JUDICIAL REVIEW OF ECONOMIC POLICY UNDER THE 1987 CONSTITUTION*

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INTRODUCTION

In 1993, the Malcolm Trust Fund Lecture revolved on the theme "The Supreme Court and the Constitution: The Function of Judicial Review." Two of the lecturers, the best legal minds in the academe and in the practicing bar, Prof. Perfecto Fernandez and Atty. Ricardo Romulo, focused on the function of the Supreme Court in reviewing economic policy under the present Constitution. By their titles alone, one can discern the thesis of their lectures: Prof. Fernandez's was "Judicial Overreaching in Selected Supreme Court Decisions Affecting Economic Policy," while Atty. Romulo made "A Plea for Judicial Abstinence."

The speakers then concentrated their fire (as well as their ire) on a number of Supreme Court decisions which reversed administrative agency action on highly technical economic policy questions involved in cases like *Garcia v. Board of Investments*[1] and *PLDT v. Eastern Telecommunications Phils., Inc.*[2]

Since then, the Court has come out with decisions which are even more controversial than the above cases. One is the reversal of the decision of the Government Service Insurance System (GSIS) to award a winning bid for the Manila Hotel to a Malaysian corporation.[3] It was this decision which prompted no less than President Ramos to

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1 G.R. No. 92024, November 9, 1990, 191 SCRA 288 (1990).

2 G.R. No. 94374, August 27, 1992, 213 SCRA 16 (1992).

3 Manila Prince Hotel v. Government Service Insurance System, et al. (hereinafter Manila Prince Hotel v. GSIS), G.R. No. 122156, February 3, 1997.

brand the Court's decision as "intrusive" and he used this as an excuse to call for an amendment to the Constitution to make it more responsive to global economic developments.

Then came the big bang. The recently decided *Tatad v. Secretary of the Department of Energy and Secretary of the Department of Finance* (hereinafter Tatad v. Secretary)[4] and *Lagman v. Torres*[5] invalidated Republic Act No. 8180, the Downstream Oil Deregulation Act of 1997. Omitting the unprintable comments from big business, the more moderate reaction came from the President, who expressed "surprise" over the decision,[6] and from one of his department secretaries, who called for impeachment of the justices who voted with the majority "for meddling with economic policy."[7] A number of big businessmen called for amendments to the constitution, and one of the leading presidential candidates identified "the powers of the Supreme Court" as one of the "main areas of battle" in the forthcoming constitutional convention.

Actually, this campaign to limit the Court's power over economic policy is not new. In fact, the now infamous "court-packing plan"[8] is a Filipino invention. Sometime in 1930, the Philippine Legislature, smarting over the decisions of the American-dominated Supreme Court reifying liberty of contract and property rights, attempted to tilt the balance in the composition of the Court by passing a law increasing the membership from 11 to 15, and then immediately nominating four Filipinos to fill the four new vacancies.[9] Unfortunately, the U. S. Senate, which retained the power to confirm nominations to the Philippine judiciary, aborted the legislative coup by refusing to confirm the nominees. Undaunted, the legislature passed a

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[4] G.R. No. 124360, Nov. 5, 1997.
[5] G.R. No. 127867, Nov. 5, 1997.
[6] *Decision stuns traders, is praised by sectors*, The Manila Times, November 6, 1997, at 1,4; and *SC ruling a setback to eco-reforms – FVR*, Manila Standard, November 6, 1997, at 1, 4.
[7] *House takes out OPSF in '98 budget*, The Manila Times, November 8, 1997, at 1, 4.
[8] *See* P. AGABIN, UNCONSTITUTIONAL ESSAYS 183 (1996).
[9] J. HAYDEN, THE PHILIPPINES: A STUDY IN NATIONAL DEVELOPMENT 242 (1942).

"reorganization act"[10] which required a two-thirds vote of the Supreme Court to declare a legislative act invalid.

