SOME LIMITATIONS ON CONSTITUTIONAL CHANGE

By C. J. G. Sampford*

I INTRODUCTION

Dissatisfaction with the Constitution is as old as the federation, indeed older.[1] But it has received a qualitative lift in recent years, spawning substantial literatures on constitutional problems[2] and changes suggested to right them.[3] Yet between the suggestion and the realization lies the problem of constitutional change and it is with this — the methods rather than the substance of change — that this article will deal. It is not possible in an article of this length to deal exhaustively with such a subject. But by taking as given three generally accepted methods of change and concentrating on the limitations on their effective use some tentative conclusions can be reached about the scope of possible constitutional change, the methods of change that suffer from the severest limitations, and those which offer the best opportunities or which are best suited to particular types of change. By comparing these limitations variances and similarities may be noted, possibly leading to the finding that the limitations are similar or that there is one predominant factor limiting all constitutional change. Of all the candidates for this honour the two most commonly cited are the extent of *power* possessed by those seeking and those opposing change and the existence of *consensus* (whether in the sense of 'élite consensus', where there is virtual unanimity among élite opinion leaders, or 'popular consensus', where there is a substantial majority among the citizenry).

Opportunities and limitations

For convenience I have grouped methods of constitutional change[4] into three: change by judicial decision, change by unilateral action and formal change. Change by judicial decision occurs when the High Court[5] interprets

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1 See Crisp L. F., *Australian National Government* (4th ed. 1978) 26-31.

2 Notable are: Evans G. (ed.), *Labor and the Constitution: 1972-1975* (1977); Howard C., *Australia's Constitution* (1978); Sawer G., *Federation under Strain* (1977).

3 *E.g.* Dutton G. (ed.), *Republican Australia* (1977); Encel S. *et al.* (ed.), *Change the Rules!* (1977); Solomon O., *Elect the Governor-General!* (1977).

4 Words like 'reform' and 'development' are to be eschewed, because in no sense is constitutional change necessarily in any one direction or in anyone's favour.

5 A reference to the High Court in the text should be read, where appropriate, as including a reference to any other court, such as the Judicial Committee of the Privy Council or the Federal Court, in which a constitutional issue has been determined finally in a particular case.

the Constitution or any other related legislation.[6] Change by unilateral action occurs when an individual or body acts unconstitutionally but 'gets away with it'. Formal change is an omnibus category including all methods of constitutional change that rely on formal enactment expressly providing for constitutional change, but in this article only that provided by section 128[7] will be dealt with. These are not clear-cut categories — those who deny the validity of judicial review by the High Court[8] might wish to include judicial decision in unilateral action and those who see the Court as deriving an express mandate to change the Constitution at will from sections 74 and 76(1)[9] may wish to include it in the last — but nothing turns on such placements.

The paths of change mentioned above and the limitations on them discussed below are neither solely nor even primarily legal. Here we run into an immediate problem. These are matters discussed by both lawyers and political scientists. Each group tends to discuss them within its own frame of reference — the lawyer from the standpoint of statutes and judgments, the political scientist from that of institutional practice, the size and distribution of opinion for and against and the power of those who hold those different opinions. Yet neither the lawyer nor the political scientist can ignore each other — much is inexplicable from the point of view of each frame of reference without resort to the other. The lawyer can ignore neither the constraints imposed upon the legally recognized means of change by the power and value distributions within society, nor the fact that if there are no such constraints then certain actors will contravene the Constitution. Outside factors thus both expand and contract the scope of possible action. But nor can the political scientist disregard the role the actual rules of law have to play: they are vital in explaining many differences between the workings of our political system and those of similar nations and they can be very important in a political dispute even if only because of the institutional and popular support that can be mustered against the perpetrator of a claimed illegality, especially if the claim is backed up by a court.

The absence of an all-encompassing frame of reference makes discussion of these matters difficult. Usually writers will either downplay one (perhaps by insisting on some such crude determinism as that one conditions the other) or judge primarily from their own familiar frame of reference, political or legal, but after quickly reading up material on the other (as political scientists did with law in 1975) and acknowledging

[6] *E.g.* The Statute of Westminster 1931 (Imp.), as adopted by the Statute of Westminster Adoption Act 1942 (Cth); or State legislation referring a power to the Commonwealth pursuant to s. 51(37) of the Constitution.

[7] Where no Act is specified, reference is to the Constitution.

[8] *E.g.* Lane P. H., 'Judicial Review or Government by the High Court' (1966) 5 *Sydney Law Review* 203.

[9] *E.g.* Lindell G., 'Duty to Exercise Judicial Review' in Zines L. (ed.), *Commentaries on the Australian Constitution* (1977).

further constraints on action imposed by their new 'discoveries'. Various attempts have been made to bridge the gap, including Dicey's[10] 'convention' and Sawer's concept of a 'law-related working rule'.[11] But the approach that will be adopted here is methodological, as opposed to the above conceptual ones. Various actors in a position to effect constitutional change will be examined to see from what limitations and constraints they suffer, the strength of those limitations and the source of that strength. By concentrating on action and limitation an account will be given tied neither to law nor political science but, it is hoped, enlightening to both.

What is constitutional change?

There are two basic approaches to this question. One is to see constitutional change as confined to changes in the wording of the Constitution. In its most limited form this only comprehends section 128 and United Kingdom amendment, although it might be extended to take into account judicial interpretation that passes on the meaning and effect of those words. The other approach is the one that will be taken in this article. It is to look at the above together with other changes that have the same effect. For example, powers of the Commonwealth Parliament are not only extended by adding to the section 51 list using section 128 or by expansive judicial interpretation of those already on the list, but also by the States passing Acts under section 51(37) and perhaps section 51(38), by the conclusion of treaties[12] and the declaration of war.[13] On this view, what the Constitution is is primarily determined by *what the written Constitution seeks to regulate* (essentially (i) the balance of powers between the Commonwealth, the States and, to a small extent, individuals and (ii) the functioning of the federal government) rather than the words of the Constitution itself. Constitutional change is seen as change in constitutional law, and just as constitutional law can be found in many places so changes in those places may be classed as constitutional change.

Sometimes the existing constitutional position is uncertain because of two or more possible interpretations,[14] and it is only when various actors act on their interpretation of the Constitution and either get away with it or receive or are denied judicial approval that we can be certain what the constitutional position is. Some might argue that the Constitution must always have meant that, others insist that their initial interpretation was

[10] Dicey A. V., *The Law of the Constitution* (1885) Chapter 14.
[11] Sawer, *op. cit.* Chapter 9.
[12] Thus permitting, in at least some circumstances, legislation under the foreign affairs power in s. 51(29): *New South Wales v. Commonwealth* (1975) 135 C.L.R. 337.
[13] The defence power in s. 51(6) widens enormously the matters which the Commonwealth can regulate by legislation during a war or the reconstruction that takes place within a reasonable time thereafter.
[14] *E.g.* as to s. 53 (powers of the Senate).

correct and that a change has taken place. Thus, in order to determine whether there has been a change or not one must resolve the unresolvable legal dispute as to what the constitutional position really *was*. Either side *might* have been right, and because it is by no means certain that the 'winning' side has the better of the constitutional argument (especially, although not solely, when there has been no judicial determination) these cases will all be treated as examples of constitutional change. At the very least it could be said that in such areas of constitutional law the law has changed from greater to lesser uncertainty.

II JUDICIAL DECISION

A judge is a law student who marks his own examination papers.[15]

Few could now dispute the fact that judges can exercise some choice in the decisions they reach, including constitutional ones. Empirically this is demonstrated by the fact that appeals *do* succeed, cases *are* reversed and judges *do* dissent. In the context of constitutional change, this means that they may choose to change the Constitution when resolving doubts or reversing or confining old cases. What *is* disputed is (i) the range of choice, (ii) the nature of the limitations that keep judges' decisions within that range and (iii) the basis upon which the judges make their choices. It is with the first two that we are here concerned, the last only being relevant to the extent that it affects those two.

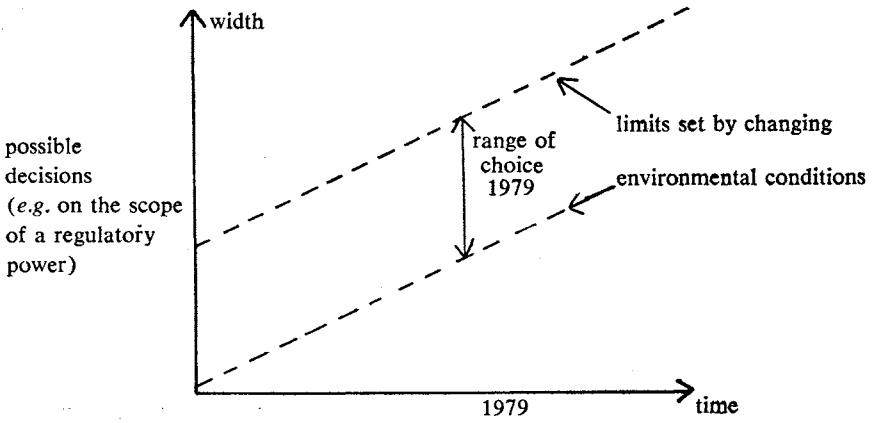
The range of choice

There are several theoretical views on how wide the judicial range of choice is. Hart[16] considers it rather narrow, owing to a fixed set of rules which provide a 'core' of legal certainty, judicial choice being confined to the 'penumbral' areas where the law has not yet been fixed. Stone[17] sees much less certainty in the apparent core because legal language and concepts are structured,[18] whether deliberately or not, so as to provide no determinate conclusion and hence an opportunity for choice. Stone praises this process in a later book[19] for allowing the courts flexibility in adapting institutions to changing social conditions. Schubert[20] and other jurimetricians[21] see the choice provided by the law as extremely wide, wide enough for personal values to be the dominant influence at least in the high proportion of cases involving dissent. The view of this writer is

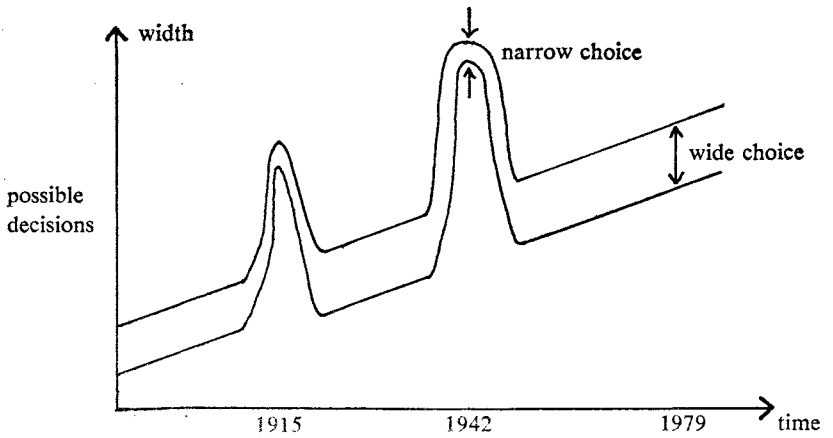
[15] Mencken H. L. in Levinson L. L. (ed.), *The Left-Handed Dictionary* (1963).
[16] Hart H. L. A., *The Concept of Law* (1961) Chapter 7.
[17] Stone J., *Legal System and Lawyers' Reasoning* (1964).
[18] By means of 'categories of illusory reference': *ibid.*
[19] Stone J., *Social Dimensions of Law and Justice* (1966).
[20] Schubert G., 'Judicial Behaviour' in 8 *International Encyclopaedia of the Social Sciences* (1968) 307.
[21] Notable work has been done in Australia by: Blackshield A. R., 'Quantitative Analysis: The High Court of Australia, 1964-1969' (1972) 3 *Lawasia* 1; 'Judges and the Court System' in Evans, *op. cit.*; Douglas R. N., 'Judges and Policy on the Latham Court' (1969) 4 *Politics* 20; see also Schubert G., 'Political Ideology on the High Court' (1968) 3 *Politics* 21.

that changing economic and social conditions lead eventually to changes in the law either (i) because those changes are reflected in the values either of the sections of the community from whom the judges come or in the values sought in judges by those who appoint them or (ii) because changing social and economic conditions have so moved the power balance that the resources of those who oppose the existing law have overwhelmed the resources of those who support it. Thus, the law can neither sprint too far ahead nor lag too far behind the changing environment, but the judges are nevertheless in a position to choose whether to be in front or behind.[22]

The range of choice idea — schematic representations

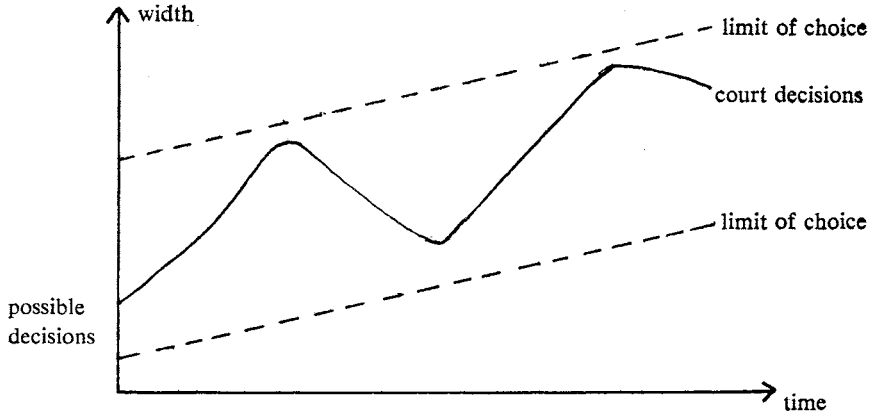


The limits to the range of choice need not be parallel or straight. During wartime *e.g.* the scope of regulatory power might have to be given wider interpretation:



Within the range of choice the decisions may vary, some courts going close to one limit, others close to the other:

[22] See Stone J., *Social Dimensions of Law and Justice* (1966).



