THE POLITICS OF JUDICIAL REVIEW OVER EXECUTIVE ACTION: THE SUPREME COURT AND SOCIAL CHANGE*

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I. Introduction: Politics Defined

We define "politics" in Laswellian terms as "who gets what, and why." In other words, politics has to be defined not in its partisan or personalistic sense, although this is an important aspect, but in a higher and more encompassing aspect as a struggle for power. For this is actually what politics is all about, when it is stripped of its excess verbiage. Politics is therefore defined here as a struggle for power among groups that make up the state to determine who would have more, and hence exercise power, over other groups. It is the element of conflict, in one form or another, that characterizes politics. It is some kind of political Darwinism, as can be illustrated in this description of a flock of chickens by a *sabungero*:

> When two chickens meet for the first time, there is either a fight or one gives way without fighting . . . . Dominance usually goes to the bird with superior fighting ability. Thereafter, when these two meet, the one which has acquired the peck-right, that is, the right to peck without being pecked in return, exercises it, except in the event of a successful revolt which, with chickens, rarely occurs. [1]

This should not be taken to mean that contending groups in a human society engage in conflict that is as crude and as primitive as that in a society of chickens. Civilization has refined the forms of the conflict; although in the Philippine context, the veneer sometimes falls off to reveal undisguised struggle for power. Thus, the society of chickens is a constant reminder to us of the kind of politics that we practise, except that great wealth or an extensive armory is the substitute for superior fighting ability, political organization or numerical superiority for physical force, out of which the right to rule, like peck-right, is achieved after a struggle. In this manner, the distribution of political power is determined, power relations are

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[1] ALLES, THE SOCIAL LIFE OF ANIMALS 176 (1938).

established, and social order assumes stability, just as the peck-right in a society of chickens insures observance of the pecking order.

The power wielders must, of course, exercise their peck-right in accordance with a principle, i. e., a theory of the right to power and its exercise. They must justify the pecking order over those who are pecked in terms of an ideology, otherwise it would be disregarded by their subjects. As Berle notes, the effectiveness and continuity of power rests on an ideological structure.[2] The ideology may differ from one society to another, but the allocation of public power must always be congruent with the prevailing ideology.

If we proceed from this view of politics, then we can see the judiciary as a participant in the struggle for power by various groups and classes of society. The judiciary is in politics because it cannot avoid it. The fact that it makes important decisions which impinge on the interests of the most powerful segments of society necessarily involves it in power politics. Thus, as Schubert puts it, "the judicial system converts social, economic, and political inputs into legal outputs, which in turn affect social, economic and political interests and relationships, which in turn affect judges and courts, and so forth."[3]

II. Judicial Review as a Political Weapon

The basic instrument wielded by the judiciary in the arena of politics is judicial review. By means of judicial review, the courts can effect changes in power relationships among the three departments of government, as well as among the power elite. When the Supreme Court declares a law unconstitutional, or strikes down as illegal an action taken by the executive department, it affects power relationships not only in the government but in the whole society. In short, judicial review can be a weapon of political action and reaction, and the Supreme Court can become an active participant in the struggle for political power. This reality comes as no surprise, when we look back and see how the concept of judicial review came about. Thus, as far back as *Marbury v. Madison*,[4] we are reminded that the very concept of judicial review was created precisely for the redistribution of political power, that is, the use of judicial veto power over political and economic reform measures. It was a devise created by John Marshall to preserve the dominance of judicial power, which was then appropriated

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[2]BERLE, POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY 98 (1959).

[3]SCHUBERT, HUMAN JURISPRUDENCE: PUBLIC LAW AS POLITICAL SCIENCE 337 (1975).

[4]5 U.S. (1 Cranch) 137; 2 L. Ed. 60 (1803).

by the losing Federalist Party, over executive power. In the election of 1800, the Federalists were decisively trounced by the Jeffersonians and realizing their abrupt fall from political power, the Federalists, by means of eleventh-hour appointments which we now refer to as "midnight appointments," entrenched themselves in the federal judiciary, including Marshall himself. One of the midnight appointees, William Marbury, was not able to get his commission as justice of the peace from the outgoing federalists, and so he sought the same from the newly-installed Secretary of State, James Madison, who, upon instructions of the President-elect Thomas Jefferson, refused to issue it to Marbury. Thus, Marbury had to file an original action for mandamus against Madison before the U.S. Supreme Court, which at that time was conveniently presided over by John Marshall, the former Secretary of State who affixed his seal in the commission of Marbury. So, when the mandamus suit got to Marshall, he saw a golden opportunity not only to rebuff his arch-enemy, Thomas Jefferson, who also happened to be his cousin, but also to assert judicial power over the executive branch and, incidentally to uphold the right of Marbury to receive his commission. It is apparent that the first case of judicial review involved a review of the action of the executive branch -- the act of Madison in refusing to deliver the commission of Marbury. Neither can it be denied that political considerations came into play in the decision process.

Thus, from *Marbury v. Madison* up to *Marcos v. Manglapus*,[5] the political power equation in judicial review of administrative action is difficult to ignore. This is because the Supreme Court and even the inferior courts are political institutions, and their exercise of the power of judicial review underscores this unique character. Justices and judges are political animals, especially when they resolve policy problems, because invariably, the contending groups press conflicting claims upon them. When justices decide on the constitutionality of a statute or on the validity of an important administrative act, their political values, especially their views on the interrelationships between the different institutions of government, color their concept of justice, and their decisions are expressions of the operation of political power.

III. Political Ideology Behind Judicial Review

While it was partisan politics that motivated Marshall to decide *Marbury v. Madison*, it can be perceived that it was his basic distrust of democracy that moved him to his conclusions. The doctrine that evolved, as Jefferson saw it, is both elitist and anti-democratic.

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[5]G.R. No. 88211, 177 SCRA 668 (1989).