In the United States six years later, President Franklin Roosevelt made the same attempt in his own version of the "court-packing plan" after the Federal Supreme Court invalidated the Agricultural Adjustment Act, one of 11 major New Deal measures struck down as unconstitutional by a bare majority, by seeking to increase the number of Supreme Court justices from nine to 11.[11] It set off one of the most heated and most sustained controversies in the entire history of the federal Court and the United States.[12]

JUDICIAL POWER AS VETO POWER ON ECONOMIC POLICY

The view that the Supreme Court has no business meddling in economic policy has no historical foundation. In fact, in the U.S. where we borrowed the idea, the federal Supreme Court has been making economic policy since judicial review was invented. Indeed, the very concept of judicial review was crafted to enable the judiciary to intervene in economic matters. In the framing of the U.S. constitution, the contest over judicial supremacy involved, in the words of Charles Beard, "substantial personalty interests on the one hand and the small farming and debtor interests on the other"[13] and judicial supremacy was crafted as a "conservative safeguard although it was presented as a means of protecting popular rights."[14] The strong proponents of judicial supremacy, while they decided that they would rather leave the Constitution ambiguous,[15] were constantly aware and warned that in the United States, a factious majority might

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[10] Public Act No. 23 (1932).

[11] *See* V. WOOD, DUE PROCESS OF LAW, 1932-1949: THE SUPREME COURT'S USE OF A CONSTITUTIONAL TOOL (1957).

[12] H. J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE US, ENGLAND, AND FRANCE 325 (1968).

[13] C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

[14] SMITH, THE GROWTH AND DECADENCE OF CONSTITUTIONAL GOVERNMENT 100-101 (1930).

[15] C. DUCAT & H.CHASE, CONSTITUTIONAL INTERPRETATION 4 (3rd ed., 1983).

eventually form from "those who will labour under all the hardships of life, and secretly sigh for a more equal distribution of its blessings."[16] Their fears were realized when the Federalists, which represented the propertied classes in the U.S., lost the election of 1800 to the Republican Jeffersonians, which represented the populists. The then outgoing President John Adams wanted desperately to salvage power for his politically prostrate party. He seized upon judicial power as a tool to protect the propertied classes which supported him, and so he packed the judiciary with as many judgeships as possible. With the aid of a lame-duck Congress which passed the necessary legislation, Adams was able to nominate and have the Senate approve 16 new circuit judges, 42 justices of the peace, and one chief justice of the U.S., his own Secretary of State, John Marshall.[17] It was Marshall who thought of judicial review as a veto power over possible economic reform measures which the Jeffersonians might pass in derogation of the rights of property. A historian of the U.S. Supreme Court notes that "Marshall was no superstitious pedant to regard the law as sacred in itself, he understood thoroughly that it is and must be a servant of economics and politics; his office was to see to it that it remained a servant of what he regarded as good economics and good politics."[18] His idea of nationalism was that his class ought to rule the nation.[19] In fact, Marshall thought that it was not only the Supreme Court, but it was society itself, which was established to protect the individual citizen's right to own property.[20] In the U.S., the contracts clause, the commerce clause, the due process clause, and the takings clause provided legal justification for the Supreme Court to write their economic philosophy of *laissez faire* into the constitution.

From the beginning of the nineteenth century up to the present, the principal function of the American Supreme Court "has been to protect the market from various regulatory incursions by the different levels of government" for "until the late 1930s the prevailing economic ideology on the Supreme Court was that of the classical

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[16] J. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 314 (1996).

[17] H. ABRAHAM, *op. cit.*, note 12 at 309 (1968).

[18] BATES, THE STORY OF THE SUPREME COURT 86 (1937).

[19] *Id.* at 100.

[20] Ogden v. Saunders, 12 Wheat. 346 (1827) (Marshall, J., dissenting).

political economists, who had a strong bias in favor of the unregulated market."[21]