Can the range of choice which all the above cited theoretical perspectives assume be measured? On one calculation the choice is extremely wide: it is between finding for and against the plaintiff or appellant, between declaring a law or executive act valid or invalid. But this formulation casts the range of choice too wide, *e.g.* the High Court could hardly rule *all* laws and executive acts questioned in front of it invalid. To do so would amount to the greatest possible constitutional change in the direction of narrow interpretation of Commonwealth power. Quite apart from the effects that this would have on the governing of the nation, the combined wrath of the Parliament, public service and Crown would be visited upon the Court, leading to the use of one or all of the remedies discussed below for dealing with refractory courts. One method of finding the range of judicial choice might be to look at various changes the High Court has made in interpretation of the Constitution, notably the widening of a whole series of powers: posts and telegraphs,[23] corporations,[24] external affairs,[25] conciliation and arbitration[26] and conditional grants under section 96.[27] However, if the postulated theoretical perspective is appropriate, then those changes might have been forced upon the courts by changing circumstances, *e.g.*, as is frequently argued, the growing power of the Commonwealth government and the raised expectations of the voters.[28] If so, then although the total variation in judicial opinion over

[23] S. 51(5). See Lumb R. D. and Ryan K. W., *Constitution of Australia* (1977) 98-100; *R. v. Brislan, Ex parte Williams* (1935) 54 C.L.R. 262 and *Jones v. Commonwealth (No. 2)* (1965) 112 C.L.R. 206.

[24] S. 51(20). See Lumb and Ryan, *op. cit.* 129-34. *Cf. Strickland v. Rocla Concrete Pipes Ltd* (1971) 45 A.L.J.R. 485 with *Huddart, Parker & Co. Pty Ltd v. Moorehead* (1908) 8 C.L.R. 330. See now *In re Adamson, Ex parte W.A. National Football League* (1979) 53 A.L.J.R. 273.

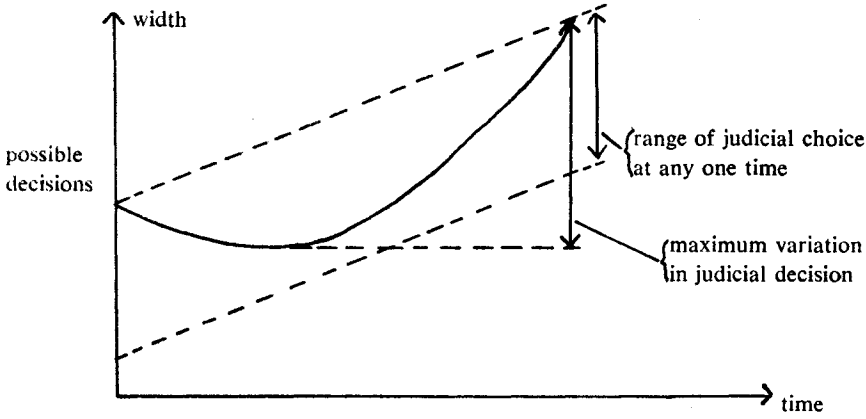
[25] S. 51(29). See Lumb and Ryan, *op. cit.* 151-9. See especially *New South Wales v. Commonwealth* (1975) 135 C.L.R. 337.

[26] S. 51(35). Lumb and Ryan, *op. cit.* 172-82. Virtually every term in the paragraph has been given an expanded interpretation.

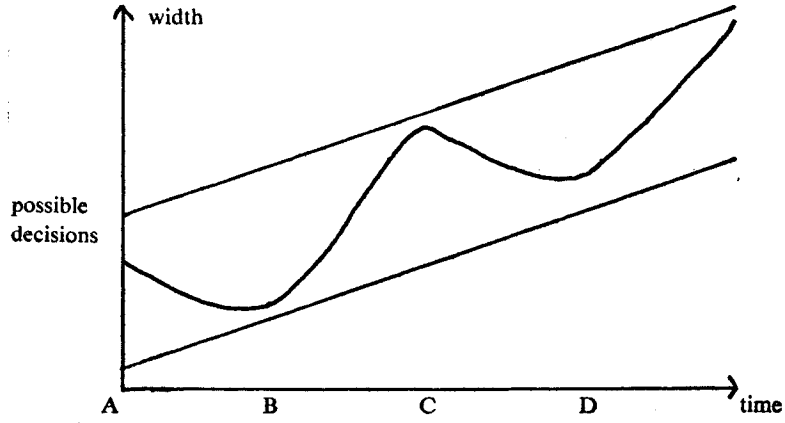
[27] See Saunders C. A., 'Development of the Commonwealth Spending Power' (1978) 11 *M.U.L.R.* 369.

[28] *E.g.* Howard, *op. cit.*

the years has been very great, the High Court may have been unable to make that change all at once, and it is quite conceivable that the total variation in the Court's interpretation over the years is greater than the range of choice open to the Court at any one time:



Alternatively, one might look at judicial interpretations that have *changed* direction at least once, *e.g.* section 92 or the judicial approach to the interpretation of the various Commonwealth powers. It is arguable that the range of judicial choice is at least as wide as the two extremes the Court has taken. But this will depend on how far apart the extremes are and how rapidly the externally imposed limitations are changing:



This might represent the periods in the construction of Commonwealth powers:
A — B: period of implied immunities
B — C: post *Engineers'* case[29] expansive interpretation of Commonwealth power
C — D: Dixon and 'strict constructionism'
D — present: gradual expansion of Commonwealth power in the later Dixon and (especially) Barwick courts.

How then does one *measure* the upper and lower limits of possible choice? The best one can manage is approximations and broad indications.

[29] (1920) 28 C.L.R. 129.

At one end there is the point where continued invalidation of popular government legislation loses a court support and allows the government to isolate it (as Roosevelt did with his 'horse and buggy' characterization) thereby forcing the court to surrender or be swamped by new justices. This point has clearly not yet been reached judging by the 100 out of 340 possible invalidations catalogued by Sawer[30] for the period 1903-1965, although this may be due more to the short periods during which the party most affected, the A.L.P., has been in office (apart from the 1940s, for the early part of which Australia was at war or undergoing post-war reconstruction, so that the Court did not start invalidating legislation until later). At the other end is the position where a court takes it upon itself to push reform so far beyond those that the legislature is prepared to enact that it invites a similar reaction to the one provoked by unbridled invalidation of the legislature's reforms. This the Australian High Court is in no danger of doing. In the United States the Supreme Court went far further than the legislature in race relations, but although the reaction was strong from outside groups there was no united action from the legislature, whose own inaction in the area was arguably due more to legislative paralysis induced by a failed party system than fundamental disagreement with the Court. In any case, the electorate was probably initially as much in favour of the Court's action as against it.

Limiting factors acknowledged by the Court

The High Court itself acknowledges some limitations on its ability to decide constitutional issues and thus, in some cases, its ability to effect constitutional change. But the fact that the limitation is created by the Court itself does not indicate that it is a purely voluntary one, since it may be imposed in response to, and in tacit acknowledgment of, effective external limitations. One should never confuse the act of creation and the force behind it. This is important, for a purely voluntary limitation is presumably reversible[31] and hence less of a limitation upon the Court. In listing the Court-acknowledged restrictions an attempt will thus be made to see if there is something substantial behind each.

The Court requires that there be a '*matter*', a dispute between interested parties,[32] one of whom is making a 'claim of legal right'.[33] The Court cannot of its own motion announce that the interpretation of a certain

[30] Sawer G., *Australian Federalism in the Courts* (1967) 80.

[31] Unless external constraints are built up in response to the voluntary limitation. Arguably, if the Court voluntarily limited itself to reviewing certain kinds of cases an unsubtle *volte face* might bring a much stronger public and parliamentary reaction than if the voluntary restriction had never been assumed and the Court had said so the first time the matter came before it.

[32] *In re Judiciary Act 1903-1920 and Navigation Act 1912-1920* (the *Advisory Opinions* case) (1921) 29 C.L.R. 257. The degree of interest necessary is a question of *locus standi*: see *infra* 220.

[33] See the characterization in Howard C., *Australian Federal Constitutional Law* (2nd ed. 1972) 167.

section has changed, some dispute involving the Constitution must come before it. Hence, prior action of others is a precondition for judicial change of the Constitution. If the change is in the direction of wider Commonwealth power, the Commonwealth must first pass a law or perform an executive act beyond the apparent current scope of power and someone has to be sufficiently unhappy about it to risk the substantial probability of paying the costs of a lost High Court action. Reasonably fearless governments and litigants are therefore required. The High Court has eased the position by allowing litigants to seek declaratory relief alone[34] and by dropping hints about its changing ideas, thereby inviting legislation and/or litigation so that it can pronounce on it.[35]

The reasons given for the 'matter' requirement are many,[36] but it would seem to reflect a desire not to get involved in the possible invalidation of Commonwealth legislation and executive action with its possible concomitant confrontation unless it is forced upon the Court by an actual case involving real and substantial interests:[37] substantial enough to risk suffering costs, although this measure of substance lacks strong egalitarian or democratic credentials. Crawshaw[38] criticizes this because it means that uncertainties are not cleared up as quickly as might happen if the Attorney-General could get a prior decision on an Act's validity. In favour of the restriction is the fact that the High Court's ability to exercise judicial review is not only contingent upon litigation commenced by an affected party but is also in some instances delayed. The greater the delay the more a contrary decision will disrupt, and the Court might well feel less inhibited in advising that a proposed or recently enacted law is unconstitutional than Acts which have already been passed and are in operation. Further, if the advisory procedure were available but not used the Court might feel less inhibited in invalidating a law, on the basis that the damage would not have been done if it had been consulted.

The Court requires, secondly, that the matter be *justiciable*. Put

[34] This does not directly affect the parties in the same way as would an order including consequential relief. See Tracey R. R. S. *et al., Cases and Materials on Administrative Law* (3rd ed. 1975) 100 for a brief history of how the Australian courts have followed English courts in permitting declaratory relief alone even where there was an alternative remedy available.

[35] *E.g.* Barwick C.J.'s dictum in *Concrete Pipes* that the corporations power was 'not necessarily limited to trading activity': (1971) 45 A.L.J.R. 485, 490. But potential plaintiffs should be wary, for the hints are rarely dropped by a majority and may not be supported by them in a subsequent case on the point: *e.g.* Barwick C.J.'s indications about the position of Territorial representatives in *Attorney-General (N.S.W.), Ex rel. McKellar v. Commonwealth* (1977) 51 A.L.J.R. 328 were not realized in *Queensland v. Commonwealth* (the *Second Territory Representation* case) (1977) 52 A.L.J.R. 100.

[36] Crawshaw S., 'The High Court of Australia and Advisory Opinions' (1977) 51 *Australian Law Journal* 112.

[37] Lane, *op. cit.* puts it that the sovereignty of Parliament is only questioned where an individual is affected, and the Court has to decide because someone affected has come before it. Crawshaw, *op. cit.* puts it that the High Court wants to avoid politicization through being drawn into the legislative arena.

