before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." As the comment recognizes, because judicial review grows out of the fiction that courts only declare what the law is in specific cases[721] and are without will or discretion,[722] its exercise is surrounded by the inherent limitations of the judicial process, most basically, of course, by the necessity of a case or controversy and the strands of the doctrine comprising the concept of justiciability.[723] But, although there are hints of Chief Justice Marshall's activism in some modern cases,[724] the Court has always adhered, at times more strictly than at other times, to several discretionary rules or concepts of restraint in the exercise of judicial review, the practice of which is very much contrary to the quoted dicta from *Cohens*. These rules, it should be noted, are in addition to the vast discretionary power which the Supreme Court has to grant or deny review of judgements in lower courts, a discretion fully authorized with *certiorari* jurisdiction but in effect in practice as well with regard to what remains of appeals.[725]

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[721] *See, e.g.*, Justice Sutherland in Adkins v. Children's Hospital, 261 U.S. 525, 544 (1923), and Justice Roberts in United States v. Butler, 297 U.S. 1, 62 (1936).

[722] "Judicial power, as contradistinguished from the powers of the law, has no existence. Courts are the mere instruments of the law, and can will nothing." Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) (Chief Justice Marshall). *See also* Justice Roberts in United States v. Butler, 297 U.S. 1, 62–63 (1936).

[723] The political question doctrine is another limitation arising in part out of inherent restrictions and in part from prudential considerations. For a discussion of limitations utilizing both stands, *see* Ashwander v. TVA, 297 U.S. 288, 346–56 (1936) (Justice Brandeis concurring).

[724] Powell v. McCormack, 395 U.S. 486, 548–49 (1969); Baker v. Carr, 369 U.S. 186, 211 (1962); Zwickler v. Koota, 389 U.S. 241, 248 (1967).

[725] 28 U.S.C. §§ 1254–1257. *See* F. Frankfurter & J. Landis, supra at ch. 7. "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case . . . . If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." Chief Justice Vinson, *Address on the Work of the Federal Court*, in 69 Sup. Ct. v, vi. It "is only accurate to a degree to say that our jurisdiction in cases on appeal is obligatory as distinguished from discretionary on *certiorari*." Chief Justice Warren, quoted in Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 51 (1954).