It was during the heyday of the economic ideology of *laissez faire* after the turn of the century that the U.S. Supreme Court intruded into the domain of economics. There was an ideological revolution in American politics where the dominant political groups, represented by Presidents Harding and Coolidge made *laissez faire* a plan for dynamic action.[22] The U.S. Supreme Court thus used the due process clause of the Federal Constitution as the instrument to invade the domain of economic policy and strike down legislation passed by the U.S. Congress as unconstitutional for being "unreasonable," "oppressive," or "impairing the liberty of contract." Thus, the Court invalidated economic reform legislation like the acts which outlawed the "yellow dog" contracts,[23] maximum hours legislation,[24] and minimum wage legislation.[25] It also ruled labor strikes to be "unlawful restraints on trade."[26] Chief Justice William Howard Taft is remembered as the one who invented government by injunction to restrain labor strikes. And the U.S. Court read the Tenth Amendment (the "reserved power clause"), as if it restricted delegated powers of Congress to tax, regulate commerce, and make all laws necessary and proper to execute specific grants.[27] The Supreme Court invalidated so many laws at this time that Justice Holmes, in one of his dissents, had to remind his colleagues that the framers of the Constitution did not write Herbert Spencer's *Social Statics* into the Constitution.[28] Spencer's Social Statics applied Darwin's evolutionary theories to ethics and sociology and advocated social Darwinism.

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[21] HOVENKAMP, "CAPITALISM" in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 118 (1992).

[22] *See* MASON, SECURITY THROUGH FREEDOM: AMERICAN POLITICAL THOUGHT AND PRACTICE 56 (1955).

[23] Adair v. U.S., 208 US 161 (1908) and Coppage v. Kansas, 236 US 1 (1915).

[24] Lochner v. New York, 198 U.S. 425 (1905).

[25] Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[26] WolffPacking Co. v. Court of Industrial Relations, 262 U.S. 522 (1923).

[27] MURPHY, COMPARATIVE CONSTITUTIONAL LAW 263 (1977).

[28] *See* Lochner v. New York, 198 U.S. 425 (1905) (Holmes, J., dissenting).

The backlash of this ideological revolution in the U.S. reached the Philippines and goaded the Philippine Court to intrude into the domain of economics. In 1924, the Philippine Supreme Court invalidated Act No. 3071 or the Women and Child Labor Law,[29] as well as an executive order fixing the price of rice.[30]

WRITING ECONOMIC POLICIES INTO THE CONSTITUTION LEADS TO INTRUSION

When the 1935 Constitution was being crafted, the delegates were very much aware of the use of judicial review to veto economic policies laid down by the National Assembly. One delegate, the late University of the Philippines President Vicente Sinco, writes that one of the factors that led to the unnecessary length and minuteness of the judiciary provisions was the desire of the delegates to insert in the Constitution doctrines declared by the Supreme Court in previously decided cases.[31] Doubtless, the delegates wanted not only to insert doctrines of the Supreme Court but also to reject precedents laid down by the Supreme Court which ran counter to the philosophy of the Constitution. Thus, the framers of the Constitution saw to it that the Supreme Court doctrines laid down in *People v. Pomar* and in *U. S. v. Ang Tang Ho* would have no precedent value by inserting provisions in the constitution calculated to blunt the legal effect of these two cases. They provided that the state "shall afford protection to labor, especially working women and minors, and shall regulate the relations between landowner and tenant, and between labor and capital in industry and in agriculture."[32] They also empowered the Executive "in times of war or other national emergency" by providing that "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."[33] In fact, the 1935 Constitution contained a number of economic policy guidelines, in addition to natural resources and

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[29] People v. Pomar, 46 Phil. 440 (1924).
[30] People v. Ang Tang Ho, 43 Phil. 1 (1923).
[31] V. SINCO, PHILIPPINE POLITICAL LAW 305 (1962).
[32] CONST. (1935), art. XIV, sec. 6.
[33] CONST. (1935), art. VI, sec. 26.

educational policies. In the view of J. Ralston Hayden, the 1935 Constitution was socialistic rather than capitalistic.[34] Some of its critics have called it radical, a product of the socialistic temper of the times.[35] Certainly, this runs counter to the advice of Justice Holmes that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*."[36]

The 1973 Constitution re-enacted the policy provisions of the 1935 Constitution. But the present constitution, aside from re-enacting the policies laid down in the 1935 Constitution, went on to add several more policies on the national economy and patrimony, on social justice and human rights, including labor, agrarian and natural resources reform, urban land reform and housing, health, women, role and rights of people's organizations, and education, science and technology, arts, culture, and sports, and even the family. Indeed the critics of this constitution have called it "verbose" and "long-winded" and one of the longest constitutions in the world. The prolixity of our present constitution can be equated only by the brevity of the American constitution.

