THE FEDERAL SPENDING POWER
CONSTITUTIONAL LIMITATIONS

The power of the Commowealth Parliament to appropriate the moneys of the Commonwealth rests solely on implications. The existence of such a power is implied in sections 53, 54 and 56 of the Commonwealth Constitution, which deal with the manner in which appropriation Bills are to be passed, in section 81 which makes the Consolidated Revenue Fund liable to be appropriated, and in section 83 which prohibits the drawing of money from the Treasury 'except under appropriation made by law'. It may be that the power is also implied in each grant of power to legislate with respect to a designated subject matter. According to Latham C.J., 'each power to make laws with respect to a particular subject matter includes a power to make a law providing for the expenditure of money in relation to that subject matter.'[1]

The Constitution has imposed a number of restrictions on the Parliament's power to authorize expenditure by the Commonwealth. Some of these restrictions were expressed to operate only for a limited period of time and thereafter until the Parliament otherwise provided. For example, section 87—the Braddon Clause—provided that during the first ten years after the establishment of the Commonwealth and thereafter until Parliament otherwise provided, the Commonwealth should not spend more than one quarter of the net revenue from duties of customs and excise. Similar restrictions on Commonwealth spending were imposed by sections 89 and 93.

The most important section of the Constitution bearing on the scope of Parliament's power of appropriation is section 81. It provides:

> All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities of this Constitution.

Latham C.J. found it difficult to give effective meaning to the words "manner" and "charges and liabilities". In relation to the manner

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1 Attorney-General for Victoria, ex rel. Dale v. Commonwealth (1945) 71 C.L.R. 237, 251.

of making appropriations, he said, section 81 added nothing to sections 53, 54 and 56. The charges and liabilities referred to, he continued, 'are imposed by the Constitution independently of the reference to them in section 81'.[2] The charges include 'the costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Fund'. Section 82 provides that these 'shall form the first charge' on the Consolidated Revenue Fund. Whether section 82 appropriates the Fund for that purpose is doubtful. If it does not itself appropriate, its only effect can be to limit the power of Parliament to appropriate and to limit the power of the executive branch to disburse appropriated moneys. Whether the words "for the purposes of the Commonwealth" have the effect of limiting the power of appropriation is debatable. Commonwealth governments have acted on the assumption that Commonwealth purposes in this context are such purposes as the Commonwealth Parliament chooses. The correctness of this interpretation has been questioned by four judges of the High Court,[3] but no majority has yet held a Commonwealth appropriation Act invalid solely on the ground that the purposes for which public moneys were appropriated were not Commonwealth purposes.

Before examining the reasoning behind the different interpretations of the effect of section 81, it is convenient to consider how the appropriation power of the United States Congress has been interpreted. There is no exact counterpart of section 81 in the United States Constitution. Article I, section 8 of that Constitution empowers Congress 'to lay and collect Taxes Duties Imposts and Excises, to pay the Debts and provide for the common Defence and general welfare of the United States'. Opinions on the significance of the differences between the two provisions are divided as are also opinions about the relevance of the American interpretations of the general welfare clause.

There appears to have been fairly general agreement that Article I, section 8 does in some way inhibit the legislative appropriation power, but how far and in what ways it does so is not at all clear. In the *Federalist Papers,* James Madison contended that the appropriation power was limited to those subjects on which Congress could legislate.[4] Alexander Hamilton disagreed. In his *Report on Manufactures* (1791) he stated his views as follows:

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2 Id. 253.

3 Ibid., opinions of Dixon, Rich, Starke and Williams JJ.

4 THE FEDERALISTS, No. 41.

> The phrase ['general welfare'] is a comprehensive as any that could have been used, because it was not fit that the constitutional authority of the Union to appropriate its revenues should have been restricted within narrower limits than the general welfare, and because this necessity embraces a vast variety of particulars which are susceptible neither of specification nor of definition.
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> It is, therefore, of necessity left to the discretion of the National Legislature to pronounce upon the objects which concern the general welfare, and for which, under that description, an appropriation of money is requisite and proper . . . The only qualification of the generality of the phrase in question which seems to be admissible is this: that the object to which an appropriation of money is to be made must be general, and not local; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot.
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> No objection ought to arise from this construction, from a supposition that it would imply a power to do whatever else should appear to Congress conducive to the general welfare. A power to appropriate money with this latitude, which is granted in express terms, would not carry a power to do any other thing that is not authorized in the Constitution, either expressly or by fair implication.[5]

