succeeds to the first effect. But how does the Court divine which effect of a number of *instantaneous* effects is to characterize an Act? In such a case the direct legal effect device will not prevent multiple characterization of an Act which may not then be neatly pigeon-holed in the Commonwealth catalogue.

At times the High Court has resolved this problem by the arbitrary expedient of insular characterization. One of a number of possible effects or subjects of Parliament's Act is isolated, the rest ignored. For instance, a law prohibiting the sale of patented articles, etc., is "obviously" a law on patents.[75] But why is it not a law on sale, or a law on sale-and-patents? A provision in a Banking Act which conditionally forbids private banks to conduct business for a State is simply a law on States.[76] But why is it not a law on banking, or a law on banking-and-States?

At other times the Court has at least conceded the possibility of multiple characterization, and has then proceeded to its own particular characterization; and so the Act has survived or been condemned. For example, the Commonwealth Marriage Act provides for the legitimation of a child by the subsequent marriage of his parents. Some Justices of the High Court appreciated that the Act dealt with two subjects, legitimation and marriage.[77] Some Justices then introduced priorities: the legitimation was but an incident to the status of marriage.[78] And thus the Act was safe within the compound of s.51(xxi) of the Constitution. Again, suppose a Licensing Act provides that a court shall not transfer a wife's liquor licence to her husband unless with the court's approval; or suppose a Marriage Act provides that every marriage shall be celebrated before two witnesses. The first law is said to deal with liquor, the second with marriage, because each of these subjects is discovered to be the "substantial", "primary" or "dominant" subject, and not the subject

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[74] *Osborne* v. *The Commonwealth* (1911) 12 C.L.R. 321 at 334-5 (referring to 328 *arguendo*); and see *Morgan* v. *The Commonwealth* (1947) 74 C.L.R. 421 at 454; *State of South Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373 at 424-5.

[75] *Morgan* v. *The Commonwealth* (1947) 74 C.L.R. 421 at 453.

[76] Latham, C.J. *Melbourne Corporation* v. *The Commonwealth* (1947) 74 C.L.R. 31 at 61, 62. See also *Fairfax* v. *Commissioner of Taxation* (1966) 39 A.L.J.R. 308, at 314—a law which taxes the sale of heroin is a law to suppress trade in heroin, not a law with respect to taxation.

[77] *Attorney-General (Vict.)* v. *The Commonwealth* (1962) 107 C.L.R. 529 at 554, 574, 601.

[78] *Ibid.* at 554, 574, 602.

of husband and wife or the subject of witnesses.[79] But how does the Court arrive at its priority in these cases?

Instead of introducing priorities, the Court may again acknowledge the multiple characterization of the Commonwealth Act but then proceed to review the Act on the basis of one subject only. The Commonwealth Marriage Act, for example, makes it an offence for a person who is married to go through the ceremony of marriage with any person. Concededly the Act deals with the crime of bigamy; it also deals with the ceremony of marriage. The latter characterization secures validity for the Act under s.51(xxi) of the Constitution.[80] But why not select the first subject of general criminal law and so invalidate the Act? Again, the Commonwealth Banking Act conditionally forbade private banks to conduct banking business for a State. Admittedly the law was concerned with banking; it was also concerned with States. Because of the latter subject the law was damned.[81] But why not characterize the Act as a law on banking and tuck it safely away in s.51(xiii) of the Constitution?

Then, the mere reading of Acts of Commonwealth Parliament does not compel the High Court to characterize many an Act one way or the other. As a consequence the Court is not compelled on its mere reading to strike down or to sustain these Commonwealth Acts.

At most it seems to me that the High Court may be persuaded "objectively" that a Commonwealth Act has a certain character because of the following kinds of factors or more concrete considerations. Other legislatures' statutes or other statutes of Commonwealth Parliament may be called in aid to indicate a comparative understanding of the kind of matter encompassed within the Commonwealth Act under review. For instance, the English Legitimacy Act may show that legitimation by subsequent marriage is rather concerned with the legitimation of children than with the marriage of parents.[82] On the other hand, the common law may be deployed to demonstrate that it traditionally regarded legitimation by subsequent marriage as part of the law of marriage,[83] or contrariwise as a category separate from marriage law.[84]

A legal historian may search into ecclesiastical and common law to prove that legitimation by subsequent marriage "always has been"[85] related to the law on marriage. In a different area of law another historian may demonstrate that sumptuary laws "have always been common war measures",[86] and then conclude that the sumptuary Act under review deals with defence and so is a law of the Commonwealth.