[38] *Op. cit.*

negatively this means that there are certain matters that the Court will not decide upon — including internal parliamentary matters[39] and certain discretions of the Governor-General.[40] McTiernan J. sought to use this heading to create a class of 'political questions'[41] upon which, following United States practice,[42] the Court would not adjudicate. However, the remainder of the Court has not chosen this path, and on the whole has moved in the opposite direction, recently holding matters of electoral law[43] and the grounds for a double dissolution (although at one stage by only a four to three majority[44]) justiciable. But where the Court does hold a matter not justiciable it is usually where it would involve interfering with the internal functioning of one of the other branches of government, which would be difficult to enforce and might end in a trial of strength should that other branch insist on going about its business as it chose.

The Court is also circumspect as to the *remedies* it will grant when dealing with Parliament or Ministers. This may stand behind the already mentioned increasing willingness to permit declaratory judgments, which do not require enforcement, so that no confrontation over the enforcement of a judgment by the (normally) Parliament-controlled executive can occur. It also lies behind the twice indicated willingness to declare laws, but not parliaments, invalid. In *McKinlay*[45] and *McKellar*[46] the Court did not find parliaments invalidly constituted or all their laws invalid, even though they had been elected under provisions of the Electoral Acts[47] it was striking down. In *Cormack v. Cope*,[48] while Barwick C.J. thought the proclamation of the joint sitting invalid he nonetheless would not hold the sitting thereby invalid, and in the *P.M.A.* case[49] he and Gibbs did not think a parliament resulting from a groundless double dissolution would be invalid.[50] This is understandable — legislators would react more strongly to judges denying them their seats than even their most crucial legislation. Further, even if the Court were to invalidate a parliament, there would probably be no alternative parliament to install. Even if there were, an alternative parliament whose time had not run out

[39] *Clayton v. Heffron* (1961) 105 C.L.R. 214, 246.
[40] See Hogg P. W., 'Judicial Review of Action by the Crown Representative' (1969) 43 *Australian Law Journal* 215 and the discussion *infra* 229 ff.
[41] *Victoria v. Commonwealth* (the *P.M.A.* case) (1975) 134 C.L.R. 81, 135 f.
[42] See Sharpf F. W., 'Judicial Review and the Political Question' (1966) 75 *Yale Law Journal* 517.
[43] *Attorney-General (Cth), Ex rel. McKinlay v. Commonwealth* (1975) 135 C.L.R. 1; *McKellar* (1977) 51 A.L.J.R. 328.
[44] *Western Australia v. Commonwealth* (the *First Territory Representation* case) (1975) 134 C.L.R. 201.
[45] (1975) 135 C.L.R. 1.
[46] (1977) 51 A.L.J.R. 328.
[47] Representation Act 1905 (Cth), ss. 3, 4, 10(b) and 12; Commonwealth Electoral Act 1918 (Cth), ss. 24 and 25.
[48] (1974) 131 C.L.R. 432.
[49] (1975) 134 C.L.R. 81.
[50] Stephen J. in the *First Territory Representation* case (1975) 134 C.L.R. 201 was more logical and less practical, and for once this combination of virtues left a High Court judge in the minority.

would contain many members of the 'invalid' parliament who might not cooperate. An invalid parliament will normally be a *fait accompli.*

The reluctance of the High Court to interfere or take any action may lead to a situation where there is a dispute between two parties but if either of them brings the matter to court for resolution it will lose. This may be an alternative explanation of why some constitutional issues are not litigated.

Standing must also be accorded the parties by the Court: without this there can be no 'matter', not even an argument over a declaration, because if there is only one party before it that the Court will recognize then there is no *dispute* that it can hear. A plaintiff must show that the legislative norm or executive action challenged does or is likely to require him to act or abstain in a certain way or will interfere with his property or person.[51] A member of the public cannot sue as a consumer or taxpayer[52] although he now can as an elector.[53] This is in line with the Court avoiding general political issues and only getting involved where there are personally rather than politically aggrieved parties. The standing rule has been substantially relaxed in the case of State and Commonwealth Attorneys-General acting of their own motion or *ex relatione,* provided the matter arises within their respective jurisdictions.[54] Here the Court can proceed on the basis that even if it does get involved in a confrontation either with one of the States or the Commonwealth as a result of its decision it at least has the tacit support of one of the seven governments.

The doctrine of *stare decisis* does not greatly limit the High Court's constitutional interpretation. As indicated previously, Stone has exposed the indeterminacy of legal decisions,[55] and the Court's ability to distinguish and confine and its occasional preparedness to overrule formally as well as in fact mean that prior decisions are not a great burden on the Court's choice. *Stare decisis* does however have three effects. First, it may discourage the legislation and litigation which are preconditions of judicial amendment. Second, it will mean that the individual justices will prefer to change course gradually,[56] invoking *stare decisis* against their brother judges who seek change too rapidly.[57] Third, once the Commonwealth has passed a law, had its constitutionality upheld, set up machinery for its implementation, employed people and embedded expectations in the

[51] *British Medical Association v. Commonwealth* (1949) 79 C.L.R. 201.
[52] *Anderson v. Commonwealth* (1932) 47 C.L.R. 50.
[53] *McKinlay* (1975) 135 C.L.R. 1.
[54] *Attorney-General (Vic.) v. Commonwealth* (1935) 52 C.L.R. 533, 566.
[55] *Supra* 213 n. 19, and accompanying text.
[56] However, recent s. 92 cases have shown that speed and gradualness are not enemies. See *e.g.* the developing views of Mason J., especially in *Pilkington v. Frank Hammond Pty Ltd* (1974) 131 C.L.R. 124 through *North Eastern Dairy Co. Ltd v. Dairy Industry Authority of New South Wales* (1975) 134 C.L.R. 559 and *Finemore's Transport v. New South Wales* (1978) 52 A.L.J.R. 465 to *Clark King & Co. Pty Ltd v. Australian Wheat Board* (1978) 52 A.L.J.R. 670.
[57] *E.g.* the *Second Territory Representation* case (1978) 52 A.L.J.R. 100.

minds of the new institution's clients, reversing the decision may prove difficult, because the Court, by attempting to abolish what people have become familiar with, would earn a host of enemies, especially former employees and clients, together with others who benefited from the law.[58] An overruling is only likely to be feasible when the same functions (and, preferably, personnel) can be transferred to a new institutional structure as happened in the aftermath of the *Boilermakers'* case.[59] This is, if you like, a reified form of the legal doctrine of *stare decisis.*

Also important is the mode of argument the Court adopts — legalism with varying standards of strictness (the standard applied being rather lower than the standard claimed in theory). Some see this as a restriction,[60] but Kadish[61] suggests that it actually broadens the scope for constitutional change. He argues that it gives the High Court greater scope for boldness because the Court does not acknowledge the political and value nature of what it is doing,[62] and since the High Court is more prepared than its United States counterpart to accept the fiction that it declares rather than creates law, Kadish says it is less 'self-conscious'.[63]

The High Court also acknowledges the power of the legislature, by refusing[64] to look at the motive or purpose behind legislation[65] and by holding that Parliament can choose the means to achieve constitutionally permissible ends.[66]

Finally, the Court may have general *presumptions* about the validity of laws, the scope of federal powers, the reviewability of gubernatorial discretion[67] *etc.* During the first decade of its existence the Court read the 'implied immunities' into the heads of Commonwealth legislative power. Following the *Engineers'* case[68] powers were read very broadly, but Dixon J. later persuaded a majority of the Court to construe strictly all powers.[69] The presumption of validity has not meant much since the Latham court at least,[70] but Murphy J. is now putting it forward again, and although he has not yet carried any other members of the Court with him, his

[58] In the *Territory Representation* cases this included Senators and M.H.R.s.

[59] (1956) 94 C.L.R. 254 (H.C.); (1957) 95 C.L.R. 529 (P.C.).

[60] *E.g.* Weschler H., 'Toward Neutral Principles of Constitutional Law' (1959) 73 *Harvard Law Review* 1.

[61] 'Judicial Review in the High Court and the United States Supreme Court' (Part I) (1959) 2 *M.U.L.R.* 4.

[62] *Ibid.* 19.

[63] *Ibid.* 20.

[64] Except in the case of the defence power, s. 51(6).

[65] *E.g. South Australia v. Commonwealth* (the *First Uniform Tax* case) (1942) 65 C.L.R. 373.

[66] Lane, *op. cit.* 212.

[67] See Hogg, *op. cit.* and *infra* 229 ff.

[68] (1920) 28 C.L.R. 129.

[69] This pattern of development is frequently outlined. See *e.g.* Howard C., *Australian Federal Constitutional Law* (2nd ed. 1972) Chapter 2.

[70] Sawer G., *Australian Federalism in the Courts* (1967) 119.

strikingly swift success with section 92[71] should make us wary of ruling out the possibility of its ultimate acceptance .

These presumptions are not necessarily accidental developments but are frequently argued to be the result of the initial weakness (during the 'implied immunities' period) and subsequent growth of Commonwealth power.[72] If these presumptions imply a narrow reading of Commonwealth powers they will probably inhibit constitutional change;[73] if they imply a wide reading then they provide the possibility of greater constitutional change through judicial amendment. But to the extent that these presumptions are effectively forced on a court because of the prevailing balance of power between the various organs of government and outside groups, then this does not widen the range of judicial choice but rather determines from what moving point the range of choice varies.

Other limitations

Apart from the unacknowledged limitations that lie behind the acknowledged ones there are two others that should be dealt with. When people exercise choice it is not in a vacuum, involving some kind of lottery, they do it against a background of personal beliefs. Schubert, Blackshield and Douglas[74] have written at length on the values discoverable in different judges' decisions. These values are not accidental. They are related indirectly to those of the general community, more directly to the range of values found among top barristers (which, Sawer points out, tends to be atypical and to cover a narrower field than that of the general community, partly because of their affluence, education and background and partly because of the nature of their clientele[75]) and more particularly to the values which the government appointing them prefers among that range. These need not be ascertained by the crude expedient of putting questions as Hughes did to Piddington, but a sensible government will peruse a potential judge's background to get a clue to whether he possesses the 'right' value outlook.[76] Some judges articulate their value outlooks but they usually go unacknowledged.

A second consideration is the strength of the argument in favour of exercising the power of judicial review in a given case. Lindell[77] rightly points out that although the availability of judicial review with its

[71] See *Clark King & Co. Pty Ltd v. Australian Wheat Board* (1978) 52 A.L.J.R. 670.
[72] See *e.g.* Crisp, *op. cit.* Chapter 3.
[73] As argued earlier, a change to a narrower reading of a power than hitherto is rarely available as an alternative.
[74] *Supra* 213 nn. 20-1.
[75] Sawer G., *Australian Federalism in the Courts* (1967) 70.
[76] Mistakes can of course be made, as in the case of Earl Warren, conservative Republican Governor of California, arch-liberal Chief Justice of the United States Supreme Court.
[77] *Op. cit.*

consequent possibility of constitutional change cannot be denied,[78] if the argument is weak then the High Court may not feel bound to exercise its power, or may even feel constrained not to exercise it, so that the power is accordingly limited.[79] Five arguments in favour of judicial review can be summarized as follows:

(1) The Constitution represents the will of the people and should thus be given precedence over Acts of Parliament.[80] This is truer in the United States than in Australia, but in both cases the Constitution represents, if anything, the will of *yesterday's* people, so that very good argument is needed to persuade people in the 1970s that the views of their dead parents should be given precedence over their own. In any case, what their parents voted for in the referenda of the 1890s was federation, not the details of the Constitution. To say that the Constitution represents the will of today's people because it is tacitly consented to by their failure to amend it is to take a very forced view of the process of formal amendment.[81]

(2) The historical argument is that ever since *Marbury v. Madison*[82] judicial review of written constitutions has been accepted and was assumed by the founding fathers.[83] However, this is a United States precedent that is historically less applicable than the United Kingdom precedent discussed under (3).

(3) Applying principles of administrative law to the Constitution (which is, after all, part of an Act of the Imperial Parliament), where powers are granted to a subordinate body (*e.g.* the Governor-General, Commonwealth Parliament *etc.*) that body has no powers beyond those contained in the grant and the courts will review the exercise of those powers to enforce this.[84] But, with respect, this is to allow a principle initially designed to ensure that the will of Parliament was carried out to frustrate the will of Parliament: a curious, not to say mischievous, extension of the principle.