The occasions on which the United States Supreme Court has considered the extent of the appropriation power of Congress have been few, but in *United States v. Butler*,[6] the Court made it clear that Madison's interpretation of the general welfare clause was unacceptable. 'The power of Congress to authorize expenditure of public moneys for public purposes,' the Court said, 'is not limited by the direct grants of legislative power found in the Constitution'.[7] The requirement that legislative appropriations be for the general welfare of the United States was considered again in *Helvering v. Davis*.[8] The question for determination in that case was the constitutionality of federal legislation providing for the payment of old-age pensions. The Court was satisfied that the legislation was a valid exercise of the spending power for, as Cardozo J. put it, the problem Congress had attempted to deal with was truly 'national in area and dimension'.[9] The test of validity he applied was reminiscent of that proposed by Hamilton. Although the appropriation power was not controlled by the specific grants of legislative power, 'the line must still be

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5 Alexander Hamilton's Papers on Public Credit Commerce and Finance (ed. S. McKee, N.Y. 1957), 240.

6 297 U.S. 1; 80 L. Ed. 477 (1935).

7 297 U.S. 1, 66; 80 L. Ed. 477, 488.

8 301 U.S. 619; 81 L. Ed. 1307 (1936).

9 301 U.S. 619, 644; 81 L. Ed. 1307, 1316.

drawn,' Cardozo remarked, 'between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment . . . nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times.'[10]

As yet the Court has not ruled a federal Act unconstitutional merely on the ground that the expenditure it authorizes is not expenditure the Congress can validly authorize. Recently it decided that a taxpayer has standing to challenge federal expenditure on the ground that 'specific' clauses of the Constitution, e.g. the First Amendment, are contravened,[11] but the constitutional issue has still to be decided.

There is only one case in which the Australian High Court has considered the possible inhibiting effect of section 81 on Commonwealth parliamentary power but the decision there was inconclusive. In *Attorney-General for Victoria, ex rel. Dale v. Commonwealth,*[12] hereafter referred to as the *Pharmaceutical Benefits Case,* action was brought for a declaration that the Pharmaceutical Benefits Act 1944 was invalid, and for an injunction restraining the Commonwealth Minister for Health and the Director-General of Health from carrying the provisions of the Act into execution or expending any moneys in pursuance of the provisions or for the purposes of the Act. The purpose of the Act was to make certain pharmaceutical benefits available free of charge to Commonwealth residents. It appropriated moneys to that end but it also contained provisions 'affecting the relationship, contractual or under the laws of the States, of medical practitioners and patients, of customers and chemists, and many other provisions which . . . [could] only be described as legislation upon the subject matter of public health'.[13] To reach a decision it was not necessary to determine whether the appropriation was a valid exercise of Commonwealth legislative power, for the presence within the Act of other provisions meant that the validity of the legislation could be

10 301 U.S. 619, 640-1; 81 L. Ed. 1307, 1315. See also Steward Machine Co. v. Davis, 301 U.S. 548; 81 L. Ed. 1279 (1936).

11 Flast v. Cohen, 88 S. Ct. 1942; 36 L.W. 4601 (1967).

12 (1945) 71 C.L.R. 237.

13 Id. 280 per Williams J.

decided solely by reference to the heads of legislative power set out in section 51 of the Constitution. If the other provisions were invalid, the appropriating section was inseverable. By a majority decision, the Court held the Act invalid, but the majority divided on the cause of invalidity. Latham C.J., Rich and Dixon JJ. (Rich J. concurring with Dixon J.) characterized the Act as doing more than authorizing the expenditure of Commonwealth moneys and concluded that it was a law with respect to a matter on which the Parliament had no authority to legislate. Starke and Williams JJ. agreed that the Act was invalid but for the reason that it appropriated money for a non-Commonwealth purpose. McTiernan J. alone accepted the Commonwealth's contention that the Act was valid as an exercise of the power to enact legislation incidental to the appropriation power.