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[79] Higgins, J. *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (1909) 8 C.L.R. 330 at 410-11. See also McTiernan, J.'s criterion in *Attorney-General (Vict.)* v. *The Commonwealth* (1962) 107 C.L.R. 529 at 549: "The test of the nature of the laws is the object to which they are primarily directed".

[80] *Ibid.*, e.g., at 551, 556-8. The Commonwealth cannot legislate for crime in general, *ibid.* at 551.

[81] Dixon, J. *Melbourne Corporation* v. *The Commonwealth* (1947) 74 C.L.R. 31 at 79.

[82] *Cf.* the reference by Dixon, C.J. dissenting, to the English Legitimacy Act in *Attorney-General (Vict.)* v. *The Commonwealth* (1962) 107 C.L.R. 529 at 540, 542; and see 534 *arguendo*. See also *Fairfax* v. *Commissioner of Taxation* (1966) 39 A.L.J.R. 308, at 314, referring to the features or familiar incidents of taxation laws.

[83] Thus Kitto and Menzies, JJ. in *Attorney-General (Vict.)* v. *The Commonwealth* (1962) 107 C.L.R. 529 at 554-5, 574.

[84] Thus Windeyer, J. *ibid.* at 592-6.

[85] Taylor, J. *ibid.* at 570 and see 562-71.

[86] *Farey* v. *Burvett* (1916) 21 C.L.R. 433 at 441; in *Illawarra District County Council* v. *Wickham* (1959) 101 C.L.R. 467 at 499, 502-3, Windeyer, J. finds history for and against the suggested characterization of a Commonwealth law.

A comparative lawyer[87] and a private international lawyer[88] may each turn to their fields to characterize a Commonwealth Act. For example, the comparative lawyer may show that peace-time control of capital issues are "recognized means"[89] of defence in Germany, United Kingdom and United States.

Text writers, such as Bracton or Pothier,[90] may persuade the Court that legitimation is associated with marriage and putative marriage. From Quick and Garran or Harison Moore's exegesis on a constitutional power[91] counsel might argue a particular characterization for the Commonwealth Act under review.

Expert evidence may reveal, for instance, "that mica is an essential mineral for the purposes of defence";[92] thereupon the High Court may characterize the Act appropriating mica as a law on defence. More generally, by evidence or judicial notice the Court may come to know "the actual practical working"[93] of a statute. To take two examples of State statutes: a statute which on its face, contrary to s.92, simply excludes out-of-State fruit may be shown by evidence to be a permitted health regulation.[94] Or the Court by judicial notice of a "map and lines of communication"[95] between milk production centres and distribution centres, may infer that a statute is concerned with the speedy, fresh supply of milk to consumers, that is to say, is concerned with public health.[96]

Not that the above factors are compulsive: for instance, by recourse to common law some Justices found that legitimation by subsequent marriage was associated with the law on marriage, some Justices found otherwise. But at least these more particularistic considerations lead to a decision on characterization that smacks a little less of divination than the arbitrary device of insular characterization, or the sheer assertion of a "primary" characteristic of an Act, or the unexplained reliance on one only of several possible characteristics of the Act.

Some Acts of Commonwealth Parliament which come up for review by the High Court are in terms not concerned with any recognizable subjects in the Commonwealth list, but with "a penumbra of things that are incidental, consequential and ancillary"[97] to such subjects. The question for judicial review then is, whether these incidental means selected by Commonwealth Parliament are "reasonable".

When dealing with the limits of judicial review, I discussed the Court's deference to Parliament's discretion in choosing means which to it seemed best to achieve the ends described in its legislative grants. Such means need not be absolutely necessary to fulfil Commonwealth ends, and there may be other less drastic means.