(4) A common argument is that without judicial review the legislature would determine the validity of its laws merely by enacting them and that this would lead to self-aggrandizement.[85] Yet the natural remedy for this would be a popular vote at the next election, so that if the electorate is not disturbed by the extension of power the High Court should not be. Moreover, whoever has the power to determine validity will suffer this tendency (as has the High Court itself), and if any group is to be aggrandized it *should* be the Parliament. What is, or, at least, what *should*

[78] Even Lane, *op. cit.*, does not do so.
[79] Lindell, *op. cit.*
[80] Kadish, *op. cit.*, citing Alexander Hamilton.
[81] See *infra* 239 ff.
[82] (1803) 1 Cranch 137; 2 L. Ed. 60.
[83] Lindell, *op. cit.*
[84] Sawer G., *Australian Federalism in the Courts* (1967) 76.
[85] *E.g.* Lindell, *op. cit.*; Kadish, *op. cit.*

be grander than the democratically elected representatives of the people assembled together for the discussion of the nation's business. This counter-argument would not prevent judicial review to ensure the democratic election of the Parliament, but the High Court has washed its hands of this responsibility completely by a four to three majority, and substantially by a six to one majority.[86] This leads to the irony that the Court, by refusing to exercise judicial review over the election of Parliament strengthens its case for judicial review of Parliament's other legislation: the refusal permits the existence of an undemocratic parliament, which of course needs to be more carefully watched and controlled because it isn't democratic! The answer to the argument that the Commonwealth Parliament should be the sole arbiter of the validity of its laws is that the *founding fathers* didn't find anything grand but something rather frightening in the national Parliament and sought to restrict it as much as possible: that is precisely why they intended and provided for judicial review.

(5) It is argued that sections 74 and 76(1) are unintelligible without judicial review.[87] Yet similar arguments to the effect that the Constitution is unintelligible without the principles of responsible government and control of supply by the House of Representatives have been found less than compelling.

How the High Court is limited

Most of the previous discussion has suggested that the Court is limited by the power of outside groups or institutions, in particular by the Commonwealth legislature and executive which, seeing that the latter has been under the control of the former for all but 32 days since federation,[88] should form a pretty formidable combination. Yet to be considered are the mechanisms by which this power is brought to bear or could be brought to bear (for power need not actually be exercised for it to be effective, indeed it is more effective if it does not have to be exercised) on the High Court should it provoke those institutions to act against it. This is not an idle question, since governments, especially socialist ones, have often been frustrated in the past, and the recent good record Mr Whitlam happily reports[89] may not be repeated should the A.L.P. be re-elected. The good record was achieved during one of the rare periods that three A.L.P. appointees have sat on the bench. A previous period, 1913-1940, also a pro-Commonwealth-power period, included three and for a brief period four A.L.P. appointees, but these included several neutral appointments after the chosen Piddington had been hounded from

[86] *McKinlay* (1975) 135 C.L.R. 1.
[87] Lindell, *op. cit.*; Sawer G., *Australian Federalism in the Courts* (1967) 76.
[88] The period from 11 November 1975 to 13 December 1975.
[89] Whitlam E. G., 'The Labor Government and the Constitution' in Evans, *op. cit.* 305.

office. But even including that period this number of Labor appointments sitting at the same time has only been achieved for 30 years out of 78. Moreover, considering some of the precarious majorities of the Whitlam years,[90] the replacement of McTiernan J. by Aickin J. represents a major conservative shift and danger.[91] Trends towards a wider reading of Commonwealth power, however inexorable in the long term, can be interrupted and even temporarily reversed: both possibilities now exist.

In considering the Commonwealth government's power to pressure the High Court we are not only looking at a *limitation* on the *Court's* power of constitutional choice but also at an *opportunity* for the *government* to achieve constitutional change. This should be no surprise in a system in which the separation of formal powers is accompanied and supported by a diffusion of actual power among both governmental and private institutions.[92]

In the first place, there is the possibility of action to affect the composition of the Court. The problems from which the A.L.P. suffered in 1913 are unlikely to be repeated. Although lawyers are now as then an extremely conservative group, the slightly increased upward mobility of the working class and the marked increase in middle class defection have made it slightly less so. More importantly, anti-Labor governments, in their characteristic habit of acting for short-term gain, have set numerous precedents of appointments that are both political and from outside the most conservative group of lawyers, the bar, hence the failure of the campaign against Mr Justice Murphy's appointment. In view of that failure the A.L.P. seems fairly free in choosing new appointees.

But an appointment requires a vacancy and the existence of current or imminent vacancies is a prerequisite for this kind of pressure. A government controlling both Houses of the Parliament could, or could threaten to, increase the size of the High Court by two, thus creating two immediate vacancies. It would possibly be accused of stacking, but previous increases in the size of the Court, admittedly a long time ago (1906 and 1913), drew quite manageable flak.[93] The government of the day could argue that nine is the same size as the U.S. equivalent and that the Court was obviously under too much pressure, citing the recent long delays in delivering judgments. The government might 'soften up' the Court, even to the extent of getting complaints about workload, if the current trend towards legislative restriction of its general appellate jurisdiction were

[90] Most noticeably in *Victoria v. Commonwealth* (the *A.A.P.* case) (1975) 134 C.L.R. 338, which turned on Stephen J.'s denial of standing to the plaintiff in an otherwise evenly divided Court.

[91] The recent retirement of Jacobs J. means that a solitary Labor appointment, Murphy J., now sits on the Court.

[92] The diffusion of actual power permits the confrontation between the holders of formal powers which conservatives in the United States call 'checks and balances', but which might more aptly be described as 'obstructions and see-saws'.

[93] See Sawer G., *Australian Federal Politics and the Law (1901-1929)* (1956).

reversed. However, such a move would only work if there was a precarious balance in key cases, with three judges already voting as the government desired so that two extra appointments could turn a three to four loss into a five to four win. If there were fewer favourable justices (*e.g.* as at present), correspondingly more appointments would be needed. But the greater the number of additional justices appointed the greater would be the 'stacking' furore and the greater the resistance of the Court, waiverers perhaps joining with the old majority to defend, publicly and in the courtroom, the 'dignity and independence of the Court'.

The other way to create vacancies is through the departure of existing justices. Those appointed from now on will have to retire at seventy, and although all but one of the current justices are legally unaffected by section 72,[94] the government would be in a position to pressure septuagenarian judges into retirement arguing that the norm had been established both by constitutional amendment and the average age of retirement of past justices (seventy for post-World War II appointees and seventy-two for all justices). Only Barwick C.J. would be affected by this before 1986 when Aickin J. turns seventy.

More drastic would be the removal of the present Chief Justice by the Governor-General in Council upon the motion of both Houses pursuant to section 72(2) for proved misbehaviour. What 'proved misbehaviour' means is of course uncertain, although arguably it should be up to the legislature to determine what constitutes misbehaviour and whether it has been proved (if it were up to the Court then would that not put High Court justices above the law — and lead to 'self-aggrandizement'?) Barwick C.J.'s action in giving advice to the Governor-General could be seen to be unconstitutional, inasmuch as it conflicted with the High Court's own rulings that the giving of advice is not part of the judicial power of the Commonwealth[95] and that there must be a strict separation of Commonwealth judicial and other power, so that judicial officers should not exercise powers that were not Commonwealth judicial powers.[96] Considering that the remedy in both *Waterside Workers' Federation of Australia v. J.W. Alexander Ltd*[97] and in *Boilermakers*[98] was to deny the exercise of judicial power to those who purported to exercise both federal judicial and other powers, removal from judicial office could be argued to be appropriate in the case of the Chief Justice.

There was a precedent for such a tendering of advice,[99] but apart from the fact of prior consent of the Prime Minister having been gained (a

[94] As amended by the Constitution Alteration (Retirement of Judges) Act 1977 (Cth).
[95] In the *Advisory Opinions* case (1921) 29 C.L.R. 257.
[96] *Boilermakers* (1956) 94 C.L.R. 254 (H.C.); (1957) 95 C.L.R. 529 (P.C.).
[97] (1918) 25 C.L.R. 434.
[98] (1956) 94 C.L.R. 254 (H.C.); (1957) 95 C.L.R. 529 (P.C.).
[99] Prior to the double dissolution of 1914.

political rather than legal point, dulled somewhat because it was less than enthusiastic) the advice was given at a time when the legislation permitting advisory opinions[1] had been passed but not yet held invalid. It was, according to strict constitutional theory, already invalid at the time, but none of the actors could *know* that.[2]

Such drastic alternatives aside, the government can only hope to affect marginally constitutional choice on the part of the High Court. It takes several years to affect the composition of the Court — this is evidenced by the time lag that Sawer noted as between the attitudes of government and Court, the former being in favour of wider powers in the period 1901 to 1914 and narrower from 1915 to 1940 and the latter favouring wide interpretations from 1920 to 1940 but narrower from 1940 to the 1960s at least. This is another manifestation of the fact that time in government is necessary to effect change, for it can take up to five years of unbroken popularity to control the Senate as well as the House of Representatives and another five to win a like-minded High Court.[3]

But there is one other possibility: reconstitution of the Privy Council that hears appeals from Australia followed by repeal of the legislation preventing appeals to the Privy Council from the High Court[4] and from State Supreme Courts[5] in federal matters. The reconstitution could be along the following lines: new judges would be appointed to the Judicial Committee of the Privy Council and there, along with desirable members of the current Court, would form a specifically Australian division sitting in Australia. This scheme could be formalized by legislation (by the Imperial Parliament[6]) or, just possibly, by using section 51(38) in an extension of Nettheim's suggestion that the *abolition* of Privy Council appeals could be effected by this section.[7] With its Australian composition and sittings it would not be open to nationalistic objections and would have the added advantage of bringing State appeals to the Privy Council 'home' at last. Indeed, this latter advantage might be put forward as a major reason for its adoption. Some[8] would see further advantages in the fact that the

[1] Judiciary Act 1903 (Cth), Part XII.

[2] Alternatively, it could be argued that the existence of a method prescribed by enactment for obtaining advisory opinions from the High Court precluded any other method and hence the Chief Justice's action was *more* wrong in 1914 than in 1975. This was a relevant argument in the recent Fijian constitutional *contretemps*, where a procedure existed for getting advisory opinions from the Full Court but the Governor-General sought the Chief Justice's opinion.

[3] The A.L.P. would need to remain in power through most of the 1980s to get to the stage of having four out of seven appointees, premature vacancies apart.

[4] Privy Council (Appeals from the High Court) Act 1975 (Cth).

[5] Judiciary Act 1903 (Cth), Part VI.

[6] Which might be persuaded to co-operate in divesting the United Kingdom of colonial responsibility: Sawer G., 'The British Connection' (1973) 47 *Australian Law Journal* 113.

[7] Nettheim G., 'The Power to Abolish Appeals to the Privy Council' (1965) 39 *Australian Law Journal* 39, 44 ff.

[8] *E.g.*, presumably, Crawshaw, *op. cit.*

Judicial Committee has traditionally given advisory opinions on legal[9] and even conventional[10] questions and could be so used by the government if it wished.[11] Furthermore, its members are more easily removable. High Court decisions on these points[12] could hardly be relevant to Privy Council traditions. *Inter se* matters[13] would present a problem, but their scope could be established by the new 'Australian' Privy Council and they could be removed to the *Privy Council* automatically as soon as they arose in any court (other than the High Court) by a similar scheme to that presently used in Part VI of the Judiciary Act 1903 (Cth).

One power the founding fathers might have imagined that the legislature would have over an unco-operative Court is the initiation of formal constitutional amendments under section 128. Harrison Moore referred to the 'great facility with which the Australian Constitution may be altered' and suggested that because of this, constitutional development would be more by formal amendment and less by judicial interpretation than in the United States.[14] As his premise is reversed so is his conclusion — because of the *difficulty* of formal amendment constitutional development *has* been by judicial interpretation.[15] Had he been correct the power of judicial amendment would be weak and relatively unimportant, because judicial decisions disapproved of by Parliament would be short-lived. But since the Constitution has proved so impervious to change, the High Court's amendments are secure and of vital importance. The High Court has accepted the very great power that this has given it, but not the responsibility for the nation's legal development that goes with it.

It remains to consider what pressure other groups can exert on the High Court. The values of the public as a group are important to the extent that they filter through into the values of the judges. But this filtering appears to be less successful with respect to the judiciary than any other branch of government. The only way that the public can exert influence on the Court is through other institutions or by denying the Court one thing most of its members cherish most — respect.