The doctrine that was imported into the Philippines was intended to be utilized for the same elitist and anti-democratic purposes. While this came about as a result of the confluence of circumstances, it was not by accident of history that judicial review was initially intended for anti-democratic purposes. The man who was mainly responsible for this was William Howard Taft who, as President of the Second Philippine Commission from 1900-1901, and as the first civil governor from 1901-1903, and later as Secretary of War of the U.S. carrying sole responsibility for the implementation of American colonial policy from 1909-1913, created and molded the colonial policy of the U.S. in the Philippines according to his principal vision of government by the chosen few.[6] Corollary to his great vision is his view of the Supreme Court as a "brake on democracy."[7]

Before William Howard Taft came to the Philippines as civil governor, he had already established his credentials in the U.S. as champion of property rights, critic of social democracy, and a believer of the role of the Supreme Court as guardian of the rights of property through the instrument of judicial review. At about that time, the U.S. Supreme Court was beginning to project itself as an insurmountable obstacle to social and economic reform in the U.S. There were continuing debates on the role of the Federal Supreme Court in a social democracy. The conservatives then were led by Chief Justice David Brewer, who warned against the "red flag of Socialism" by complaining that "many attempted to transfer to themselves through political power the wealth they lacked."[8] The liberals on the other hand were led by James Bradley Thayer of Harvard, who cautioned the Supreme Court that "if they had been regarded by the people as the chief protection against legislative violation of the Constitution, they would not have been allowed merely this incidental and long-delayed control. They would have been let in, as it was sometimes endeavored in the conventions to let them in, to a revision of the laws before they began to operate."[9] Into this fray entered William Howard Taft, a staunch Republican even at that time, inspired by the conservative rhetoric not only of Chief Justice Brewer but also of Judge Thomas M. Cooley. Addressing the graduating class of the Michigan Law School in 1894, Taft took heart in the position that the Supreme Court "could be counted upon to uphold the sacred character of private property". He applauded the use of the judicial veto to thwart intermittent attempts of state legislatures and of Congress to regulate private property, and declared that the Constitution made ours "a conservative government strongly buttressed

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[6]B. SALAMANCA, THE FILIPINO REACTION TO AMERICAN RULE; 1901-1913 (1983).
[7]A. MASON, WILLIAM HOWARD TAFT, CHIEF JUSTICE 15 (1965).
[8]*Id.*, at 42.
[9]*Quoted* in MASON, *id.*, at 43.

by written law . . . against the attack of anarchy, socialism, and communism."[10] The following year, in 1895, Taft, in an address before the American Bar Association, defended the role of federal courts as protectors of the vested rights of corporations, explaining that "in a corporation-hating community, the courts were marked as friends and protectors of corporations."[11] As Superior Court judge in Ohio and later as Federal Circuit Court judge from 1892-1900, he distinguished himself by issuing so many labor injunctions that he came to be known as the inventor of "government by injunction."

IV. Judicial Power in the Philippine Setting

Thus, when Taft was sent by Mckinley to the Philippines in 1900 as President of the Second Philippine Commission, he was carrying with him heavy intellectual baggage. But it would not be accurate nor fair to attribute to Taft the whole spectrum of American policy towards the Philippines. We have to remember that the divine inspiration which prompted Mckinley to acquire the Philippines, represented the triumph of expansionist businessmen in the U.S. to gain a foothold in Asia, and the Philippines, as Elihu Root saw it, "offered a ready and attractive field for investment and enterprise."[12] Gen. Arthur MacArthur viewed the Filipinos as "a people chosen to carry not only American commerce but also republican institutions and the principles of personal liberty throughout Asia."[13] He added privately, though, that before this could come about, the Filipinos would need bayonet treatment for at least 10 years.[14] Taft would not do such a thing to a "little brown brother", and he thus replaced MacArthur as governor in 1901. Taft was shrewd enough to see that the Philippines could never be developed as a market for American goods if there was bad blood between Americans and Filipinos. Taft therefore launched a policy of attraction in the Philippines: he attracted the elite, the *ilustrado* class, by perpetuating the feudal oligarchy or by holding out promises of liberal tariffs for Philippine agricultural exports to the U.S., or of public utility franchises; he attracted the middle class by promising government positions as municipal officers, provincial board members, members of the civil service, and members of the colonial legislature. But, knowing the power of judicial review, he stopped at the judiciary. "It is the basis of all civil right and liberty, and no Filipino judiciary could have any adequate conception of what practical civil liberty is," he wrote.[15]

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[10] *Id.*, at 44.
[11] *Id.*, at 48.
[12] REPORTS OF THE PHILIPPINE COMMISSION, 1900-1903, at 34-35 (1903).
[13] U.S. SENATE DOC. 331 (57 Cong., 1st Sess.) 866.
[14] 1 H. PRINGLE, LIFE AND TIMES OF WILLIAM HOWARD TAFT 170 (1939).
[15] SALAMANCA, *supra* note 6, at 60.

"The administration of justice through the native judges in Manila stinks to Heaven," he wrote to Elihu Root, complaining that "with a few notable exceptions, there is not a single Filipino lawyer who could be trusted to resist the temptation of a bribe were he raised to the bench".[16] He decided to substitute American judges for the Filipino bribe-loving jurists.[17] He reorganized the Supreme Court by reducing its membership from 9 to 7, and reducing the Filipinos into a minority of 3 with 4 Americans in the majority. This reversed the ratio during the military regime of General Otis and General MacArthur when there were 6 Filipinos against 3 Americans in the Court.[18] In the appointment of Filipinos to the government, Taft's principal criterion was membership in the Federal Party. "We can select the men who will be as orthodox in matters of importance as we are," he wrote.[19] Later, speaking of the facility with which American judicial ideas were readily acquired and practised by the judiciary in the Philippines, W. Cameron Forbes enthused, "the spirit infused by the American Administration in the whole judicial system was little short of marvelous."[20]

The power of judicial review during the colonial era was lodged not only in the American-dominated Supreme Court of the Philippines but also, in the Federal Supreme Court of the U.S. Thus, Section 10 of the Philippine Bill of 1902 provided:

> That the Supreme Court of the U.S. shall have jurisdiction to review, revise, reverse, modify or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes and proceedings now pending therein or hereafter determined thereby in which the constitution or any statute, treaty, title, right, or privilege of the U.S. is involved or brought into question;[21]

It is to be expected that the American administrators had to rely on the Federal Supreme Court to protect their interests in the newly-acquired colony. The Court had earlier demonstrated, in 1901, that it was not beyond politics in the use of judicial review to protect American interests in the colonies. This was made manifest in the *Insular Cases for Porto Rico*, and in the case of the *14 Diamond Rings* for the Philippines. These cases, which technically involved judicial review of executive action, cropped up when Taft was the civil governor of the Philippines. As the ultimate issue in these cases was whether

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[16] *Id.*, at 191.