In this sense, therefore, we can see the differences between the American Constitution and its Philippine counterpart. While the U.S. constitution is a model of conciseness containing only three basic parts, namely (1) bill of rights, (2) organization and functions of government, and (3) method of amendment, the Philippine constitution contains, in addition to these, economic, social and educational policies. Students of comparative constitutional law observe that generally, countries which drafted their constitutions before the advent of industrial capitalism have very little to say about governmental regulation of the economy. On the other hand, countries which started afresh in the 20th century became cognizant of the costs as well as the benefits of capitalism, and explicitly laid down policies to regulate the excesses of the marketplace and to recognize the positive

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[34] J. HAYDEN, *op. cit.*, note 10 at 242.
[35] V. SINCO, *op. cit.*, note 31 at 467.
[36] Lochner v. New York, *supra*.

obligation of the government to foster economic well-being.[37] Thus, the Irish Constitution reflects the traditional Catholic emphasis on social justice. The German constitution established a "democratic and social federal state," and this provision alone was used by the German Supreme Court to justify the major role of the state in the country's economic recovery and the expansion of social services. The Japanese Constitution authorizes the Diet to regulate wages and hours and limits the use of property rights in "conformity with public welfare."[38] As Justice Bellosillo observed in his *Manila Prince Hotel v. GSIS* ruling,

> As against constitutions of the past, modern constitutions have been generally drafted upon a different principle and have often become in effect extensive codes of laws intended to operate directly upon the people in a manner similar to that of statutory enactments, and the function of constitutional conventions has evolved into one more like that of a legislative body.[39]

The 1987 Constitution follows the modern trend. It is not made out of the same mold as the American federal constitution. While the latter is almost silent on government intervention in the economy, our constitution is replete with provisions for regulation of the economy and of the state's positive obligation to promote social justice. As its framers like to put it, our present constitution is "pro-people, pro-poor, and pro-Filipino." This means that the Philippine Supreme Court, unlike the U.S. Supreme Court, cannot promote the development of capitalist institutions at the expense of the people. It cannot assume the function of protecting the market from various regulatory incursions if these conflicts with the economic policies incorporated in the constitution. While the constitutional tools which may be used to protect free enterprise have been copied in the present constitution, like the due process clause, the equal protection clause, the contracts clause, and the takings clause, these have been neutralized not only by reversals by the Supreme Court but also by countervailing policies in the constitution itself. Unless we reduce the constitution to a mere imitation of its American counterpart, the Supreme Court cannot

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[37] W. MURPHY, *op. cit.*, note 27 at 263-264.
[38] *Ibid.*
[39] Manila Prince Hotel v. GSIS, *supra, see note 3.*

behave like the U.S. Supreme Court during the Gilded Age when it tilted the balance in favor of free markets over the sovereignty of the people.

Of course, the basic understanding behind our politico-legal culture is that the function of our electorally accountable legislative branch is to make policy choices; the function of our electorally accountable executive branch is to administer policy choices; and the function of our electorally unaccountable judicial branch is merely to enforce policy choices. Proceeding from this premise, it becomes clear that it is the duty of our Supreme Court to enforce policy choices, especially if these are provided for in the fundamental law. While "originalists" think that it is illegitimate for the judiciary to go beyond the enforcement of policy to the making of policy, and while it is illegitimate for the judiciary to oppose itself to the democratic departments of government, it must now follow that it is the legitimate duty of the judiciary to enforce policy which has been constitutionalized by the people. It must be granted that policies constitutionalized by the people constitute valid delegations of power to the Supreme Court, which it cannot shirk to enforce if its members are to be true to their oath to support the constitution. To draw an analogy from the U.S. Constitution, it is like the ideals of liberty and equality which are enshrined in that constitution. To paraphrase Justice Benjamin Cardozo, these "are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders."[40] Since the "body of defenders" referred to is the Supreme Court, it cannot shirk the defense of provisions embodied in the constitution without abdicating its duty, not to mention that of the individual justices to uphold the constitution. To quote Justice Felix Frankfurter in another context, "the course of constitutional history has cast responsibilities upon the Supreme Court which it would be 'stultification' for it to evade."[41]

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[40] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 92 (1921).
[41] Rochin v. California, 341 U.S. 173 (1952).