Disappointed plaintiffs might seek to mobilize public opinion against the High Court, in particular by painting it as the rubber stamp of the legislature in an attempt to deny it the respect it desires. However, this attack could only be meaningful in the context of a much lower rate of invalidations, and in any case the United States Supreme Court has shown itself to be pretty secure from public attack, protected as it is by tenure and

[9] *Ibid.*
[10] See Evatt H. V., *The King and his Dominion Governors* (1936), citing some cases last century where this occurred.
[11] But see the policy argument against this *supra* 218.
[12] *E.g.* the *Advisory Opinions* case (1921) 29 C.L.R. 257.
[13] S. 74.
[14] *Constitution of the Commonwealth of Australia* (1902) 332, quoted in La Nauze J. A., *The Making of the Australian Constitution* (1972).
[15] See *infra* 239 ff.

self-righteousness. Furthermore, if the High Court is *validating* legislation it presumably has at least the tacit support of those for whose benefit the government passed the legislation in the first place. Disappointed State governments may be better mobilizers of public opinion but lack the power of the federal government discussed above.[16] This may help to explain the higher rate of invalidations of State Acts (44 per cent compared to 29 per cent for Commonwealth legislation catalogued by Sawer[17]) despite the relatively few provisions in the Constitution limiting State legislative power.[18] The only course open to the States is continued ingenuity in finding opportunities in the High Court's contorted logic.[19]

II UNILATERAL ACTION

Shoot first and ask questions afterwards.[20]

If some individual or institution acts unconstitutionally and gets away with it, then a constitutional change has effectively eventuated. He, she or it may get away with it in one of two senses: (1) inasmuch as the act stands, *i.e.* is not invalid, either because it goes unchallenged for one reason or another or because the action is challenged but legitimated after the event; (2) insofar as the action is not punished, whether officially, *e.g.* by means of a conspiracy case, or unofficially, *e.g.* where the perpetrator is forced to resign or defect at the next election because of it.

This power of change by unilateral action is interwoven with the power of judicial amendment. Where the High Court is limited in reviewing the actions of the other branches of government, those branches of government are free to act unconstitutionally and effect constitutional change and the High Court is not. Where the Court is not confined in reviewing actions of those branches and is prepared to find those actions unconstitutional, this imposes a limitation on constitutional change by those branches but provides an opportunity for constitutional change by the Court. In this sense the limitations on the one are the opportunities of the other. Yet sometimes the opportunity of one is also the opportunity of the other. Where the High Court is prepared to legitimate extensions of Commonwealth power, judicial decision making provides an opportunity for the legislature or executive, and legislative or executive action provides an opportunity for the Court.

It should be remembered that where some branches of government 'get away with' unconstitutional action, it may be argued that it always was

[16] See *supra* 225.

[17] *Australian Federalism in the Courts* (1967) 81 (for the period 1903 to 1965).

[18] S. 92 (45 cases); s. 109 (11 cases); s. 90 (7 cases); implied intergovernmental immunities (7 cases): *ibid.* Note that the lack of specific limitation would be a better reason for fewer cases than fewer invalidations.

[19] As *e.g.* in the excise duty cases, the latest decision in favour of the States on the s. 90 issue being *H.C. Sleigh Ltd v. South Australia* (1977) 136 C.L.R. 475.

[20] Hollywood approach to constitutional and legal questions and the essence of Barwick C.J.'s advice to Sir John Kerr.

constitutional, indeed it almost certainly will be so argued by those who support or are supported by that branch of government. It is possible to argue this, but not necessarily convincingly. There may be contrary precedent which the High Court overrules, or the Court might not hold the action constitutional but simply refuse to consider the question because of questions of standing or justiciability. There may be no previous authority, but the bulk of academic opinion — the 'better view' — might be against the action's constitutionality. If the actor gets away with it there is at the very least a change from uncertainty to certainty, and if the 'better view' has been that it was unconstitutional then surely the 'better view' is that there has been a change. But even if it is a doubtful case of change, discussion of the limitations the actors there face may give inklings of the limitations present in clearer cases of constitutional change.

Limitations on the legislature

Most of the changes in the Constitution have occurred by the Parliament passing laws that assumed a progressively wider scope for federal powers. When the legislation has been challenged the High Court has usually acquiesced and only relatively rarely invalidated it. Some of the reasons for this are the limitations on the ability and power of the High Court to stand up to Parliament discussed in the preceding section. But the legislature is limited where the Court can and will invalidate legislation. Another very important limitation on the choice of the governing majority in the legislature as to change is the desire for re-election. This political imperative means that the legislature is limited in the amount of generally unpopular legislation it can pass. If unconstitutional legislation is unpopular,[21] this limits the legislature's ability to change the Constitution. On the other hand, if unconstitutional legislation is popular, then this limits its power *not* to change the Constitution by unilateral action, because if the government party doesn't do it the opposition will propose the measure at the next election, and constitutional ignorance and apathy will make claims by the government that its hands are legally tied sound like excuses.

Limitations on the Governor-General in Council

An executive that is secure in its parliamentary support is one of the most powerful institutions in the nation, gaining prestige and symbolic support from the institutions of Parliament and the monarchy and real power from a combination of the popularity of the majority party, the organizations of the bureaucracy and the support of the many powerful friends which any government picks up when it has majority or near majority support amongst the populace. This power is underlined by the

[21] This may well be for reasons other than its unconstitutionality: public ignorance and apathy towards the Constitution will ensure that there is no necessary link.

High Court's treatment of the formal body, the Governor-General in Council, through which Cabinet performs most of its most important actions. The Court has accepted that that body's power covers a wider range of subject matters than does Parliament's legislative power,[22] with the usually cited exception about the authorization of expenditure. Furthermore, the Court accords the Governor-General in Council immunity from the normal judicial review of executive action: 'The same principles as govern discretionary powers confided to subordinate administrative officers and bodies . . . have never applied to [the Governor-General in Council] and are inapplicable.'[23] Actions of the Governor-General in Council can only be invalidated if they are beyond power in the very narrowest sense of not relating to the wide range of subject matters allowed by the *A.A.P.* case,[24] rather than in the broader sense of *ultra vires* which has regard in the case of less eminent public bodies to the decision behind the action and the considerations, purposes, *etc.* involved or whether it was reached in accordance with the principles of natural justice. The High Court will look to the existence of a power, not the manner of its exercise.

The Court's greater restraint in reviewing the actions of the Governor-General in Council as compared to enactments of the Parliament is at least partly due to the differing nature of that which the Court is called upon to review. Where *actions* have been performed under the authority of the Governor-General in Council the Court is dealing with something that has already happened, a *fait accompli* which it may feel less willing to disturb than an apparent legislative *fait accompli.* In a sense invalidating an *action* already performed is more drastic a step than invalidating a *command* as is the case with legislation.

Limitations on the Governor-General

The Governor-General acting alone, either without or against the advice of the majority party in the House of Representatives, is in an intrinsically far weaker position. He lacks any strong power base of his own and has to rely on that of others.[25] However, Sir John Kerr has demonstrated the possibility of drastic short term actions, three of which, namely his seeking of advice from the Chief Justice, the dismissal of Mr Whitlam as Prime Minister and the subsequent double dissolution, have been frequently claimed to be unconstitutional.[26] As these actions stood then he in one

[22] The *A.A.P.* case (1975) 134 C.L.R. 338.

[23] *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1, 180, *per* Dixon J.

[24] (1975) 134 C.L.R. 338. The range varied for each of the different judges, but included matters relating to Australia's status as a nation. In the case in hand the plaintiff failed to have executive action that could not have been authorized by legislation declared invaiid.

[25] The Governor-General must rely on it being in the interest of others to support him.

[26] As to the obtaining of advice from the Chief Justice see *supra* 226; Sawer G., *Federation under Strain* (1977) 157; Whitlam, *op. cit.*; Howard C. and Saunders C. A.,

sense 'got away with' them, and to the extent that such actions *were* previously unconstitutional then constitutional change was effected by unilateral action. The constitutionality of such actions is not presently of direct concern, but the limitations on such action are.

A preliminary question is whether, constitutionally speaking, there *is* a separate class of actions of the Governor-General acting alone. This is important because it affects the propriety of constitutional change by unilateral action on the part of the Governor-General and also undermines a distinction which could otherwise be made.

It is generally conceded that where the Constitution mentions the 'Governor-General in Council' there is no power to act alone.[27] The question is whether there is such power where the Constitution mentions only the 'Governor-General'.[28] Sawer[29] and others[30] who say that there is suggest that the variation in wording must be deliberate, indicating that some distinction is intended. But Quick and Garran claim that the difference is purely verbal,[31] reflecting a formal distinction between prerogative powers and general executive powers, both of which were intended however to be exercised in the same way. Section 15A of Acts Interpretation Act 1901 (Cth), which instructs us to read 'Governor-General in Council' for 'Governor-General', cannot affect the interpretation of the Constitution, but its insertion in 1957, though long after federation, is at the very least indicative of what the words were at the time taken to mean.[32] On another tack, Richardson[33] suggests that the existence of section 62, providing for a Federal Executive Council to advise the Governor-General, may mean that it is contemplated that he is always to act on their advice.[34] Here the clear meaning of the word 'advise' in 1900, as indicated by constitutional writing, cannot be ignored; it was the polite word the legislature used for its dominance over the Crown. This is saying more than that the convention of responsible government is necessary to explain Chapter Two of the Constitution,[35] it is meant to assert that it is actually contained within the meaning of one of the words within it. It could be argued that section 61

'The Blocking of the Budget and Dismissal of the Government' in Evans, *op. cit.* 283 ff. On the dismissal see Howard and Saunders, *op. cit.* 273 ff. On the double dissolution see Zines L. in Evans, *op. cit.* 231. He, like Sawer in *Federation under Strain* (1977) 57, thinks that this last issue could not have been litigated, because a majority of the High Court would have regarded the action as non-reversible.

[27] *E.g.* Richardson J. E., 'The Executive Power of the Commonwealth' in Zines L. (ed.), *Commentaries on the Australian Constitution* (1977) 52.

[28] *E.g.* ss. 5, 21, 56, 57 and 126.

[29] *Federation under Strain* (1977) 156.

[30] *E.g.* Zines L., 'The Double Dissolution and the Joint Sitting' in Evans, *op. cit.*

[31] *The Annotated Constitution of the Australian Commonwealth* (1901) 406.

[32] It might however be legitimately argued that the Commonwealth Parliament would have a vested interest in such an interpretation, so that their choice of it is as illuminating about their perceived self-interest as about the meaning of the word.

[33] *Op. cit.* 50.

[34] Or at least must always *listen* to their advice, as Sir John Kerr patently did not?

[35] See Howard and Saunders, *op. cit.* 270 ff.

gives executive power to the Governor-General and section 62 takes it away, or at the very least limits it by constraining the manner of its exercise (this is a common scheme for conferring limited powers). It can further be argued that section 62 limits all powers exercised by the Governor-General. This is based on Richardson's argument[36] that the separate powers mentioning the Governor-General are a specific spelling out of the executive power granted in section 61, and hence subject to its limitations, rather than separate grants of power which would not be so subject. This would be consistent with the granting of full legislative and judicial power in the opening sections of the first and third Chapters of the Constitution.[37] For example, section 51 does not grant *extra* legislative power to the Commonwealth over and above that granted in section one.

It should be noted here that there are three current versions of responsible government. One extreme version, advocated by Mr E. G. Whitlam, is that if the Ministers having majority support in the House of Representatives advise the Governor-General to act he must act on that advice: the Ministers are responsible for the advice they give and hence for the action of the Governor-General.[38] A second view, supported by Lane[39] and to some extent by Sawer,[40] denies this but says that if the Governor-General *acts* he must have *advice*, although the legal fiction of *ex post facto* advice is permitted. This is responsible government with a fiction.[41] The third version, that of Sir Samuel Griffith[42] and Quick and Garran,[43] is the same as the first except that there are some limited circumstances where the Governor-General may *refuse to act*, and, according to some theorists,[44] *act* as well, without or against advice. In these cases the responsibility for the decision is the Governor-General's alone.[45] This is reasonable because the choice is his, whether it be characterized as a choice of action without advice or a choice of the advice on which to act. This last distinction is particularly important for our purposes because the second alternative permits the use of a fiction to deny the independent

[36] *Op. cit.* 50.
[37] Ss. 1 and 71.
[38] Whitlam, *op. cit.*
[39] 'Double Dissolution of Federal Parliament' (1973) 47 *Australian Law Journal* 290.
[40] *Federation under Strain* (1977) 142.
[41] The logical difference between the two may be seen by putting them into propositional form. According to Whitlam: 'If advice, then action'; according to Lane: 'If action, then advice'.
[42] *Notes on Australian Federation* (1896) 17 f., cited by Quick and Garran, *op. cit.* 704.
[43] *Op. cit.* 407.
[44] See some of the authorities cited by Quick and Garran, *op. cit.* 408, *e.g.* Hearn and Todd.
[45] 'It is, of course, an elementary principle that the person at whose volition an act is done is the proper person to be held responsible for it. So long as acts of State are done at the volition of the head of State he alone is responsible for them. . . . But if he owns no superior who can call him to account, the only remedy against intolerable acts is revolution': Griffith, *loc. cit.*

exercise of viceregal authority and hence the existence of the separate class of acts of the Governor-General acting without advice.