[17] 1 PRINGLE, *supra* note 14, at 206.

[18] SALAMANCA, *supra* note 6, at 62.

[19] 1 PRINGLE, *supra* note 14, at 205.

[20] 1 W. FORBES, THE PHILIPPINE ISLANDS 307 (1945), *cited* in SALAMANCA, *supra* note 6, at 63.

[21] ACT OF CONGRESS OF THE U.S. of 1 July, 1902, sec. 10, 32 stat, part 1.

the American Constitution followed the flag or not, the General was agitated. He showed slight patience with those who contended that the inhabitants of the colonies had the full protection of the U. S. Constitution, calling them "cranks and fanatics."[22]

To make sure that his views would be heard, Taft wrote to his friend, Associate Justice John Harlan, warning the latter that "if you should decide that the Dingley Law must extend to these islands, it will produce a confusion in the finances here, for which at present I see no remedy, and it will subject these islands and their businesses to a tariff law framed only for the U.S. and inapplicable to islands so far removed from that country."[23] Obviously the U.S. Supreme Court agreed with Taft, for, in a 5-4 decision, it held that the protection of the Constitution could not be automatically extended to the colonies.[24] This ruling was applied to the Philippines in the case of the *14 Diamond Rings*,[25] where the Federal Supreme Court was also divided 5-4 along the lines of the *Insular cases* decision. The majority also held, in effect, that the Philippines, though not a foreign country, was placed outside the provisions of the U.S. Constitution in respect of national taxation. Subsequently,the area of civil and political rights previously denied to the Philippines and other colonized territories was expanded by the U.S. Supreme Court (e.g. trial by jury).[26]

The decision of the U.S. Supreme Court in the *Insular Cases* was pursuant to the interests of the economic centurions of the U.S. not only for the protection of their sectoral business participation but also for trade expansion. Stanley Karnow writes that the Supreme Court in these cases bowed to McKinley and the Republicans in Congress.[27] As Mr. Dooley of Finley Peter Dunne perceived it, "no matter whether the constitution follows the flag or not, the Supreme Court follows the election returns." To the vested interests in the U.S., this decision meant that agricultural products in the U.S. were assured of protection by the U.S. Congress from competition by Philippine products; at the same time, the U.S. Congress could adjust tariff laws of the Philippines to allow the preferential entry of American goods into the latter. And that is exactly what the U.S. Congress did after the ruling of the Federal Supreme Court in the case of the *14 Diamond Rings*. Pressure from the beet sugar, tobacco and other business interests lobby, who were hysterical in the defense of their cause for high tariffs, compelled the

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[22]1 PRINGLE, *supra* note 14, at 207.
[23]*Id.*, at 208.
[24]De Lima v. Bidwell, 182 U.S. 1; Downes v. Bidwell, 182 U.S. 244 (1901).
[25]Pepke v. U.S., 183 U.S. 176 (1901).
[26]Kepner v. U.S., 195 U.S. 100 (1904); Dorr v. U.S., 195 U.S. 138 (1904).
[27]S. KARNOW, IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES 192 (1989).

U.S. Congress to maintain the high tariffs for Philippine products entering the U.S. by legislating only a token 25% cut, while American goods entered the Philippines virtually duty-free.

The *Insular Cases* likewise paved the way for Congress to approve the law extending the Chinese exclusion laws to the Philippines. Furthermore, this decision made it justifiable to deny American citizenship to Filipinos even as they were made to swear allegiance to the U.S. Thus, the Organic Act of 1902 decreed that "all inhabitants of the P.I. shall be deemed to be citizens of P.I." only.

This decision of the Federal Supreme Court formed part of the framework within which American colonial policy in the Philippines was carried out. Stanley Karnow expounds that from the beginning, starting with Taft, the Americans set out to create a society in the American image. The colonial administrators implanted American institutions on Philippine soil, including American jurisprudence and the institution of judicial review. Unfortunately, as Karnow observes, "the Americans coddled the elite while disregarding the appalling plight of the peasants, thus perpetuating the feudal oligarchy that widened the gap between rich and poor."[28]

With respect to the review of executive action by the Philippine Supreme Court during the colonial period, the American-dominated Court had to perform a legitimating function to the actions taken by the American governor-general. While the power of the executive had been challenged before the Supreme Court a number of times, the latter consistently, either upheld the validity of executive action taken by the Governor-General or, refused to take jurisdiction on the ground of political question. Thus, on the exclusion and deportation of aliens,[29] on non-liability of the executive for civil damages arising from performance of official duty,[30] on the suspension of the privilege of the writ of *habeas corpus*,[31] on the regulation and control of the currency,[32] on the prohibition of the slaughter of carabaos,[33] on the summary destruction of unsightly billboards,[34] on the regulation of businesses clothed with public interest,[35] and on the enforcement of Philippine domestic law on foreign vessels in Manila, the Supreme Court

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[28]*Id.*, at 198.
[29]In Re Allen, 2 Phil. 630 (1903).
[30]Chuoco Tiaco v. Forbes, 16 Phil. 534 (1910); affd. 228 U.S. 549 (1913).
[31]Barcelon v. Baker, 5 Phil. 87 (1905).
[32]U.S. v. Ling Su Fan, 10 Phil. 104 (1908).
[33]U.S. v. Toribio, 15 Phil. 85 (1910).
[34]Churchill and Tait v. Rafferty, 32 Phil. 580 (1915).
[35]De Villata v. Stanley, 32 Phil. 541 (1915).

either deferred to executive discretion or validated administrative action in the name of police power.

