At various times, the Court has followed more strictly than other times the prudential theorems for avoidance of decisionmaking when it deemed restraint to be more desirable than activism.[726]

The Doctrine of "Strict Necessity".—The Court has repeatedly declared that it will decide constitutional issues only if strict necessity compels it to do so. Thus, constitutional questions will not be decided in broader terms than are required by the precise state of facts to which the ruling is to be applied, nor if the record presents some other ground upon which to decide the case, nor at the instance of one who has availed himself of the benefit of a statute or who fails to show he is injured by its operation, nor if a construction of the statute is fairly possible by which the question may be fairly avoided.[727]

Speaking of the policy of avoiding the decision of constitutional issues except when necessary, Justice Rutledge wrote: "The policy's ultimate foundations, some if not all of which also sustain the jurisdictional limitation, lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system." [728]

The Doctrine of Clear Mistake.—A precautionary rule early formulated and at the base of the traditional concept of judicial restraint was expressed by Professor James Bradley Thayer to the effect that a statute could be voided as unconstitutional only "when those who have the right to make laws have not merely made a

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[726] *See* Justice Brandeis' concurring opinion in Ashwander v. TVA, 297 U.S. 288, 346 (1936). *And contrast* A. Bickel, supra at 111–198, *with* Gunther, *The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

[727] Rescue Army v. Municipal Court, 331 U.S. 549, 568–75 (1947). *See also* Berea College v. Kentucky, 211 U.S. 45, 53 (1908); Siler v. Louisville & Nashville R.R., 213 U.S. 175, 191 (1909); Carter v. Carter Coal Co., 298 U.S. 238, 325 (1936); Coffman v. Breeze Corp., 323 U.S. 316, 324–325 (1945); Spector Motor Service v. McLaughlin, 323 U.S. 101, 105 (1944); Alma Motor v. Timken Co., 329 U.S. 129 (1946). Judicial restraint as well as considerations of comity underlie the Court's abstention doctrine when the constitutionality of state laws is challenged.

[728] Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947).