Administrative law

Several suggestions have been made that the Governor-General's power of action without advice may be limited by the usual criteria of judicial review of administrative action. Of special interest are (1) the requirements that all and only relevant considerations be taken into account,[46] for if the only relevant considerations were taken to be the advice of Ministers then responsible government would be written into the Constitution via administrative law, and (2) the requirements of natural justice.[47] In this context it is argued that gubernatorial powers are, like the more usual administrative powers, *statutory* powers and 'must be exercised for the purposes for which they were initiated'.[48] But standing in the way of such judicial review is the 'immunity doctrine' already referred to.[49] However, the cases on which this doctrine is based might be distinguished[50] on the ground that they all involve exercises of power by the Governor-General acting on the advice of the Executive Council rather than acting alone (herein lies the importance of the distinction outlined above). This distinction is eminently reasonable. If a Governor-General acts on the prior advice of his Ministers then those Ministers are responsible for the action and are supposedly censured by Parliament and the people if they do wrong. But if a Governor-General acts on his own, he is responsible either for the action or at least for choosing which advice to listen to.[51] Since he cannot be removed by Parliament or the people it is reasonable that the High Court should be able to review such action. On a purely practical level, High Court control of the Governor-General acting alone is the more feasible, because unlike the Governor-General in Council he has no independent political power base with which to resist such regulation.

Nonetheless, even if the Court were to review unilateral gubernatorial action, successful remedies would prove difficult to find. The Court might feel that it was impossible to declare some of the Governor-General's actions void because of the enormous consequences involved.[52] On the other hand, the voiding of some actions may be useless because such

[46] *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 (H.L. (E.)).

[47] Sawer G., *Federation under Strain* (1977) 160.

[48] Howard and Saunders, *op. cit.*

[49] *Supra* 230 f.

[50] As Peter Bayne does in Evans, *op. cit.* 248.

[51] Or, as in 1975, the advice he *demanded* as a condition of Mr Fraser's appointment.

[52] In the case of a double dissolution it would mean either cancelling an election if the Court were presented with and accepted the opportunity to act quickly, or declaring void both election and Parliament if it was not or did not. See *supra* 219.

voiding can have *no* consequences: if seeking the Chief Justice's advice was unconstitutional and the action of seeking the advice were declared void, the advice would presumably be deemed not to exist. This would have no effect unless the rather shaky doctrine of unreasonableness[53] were accepted on the basis that no reasonable Governor-General could have come to the conclusion in issue on the advice Sir John Kerr was deemed to have,[54] namely the Enderby/Byers opinion.[55]

This judicial review using the principles of administrative law is more a desirable than an actual or possible limitation on the Governor-General acting alone.

Statutory limitations

Could the power of the Governor-General to act on his own initiative be limited by statute? Prerogative power can be so limited,[56] but the point is usually raised that statutory not prerogative powers are in question, which hence cannot be abridged by a legislature subordinate to the one that created the power.[57] Yet this argument leads its proponents in surprising directions. If it is statutory power, why is it not subject to judicial review? If it is such a strange statutory power as to be free of judicial review, then might it not be sufficiently strange to be subject to limitation by a subordinate legislature? This solution seems particularly appropriate, since it would mean that all statutory powers are controlled either by the courts or the legislature. If the Governor-General's is a statutory power then presumably all other powers conferred by the Constitution are statutory powers, including those of the High Court and the Parliament. This would wreak havoc upon the High Court's insistence that there are three quite distinct types of power conferred on three

[53] The doctrine of unreasonableness has always been more alive in England than in Australia. Compare the cases from *Roberts v. Hopwood* [1925] A.C. 578 (H.L. (E.)) to *Congreve v. Home Office* [1976] 1 Q.B. 629 (C.A.) with the Australian attitude in *Williams v. City of Melbourne* (1933) 49 C.L.R. 142.

[54] This view seems particularly dubious, since the doctrine of unreasonableness deals with facts rather than advice, particularly legal advice. Legal advice would normally be irrelevant, because unlike questions of fact the courts generally decide legal questions themselves, so that the quality of the advice will have no bearing on the validity of action consequent upon it. Against this it could be argued that the proper advice should be the only relevant consideration, but this is to rely on another ground of *ultra vires*, one which is more generally applied than the unreasonableness ground. It could be said that if the advice is characterized as legal advice then it raises questions of law that the Court should decide.

[55] Sir John Kerr did refer to the Law Officers' advice in his detailed 'statement of decisions' and he is quite right that the advice did not claim that he lacked the legal power to dismiss the government. However, if the advice the Governor-General is to be given and to listen to is not merely legal, but touches questions of propriety, including matters of convention (as did also the advice of Barwick C.J.) and the manner in which his powers ought to be exercised, then Sir John Kerr had no advice other than that it was improper to exercise his powers in the way he ultimately did. See Sawer G., *Federation under Strain* (1977) 210.

[56] *Barton v. Commonwealth* (1974) 48 A.L.J.R. 161; *Attorney-General v. de Keyser's Royal Hotel* [1920] A.C. 508 (H.L. (E.)).

[57] Evatt, *op. cit.* 286 ff., does not think that this is a problem, however.

separate institutions by the Constitution,[58] for it would reduce all three to statutory bodies exercising administrative powers. A more logical view is to see the Constitution not as a statute creating statutory bodies and powers but a *Grundnorm* that sets up various sorts of bodies and confers on these various types of powers — some judicial, some legislative, some prerogative — all possessing their normal characteristics unless otherwise specifically stated, including limited discretion and life tenure[59] for those exercising judicial power and limitation by statute on prerogative powers.

Conventions

Conventions relating to the use of powers granted by the Constitution are extremely weak. They are not enforced by the High Court and the events of 1975 showed that there is no informal enforcement either through self-restraint induced by conscience on the part of those who might break them or electoral backlash against politicians who do. The reason for the former lack is that in the value systems of politicians the selfish goals of personal power or the unselfish goals of advancing 'the cause' are in virtually all cases valued more highly than the goal of 'doing it the right way'. Such single-minded determination is both a prerequisite for the success of junior politicians and an attribute looked for by senior ones. Thus, in a conflict between adhering to convention and reaching a goal the convention always loses out. The reason for the electorally speaking inconsequential backlash is that the public is generally ignorant of 'conventions': they only become an issue when one side accuses the other of a breach. Thus convention first comes to the public eye as a partisan issue, and since those who lean towards one party or the other normally lean that way because they give it more attention and have greater trust and respect for it and its aims, they are more likely to adopt that party's viewpoint on the issue.[60] Breaches of convention are therefore unlikely to have a substantial impact on the vote, so that if the swing is going with a party it will not be harmed by breaking conventions or having them broken to its benefit.

Not only can conventions be ignored but they can be inconsistently ignored with impunity. Whilst denying the convention as to strength in the lower House being the source of the legitimacy of a government by dismissing Mr Whitlam, Sir John Kerr acknowledged it by his appointment of Mr Fraser and not Senator Withers as caretaker Prime Minister with a brief to obtain supply in the Senate. By this last action he also acknowledged the interhouse party links that belie his assertion that the Senate

[58] *Boilermakers* (1956) 94 C.L.R. 254 (H.C.); (1957) 95 C.L.R. 529 (P.C.). Although some intermingling of powers is permitted between two of the branches there is a rigid two-way separation between judicial power on the one hand and executive or legislative power on the other.

[59] Subject to the recent amendments to s. 72.

[60] *Infra* 239 ff.

was an independent States House. By dismissing Whitlam he ignored the conventions of responsible government, yet his manner of doing it presupposed many of the denied conventions. In his letter of 11 November 1975 he terminated Whitlam's commission and said '*therefore* I determine the commission of the Ministers in your government'.[61] On a strict reading of section 64, without the assumption of any conventions, the dismissal of one Minister cannot mean the rest are dismissed. If conventions are to be read into the Constitution then, depending on which conventions and what versions of them are read in, perhaps Whitlam was not validly dismissed; if they are not (which seemed to be Kerr's position[62]) then only Whitlam was validly dismissed. This raises the fascinating possibility that if Whitlam was the only validly dismissed Labor Minister, then at mid-afternoon there were 25 Labor ministers still in office: outnumbering the caretaker coalition ministers by more than two to one. What if they had tendered advice to the Queen? There is one rather unsatisfactory answer to this argument. Section 64 says Ministers hold office 'during the pleasure of the Governor-General'. Since the Governor-General found them no longer pleasurable, so the argument runs, they automatically ceased to be Ministers, their office ending when the pleasure passed, not when the displeasure was communicated. But it is unthinkable in a system such as ours for the position of Ministers, who exercise a whole host of powers exercisable only so long as they are Ministers, and who hence might unwittingly be acting illegally[63] were they erroneously to believe that they were still Ministers, to be dependent solely upon the mental state of one man. The fact that all these arguments and counterarguments only arise after considerable thought underlines the necessity of surprise in unilateral action by the Governor-General. If the A.L.P. had known that was going to happen they could have planned in advance.

Dismissal

A Governor-General acting contrary to advice on any important matter runs the risk of dismissal.[64] There is a much quoted exchange between Mr R. G. Menzies (as he then was) and Sir William Slim about who might dismiss whom first. Such considerations appear to have been paramount in Sir John Kerr's dismissal of Mr Whitlam before he could tender advice the rejection of which would have alerted him — Kerr suffered from the

[61] Emphasis supplied. This passage is reproduced in Sawer G., *Federation under Strain* (1977) 205.

[62] The only aspect of the Enderby/Byers opinion that Sir John Kerr referred to or seemed to regard as important was the fact that it didn't say that there was a legal as opposed to a conventional restraint upon him. He seemed to think he could do as he wished to resolve the crisis.

[63] Sawer G., *Federation under Strain* (1977) 165 n. 42. *E.g.* authorize phone-tapping.

[64] Sawer's claim that the Queen might not accede to a request to dismiss the Governor-General is unconvincing. The Queen demonstrated in the Heath crisis that the Crown will no longer step in even in circumstances where writers had predicted it would. While this theoretically leaves inaction as a possibility, Australia's status as an independent dominion would preclude *any* exercise of discretion by the Queen.

hubris of believing that if it was a question of who as between himself and the popularly elected government should stay, he should be the one. But this view ignores the asymmetry of their two positions. The Governor-General has not the independent power base that the government has in its control of the majority in the House of Representatives.[65] The result of this is that as far as the government is concerned any Governor-General will do: but as far as the Governor-General is concerned any government will *not* do, for if he chooses one that does not have a majority in the House of Representatives then supply will eventually run out, and if such a government lacks a majority in both Houses supply could be withdrawn by amending tax and appropriation legislation.

Hence the asymmetry as to the Governor-General's power to act unilaterally against the wishes of the government. If the government wants an election and the Governor-General does not want to grant it then he may face dismissal, the only thing inhibiting the government being the public opinion costs of doing this. He cannot appoint the opposition to form a government so as to prevent an election, for this course will soon lead to an election anyway.[66] If on the other hand the government does not want an election, then, provided he gets in first, the Governor-General can force the election by dismissal of the government and dissolution of the Parliament and the appointment of a political concubine.

It is submitted that these factors are far more important than the restraints of convention; this conclusion is supported by the fact that, although conventions were supposedly far more disposed toward *refusing* a *desired* election (in appropriate circumstances) than *forcing* an *undesired* one, Sir John Kerr did the latter but not the former when the opportunities presented themselves.[67]

Overall the power of the Governor-General for unilateral action (constitutional or unconstitutional) is strictly limited to those circumstances where his intervention is short, sharp and decisive and when he can deal with the former government's power base, their majority in the House of Representatives, by forcing an election. If the election does not destroy that power base, that is, if the government is returned, then 'no one can save the Governor-General'.

[65] The position is of course entirely different if the government does not have such a majority.

[66] The only sanction which the Governor-General can apply to a government seeking an election is to force it to go to the people as an opposition rather than as a government. But if the government is seeking an election it is presumably because it thinks it has majority support, and if this is so the majority may well take the government's side in the dispute with the Governor-General, so that instead of the latter's prestige reinforcing the government's unpopularity, as occurred in 1975, the government's popularity might damage the Governor-General's prestige.

[67] He forced an undesired election in 1975 but permitted a desired election in 1977. Most commentaries (including his own public statements) would have indicated the refusal of the latter election to be more likely than the forcing of the former.