The turning point came in 1920. This was a backwash of the ideological revolution in American politics where the dominant political groups, represented by President Harding, and later by President Coolidge, made *laissez faire* a plan for dynamic action.[36] At this point in time, William Howard Taft, who had been President in the U.S. but had lost his reelection bid to Woodrow Wilson in 1912, had taken to the campaign trail again in 1920, because he saw no greater domestic issue than "the maintenance of the Supreme Court as the bulwark to enforce the guaranty that no man shall be deprived of property without due process of law."[37] The philosophy of *laissez faire* was resurrected, and it was seen as the main vehicle for national progress and social prosperity. The change in administration in Washington, from Woodrow Wilson to Warren Harding, also meant a change in economic policies.

President Harding, whose guiding slogan was "less government in business and more business in government,"[38] did not spare the Philippines, which at that time was known for its numerous government-owned development and marketing corporations.[39] Appointed Governor-General of the Philippines was Leonard Wood, a trusted Harding lieutenant who, upon his induction into office in 1921, hammered on his policy of "keeping the government out of business in order to encourage private enterprise."[40] He thus reversed the policy laid down by his predecessors, and sold to private firms almost all governmental operations.[41] He strongly opposed the grant of Philippine independence on the ground that the country did not have a stable government. The latter being "one where public and private funds are abundant," and "where investment is sought at moderate rates of interest."[42] The colonial government's partiality to American businessmen can be seen from the fact that federal taxes supposed to be paid by American businessmen doing business in the Philippines were not collected during the Harding, Coolidge, and Hoover administrations,

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[36]A. MASON, SECURITY THROUGH FREEDOM: AMERICAN POLITICAL THOUGHT AND PRACTICE 56 (1955).

[37]A. MASON, TAFT-CHIEF JUSTICE 158 (1964).

[38]A. MASON, SECURITY THROUGH FREEDOM 38 (1959).

[39]J. APOSTOL, THE ECONOMIC POLICY OF THE PHILIPPINE GOVERNMENT: OWNERSHIP AND CONTROL OF BUSINESS 93 (1923).

[40]*Id.*

[41]*Id.*

[42]W. ANDERSON, THE PHILIPPINE PROBLEM 139 (1939).

upon strong representations made by Justice Taft, Governor General Wood, and even President Hoover himself.[43]

Meanwhile, in June, 1921, Taft was appointed Chief Justice by President Harding, and the Federal Supreme Court thereupon appointed itself as some kind of a "superlegislature" to protect property rights from majoritarian legislative encroachments. It was noted by Frankfurter that from 1920 to 1930, the Supreme Court had invalidated more legislation than in the preceding 50 years. Justice Holmes observed that he could see "hardly any limit but the sky" against the veto of state laws under the 14th Amendment.[44] Taft and his conservative wing saw that the responsibility for upholding time-tested values and for safeguarding society from legislative invasion of property rights rested with the Supreme Court.[45]

It was at this stage of Philippine economic development that the American-dominated judiciary became a model to the Philippine Judiciary in the protection of property interests against the assaults of the Filipino legislature.

Thus, a new meaning came to be infused with the due process clause of the Organic Act when, in 1922, an executive order fixing the price of rice was challenged before the courts.[46] At that time, the Philippines could not produce sufficient rice and had to resort to importation of the commodity from Saigon. Consequentially, a rise in the price of rice in Saigon caused a corresponding increase in the Philippines, and as stocks became depleted and the chances for importation grew uncertain, the rice merchants withdrew their stocks from the stores and hoarded them, awaiting the high prices that would follow. The machinations of market manipulators made the price soar beyond the means of the consumers. It was then that the government sought to remedy the situation by regulating the price of rice.[47] Chinese merchant, Ang Tang Ho, was accused of violating the executive order and, by way of defense, he challenged the constitutionality of the executive order as well as the enabling statute granting authority to the Governor General to fix the price of rice.[48] In declaring both the executive order and the statute unconstitutional, the Supreme Court adopted a rigid and absolutist approach to the Constitution, and declared:

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[43]*Id.*, at 49.

[44]MASON, TAFT-CHIEF JUSTICE, *supra* note 37, at 293.

[45]*Id.*, at 292.

[46]J. APOSTOL, *supra* note 39, at 95.

[47]REPORT OF THE SECRETARY OF THE DEPARTMENT OF COMMERCE AND COMMUNICATIONS (1919).

[48]ACT NO. 2668, sec. 1 (1919).

> The Constitution is something solid, permanent and substantial. Its stability protects the life, liberty and property rights of the rich and poor alike, and that protection ought not to change with the wind or any emergency condition. The fundamental question involved in this case is the right of the people of the Philippine Islands to be and live under a republican form of government. We make the broad statement that no state or nation, living under a republican form of government, under the terms and conditions specified in Act No. 2868, has ever enacted a law delegating the power to any one to fix the price at which rice should be sold. [49]

In the same decision, the Court considered the private nature of the property, the price of which was sought to be regulated, and distinguished the same from the wheat and flour commandeered by the U.S. government during the first world war. According to the U.S. Supreme Court, the latter became public property after they were commandeered, and the government could thus fix the price. In our case, on the other hand, the government was dealing with private property rights which, in the eyes of the Court, are "sacred under the Constitution."[50] While the Court was not oblivious of the hardship encountered by the people, it declared that "the members of this Court have taken a solemn oath to uphold and defend the Constitution, and it ought not to be construed to meet the changing winds or emergency conditions."[51] Thus, the Court set itself up as the reviewing branch of economic legislation.