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[87] *Attorney-General (Vict.)* v. *The Commonwealth* (1962) 107 C.L.R. 529 at 564, 578, and see 533, 536-7 *arguendo.*

[88] *Ibid.* at 596-7.

[89] *Marcus Clark & Co. Ltd.* v. *The Commonwealth* (1952) 87 C.L.R. 177 at 218 and see 216-17, 219.

[90] *Attorney-General (Vict.)* v. *The Commonwealth* (1962) 107 C.L.R. 529 at 554-5 (Pothier), 598 (Bracton).

[91] *Ibid.* at 543-4, 588, 602; 535-6 *arguendo.*

[92] *Jenkins* v. *The Commonwealth* (1947) 74 C.L.R. 400 at 402.

[93] *Attorney-General (Vict.)* v. *The Commonwealth* (1962) 107 C.L.R. 529 at 543.

[94] See *McNee* v. *Barrow Bros. Commission Agency Pty. Ltd.* (1954) V.L.R. 1 at 9.

[95] *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (1939) 62 C.L.R. 116 at 145, Evatt characteristically.

[96] *Ibid.* at 145, 153.

[97] *Attorney-General (Vict.)* v. *The Commonwealth* (1962) 107 C.L.R. 529 at 543.

The difference between Commonwealth Parliament's permitted means and the High Court's "reasonable" means is one of degree only[98]—meaning thereby that while Parliament exercises its discretion in choosing its own means the Court exercises *its* discretion in marking out the limits of Parliament's discretion. Means indicated by history or by common practice or means argued just from the reason of the thing may help us, in turn, to guess the confines of the High Court's discretion.

When I spoke of the High Court's stated adherence to the direct legal effect of a Commonwealth Act under its review and of the High Court's refusal to ferret out Parliament's motive or ulterior object in passing an Act I put on a caveat. From time to time the Court has alluded to fabricated Acts of Parliament outwardly valid but inwardly offending constitutional prohibitions and limitations or exceeding Commonwealth legislative powers. Now long ago Marshall propounded the doctrine of judicial review of Congressional Acts.[99] However, a little later he affirmed judicial deference to Congressional sovereignty in its selection of means to fulfil legitimate ends.[100] But he added a warning:

> should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it should become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.[101]

Marshall thus intended to expose colourable exercises of Congressional power, when the Act seemed to be within power but was not "really".

The High Court has warned Commonwealth Parliament, as Marshall warned Congress, against fabricated legislation.[102] And so the Court must be able to see in a defence law arraigned before it a "real" connection between the proposed measure and Commonwealth defence,[103] or the defence Act must appear "in substance" a law on defence.[104] Again the Court does not want to discover "any ulterior objective"[105] secreted in Commonwealth *Commerce (Meat Export) Regulations*; for instance, while ostensibly dealing with overseas trade the Regulations may "really" be an attempt to control intra-State abbatoirs unassociated with overseas or inter-State trade. Since a Commonwealth external affairs Act may with ease invade "State" territory, High Court opinions in s.51(xxix) cases frequently carry a rider against such a sneaking use of the external affairs power.[106] Section 96 laws making conditional grants to the States must not be "merely colourable" exercises of Commonwealth power where "the real substance and purpose" of the Grants Act is, for example, an evasion of the constitutional limitation in s.51(ii).[107]