Limitations on the Senate

Space does not permit a full discussion of this topic, except to point out that the Senate is in a tactically excellent position to change the Constitution by unilateral action in some ways but not in others. They can do so by refusing to do what they should do, *e.g.* by failing to pass supply after it has been passed by the House of Representatives and requested amendments have been rejected. This is because there is apparently no alternative means of getting supply, although O'Brien makes some doubtful suggestions.[68] But it is hard for the Senate to allow or initiate change by *doing* an act, because its only positive action, legislation, has to be passed in the House of Representatives, and unlike that House it has no second string (*i.e.* executive power, which is usually exercised by the party in control of the lower House).

Both the Governor-General acting alone and the Senate can achieve constitutional change (usually destructive) with respect to the machinery of government rather than the distribution of powers in the federation. It is the latter which the legislature and courts can achieve, much more so if they act in concert.

III FORMAL CHANGE

One of the labours of Hercules.[69]

It remains to deal with the method the founding fathers would have expected to come first in a discussion such as this — that which they themselves provided. They did not want amendment that would too easily destroy the balance they had so painstakingly thrashed out and the protection they had given to their regional and State political interests. But in La Nauze's words, 'the Australian framers certainly believed that their Constitution was more easily alterable than that of the United States',[70] and in the same vein Harrison Moore made his less than prescient remark about the 'great facility' of amendment.[71] It may have appeared quite reasonable to assume that since the people had voted for the whole document in all States by margins greater than 50 per cent,[72] then surely the lesser requirements of section 128 could be met for small changes in that document. It was not realized that the referendum votes in 1899-1900 were votes for Australian nationhood, not for the details that the founding fathers had so painstakingly drawn up. Furthermore, the Premiers who had

[68] O'Brien B. M., 'The Power of the House of Representatives over Supply' (1976) 3 *Monash University Law Review* 8.

[69] Pigironaos, keeper of the Augean Stables, quoted in Hornadge B., *The Ugly Australian* (1975), although there spelt, fascinatingly, without a 'u'. Later attributed to Sir Robert Menzies.

[70] La Nauze, *op. cit.* 286.

[71] *Supra* 228.

[72] There had been moreover the additional requirement in New South Wales that 80,000 voters support federation. See Quick and Garran, *op. cit.* 217.

agreed to the modification[73] allowing bills for altering the Constitution to be put to the people after passing through one House twice instead of each House once clearly imagined that it would be harder to convince Parliament than the people. Harrison Moore ebulliently proclaimed that it would prove a simpler method of overcoming Senate obstruction than section 57.[74] The experience has been the reverse — constitutional change has been extremely difficult, notwithstanding the fact that the Senate has rarely been a problem.[75] Rather it has been the people. A recent extreme example is the Simultaneous Elections Bill of 1977, which was supported by 52 out of 64 Senators (81 per cent) and 179 out of 191 federal M.P.s (94 per cent) yet got only a 62 per cent 'yes' vote nationally and failed in three States. It is harder to get the bare national and State majorities required by section 128 than what amounts to virtual élite consensus.

Why were the founding fathers so wrong? Their major error in so many things[76] — their belief that the Parliament would divide along regional rather than class lines — is no explanation here: if anything, it should make amendment easier.[77] Perhaps their error lay in thinking that the popular vote was necessarily a force for progress. This was understandable in the 1890s — universal franchise was a relatively recent innovation: it *represented* progress to the reformers, and the conservatives were desperately afraid of it, seeking to protect themselves by powerful entrenched upper Houses that were either appointed or elected on a limited franchise. But just because the popular vote *was* a reform did not mean it was a *force* for reform. Political scientists, with the advantages of hindsight and a greater awareness of the complexities of voters' reasons for voting as they do, have offered many explanations of the failure of the section 128 procedure and suggested changes to deal with them.

It has been suggested that not enough effort has been put into 'selling' constitutional amendments to the public.[78] Success, it is argued, requires that the suggestion come from an apparently independent and authoritative body in order to give it the stamp of legitimacy,[79] and that it be accompanied by an education program to produce an informed public. A Royal Commission (1927-29), an all-party Parliamentary Committee (1956-59),

[73] Fears of small State conservatism and Senate obstructionism seemed to have moved New South Wales to insist on it: Quick and Garran, *op. cit.* 217; La Nauze, *op. cit.* 241-4.

[74] *The Constitution of the Commonwealth of Australia* (London, 1902; Melbourne, 1910), quoted by La Nauze, *op. cit.* 353.

[75] Only two out of the 47 moves to amend the Constitution that originated in the House of Representatives prior to 1948 failed for want of a *Senate* majority. There were several during the years 1974-75, but the success record of referenda opposed by the opposition was already pretty abysmal by that time, so that failure in the Senate could hardly reduce their chances of success.

[76] *E.g.* in their belief that an elected Senate would be a States House.

[77] La Nauze, *op. cit.* 286.

[78] *E.g.* by Blewett N., as cited in Encel, *op. cit.* 162; also by Porter, 'Political Projections and Partisan Perspectives' (1976) 11 *Politics* 12.

[79] Crisp, *op. cit.* 56 f.; Evans, *op. cit.*, arguing for a 'people's convention'.

a Premiers' Conference (1942), and recently a Constitutional Convention (1973-76)[80] have attempted to fill the former role. The recommendations of the first three were substantial; in the first two cases they were not put to the people and in the third they were put and rejected. The recommendations of the fourth were largely insubstantial and only the least consequential were put and passed.

The plea of insufficient education can always be made. It rests on a rather quaint eighteenth and nineteenth century rationalist belief in the power of pure persuasion over the then unknown mass of forces influencing human action. It also fails to explain why 'uneducated' people should vote 'no' rather than 'yes', apart from the doubtful suggestion that their primary attitude becomes 'play it safe'.[81] But most importantly, it is opposed by the facts. Referenda campaigns should educate voters at least to some extent. Yet Goot and Beed[82] have shown by studying opinion poll results that support for referendum proposals declines sharply from the time of first suggestion until voting day. Moreover, the public should in theory be less informed about referenda held concurrently with general elections than about those held at other times, since less time is spent on debating the referendum issues. This ignorance is empirically confirmed by the relatively poor discrimination between different proposals submitted at elections as compared with those submitted at other times, the average difference between the most and least popular proposals being 2.6 per cent in the former case and 16 per cent in the latter.

VOTER DISCRIMINATION BETWEEN PROPOSALS

Year of multiple proposal	Number of proposals	Voting range	Difference: most minus least popular
Concurrent with Election			
1910	2	49.04 — 54.95	5.91
1913	6	49.13 — 49.78	0.65
1919	2	48.64 — 49.65	1.01
1946	3	50.30 — 54.39	4.09
1974	4	46.87 — 48.32	1.45
Held at other Times			
1911	2	39.42 — 39.89	0.47
1926	2	42.80 — 43.50	0.70
1937	2	36.26 — 53.56	17.30
1967	2	40.25 — 90.77	50.52
1973	2	34.42 — 43.81	9.39
1977	4	62.20 — 80.10	17.90

Yet nowithstanding the greater ignorance expected and apparently displayed at referenda held concurrently with elections, the average 'yes'

[80] Saunders C. A., 'The Interchange of Powers Proposal' (1978) 52 *Australian Law Journal* 187 and 254, indicates that Herculean tasks can even precede submission for the vote of the people.

[81] Crisp, *op. cit.* 51.

[82] 'The Referenda: Pollsters and Predictions' (1977) 12 *Politics* 86.

vote in such referenda is no worse than at other times: 52.7 per cent as compared with 52.6 per cent (the percentage difference was 52.7 per cent to 46.2 per cent until the 1977 collection). And this was in spite of the fact that there were fewer bipartisan-supported referenda held at election time: a mere four out of 19 as compared with eight out of 17. With the generally more controversial 'powers' referenda[83] the difference is quite marked: 49.99 per cent for those held concurrently with as compared with 41.95 per cent for those held separately from elections. Either an informed public votes 'no' or campaigning produces a less well-educated public. Either way it would appear that ignorance is one of the preconditions of constitutional change.

Politicians tend to seek constitutional change not out of constitutional vision but to deal with immediate problems, *e.g.* prices and incomes (1973) and simultaneous elections (1977). Professor Howard suggests that this is because the political costs of the more than possible failure of the referendum are significant, so that politicians, who typically are concerned with holding power for the moment, will only put referenda if they can see immediate gain. This tends to embroil the constitutional question in the partisan issues of the day, since the gain sought is normally political and at the expense of the opposing parties.

This is not the only reason for referenda becoming partisan issues. Even where the government is being far-sighted the opposition may oppose: out of habit; out of knowledge that it is easy to oppose referenda successfully[84] and hence appear to gain a victory over the government; or out of the fear that the government may exploit the new constitutional position so as to harm opposition supporters[85] or, worst of all, so as to gain *kudos* from first successful use.[86] Moreover, even where amendment is federally bipartisan, State governments or oppositions may oppose it. As a result, true national bipartisanship is truly rare. Finally, the two major parties are not the only politically active bodies — there are other parties, the media (which is State-based[87]), constitutional pressure groups and interested lobbies (especially business, which has been afforded a lot of protection by the Constitution).

The importance of partisanship is evidenced both by opinion poll work

[83] Crisp's categorization: *op. cit.* 42. This category excludes the federal financial questions: 1910, 1928 and 1974; constitutional and electoral questions: 1906, 1967, 1974 and 1977; and civil liberties and rights questions: 1926, 1957, 1967 and 1977.

[84] Indeed it is the one battle that they can be sure to win. Despite some near results (involving one with three States and over 49 per cent and two with three States and over 50 per cent) no partisan referendum has yet succeeded.

[85] This fear played a part in the referenda as to *e.g.* the trade, commerce, industrial and monopolies powers sought by the A.L.P. in 1911 and 1913 and by the Nationalists in 1919.

[86] *E.g.* the 1973 prices and incomes powers would probably have been used by either party to implement the then popular 'prices and incomes freeze'.

[87] Crisp, *op. cit.* Chapter 2.

correlating intended party and referendum vote[88] and electoral office work making a State by State and then an electorate by electorate comparison of party and referendum voting where the two take place together.[89] Party alignment seems to be much stronger in the case of referenda held at election time than otherwise, which may be because voters generally then feel more loyal to their chosen party:[90] it is time to 'stand up and be counted' rather than give a by-election type 'vote of disapproval' as in a mid-term referendum. Alternatively, it may be because the party itself is less likely to be divided either at the federal level (there will be *e.g.* no 'rebel Senators') or between federal and State bodies. Again, with less information being communicated about referenda at election time, the doubtful, instead of voting 'no' out of fear, as suggested by Crisp,[91] appear to vote as their party suggests.

The generally higher vote in favour of referenda at election time added to the greater allegiance to party referendum recommendations would indicate that bipartisan support for concurrently held referenda would guarantee success. Certainly, of the four such referenda held all have been successful, compared to the 50 per cent (four out of eight) record for bipartisan mid-term referenda. Such referenda are to be favoured not only on statistical grounds but also for the reasons that would appear to lie behind the statistics — parties can expect greater unity and support from their State organizations and supporters; and the less information the better the result.

Given the natural antagonism and competitiveness between parties that exists at election time it might be thought more difficult to get bipartisan support and that it could only exist in respect of more trivial issues. The former point would appear to be borne out by the fact that only four out of twelve bipartisan referenda have been held at election time, but surely if politicians agree mid-term, couldn't they agree to postpone the question until the next election? This may make the proposal less attractive to a government trying to confront an immediate problem but it also makes it *more* attractive to the opposition, which may have first use after all. The government should console itself with the knowledge that it is unlikely to get the referendum through earlier even *with* the opposition's support.[92]

[88] Parker R. S., *The People and the Constitution* (1964) 12; Rydon J., 'Constitution Change and Referendums' (1977) 12 *Politics* 94.

[89] Rydon, *op. cit.*

[90] This is true of supporters of either party on partisan issues and of the government party on bipartisan issues. There is a heavy leakage of opposition supporters to the 'no' vote, but never enough to endanger the referendum. This leakage is presumably due to the fact that the proposal is more identified with the government than with the opposition even if both support it equally strongly, or, as in 1977, the opposition supports it even more strongly.

[91] *Op. cit.* 51.

[92] There is an objection to this view in that if the public know about the proposal there may be a very *long* campaign against it. On the other hand it will lack urgency and hence be given less (and less frenetic) media coverage, which will probably die down as the election campaign approaches.

As to the nature of the issues, those the subject of election referenda seem, as a group, no more trivial or intrinsically uncontroversial than those made the subject of mid-term referenda and rather weightier than the successful referenda held in recent times.