After this far-reaching decision in favor of private property, the Court adopted from the United States the doctrine of "liberty of contract" to complete the cult of *laissez faire*. The constitutional challenge was thrown at the Women and Child Labor Law,[52] which required employers to give maternity leave pay to women employees. An employer who refused to comply with the statute was indicted and, as a defense, he challenged the law as violative of his freedom to contract.[53] In declaring the law unconstitutional, the Court, speaking through Justice E. Finley Johnson, said:

> The law has deprived every person, firm or corporation owning or managing a factory, shop or place of labor of any description within the Philippine Islands, of his right to enter into contracts of employment upon such terms as he and the employee may agree upon. The law creates a term in every such contract, without the consent of the parties. Such persons are, therefore, deprived of their liberty to contract.

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[49]U.S. v. Ang Tang Ho, 3 Phil. 1, 17 (1932).

[50]*Id.*, at 18.

[51]*Citing* Tyson & Brother United Ticket Theater Officer v. Banton, 273 U.S. 418, 7 S. Ct. 426, 71 L. Ed. 718 (1927).

[52]ACT No. 3071 (1916).

[53]People v. Pomar, 46 Phil. 440 (1924).

> The constitution of the Philippine Islands guarantees to every citizen his liberty and one of his liberties is the liberty to contract. [54]

The Court agreed with Justice Sutherland, who penned the Adkins case decision,[55] that "wages are the heart of the contract" and then stated:

> In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land, under a constitution which provides that no person shall be deprived of his liberty without due process of law.[56]

The copious citations from American cases point to the helplessness of the Court in the grip of *stare decisis*. The Court could not go against the rampaging current of dominant judicial thought, spawned by the free enterprise philosophy. *Adkins, Adair,*[57] and *Coppage*[58] were more than names in the Supreme Court reporter system; they were the guiding doctrines in the heyday of *laissez faire*.

The influence of Chief Justice William Howard Taft as high priest of the new constitutionalism was not limited to the United States. An opportunity for him to write his notion of what is fair and reasonable under the Philippine Organic Act cropped up in the *Yu Cong Eng* case,[59] which involved the Chinese Bookkeeping Act. Sometime in 1920, the Philippine Legislature, seeking to prevent tax evasion among the Chinese businessmen, passed an act which made it unlawful for any person engaged in commerce, industry or any other activity for the purpose of profit to keep its account books in any language other than English, Spanish, or any local dialect.[60] As expected, the Chinese merchants brought the case to court on the issue of constitutionality. The Supreme Court, attempting to give every intendment possible to the validity of the act, indulged in semantics by defining "account books" to mean only those that are necessary for purposes of taxation. The Court limited the meaning of the phrase by way of compromise between upholding the law and safeguarding the rights of the Chinese merchants.

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[54] *Id.*, at 454.

[55] Adkins v. Children's Hospital of D.C., 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 785 (1923).

[56] *Id.*, at 452.

[57] Adair v. U.S., 208 U.S. 161, 28 S. Ct. 277, 52 L. Ed. 36 (1908).

[58] Coopage v. Kansas, 236 U.S. 1, 35 S. Ct. 240, 59 L. Ed. 441 (1915).

[59] Yu Cong Eng v. Trinidad, 271 U.S. 500, 46 S. Ct. 619, 70 L. Ed. 1059 (1926).

[60] ACT No. 2972, sec. 2 (1920).

On appeal, the U.S. Supreme Court, speaking through Chief Justice Taft, rejected the construction given by the Philippine Court and took the view that the law by its plain terms forbade the Chinese from keeping their account books in any language except English, Spanish, or any local dialect; in short, according to the Washington Court, it forbade the Chinese to keep their account books in Chinese.[61] It was held that to prohibit Chinese merchants from maintaining a set of books in Chinese would be "oppressive and arbitrary" as it would prevent them from being advised of the status of their business. The Court took note of the fact that majority of the Chinese merchants in the Philippines did not speak or write English, Spanish or any local dialect. Without their books of account in Chinese, such merchants would be prey to all kinds of fraud. To the Court, this "would greatly and disastrously curtail their liberty of action, and be oppressive and damaging in the preservation of their property."[62] As against Chinese merchants, "the law deprives them of something indispensable to the carrying of their business and is obviously intended chiefly to affect them as distinguished from the rest of the community."[63]

V. Political Action Against Judicial Conservatism

It was C. Herman Pritchett who, drawing the moral from the Dred Scott decision and its tragic aftermath, observed that when the Supreme Court attempts to thwart the political decisions of a democracy, it will be overridden, sooner or later, peacefully or with violence.[64] In the Philippines, the assault on the judiciary began in 1930 when the Philippine Legislature, in a futile attempt to change the composition of the American-dominated Supreme Court, tried to increase the membership of the Court from 11 to 15, and it nominated four Filipinos immediately to the 4 new vacancies.[65] However, the U. S. Senate, which retained the power to confirm nominations to the judiciary, aborted the ill-conceived plan by outrightly refusing to confirm the nominees. Undaunted, the legislature passed another "reorganization act"[66] which emasculated the Supreme Court, vis-a-vis the legislative and executive departments of its power to declare an act of the legislature invalid by less than a seven-eleven vote. The provision was incorporated as Section 10, Article VIII of the 1935 Constitution, in an attempt to limit judicial power over

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[61]Yu Cong Eng v. Trinidad, *supra* note 59, at 511.

[62]*Id.*, at 514.

[63]*Id.*

[64]C. PRITCHETT, THE ROOSEVELT COURT A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947 73 (1948).

[65]HAYDEN, *op cit.*, 242, note 6 (1942).