Since in defending the action the Commonwealth relied solely on section 81 and the legislative power incidental thereto, the Court was bound to address its attention to the scope of the appropriation power even though in the end a decision could be made without a ruling upon that particular question. In fact, all the judges who delivered opinions dealt with this question at some length. Four judges, Rich, Dixon, Starke and Williams JJ., came to the conclusion that section 81 operated to restrict the purposes for which the Parliament might appropriate the Consolidated Revenue Fund; only two, Latham C.J. and McTiernan J., accepted the contention that "purposes of the Commonwealth" meant such purposes as the Parliament chooses to nominate as Commonwealth purposes. On one point all were agreed: it was that the appropriation power was not limited to purposes with respect to which the Parliament had power to make laws.

If the appropriation power is not so limited but is nevertheless controlled by the requirement that the expenditure authorized be for Commonwealth purposes, by what criteria is the legitimacy of a parliamentary appropriation to be determined? The criteria suggested by Dixon, Starke and Williams JJ. are extremely vague and do not afford much guidance to the legislature or to the executive branch. According to Williams J., Commonwealth purposes are to be 'found within the four corners of the Constitution'.[14] To Starke J., purposes of the Commonwealth include 'the exercise of executive and judicial functions vested in the Commonwealth by the Constitution or by any other Act' and 'matter arising from the existence of the Commonwealth and its status as a Federal Government'. He had no doubt that

[14] Id. 282.

the Commonwealth Parliament could validly appropriate money for 'exploration and so forth'.[15] Dixon J.'s observations betray doubt and hesitation, and are in sharp contrast with the emphatic and unqualified views he expressed to the Royal Commission on the Constitution in 1928. On that occasion his opinion was that an appropriation Act 'like any other statute, must be a law for the peace, order and good government of the Commonwealth, with respect to one or more of the enumerated subjects of legislation which come within that power'. His reason for so thinking was that 'the function of appropriating seems to be treated as an exercise of the power of law-making, and not as a separate power. An appropriation Act,' he continued, 'is simply regarded as a law depending for its efficacy upon legislative power'.[16] In the *Pharmaceutical Benefits Case,* he carefully refrained from committing himself to any one of the possible interpretations of section 81. 'No-one . . . suggests,' he said, 'and I certainly do not, that any narrow interpretation or application should be given to these provisions [sections 81 and 83]. Even upon the footing that the power of expenditure is limited to matters to which the Federal legislative power may be addressed, it necessarily includes whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government. These are things which, whether in reference to the external or internal concerns of government, should be interpreted widely and applied according to no narrow conception of the functions of the central government of a country in the world today.'[17] Later on, he added: 'In deciding what appropriation laws may validly be enacted it would be necessary to remember what position a national government occupies and . . . to take no narrow view, but the basal consideration would be found in the distribution of powers and functions between the Commonwealth and the States.'[18]

Latham C.J. concluded that the appropriation power could not possibly be limited to appropriation for the purposes of specific legislative powers. In the first place, every specific grant of legislative power included authority to appropriate money for the purposes of the power. That being so, the appropriation power implied in section 81 would be superfluous unless it enabled the Parliament to legislate

15 Id. 266.
16 MINUTES OF EVIDENCE, 780.
17 71 C.L.R. 237, 269.
18 Id. 271-2.

for other purposes.[19] In the second place, had it been intended to limit the appropriation power to legislative purposes, the framers of the Constitution would probably have used a form of words similar to that in section 51 (xxxi). That section empowers Parliament to make laws with respect to the acquisition of property on just terms 'for any purpose in respect of which the Parliament has power to make laws'. 'It would be contrary to well recognized principles of statutory construction,' the Chief Justice said, 'to regard these distinct phrases [in section 51(xxxi) and section 81] as identical in meaning unless, indeed, there were something in the context which showed that they must be so construed . . . Prima facie at least, such a definite difference in language points to a real difference in signification.'[20] Like McTiernan J., he found nothing in the express terms of the Constitution that would justify any reading down of section 81. The word "Commonwealth" in that section meant simply 'the people who, by covering clause 3 of the Constitution are united in a Federal Commonwealth under the name of the Commonwealth of Australia' and "the purposes of the Commonwealth" could not be read, as Williams J. seems to have read it, as limiting the appropriation power 'to governmental purposes in the sense of the discharge of legislative, judicial and executive functions'.[21]