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[98] *Cf. Burton* v. *Honan* (1952) 86 C.L.R. 169 at 179.
[99] *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 at 177 (1803).
[100] *McCulloch* v. *Maryland*, 7 U.S. (4 Wheat.) 316 at 421, 423 (1819).
[101] *Ibid.* at 423 and see also 421.
[102] *Bank of New South Wales* v. *The Commonwealth* (1948) 76 C.L.R. 1 at 186, 187; *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *ex p. Victoria*; *Victoria* v. *The Commonwealth* (1942) 66 C.L.R. 488 at 508.
[103] E.g., *Australian Communist Party* v. *The Commonwealth* (1951) 83 C.L.R. 1 at 140, 153, 240; *R.* v. *Foster*; *ex p. Rural Bank of New South Wales* (1949) 79 C.L.R. 43 at 81.
[104] *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (1943) 67 C.L.R. 116 at 151.
[105] *O'Sullivan* v. *Noarlunga Meat Ltd.* (1954) 92 C.L.R. 565 at 595; and see *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 55 at 72, referring to "latent characteristics" and "secondary meaning" in a State law.
[106] *R.* v. *Burgess*; *ex p. Henry* (1936) 55 C.L.R. 608 at 642, 674-5, 687.
[107] *W. R. Moran Pty. Ltd.* v. *Deputy Federal Commissioner of Taxation* (*N.S.W.*)

Take as an instance of this substance-form antinomy the following provision in a federal Excise Tariff Act:

> Duties of Excise shall . . . be imposed on the dutiable goods specified in the Schedule at the rates specified (therein). . . . Provided that this Act shall not apply to goods manufactured by any person . . . under (reasonable) conditions . . . (of) remuneration of labour. . . .[108]

Having regard to "substance",[109] a majority in the High Court threw out this Commonwealth provision because its "true nature and character"[110] dealt with general labour conditions, a subject matter which could not be inserted in any Commonwealth slot. But what did the majority mean by the "substance" behind the Excise Tariff Act which in form seemed to deal with the legitimate Commonwealth matter of tax? And by what kind of augury does the High Court divine that "substance"?

The majority in *Barger*[111] declared that it was undertaking that type of "inquiry into the purpose of an Act" which was "not an inquiry into the motives of the legislature".[112] For the majority had laid aside as irrelevant to its judicial review "the motive which actuates the legislature, and the ultimate end desired to be attained . . . (the) ultimate indirect consequences".[113] All of this is orthodox and has been preached fairly faithfully ever since *Barger*. But if one re-reads the provision in the Excise Tariff Act given above then asserts that it is "in substance" a regulation of labour although in form tax, what else can one mean but the "ulterior objective"[114] deviously desired by Commonwealth Parliament and the ultimate consequences secured by its Act?

Indeed, this was the only meaning that Higgins could give to the substance-approach in judicial review. He protested that "unless motives, or consequences, are brought into defendants' argument (that the Excise Tariff Act in substance dealt with labour) in the disguise of a deftly turned phrase, I do not think that the defendants' argument would stand an hour's consideration".[115] Then, when the High Court, reviewing Parliament's Act, seeks out the "substance" of the Act it is searching for Commonwealth Parliament's contemplated object in passing the Act, it is looking for some indirect consequence flowing from the direct operation of the Act—in spite of the Court's usual condemnation of contemplated objects and indirect consequences.

How does the High Court, when it wants to, discover the "substance" of a Commonwealth Act? The Court itself imputes a particular purpose to Commonwealth Parliament in passing the Act. That purpose is inferred from the terms of the Act,[116] the circumstances which incited the passing of the Act and the context in which the Act is to apply.[117] *Ex hypothesi* the Court

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(1940) 63 C.L.R. 338 at 350; and see the example suggested in State of *South Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373 at 428.

[108] See *R.* v. *Barger* (1908) 6 C.L.R. 41 at 63. *Barger* was fully and unsuccessfully canvassed in *Fairfax* v. *Commissioner of Taxation* (1966) 39 A.L.J.R. 308.

[109] *R.* v. *Barger* (1908) 6 C.L.R. 41 at 75.

[110] *Ibid.* at 73 and see 65, 74-5.

[111] *Ibid.*

[112] *Ibid.* at 75.

[113] *Ibid.* at 67.

[114] See *O'Sullivan* v. *Noarlunga Meat Ltd.* (1954) 92 C.L.R. 565 at 595.

[115] *R.* v. *Barger* (1908) 6 C.L.R. 41 at 118; and see Isaacs, J., *ibid.* at 97 ". . . the words of the Commonwealth Parliament are rejected, and others it has not used are constructively substituted".