[66]ACT No. 23 (1932).

legislation permanently. They had in mind not only the Philippine experience but also that of the United States where, a few years before the constitutional convention of 1934, the U.S. Supreme Court ruled as unconstitutional 11 major New Deal legislations by a divided 5-4 or 6-3 vote.[67] The convention delegates thus looked at this provision as a "decided advantage" of the Philippine Constitution over that of the American Constitution.[68]

In fact, the framers of the Constitution saw to it that the Supreme Court rulings in *Pomar* and in *Ang Tang Ho* would have no precedent value by inserting provisions in the Constitution calculated to blunt the legal effect of the two cases. Thus, to override the *Pomar* doctrine, the delegates approved a blanket protection for laborers by providing that the state should "afford protection to labor, especially to working women and minors, and shall regulate the relations between landowner and tenant, and between labor and capital in industry and agriculture."[69] To wipe out the effect of the *Ang Tang Ho* decision, the framers took care to provide that "in times of war or other national emergency, the National Assembly may by law authorize the President, for a limited period and subject to such restrictions as it may prescribe, to promulgate rules and regulations to carry out a declared national policy."[70] In fact, the delegates emphatically established the policy guidelines for the government. They provided that "the promotion of social justice to insure the well-being and economic security of all the people should be the concern of the State."[71] Likewise, "the State may, in the interest of national welfare and defense, establish and operate industries and means of transportation and communication, and, upon payment of just compensation, transfer to public ownership utilities and other private enterprises to be operated by the government."[72]

The 1935 Constitution was, in the view of J. Ralston Hayden, socialistic rather than capitalistic in orientation. Expounding on the philosophical underpinnings of the Constitution, President Manuel Quezon sounded the dirge for *laissez faire*:

> Under our constitution it is provided that one of the main duties of the State is to look after the interests of the large number. . . . The philosophy of *laizzez faire* in our Government is dead. It has been

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[67]V. WOOD, DUE PROCESS OF LAW, 1932-1949; THE SUPREME COURT'S USE OF A CONSTITUTIONAL TOOL 68 (1950).

[68]*See, e.g.* Recto, *The Irdependence of the Judiciary Under The Constitution*. 4 LAWYERS J. 209 (1936).

[69]CONST. (1935), art. XIV, sec. 6.

[70]CONST. (1935), art. VI, sec. 26.

[71]CONST (1935), art. II, sec. 5.

[72]CONST. (1935), art XIII, sec. 6.

> substituted by the philosophy of government intervention whenever the needs of the country require it. [73]

Law always lags behind any social or economic development. Being concerned with stability rather than change, conservatism rather than progress, the legal system moves with the leaden feet of *stare decisis* behind the times. Sometimes, it needs a sudden jolt or a vigorous push from the restless majority to shove it out of the rut of time-worn doctrines or to free it from the weight of the dead past. In the Philippines, it took some time for the judiciary to realize the full implications of the new provisions of the 1935 Constitution.

The assault on judicial conservatism was precipitated by a Court of Appeals decision denying compensation to a laborer who was drowned after obeying an order from his superior to jump into the flooded Pasig river to salvage a piece of lumber.[74] No less than President Quezon led the attack by assailing the judges for their "sixteenth century minds" and "for safeguarding the interests of the wealthy". The lawyers also came under fire "for trampling down on individual rights in defending property interests."[75] There was a counterattack both from the bar and the public for the President's meddling in judicial affairs,[76] but from the progressive sector of the legal profession came a call for judicial statesmanship and for a revision of the techniques of legal reasoning. Thus, the President of the Constitutional Convention, Senator Claro M. Recto, took pains to point out that under the Constitution, the protection of property rights has been subordinated to human values and national welfare, and this guiding principle should be implemented by the judiciary.[77] U.P. President Jorge Bocobo assailed legalism as "the forbidding bulwark of the dominant caste, whether social or economic," and he called upon the lawyers "boldly to storm this fortress of special privilege."[78] President Bocobo further called for the "socialization of the law":

> This movement stands for the principle that the whole legal structure — statutory and judge-made — must be reconstructed on the

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[73]Speech of President Quezon before the Foreign Policy Association, New York, 13 April 1937, printed in Message of the President 67-68, vol III, Part I (1937).

[74]The account is found in the Philippines Herald, September 22, 1937, p. 1. The case is Cuevo v. Barredo, G.R. No. 19 July 1937, printed in 5 LAWYERS J. 791 (1937). The Supreme Court reversed the Court of Appeals decision.

[75]*Id.*

[76]*See* Philippines Herald editorial, September 23, 1937; Manila Daily Bulletin, September 2, 1937. The statements and resolutions have been compiled in 5 LAWYERS J. 848-852 (1937).

[77]Recto, *The Philippine Constitution*, 6 LAWYERS J. 225 (1938).

[78]Bocobo, *The Cult of Legalism*, 17 PHIL. L. J. 253 (1937); *also* in 6 LAWYERS J. 3 (1938).

> bases of changed and changing social and economic conditions of modern life. The breath of the new life of society must be breathed into the traditional concepts of law.[79]

Even under the pressure, the shift in judicial thought in the late 30's was painfully slow and imperceptible. The Supreme Court stuck to its habit of thought and refused to disengage itself from absolutistic reasoning. Dogmatism was mistaken for independence, as *stare decisis* prevailed over change.

Gradually, the shift in constitutional doctrine began in 1939 with the first *Ang Tibay* case.[80] In his concurring opinion, Justice Laurel, while agreeing with the outmoded argument of the majority concerning freedom of contract and social justice, wedged his foot on the door by pointing out the doctrinal basis for the law:

> These provisions in our Constitution all evince and express the need of shifting emphasis to community interest with a view to affirmative enhancement of human values. In conformity with the constitutional objective and cognizant of the historical fact that industrial and agricultural disputes have given rise to disquietude, bloodshed and revolution in our country, the National Assembly enacted Commonwealth Act No. 103.[81]

This relatively mild pronouncement heralded balanced judicial reasoning as against absolutistic syllogism utilized by the majority. Justice Laurel, however, went on to reject the notion of absolute freedom to contract by diminishing the effects of the *Pomar* doctrine. Thus, he stated, that "the policy of *laissez faire* has to some extent given way to the assumption by the government of the right of intervention even in contractual relations affected with public interest."[82]

VI. The Death of Ideology

The Filipinization of the Court upon ratification of the 1935 Constitution and the inauguration of the Commonwealth regime did not spell much radical changes in judicial attitude insofar as executive action was concerned. In the first place, unlike in the U.S., our Supreme Court has never been divided along ideological lines. This is due to what one American political scientist terms as our "pragmatic political culture," characterized by political patronage which precludes the

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[79]Bocobo, *Unfettering the Judiciary*, 17 PHIL. L. J. 139 (1937); *also* in 6 LAWYERS J. 97 (1938).