The Chief Justice and McTiernan J. both preferred to regard the phrase "for the purposes of the Commonwealth" as having no more effect than the phrase "for the peace, order and good government of the Commonwealth" when used in association with grants of specific legislative power. Whether or not a law with respect to taxation was a law for the peace, order and good government of the Commonwealth, Latham C.J. explained, was a political matter. Whether a parliamentary appropriation was for the purposes of the Commonwealth should also be regarded as a political question.[22] 'No test has been suggested,' he continued, 'which would enable a court to undertake a judicial review upon any legal basis of the multifarious expenditure which a Parliament may consider it necessary or desirable to undertake'.[23] McTiernan J. expressed the same thought when he said: 'When Parliament has appropriated revenue for any purpose the Court could not decide the question whether it was a purpose of

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19 Id. 253.
20 Id. 252.
21 Id. 256.
22 Id. 255-6.
23 Id. 256.

the Commonwealth without entering into a consideration of matters of policy which are peculiarly and exclusively within the legislative sphere.'[24]

The criteria advanced by Williams, Starke and Dixon JJ. are, as I have said, vague and not of a kind that give much guidance to the legislature. But once it is accepted that it is permissible for Parliament to authorize expenditure for purposes other than the purposes of particular heads of legislative power, including the incidental legislative power, it is difficult to think of any limitation of the appropriation power which the courts could apply without making a judgment on how the financial resources of the Commonwealth ought to be deployed and what objects a federal government ought to promote. Cardozo J.'s hint that the exercise by Congress of its discretion to determine what expenditures are for the general welfare of the United States may be judicially reviewable when the choice between one welfare and another 'is clearly wrong, a display of arbitrary power, not an exercise of judgment,'[25] reflects a conception of the judicial function which has not found favour among most judges of the High Court of Australia and the criteria of validity which it expresses are obviously no more exact than those suggested by Williams, Starke and Dixon JJ. in the *Pharmaceutical Benefits Case*.[26]

Like the taxing power, the spending power is a power that can be used for regulatory purposes, but an appropriation Act merely authorizes expenditure; it creates neither rights nor duties. If such Acts are judicially reviewable, the only question a court can consider is whether the Constitution permits Parliament to authorize the Crown to spend money for the purpose indicated. Even if the federal appropriation power is interpreted narrowly, that is to say, is construed as extending no further than the appropriation of money for purposes with respect to which the Parliament may legislate, the courts are likely to have difficulty in deciding whether the purpose of an appropriation is a legitimate one. The purposes of appropriations are not always spelt out with great particularity. A vote for construction of ships, to take but one example, could be interpreted as supplying authority for construction of war ships, of ships to be used in inter-State or foreign trade, or even of ships to be used for commercial purposes on Sydney Harbour. If the federal Parliament's power to authorize spending is a limited power and if that power does not

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24 Id. 274.
25 Helvering v. Davis, 301 U.S. 619, 640; 81 L. Ed. 1307, 1315 (1936).
26 (1945) 71 C.L.R. 237.

extend to authorizing expenditure on the construction of ships to be used for commercial purposes on Sydney Harbour, is an appropriation for shipbuilding invalid merely because the appropriation may be interpreted to authorize illegitimate expenditure? The spending authority which the High Court considered in the *Pharmaceutical Benefits Case* happened to be very specific. The Pharmaceutical Benefits Act 1944 provided that payments in respect of pharmaceutical benefits should be paid out of the National Welfare Fund. But the Constitution at this time did not empower the Parliament to make laws with respect to such benefits—did not empower it to create legal rights to such benefits. It was clear, therefore, that in appropriating money, Parliament had authorized the executive to spend money in satisfaction of legal liabilities which it could not validly create. This kind of situation is likely to be exceptional. More often than not, the purposes for which an appropriation is made will be expressed in such broad terms that if there are limitations on Parliament's appropriation power, it will be impossible to determine whether the purposes indicated are legitimate ones. It may be that in such cases a court would interpret the appropriation as one authorizing expenditure for legitimate purposes only so that if the Commonwealth did expend money on illegitimate purposes, that expenditure would be considered not to have been authorized by Parliament.