[116] Not that an examination of the terms of the statute helps much by itself. Consider the duties of excise provision in *Barger*. In "substance" one can as well declare the Act dealt with tax as with labour: for the Commonwealth Parliament's contemplated purpose in passing the Act could have been to fill the Treasury coffers as well as to regulate labour.

[117] See *Stenhouse* v. *Coleman* (1944) 69 C.L.R. 457 at 471; analogically *cf. Arthur Yates & Co. Pty. Ltd.* v. *The Vegetable Seeds Committee* (1945) 72 C.L.R. 37 at 72.

must go outside the four walls of the statute since the substance of the law is to prevail over the form, that is, the terms of the Act.

For all that, when Commonwealth Parliament waits on the High Court to review its Act it need have no great apprehension of *Barger*.[118] For the Court has but rarely practised its preaching that a Commonwealth Act in form seemingly within power will not be recognized because in substance it discloses a purpose outside the Commonwealth list of matters. *Barger* was one such case in which the High Court did act on this method of judicial review; even so, the majority who adopted this method were infected with States'-rightsism;[119] hence their willingness to uncover a national invasion of a "State" matter. Some Justices in the *Industrial Lighting Case*,[120] the *Pharmaceutical Benefits Case*[121] and the *Second Uniform Tax Case*[122] later sought out and discovered to their satisfaction an *ultra vires* "substance" hidden in other Acts of Commonwealth Parliament.

On the other hand, Parliament cannot completely jettison *Barger's* substance-method of testing validity as antiquated pre-Engineers'[123] law. Firstly, colourable legislation must always remain a temptation to a Government with limited powers. Consequently, the Court needs to reserve some weapon to strike down such fabricated legislation—a need adverted to by Marshall long ago in *McCulloch* v. *Maryland* (the passage is given at the beginning of this sub-heading). Secondly, the Court has not only warned against colourable legislation on a number of occasions since *Barger* but it has actually tested legislation by the true-nature-and-substance-method from time to time, as shown.

When the High Court reviews a Commonwealth Act it looks to the direct legal effect—but not always: if the Court wants to, it throws out an Act because of its indirect effect or because of its necessary effect. When the High Court characterizes an Act it insists on a direct legal effect again, not an ulterior objective—but not always: if the Court wants to, it seeks out the substance of the Act or its ulterior objective. When the High Court scrutinizes the means chosen by Parliament to secure one of its legitimate ends, it concedes Parliamentary discretion to choose its own means—but only if the High Court, exercising its discretion, judges the means reasonable.

And so in the end it depends upon judicial review or government by the High Court.

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[118] Even less so since *Fairfax* v. *Commissioner of Taxation* (1966) 39 A.L.J.R. 308—at least, when the law is *prima facie* on tax.

[119] *R.* v. *Barger* (1908) 6 C.L.R. 41 at 72; contrast Isaacs, J. at 83.

[120] *Victorian Chamber of Manufactures* v. *The Commonwealth* (1943) 67 C.L.R. 413, e.g., at 418 (no "real" connection with defence), 423 ("in substance" a law on a non-Commonwealth matter).

[121] *Attorney-General (Vict.)* v. *The Commonwealth* (1945) 71 C.L.R. 237 at 258 ". . . an Act which, though it appropriates money, is really an Act for the control of doctors . . .", Latham, C.J.

[122] *State of Victoria* v. *The Commonwealth* (1957) 99 C.L.R. 575 at 614, 625-6—an Act forbidding taxpayers to pay State income tax until they had paid Commonwealth income tax; said to be a colourable use of the incidental power or a law "in substance" on State income tax.

The Court has also rejected a State Act which in form was an acquisition and repurchase statute, but in substance was an excise duty, *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (1937) 56 C.L.R. 390 at 399, 405, 414, 417.

[123] True, *Engineers* directly threw out the implied doctrine of immunity of instrumentalities. But its language was sufficiently wide to render obsolete the doctrine of implied prohibitions which infected the States'-righters in *Barger*, see *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129 esp. at 145, 149-50, 154-5; and see the dissenter, Isaacs, J. in *Barger* itself, *R.* v. *Barger* (1908) 6 C.L.R. 41 at 83.