In the face of the numerous policies laid down in the constitution, it would now be illegal for the Supreme Court to use judicial review to veto economic or social reform measures which implement the policies laid down in the Constitution. It can no longer seize upon the due process clause or the contracts clause to invalidate social and welfare legislation as it used to do. For instance, the Court would not now be able to declare the Women and Child Labor Law unconstitutional in the face of the constitutional policy on protection of women and minors. It would not be able to invalidate the price control law in the face of the clear delegation of power to the President in times of national emergency.

On the other hand, would the Court be able to check executive action or invalidate legislative acts by invoking the economic policies in the constitution?

With regard to executive and administrative acts, this would depend on whether the policies invoked are self-executing or not. If the policies are self-executing, then the court on review can nullify executive or administrative acts contrary to constitutional policy. A provision which is complete in itself and becomes operative without the aid of supplementary or enabling legislation, or that which supplies a sufficient rule by means of which the right it grants may be enjoyed or protected, is self-executing. On the other hand, a provision which lays down a general principle, without more, is not self-executing.[42]

However, unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, the presumption is that all provisions of the constitution are self-executing, otherwise, the legislature would have the power to ignore and practically nullify the mandate of the fundamental law.[43] This distinction between self-executing and non-self-executing provisions of the constitution proceeds from the requirement in Article VIII, Section 1 on the definition of judicial power that mandates the courts to settle only controversies involving rights which are demandable and enforceable.

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[42] Manila Prince Hotel v. GSIS, *supra, see* note 3.
[43] *Id.*

In other words, the constitutional mandate must be judicially identifiable and its breach judicially determined, and the protection for the right asserted can be judicially molded.[44]

Since most constitutional provisions are self-executing, this would mean that the people have delegated to the Court the power as well as the duty to shoot down any executive act which would be diametrically opposed to the economic policy provisions of the constitution. This is what the Court did in the case of *Manila Prince Hotel v. GSIS*.[45]

With respect to laws passed by Congress, however, even economic principles which are not self-executing may be used to strike down statutes as unconstitutional, if these are sufficiently vague or general enough to allow for interpretation. By invoking the history of a concept, or the spirit of the law, or the dictates of just reason, the Court can declare a statute in violation of the constitution. In fact, the "non-interpretivists" would make it not only appropriate but necessary for judges to infuse the constitution with contemporary conceptions of justice, with the aim of rendering the constitution a morally evolutionary document untied to its text.[46] Taking the oil deregulation case as an illustration, note how a phrase like "unfair competition" was used to strike out the law as unconstitutional. A phrase like this, or "national patrimony" in the *Manila Prince Hotel case*, is so general that even reasonable men disagree as to its meaning. An activist court will construe it liberally; a "restraintist" court will interpret it strictly. In both of these decisions, the majority of the Court resorted to a method of reasoning called the "prudential approach," which balances the costs and benefits of economic policy after taking the facts into consideration. In both of these cases, the facts simply played into the economic policies written in our constitution. But all of the arguments in both cases may just be rationalizations for a Court that believes that it has a unique function in our society.

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[44] Baker v. Carr, 369 U.S. 186 (1962).

[45] *See note 3, supra.*

[46] MCDOWELL, "INTERPRETIVISM AND NON-INTERPRETIVISM," in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* at 436.

Does the Supreme Court have a unique role in a democratic society?

The Court would answer this query in the affirmative.

"The Constitution mandates this Court to be the guardian not only of the people's political rights but their economic rights as well," said Justice Reynato Puno in the majority opinion in the oil deregulation case.[47] What comes out clear is that the Court is now cognizant of its role to intervene in economic policy to enforce constitutional provisions. Judicial review under the present constitution is no longer a single-shot rifle kept behind the door, to borrow the metaphor of the U.S. Supreme Court. Rather, it is now a double-barreled shotgun brought into the open to instill the fear of God in the hearts of those who would violate the economic policies of the constitution.