Whether or not the federal Parliament's appropriation power is subject to any judicially cognizable limitations concerning the purposes of expenditure has still to be resolved by the High Court. Whether it can ever be so resolved depends on whether a situation can ever arise in which some party has standing to contest the validity of a parliamentary appropriation or expenditure proposed to be made in pursuance of such an appropriation.

STANDING TO CHALLENGE UNCONSTITUTIONAL EXPENDITURE

If section 81 does impose restrictions on the power of the federal Parliament to authorize expenditure, who, if anyone, has standing to sue for a declaration or an injunction to restrain the expenditure that is alleged to be unconstitutional? I shall consider first the question of taxpayers' standing and then the standing of State Attorneys-General.

There are isolated cases in which ratepayers have successfully sued for an injunction to restrain unauthorized expenditure by local

authorities,[27] but most English judges have taken the view that suit to restrain illegal spending by statutory bodies can only be brought by the Attorney-General.[28] In *Dalrymple v. Colonial Treasurer*,[29] standing was denied to taxpayers who sued to restrain a Minister of the Crown from authorizing expenditure of public funds appropriated solely by resolution of one House of the legislature. The reasons given for denying standing in this case are significant since they indicate what may be an important distinction between those cases where the ground of complaint is that the executive has acted or is about to act without the requisite parliamentary authority, and those cases where what is alleged is that Parliament itself was constitutionally incompetent to confer spending authority. One of the reasons given by the judges in *Dalrymple's Case* for denying citizens standing to sue was that if citizens were not satisfied that the expenditure of public moneys was in accordance with law, they could have their grievances ventilated in Parliament and Parliament itself could provide a remedy.[30] In any event, if money were spent without the requisite parliamentary authority, Parliament might afterwards pass legislation authorizing the expenditure *ex post facto*.[31] And if Parliament dealt with the matter 'in a manner unsatisfactory to the taxpayers,' they had their remedy through the electoral process.[32] These arguments do not, of course, apply when Parliament has in fact authorized the expenditure but without having any constitutional authority to do so.

In the past, the view of the High Court of Australia has been that a citizen has no standing to challenge legislative or executive action for unconstitutionality unless his rights or liabilities are affected by the action impugned. A citizen, it was held in *Anderson v. Common-*

27 Bromley v. Smith (1826) 1 Sim. 8; 57 E.R. 482; Prescott v. Birmingham Corporation [1955] Ch. 210. In Prescott's Case, an injunction was sought to restrain a local authority from carrying on a certain activity. At one point it was suggested that local authorities owe a fiduciary duty to ratepayers in respect of the funds contributed by them, but the standing of ratepayers to challenge unauthorized expenditure of local funds was not really considered.

28 Evan v. Avon Corporation (1860) 29 Beav. 144, 54 E.R. 581; Reg. v. Lord Newborough (1869) L.R. 4 Q.B. 585; Holden v. Corporation of Bolton (1887) 3 T.L.R. 676; Bradford v. Municipality of Brisbane (1901) 11 Q.L.J. 44; Weir v. Fermanagh [1913] 1 I.R. 193; Bennett v. Yately Parish Council (1965) 63 L.G.R. (U.K.) 29; Collins v. Lower Hutt City Corporation [1961] N.Z.L.R. 250.

29 [1910] S.A.L.R. (Transvaal Prov. Div.) 372.