[80]Concurring opinion in Ang Tibay v. CIR and National Labor Union, G.R. No. 46496, 29 May 1939, published in 7 LAWYERS J. 487, 494 (1939).

[81]*Id.*

[82]*Id.*

development of an ideological political culture. According to him, "the importation of an educational system from the U.S. helped forestall commitment to ideology in the Philippines, and a network of interpersonal obligations also acts as a barrier to ideological commitments that might disrupt it."[83] In the second place, the members of the Supreme Court had always been recruited from the same class, that is, the ruling elite within the Philippine political system, and they adhere to the same ideology of God, mother, and country.[84] A profile of Filipino Supreme Court justices shows that 80 % of them graduated from the College of Law of U.P., nearly 50% of them did post-graduate work in high-status American universities, and most of them had political experience either in the lower courts, in Congress, or in the Cabinet.[85] Thirdly, the Philippine Constitution of 1935 created such a strong Presidency based on solid cultural and institutional foundations that it would have needed deep ideological commitment to decide against the Executive's pronouncements. The President, after all, nominated the Supreme Court justices. The patterns of trust and obligation, represented by the Pilipino terms *utang na loob* and *hiya*, in the context of an intensely personalistic culture, are too well-encrusted in the Filipino psyche to be disregarded by none but the most irrepressible maverick. Exceptions to judicial timidity abound, of course, but most of these happen after a change in administration, after the President who appointed the justices has been deposed, or a new Supreme Court has been constituted. Fourth, Filipinos are more collectivist rather than individualistic in the process of making decisions. Thus, in the judicial process, Filipino judges in collegiate courts are predisposed more towards consensus rather than self-assertion. This tends to moderate deep ideological divisions among them, if any, papering over differences in value judgments, except the most crucial ones.

These moderating factors notwithstanding, the Supreme Court had stood fast against social change in favor of constitutionalism, even against executive action. This is exemplified in the *Emergency Powers* cases[86] wherein the Supreme Court invalidated executive orders of the President fixing rentals for houses and lots for residential buildings, controlling exports from the Philippines, and appropriating funds for the operation of the government after Congress failed to pass the appropriations bill for the year, and appropriating funds to defray expenses for the national elections. The majority considered as "anomalous" the exercise of legislative functions by the

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[83]D. WURFEL, FILIPINO POLITICS: DEVELOPMENT AND DECAY 6 (1988).

[84]*Id.*, at 89.

[85]*Id.*, 89-90.

[86]Araneta v. Dinglasan, 84 Phil. 368; Rodriguez v. Treasurer, 84 Phil. 368 (1949).

Executive when Congress was in session, and even "more anomalous" the fact that there were two legislative bodies operating over the same field. "Never in the history of the U.S., the basic features of whose Constitution have been copied in ours, have the specific functions of the legislative branch been surrendered to another department,"[87] declared the majority, forgetting that the 1935 Constitution allowed that situation. The Court, in a motion for reconsideration, came out with an even stronger pronouncement holding that the executive orders issued were without authority of law. The majority of the Court said that "democracy is on trial in the Philippines," and that "the vital principles underlying its organic structure should be maintained firm and strong, hard as the best of steel."[88]

The dictum of the Supreme Court reveals its conservative bent even if the rationale for the decision is cloaked in legal jargon. These cases were brought up to the Court by the members of the social and economic elite whose business and political fortunes would be adversely affected by the prohibitions on certain economic activities and by the appropriations of government funds. Clearly, the Supreme Court, likewise saw the the need to clip the powers of then President Quirino, who at that time had been barely a year in the Presidency, and yet was perceived as a dictator facing grave economic and financial crisis and tolerating graft and corruption in the government.

The next example that rocked the constitutional foundations of the Court was the imposition of martial law in 1972. While the declaration of martial law was received with varying emotions, it shocked the etablishment because Marcos threatened to dismantle the oligarchy and to set up a new social order. In proclaiming martial law, he even used the rhetorics of the left: "I believe in the necessity of Revolution as an instrument of social change, I have proclaimed martial law to save the Republic and reform our society." While the legalistic-minded opposition from the elite agreed with him that saving the Republic is, indeed, a constitutional ground for proclaiming martial law, they argued that reforming society is not acceptable as a justification for martial law. As the opposition prepared to do legal battle, they were stymied because Marcos also out-maneuvered them in this arena by precluding judicial review. General Order No. 3, issued by the President, in his capacity as Commander-in-Chief, removed from the judiciary the jurisdiction to try and decide all cases involving the validity of any decree or order promulgated pursuant to his martial law proclamation.

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[87] *Id.*, at 382.
[88] *Id.*, at 436.