Yet our Supreme Court had always professed to judicial passivity, not activism, even as it intervenes in economic policy. This is possible under our present constitution because of the broad range of policies written in our charter. "The reasons for denying a cause of action to an alleged infringement of broad constitutional principles are sourced from basic considerations of due process and the lack of authority to 'wade into the uncharted ocean of social and economic policy-making,'" said the Court, through Justice Panganiban, in refusing to overrule the Senate's ratification of the WTO [World Trade Organization] agreement.[48] He cited the concurring opinion of Justice Feliciano in the *Oposa case*,[49] which expressed the view that "[w]here no specific, operable norms and standards are shown to exist, then the policy-making departments — the executive and the legislative departments — must be given real and effective opportunity to fashion and promulgate these norms and standards, and to implement them before the courts should intervene." Yet the same Justice Panganiban, in the oil deregulation case, even as he declared that the Court was not

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[47] Tatad v. Secretary, *see* note 4, *supra*.
[48] Tañada v. Angara, G. R. No. 118295, May 2, 1997.
[49] Oposa v. Factoran, G.R. No. 101083, July 30, 1993, 224 SCRA 792 (1993).

making a policy statement against deregulation, concurred in the opinion that struck down the Oil Deregulation Act of 1997 as unconstitutional, saying that everyone, rich or poor, must share in the burdens of economic dislocation.[50]

Significant in the *obiter* of the Court in the oil deregulation case is its realization that it has a unique function to perform. Just as the American Supreme Court realized its role to protect the rights of minorities and the marginalized, our court has recognized its function of protecting the economic rights of the majority who are poor and powerless. "The protection of the economic rights of the poor and the powerless is of greater importance to them for they are concerned more with the esoterics of living and less with the esoterics of liberty. Hence, for as long as the Constitution reigns supreme so long will this Court be vigilant in upholding the economic rights of our people especially from the onslaughts of the powerful," declared the Court in the oil deregulation case. This has been criticized as pure populist rhetoric by the critics of the decision. They are right in one aspect: this pronouncement sows the seeds of activism on the part of the Supreme Court to perform a unique function in a modern democratic state. This unique function is to dispense justice under a capitalist system, where the rights of marginalized groups must be protected from "the onslaughts of the powerful." The powerful groups referred to by the Court here must be the economic groups who have the resources to win their battles in the legislative and in the executive forums. Certainly, they have every reason to complain against judicial intrusion on economic policy, for they see the role of the judiciary as limited to enforcing the terms of a statute which delineates the spoils of legislative battles.

Perhaps this may be a new development in our jurisprudence. It is not in other lands. Long ago in England, the concept of equity was developed for the protection of the legally weak and incapable.[51] The U.S. Supreme Court followed more recently, giving substance to

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[50] Tatad v. Secretary, *supra*, (Panganiban, J., concurring).

[51] P. HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 16 (1990).

. the concept of "equal protection" by affirmative action.[52] In our case, the framers of our constitution have drawn the lines of judicial power quite broadly to stifle all debate about the legitimacy of judicial supremacy.

JUDICIAL SUPREMACY UNDER THE PRESENT CONSTITUTION

In both the 1935 and the 1973 Constitutions, the provisions of Act No. 23, passed in 1932, which emasculated judicial power as against legislative power, were constitutionalized. The 1935 Constitution provided that "no treaty or law may be declared unconstitutional without the concurrence of two-thirds of all members of the court."[53] Likewise, the 1973 Constitution provided for a vote of at least 10 members to declare a law, treaty, or executive agreement unconstitutional.[54]

But the formula of the present Constitution for the distribution of power among the three departments of government is somewhat different. Born out of the trauma of martial law, the 1987 Constitution relies on a strengthened judiciary not only to safeguard the liberties of the people but also to prevent the unwarranted assumption of power by the other two departments of government. So it modifies the formula used in the 1935 and the 1973 Constitutions by providing that —