30 Id. 401 per Bristowe J., 387 per Innes C.J.

31 Id. 387 per Innes C.J.

32 Ibid.

wealth,[33] had no standing to sue for a declaration that a Commonwealth-State agreement to restrict the importation of sugar was invalid even though the effect of the agreement might be to increase the cost of sugar to the plaintiff and other consumers. In *Logan Downs Pty. Ltd. v. F.C.T.*[34] the Court held that a taxpayer had no standing to challenge the Wool Industry Act or the payments it authorized even though as taxpayer he might have standing to challenge an Act imposing taxes to raise revenue for support of the activities of the Wool Board established under the Wool Industry Act. In their joint judgment, Barwick C.J., Kitto, Taylor, Menzies and Windeyer JJ. said: 'Should the Australian Wool Board engage in activities beyond its functions as so defined, there are, of course, effective procedures to restrain it, but an action by an individual asserting to a particular interest of his own merely as a taxpayer, to give him locus standi to maintain an action, is not one of those procedures.'[35] The reference to "effective procedures" is presumably a reference to the possibility of a relator action by the appropriate Attorney-General.

The fact that public action may be brought by an Attorney-General is not, however, a complete justification for denying citizens standing to sue for an injunction to restrain unconstitutional spending. There is no legal duty on an Attorney-General to institute proceedings when requested to do so by a citizen, so the availability of relator actions cannot be regarded as sufficient alternative remedy. Reasons commonly given for denying taxpayers standing to sue in these circumstances include the remoteness and trifling nature of the individual taxpayer's "interest" in public funds, the inability of the courts to handle the multiplicity of suits that might be brought if standing were accorded,[36] and the danger of interference with the operations of government. If taxpayers were permitted to sue to prevent illegal spending of public moneys, Wessels J. argued in *Dalrymple v. Colonial Treasurer*:[37]

> they would be entitled to come to the courts in every case in which they conceived that money had been paid or an act had been done in violation of statute. The courts might therefore be constantly engaged in inquiries as to alleged grievances against the public acts of Ministers at the instance of enthusiastic or

33 (1932) 47 C.L.R. 50.
34 (1965) 112 C.L.R. 177.
35 Id. 188.
36 See Frotheringham v. Mellon, 262 U.S. 447 (1922).
37 [1910] S.A.L.R. (Transvaal Prov. Div.) 372, 392 per Wessels J.

> hostile politicians. Moreover, the Government might be constantly hampered in the execution of the duties of their office.[38]

It was considerations of policy that moved the United States Supreme Court in *Frothingham v. Mellon*[39] to hold that a taxpayer had no standing to challenge the constitutionality of the federal Maternity Act, 1921. The Act had authorized the making of conditional grants to States and was challenged on the ground that it invaded the sphere reserved to the States. To have standing, the Supreme Court held, the plaintiff must show that he had sustained, or was in immediate danger of sustaining, direct injury as a result of enforcement of the Act. Although it recognized that enforcement of the Act might eventually lead to heavier taxation, the Court thought that the plaintiff's interest as a taxpayer was comparatively minute, remote, fluctuating and uncertain and that if he were permitted to sue, a multiplicity of suits might follow.

The decision in *Frothingham v. Mellon* was recently reconsidered by the Supreme Court in *Flast v. Cohen*[40] and the grounds of policy on which it was founded disapproved. Although the Court in *Flast's Case* did not go so far as to say that taxpayers might bring suit to challenge the constitutionality of federal expenditure in every case, it held that suit might be brought when what was alleged was that the expenditure contemplated would be contrary to 'specific' clauses of the Constitution such as the First Amendment. The ground of invalidity assigned in *Frothingham v. Mellon* did not fall into that category. To have standing, the majority said, the taxpayer must have the requisite personal interest in the outcome and he must base his claim on breach of those specific constitutional provisions limiting the spending power. The plaintiff must 'show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, section 8'. He could not challenge expenditure which was incidental to the administration of an 'essentially regulatory statute'. The only reasons the majority gave for concluding that a taxpayer had no standing to challenge under non-specific clauses of the Constitution were that the issue so raised was not sufficiently specific, would not 'be contested with the necessary adverseness' and

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38 See also id. 402 per Bristowe J.
39 262 U.S. 447 (1922).
40 88 S. Ct. 1942; 36 L.W. 4601 (1967).

the litigation would not 'be pursued with the necessary vigor'. It is difficult to understand why a suit based on contravention of specific clauses, such as the First Amendment, can be assumed to satisfy these criteria whereas a suit founded on contravention of the non-specific clauses cannot.