BIPARTISAN REFERENDUM PROPOSALS

Classification[93]	Held concurrently with election	Held mid-term	
	All successful	Successful	Failed
Powers	Social services 1946		Aviation 1937 Marketing 1937
Machinery (constitutional and electoral)	Senators 1906	Casual vacancies 1977 Judges 1977	Nexus 1967 Simultaneous elections 1977
Civil liberties and rights		Aborigines 1967 Territorial rep. 1977	
Federal finances	State debts 1910, 1928		

Despite the importance of party allegiance for the success of referendum proposals it is also clear that support for the referendum proposal of a particular party is usually less than the support for that party. This is not just a matter of saying that voters are not tied to their party — one would expect leakage each way — what is significant is that there is universally greater leakage from the support of the party seeking change than from that of the party opposing change.[94] In partisan issues the vote (or, if the referendum is held mid-term, the public opinion poll) for the party suggesting it is higher than the 'yes' vote and the vote or poll for the party disagreeing with it is lower than the 'no' vote.[95] In bipartisan issues the 'yes' vote is well under the combined party vote or poll. Why is this the case?

One factor, compulsory voting, which forces the apathetic, the ignorant, the resentful and the fearful to vote, has been blamed in varying degrees.[96] Woldring[97] dismisses the dismal record of two out of 13 positive votes under voluntary voting (worse than the six out of 24 under compulsory voting) by means of the unsubstantiated claim that the voluntary voters have now shifted in favour of constitutional change and that it was only the inclusion of the compelled voters that hid this reversal! Considering the various factors influencing the compelled voters' choice — general party affiliation (the effect of which depends on whether the proposal is bipartisan or not and on the strength of parties), ignorance (and hence

[93] According to Crisp, *op. cit.* 42.
[94] If the leakage were equal then virtually every referendum would succeed: it is the government which proposes and it is usually more popular than its opposition.
[95] See *supra* 243 n. 90.
[96] Crisp, *op. cit.* 57.
[97] 'The Case for Voluntary Voting in Referendums' (1976) 11 *Politics* 209.

ambivalence), fear (presumably a 'no' influence) and resentment (informal or 'no') — the overall effect is hard to predict without detailed poll work.[98] Consider, for example, that if the first factor is very dominant then the overall effect will be at least self-cancelling in partisan referenda and positively favourable in bipartisan ones.

Another possibility, especially where the proposal is bipartisan, is that a referendum 'no' vote affords one of very few opportunities for electors to register a vote against *all* politicians (*cf.* the popular feeling about elections that 'whoever you vote for, a politician always gets in').

Some blame the terms of section 128 itself, which requires in addition to a national majority a majority in a majority of States. This would have only made a difference in three referenda (although it would have made nine others with three states and 49 per cent very close), but its significance and unpopularity have been increased by the amazing failure of the Simultaneous Elections Bill in 1977 despite a 62 per cent national 'yes' vote.[99]

The addition of a seventh State would without constitutional amendment ease the situation slightly, for it would give the referendum a further chance — of persuading either three existing States and the new State or four existing States. Put another way the addition of an extra State to an even number of States increases the chances of change because although the number of States to be convinced is still four, one has a slightly larger field in which to achieve this. If the new State were the Northern Territory (the logical choice as the being the Territory closest to statehood) it would as a small remote State not be expected to be particularly progressive were it not for the large aboriginal population, who in recent years have looked in vain to Canberra for help against local whites and who might therefore tip the balance. But a much better prospect for 'yes' votes would be the Australian Capital Territory, which as the national Capital would presumably be in favour of the concentration of power in the central Parliament so often sought at referenda. The wording of section 125 establishing the 'seat of government' has been cited as an obstruction to A.C.T. statehood[1] — the words: 'shall be vested in and belong to the Commonwealth' are thought to be inconsistent with the degree of independence implicit in statehood. Yet a close scrutiny of the grammar in section 125 indicates that the grammatical subject of the clause is 'seat of government' not the 'territory' *within* which it shall exist. The 'seat of government' may therefore always be Commonwealth property and not part of a State (although it might be no more than a 'Commonwealth place'), but the

[98] One would have to ask questions as to intended vote, whether the respondent would vote if voting were voluntary and whom they would vote for if a general election were held.

[99] Whereas in the case of the other two the national 'yes' vote had been under 51 per cent.

[1] The author is indebted to Professor Colin Howard for alerting him to this argument.

Commonwealth would seem free to make the 'territory' into a State as it clearly may with other territory it gains from States. A contrary argument might be that the Constitution requires the seat of government to be within 'territory' not within a State. One answer would be to suggest that this section was not 'making provision for all time', as Mason J. pointed out in respect of sections 7 and 24.[2] On much firmer ground is the argument that 'territory' having a small 't' refers to geographical territory rather than a 'Territory' as used in section 128.[3] And in the immediately preceding section the word 'territory' is used to refer to the land that is a part of one State and transformed into another State without at any stage being a 'Territory' in the constitutional sense. The High Court, part of the Canberra scene as it will become when it makes its permanent home there, might well be influenced in its legal determination of the question by the local popularity such a move might well enjoy. A government bent on constitutional reform might care to assess the voting patterns of the A.C.T. and Northern Territory in referenda under the amended section 128 before deciding which to admit. However, if the A.C.T. as the more likely 'yes'-voting Territory were admitted as a State the pressure for the Northern Territory to become one also would be fairly strong, as the A.C.T. would be appearing to jump the queue. This would of course undermine the good work, as we would be back to an even number of States, but it might be possible to avoid this by arguing that the relative population size and economic viability of the A.C.T. and Northern Territory justified admission of the former but not the latter.[4]

Other fascinating suggestions are to submit proposed amendments to referenda in different States at different times or to resubmit failed proposals, either nationally or in the failed States only. The first possibility seems clearly envisaged by section 128 ('shall be submitted in each State and Territory' and 'the vote shall be taken in such manner as the Parliament provides') and the second is probably likewise acceptable, for section 128 lays down conditions to be met for the *passage* of an amendment rather than the conditions upon which the amendment fails. The first suggestion envisages submitting the question first in the States most likely to vote 'yes': the second presupposes that failed States will swim with the tide. Both rely on a 'bandwaggon' effect rather than an 'underdog' effect — on the assumption that Australians vote with success. There is evidence to support this in opinion poll results, in that the winner according to the immediate pre-election polls normally does even better on election day, and in immediate post-election polls even better than that. This is in

[2] *First Territory Representation* case (1975) 134 C.L.R. 201, 270.

[3] As amended by the Constitutional Alteration (Referendums) Act 1977 (Cth).

[4] Recent speculation as to the possibility of political union with New Zealand raises further possibilities.

marked contrast to an apparent 'underdog effect' in the United Kingdom.[5] The success of the second tactic is less certain in that the 'winner' in a referendum which has obtained a national but not a States majority is ambiguous, and if the 'yes' vote was seen as a national winner, would voters in the 'no' States stick with the local winner (the 'no' vote) or the national one? In this context it is to be regretted that there has not been any post-referendum polling on referendum questions.

One minor improvement to the existing procedures builds on a suggestion by the Commissioner for Community Relations, Mr Grassby, who has suggested that non-naturalized immigrants should, for impeccable reasons of equity and justice, be given the vote. As far as getting constitutional reforms passed is concerned, non-English migrants, who comprise the bulk of our recent intakes, seem to be prepared to accept more drastic constitutional change. For example, they were in late 1976 the group most prepared to accept Republican independence.[6] Manning Clark suggests that this is because they naturally feel less tied to our institutions.[7] Thus, one could expect the addition of non-naturalized migrants to the rolls to swell the 'yes' vote in referenda. Naturally enough, on past trends, one would also expect them to support the A.L.P. in elections, so the proposal would not appeal to an anti-Labor federal government — yet another example of constitutional reform yielding to electoral success. However, State A.L.P. governments could enfranchise migrants, so that by virtue of section 41 they would be automatically entitled to vote in elections for the House of Representatives and therefore, pursuant to section 128, in referenda. In *King v. Jones*[8] this device failed to enfranchise eighteen year olds, but only because the High Court construed 'adult' in section 41 to mean 'over twenty-one'. On the Court's reasoning adult migrants (if not eighteen to twenty-one year old ones) enrolled for the State lower Houses could not be denied the vote.

[5] The 1970 and 1974 elections in the United Kingdom were won by the party whom the polls predicted would lose. However, voluntary voting confuses the 'underdog' effect with an 'overconfident supporter' effect.

[6] Dutton, *op. cit.*

[7] 'The People and the Constitution' in Encel, *op. cit.* 9.

[8] (1972) 128 C.L.R. 221.

SUMMARY OF REFERENDA

Referendum	Type†	Party submitting	In favour: States	Percentage
1906 Senate elections	M	non-Labor	6	82.65
1910 Finance	F	non-Labor*	3	49.04
State debts	F	non-Labor	5	54.95
1911 Powers‡	P	Labor*	1	39.42
Monopolies‡	P	Labor*	1	39.89
1913 Trade	P	Labor*	3	49.38
Corporations	P	Labor*	3	49.33
Matters	P	Labor*	3	49.33
Rwy disputes	P	Labor*	3	49.13
Trusts	P	Labor*	3	49.78
Monopolies	P	Labor*	3	49.33
1919 Powers	P	non-Labor*	3	49.65
Monopolies	P	Labor*	3	38.64
1926 Powers‡	P	non-Labor*	2	43.50
Essential services‡	R	non-Labor*	2	42.80
1928 State debts	F	non-Labor	6	74.30
1936 Aviation‡	P	non-Labor	2	53.56
Marketing‡	P	non-Labor	0	36.26
1944 Post war powers‡	P	Labor*	2	45.99
Social services	P	Labor	6	54.39
Marketing	P	Labor*	3	50.57
Industrial	P	Labor*	3	50.30
1948 Rents, prices‡	P	Labor*	0	40.66
1951 Communists‡	P	non-Labor*	3	49.44
1967 Nexus‡	M	non-Labor	1	40.25
Aboriginals‡	R	non-Labor	6	90.77
1973 Prices‡	P	Labor*	0	43.81
Incomes‡	P	Labor*	0	34.42
1974 Sim. elections	M	Labor*	1	48.32
Amendment	M	Labor*	1	48.02
Dem. elections	R	Labor*	1	47.23
Local government	F	Labor*	1	46.87
1977 Sim. elections‡	M	non-Labor	3	62.20
Casual vac.‡	M	non-Labor	6	73.30
Terr. rep.‡	R	non-Labor	6	77.70
Judges‡	M	non-Labor	6	80.10

* Indicates partisan referendum at federal level.

† P = Powers, M = Machinery provisions, R = Rights and liberties, F = Financial.[9]

‡ Indicates mid-term referendum.

[9] Crisp's categorization: *op. cit.*

IV CONCLUSION

The last three sections have described the considerable limitations that exist on constitutional change. The High Court is limited by the power of other institutional organs, but is itself a sufficiently strong force to provide a real limit on change by unilateral action on the part of the legislature and, to a lesser extent, the Governor-General in Council. However, if the legislature and the Court are not in opposition to one another major limitations on each are removed and there is considerable opportunity for constitutional reform, especially in the area of expansion of Commonwealth heads of legislative and other powers. Formal amendment is a very limited tool — confined essentially to those changes sufficiently uncontroversial to be supported by both parties at election time — a time when their primary activity is opposition not co-operation and their sights are on short and not long-term goals. Other bodies have far fewer limitations imposed upon them, but the area in which they can effect constitutional change is, though important, small: the machinery and processes of government. And, unfortunately, the changes they can effect are likely to be merely destructive of old forms rather than creative of new ones.

Most limitations encountered have been related to the relative power (in the broadest sense) of institutions and their ability to affect each other by imposing costs on the actions of others. The picture of Australian institutions which emerges is of 'social inertia' resulting from a lack of systematic organization. No one group or institution can dominate the others to the extent of forcing unwanted changes on them: although all are not equally powerful none has overwhelming power, and the more assertive one institution is the more the others unite to resist it. Change does occur, but it is the result of the relative power of those institutions waxing and waning, leading to a shift in the power balance. With that change a constitutional change will occur, but it may precede or lag behind it.

Elite consensus is useful in that it will lead to key personnel in the different institutions having the same beliefs and therefore not opposing each other and will facilitate the *putting* of election-time bipartisan referenda, which, it has been seen, are those most likely to succeed. But consensus is unlikely on most constitutional issues, for constitutional principles mostly favour either one side or the other when they come into issue, and most people value their goals, ideas and interests over those principles. Thus there is no general *élite* consensus. *Public* consensus is extremely unlikely — impossible without élite consensus — but luckily it is not necessary for constitutional change, since most changes do not involve the public, and where the public *is* involved complete consensus is not required: see section 128.

Power, not opinion, is the backbone of the Constitution, and changes in it provide the opportunities and the force for constitutional change.