> All cases involving the constitutionality of a treaty, international or executive agreement, or law,...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.[55]

This means that even five justices where only a majority of eight took part in the deliberations can declare a law unconstitutional. The removal of the two-thirds of the entire membership vote

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[52] *Id.* at Ch. 7.
[53] CONST. (1935), art. VIII, sec. 10.
[54] *See* CONST. (1973), art. X, sec. 2.
[55] CONST., art. VIII, sec. 2.

requirement and adoption of the simple majority of those who took part in the deliberations rule has unshackled the Supreme Court to make it really supreme; unlike its American counterpart, it is no longer "the least dangerous branch."

But the more significant innovation in the present constitution is the definition of judicial power, which expands the scope of judicial review and gives access to ordinary taxpayers to the Court to raise even political questions. As the Court itself put it, the broadened concept of judicial review under the present constitution is an "innovation,"[56] born out of the experience of the people under martial law. The definition of "judicial power" includes "the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and 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."[57] We should not miss here the significance of stating the definition of judicial power in terms of "duty," and that such duty is imposed by the constitution. In short, the Court has the duty to render justice under this definition of judicial power. This should include social justice, one of the basic policies of the constitution. Social justice is basically economic justice, although these terms are also susceptible of varying definitions.

This provision of the constitution erodes the "political question" doctrine and, as the 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."[58] As the proponent of the innovation, Justice Roberto Concepcion, put it —

> The judicial power is meant to be a check against all powers of government without exception, except that judicial power must be exercised within the limits confined thereto. A matter of

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[56] Tañada v. Angara, *supra, see note* 48.
[57] CONST., art. VIII, sec. 1.
[58] Marcos v. Manglapus, G.R. No. 881211, September 15, 1989, 177 SCRA 695 (1989).

> national defense, national interest, national welfare is not necessarily beyond the jurisdiction of judicial power.[59]

EROSION OF TECHNICAL RESTRAINTS ON JUDICIAL REVIEW

Judicial review, however, should not be considered a roving commission for the Supreme Court to check all abuses committed by the executive and legislative arms of the government. There are built-in constraints as well as technical restraints to judicial review premised on separation of powers and on the republican nature of our system of government. The restraints founded on separation of powers include requirements of "standing," "ripeness," "mootness," and the political question doctrine. The restraints stemming from the republican nature of our government include doctrines that the decision on constitutional issues must be necessary to the determination of the case itself, and that the decision should not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.[60] There is also the doctrine of "primary jurisdiction" with regard to administrative agency action, and its converse, judicial incompetence to decide on economic and technical issues.

Fortunately or unfortunately, all of these technical restraints and institutional constraints have been eroded, either by chipping away at the elements that constitute these or by constitutional fiat. "Standing," which identifies who may bring claims, has given way to the taxpayer suit. "Ripeness" and "mootness," which determines when such claims may be brought, are still contained in the definition of "judicial power" in the form of the "case or controversy" requirement, with "ripeness" as front-end counterpart of "mootness." But these requirements may be overlooked by the Court in important public policy cases. As to the doctrine of "primary jurisdiction," the Court has looked suspiciously on this doctrine where there are allegations of irregularities or anomalies, like the "petroscam scandal" in the case of

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[59] III Record of the Constitutional Commission 645-646 (1986).

[60] Dumlao v. Comelec, G.R. No. 52245, January 22, 1980, 95 S CRA 392 (1990).

Garcia v. Board of Investments.[61] As for the late lamented "political question" doctrine, this has been emasculated by the new definition of judicial power.