The majority gave no clear indication of why it was that they thought that the plaintiff taxpayers had the requisite personal interest to give them standing. Was it because their tax liabilities might be affected or was it because of their interest in the maintenance of the freedom of religion guaranteed by the First Amendment? Having regard to the basis on which the Court in *Doremus v. Board of Education*[41] distinguished its earlier decision in *Everson v. Board of Education,*[42] the requisite interest would appear to be economic. In *Everson* the Court adjudicated a suit by State taxpayers to challenge spending of State funds to reimburse parents for the money they spent in having their children transported to school. Their standing to sue was not questioned, but in *Doremus* where a taxpayer sued for a declaration that a State statute on bible readings in schools was invalid, the Court held that the taxpayer lacked standing, for unlike the plaintiffs in *Everson,* the legislation which was challenged did not operate so as to inflict 'a direct dollars-and-cents injury'. In rejecting the policies upon which the decision in *Frothingham* was based, the Court in *Flast* obviously was not concerned that the financial interest which justified a taxpayer's suit might only be a trifling one.

The views expressed in *Massachusetts v. Mellon; Frothingham v. Mellon* on the question of standing have been cited with approval by several judges of the Australian High Court.[43] But the main reason why the Court has denied citizens standing to challenge governmental action for unconstitutionality, without proof that the action complained of prejudicially affects their legal rights, is that where the public as a whole are affected, suit may be brought, on the relation of individuals, by an Attorney-General. The Attorney-General of a State has standing to challenge the validity of federal legislation extending to and operating in the State on the ground that the legislation relates to a subject-matter within the exclusive legislative pro-

41 342 U.S. 429 (1951).

42 330 U.S. 1 (1946).

43 Anderson v. Commonwealth (1932) 47 C.L.R. 50, 52 per Rich and McTiernan JJ.; Attorney-General (Victoria) ex rel Dale v. Commonwealth (1945) 71 C.L.R. 237, 248 *per* Latham C.J.

vince of the States.[44] Similarly the Commonwealth Attorney-General has standing to challenge State legislation on the ground that it is in excess of State legislative power.[45] Both States and the Commonwealth have standing to challenge the legislation of the other on the ground that it infringes constitutional prohibitions.[46] Whether a State Attorney-General has standing to challenge a federal appropriation Act has not been decided. In the *Pharmaceutical Benefits Case*,[47] two of the judges, Starke and Williams JJ., held the federal Act challenged by the Victorian Attorney-General unconstitutional on the ground that it exceeded the limits imposed on the federal appropriation power by section 81 of the Constitution. Their decision therefore implied that the Attorney-General had standing. The other majority judges characterized the Act as doing more than appropriating money, so did not find it necessary to rule on the question whether an appropriation Act simpliciter might be challenged. But one of the grounds of the suit was that the Act exceeded the limits of the federal spending power. Had the majority taken the view that the State Attorney-General had no standing to sue on this ground, it would not have been necessary to consider whether section 81 did or did not impose limits on the spending power. Yet the issue was in fact considered.

On what does the standing of a State Attorney-General to challenge federal legislative or executive action depend? According to Isaacs J., it does not depend on the infringement of rights possessed by individuals. When a State Attorney-General sues in respect of federal action alleged to be unconstitutional, he sues to protect 'on behalf of the Crown those rights and functions with which the King, guided solely by his State representatives and advisers, is invested in respect of the State'.[48] This was also the view of Williams J.[49] Griffith C.J., on the other hand, regarded suits by State Attorneys-General to challenge the constitutionality of federal legislation as suits brought in exercise of the Attorney-General's right to sue in respect of a common injury to the public resulting from the unauthorized acts of public officers.[50]

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44 Attorney-General for New South Wales v. Brewery Employees Union of New South Wales (Union Label Case) (1908) 6 C.L.R. 469; Attorney-General for Victoria (ex rel Victorian Chamber of Manufactures) v. Commonwealth (1935) 52 C.L.R. 533; Attorney-General for Victoria, ex rel Dale v. Commonwealth (1945) 71 C.L.R. 237, 247-8, 272.