To Marcos partisans, the proclamation of martial law brought one last hope for social change. One Supreme Court justice, voting to validate the 1973 Constitution, enthused:

> For the last seven decades since the turn of the century, for the last 35 years since the establishment of the Commonwealth in 1935, and for the last 27 years since the inauguration of the Republic on July 4, 1946, no tangible substantial reform had been effected, funded and seriously implemented, despite the violent uprisings in the thirties, and from 1946 to 1952, and the violent demonstrations of recent memory. Congress and the oligarchs acted the life of ostriches, 'burying their heads in timeless sand.' Now the hopes for the long-awaited reforms to be effected within a year or two are brighter.[89]

The other Supreme Court justices, however, either did not see it that way, or were afraid of the threatened reforms. When six cases were filed with the Court to enjoin the Comelec from proceeding with a plebiscite to ratify the Marcos Constitution, a few of the justices went to talk with the President in an attempt to disregard G.O. No. 3 in order for them to take jurisdiction of the cases.[90] While Marcos acceded to their request, he pulled a rabbit out of his hat by issuing a proclamation that the new Constitution had been ratified by the barangay assemblies. The five petitions challenging the validity of this proclamation, and ultimately the validity of the new Constitution, gave rise to the Court's historic decision dismissing the five petitions by a 6-4 vote.[91]

Although 6 justices voted to assume jurisdiction against the political question doctrine, and although the same 6 justices opined that the draft Constitution was not validly ratified in accordance with the provisions of the 1935 Constitution, the two swing justices withheld relief, thus voting with the other side, resigning themselves to the *de facto* effectivity of the new Constitution since that involved considerations other than judicial, and therefore beyond the competence of the Court. The Chief Justice who dissented immediately resigned in disgust from the Court after the promulgation of the decision.

From hindsight, it is evident that Marcos, being the clever politician that he was, used the Supreme Court to validate his acts which were of dubious legitimacy. His legal training and his mind-set as a lawyer dictated that all actions taken by the Executive should have a semblance of legality. He used all legal devices and spared no efforts to obtain the imprimatur of the Supreme Court, as he was

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[89]Javellana v. Secretary, 50 SCRA 30, Makasiar, J., concurring at 229-230 (1973).

[90]D. WURFEL, *supra* note 83, at 117.

[91]Javellana v. Executive Secretary, *supra*.

concerned most of all with the form, rather than the substance, of legitimacy.

The decision in that case has gone down in history, and as one of the justices involved aptly put it, "no question more momentous, more impressed with such transcendental significance is likely to confront this Court in the near or distant future as that posed by these petitions."[92] And all of the ten justices involved in this case were aware of the role that they would play not only in Philippine jurisprudence, but also in Philippine history. They were so conscious of their role in history that almost everyone of them filed individual opinions, and even after the resolution of the Supreme Court had become final on April 18, 1973, some of them still filed additional opinions to explain their votes.

On the question of the effectivity of the new Constitution, which raised the threshold issue of jurisdiction, the positions of the judicial activitists (the dissenting group) and the judicial restraintists (the ultimate majority), have been well-articulated.

The judicial activists, while harping on the five distinctions between "political questions" and "justiciable questions," also directly attacked the fraud and intimidation employed by the martial law regime to obtain acquiescence to the new Constitution. The restrainists, on the other hand, invoked the orthodox arguments justifying deference to the political departments, and referred to the embarrassment that the Court might have suffered if it entered a "political thicket". Most of the restrainists were appointed by Marcos to the Supreme Court, and they carried the day for him. Indeed, judicial review became a victim of martial law in more ways than one.

Unfortunately, as one of the restraintists aptly prophesied, he who rides the tiger will eventually end up inside the tiger's stomach. The Ponce Enrile-Ramos *coup d'etat* of 1986 determined the end of the 1973 Constitution, and likewise that of the martial law regime. Former Chief Justice Roberto Concepcion, the judicial activist who resigned in disgust over the Supreme Court decision in the *Javellana* case, was named a member of the commission that would draft a new constitution. He gave a new lease of life to judicial activism and dealt a blow to the political question doctrine. He authored the provision of Article VIII, Section 1 of the 1987 Constitution reading,

> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and

[92] *Id.*, Fernando, dissenting, at 310.

> enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."[93]

This provision is obviously a reaction to Marcos and to the stance adopted by the Supreme Court in the *Javellana* ruling. As the former Chief Justice stated in the deliberations of the Constitutional Commission:

> Mr. Concepcion. The Article on the Judiciary has determined that nothing involving abuse of discretion amounting to lack or excess of jurisdiction is beyond judicial review. I cannot accept the interpretation that anything related to national defense or national security is beyond the jurisdiction of the courts. That was always the argument of Marcos - national interest, national welfare, national security, national defense. That was the reason Section 1 of the Article on the Judiciary specifies that judicial power includes the power to settle all controversies involving abuse of discretion amounting to lack or excess of jurisdiction. The judicial power is meant to be a check against all powers of the government without exception, except that the judicial power must be exercised within the limits confined thereto. A matter of national defense, national interest, national welfare is not necessarily beyond the jurisdiction of a judicial power.[94]

So the above-quoted constitutional provision erodes the political question doctrine and, as the Supreme Court notes, "broadens the scope of judicial inquiry into areas which the Court, under previous constitutions would have normally left to the political departments to decide."[95] The new political equation for the Supreme Court can better be appreciated if we read this provision in conjunction with Article VIII, Section 4 (2), which provides:

> All cases involving the constitutionality of a treaty, international or executive agreement, or law, x x x including those involving the constitutionality, application, or operation of presidential decrees, proclamations, orders, instructions, ordinances or other regulations shall be decided with the concurrence of a majority of the Members who actually took part in the deliberations of the issues in the case and voted thereon.

The political implications of this provision are loud and clear: the Supreme Court has been strengthened as a check on the executive and legislative powers by requiring a simple majority vote to declare a law unconstitutional. Our experience under martial law has swung the pendulum of judicial power to the other extreme where the Supreme

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[93]CONST., art. VIII, sec. 1.
[94]RECORDS OF THE CONSTITUTIONAL COMMISSION 645-646, 23 August 1986.
[95]Marcos v. Manglapus, *supra* note 5, at 695.

Court can now sit as "superlegislature" and "superpresident." If there is such a thing as judicial supremacy, then this is it.

Judicial review, like most things in life, is double-edged. In our political life, it can cut both ways: it can protect human rights, but it can also prevent social reforms. With its new found strength and its expanded power, the judiciary is no longer the "least dangerous branch of our government", to borrow Bickel's phrase. Considering the divisiveness of our politics, the ideology of our ruling class, and the conservatism of the courts, it may yet evolve to be the most dangerous branch.