Yet the definition of judicial power under Article VIII is not really an innovation, for even the "restraintists" in the U.S. acknowledge that in instances of obviously capricious, unreasonable, or arbitrary exercise of legislative or executive power, the judiciary may invoke its power to nullify policy.[62] There is already a settled definition of "grave abuse of discretion" in our jurisprudence: it is such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction; where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility which is so patent and so gross as to amount to an evasion of positive duty or to a virtual refusal to perform the act enjoined or to act at all in contemplation of law.[63] Mere abuse of discretion is not enough.[64] Certiorari, prohibition, and mandamus are proper tools to raise constitutional issues to review, prohibit, or nullify acts of the legislature and executive officials.[65]

Of course, the definition of "grave abuse of discretion," while confined to discretionary acts committed in the extreme, is highly subjective, which gives the judges sufficient leeway in deciding one way or the other. Aside from that, certiorari, prohibition, and mandamus are prerogative writs, which means that the judges enjoy sufficient discretionary power. In addition, the linchpin element of "want of jurisdiction" is very flexible and can be inflated to justify the court's inclination to intervene. Because of this, there is no bright line dividing certiorari from writ of error. All of these can be used by an activist court to defeat the "political question" doctrine as well as the doctrine of primary jurisdiction with respect to acts of executive and administrative agencies. But this is the essence of writs of certiorari,

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[61] *See note 1*, (Aquino, J., dissenting).
[62] C. DUCAT & H. CHASE, *op. cit.*, note 15 at 61.
[63] Alafriz v. Nable, 72 Phil. 280.
[64] Tañada v. Angara, *supra*.
[65] *Id.*

which are largely discretionary, or, in the words of Justice Murphy, "matters of grace."

CONCLUSION

Critics of the Supreme Court are not really against judicial review of economic policy in principle. They are against judicial review only if the Court declares a law unconstitutional, or if it reverses administrative agency action implementing economic policy as grave abuse of discretion. In short, they are against the use of judicial review as a veto power, with the Supreme Court sitting as a super legislature or as super executive. But this depends, as one wag puts it, on "whose ox is being gored." In any case, the assumption is that the since the Court's members are appointive, they are not accountable to the people and may give free rein to their personal philosophies and even idiosyncrasies without considering the needs and desires of the people.

This is apparently in line with the democratic theory of government. Yet as Dean Eugene Rostow of Yale notes, "government by referendum or town meeting is not the only possible form of democracy. The task of democracy is not to have the people vote directly on every issue, but to assure their ultimate responsibility for the acts of their representatives, elected or appointed."[66]

This attack against judicial "intrusion" in economic policy is off-tangent in the Philippine context. This view of the limited role of the Court uses the American constitution as its frame of reference, and sees the Court as the counterpart of the American Supreme Court. Indeed, it is reminiscent of the American cultural bias for non-intervention in economic affairs. Perhaps in our day and age, with globalization and liberalization of trade and commerce as the pervasive buzzwords, this is the proper perspective. But the historical fact is that the Philippine constitution is not completely carved out of the pattern of the American constitution. The Philippine constitution is cast in the modern mold which lists a number of economic, social

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[66] Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, at 197 (1952).

and educational policies which the Court is bound to enforce. This enforcement of economic policy, which necessarily carries with it the interpretation of words and phrases used in the constitution, gives the Court not only the opportunity but also the duty to review economic measures implementing policy. Unfortunately or fortunately, depending on one's bias, questions of who gets what economic rewards and why, are intricately bound up with legal rules and processes outlined in the constitution. In our day and age, we have to realize the fact that there is no clear dividing line between politics and economics. And law, which is just a reflection of political power, almost always intersects with economics. This holds true most especially in the constitution.

Because of the innovation in the present constitution defining judicial power, economic interest groups that lose the battle in the legislative and executive forums go up to the Court for redress. It would be an abdication of duty for the Court to refuse to decide on issues that implement economic policies incorporated in the constitution. While there are a number of institutional constraints and technical restraints which the Court can use to deny due course to certiorari petitions involving grave abuse of discretion on the part of the executive and the legislative branches, or to petitions alleging violation of the charter, the Court cannot escape its duty to decide appropriate cases on the ground that these treat of economic matters.

Industrialization and globalization is the path that we have chosen for development. As our economists admit, there will be winners and there will be losers under this scheme. Right now, it is easy to tell who will be the losers in our country. It is the weak economic groups who have been marginalized by economic power. Does the Supreme Court recognize a unique function to protect their economic rights under the constitution, or will it refuse to act and let the invisible hand decide the fate of the losers?

If so, that means that the losers will themselves become invisible peoples in the eyes of the Constitution.