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

46 Tasmania v. Victoria (1935) 52 C.L.R. 157.

47 (1945) 71 C.L.R. 237.

48 Union Label Case (1908) 6 C.L.R. 469, 558.

49 Pharmaceutical Benefits Case (1945) 71 C.L.R. 237, 277.

50 Union Label Case (1908) 6 C.L.R. 469, 499-500.

O'Connor J. agreed. A State Attorney-General, he said, is entitled to represent the State 'in any claim for relief against an illegal act . . . affecting the people of the State'.[51] Dixon J.'s conception of the role of the Attorney-General was much the same. It is, he said:

> the traditional duty of the Attorney-General to protect public rights and to complain of excesses of a power bestowed by law and in our Federal system the result has been to give the Attorney-General of a State a *locus standi* to sue for a declaration wherever his public is or may be affected by what he says is an *ultra vires* act on the part of the Commonwealth or of another State.[52]

The inference to be drawn from the remarks of Griffith C.J. and of O'Connor and Dixon JJ. is that a State Attorney-General may sue to challenge the constitutionality of any federal action which affects his public and that his standing does not depend upon proof that the federal action will in any way affect the legal powers of the State. Whether the requirement that his public is or may be affected by what is alleged to be unconstitutional action by the Commonwealth really limits his right of suit is uncertain. There is no doubt that the people of a State will be affected by a federal law, for if the law is valid, they will be bound by it. A federal appropriation Act is a little different. It is a law of the Commonwealth, but as has been mentioned, its legal effect is merely to authorize expenditure by the Crown in right of the Commonwealth. The expenditure it authorizes may have economic consequences affecting State financial planning, and the raising of revenue for the purposes of expenditure may lead to an increase in federal taxation which affects not only taxpayers but the ability of States to raise revenues for their own purposes, though not their legal powers. Conceivably suit on behalf of a State could be founded on State entitlement under section 94 of the Constitution to receipt of the surplus revenues of the Commonwealth. Revenue is surplus only if no authority for its expenditure has been given, and there is nothing to prevent the Commonwealth Parliament from appropriating all revenues so that there is no surplus available for distribution among the States.[53] But if Parliament has exceeded its power to authorize expenditure, and an appropriation Act is invalid, there could be a surplus of revenue not appropriated by the Commonwealth Parliament to which States could claim entitlement. In such a case, the State might itself sue to recover what was due to it under section 94.

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51 Id. 553.

52 (1945) 71 C.L.R. 237, 272.

53 New South Wales v. Commonwealth (1908) 7 C.L.R. 179.

In the United States, States have been denied standing to challenge the constitutionality of federal expenditures. In *Massachusetts v. Mellon*[54] the United States Supreme Court held that the Commonwealth of Massachusetts had no standing to challenge the federal Maternity Act, 1921, appropriating conditional grants to States. Standing was denied because the Court thought that it was not part of the duty or power of States to enforce the rights of its citizens 'in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them as *parens patriae,* when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status'.[55] The case was referred to with approval by Latham C.J. and Starke J. in the *Pharmaceutical Benefits Case,*[56] but the judges of the High Court did not draw any distinction between the public rights of people of individual States and public rights of the people of the Commonwealth.

It is quite unrealistic to suppose that in a federal context, the Attorney-General of the national government should be expected to respond to requests to take legal action to challenge legislation or action of the national government, especially when the legislation in question is legislation introduced by the executive branch and when the federal Attorney-General is himself a political officer. The very existence of a federal form of government should be a sufficient reason for allowing State Attorneys-General to sue when the federal government is alleged to have exceeded its constitutional authority. The question of standing, it should be emphasized, is altogether separate from that of the justiciability of the issue sought to be raised for decision and from the substantive issue, and standing should not be denied because the court regards the issue as non-justiciable or one that it would probably decide in the defendant's favour.

ENID CAMPBELL*

54 262 U.S. 447 (1922).
55 262 U.S. 447, 486; see also Florida v. Mellon, 273 U.S. 12, 18 (1926).
56 (1945) 71 C.L.R. 237, 248.

* *Sir Isaac Isaacs Professor of Law, Monash University.*