Judicial Supremacy

By
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THAT the Executive or the Legislative or both combined should play the dominant role in the government is easy to understand. Each is inherently a political agency. Each is immersed in the conduct of public affairs. The case for the Executive is particularly strong. He initiates and proposes policies, may have a hand in its translation into legislation, and thereafter is entrusted with their implementation and execution. To him usually falls the task of conducting foreign relations, admittedly one of delicacy and gravity. And in these days and in the immediately foreseeable future, it has an importance second to none, the more so, in view of the apparently vanishing distinction between what is of domestic and what is of foreign concern. It is likely too that he is in control of the armed forces. He is required to be on the alert to protect the country from internal disorder and foreign aggression. He carries on the administration of government, a function of the utmost complexity and intricacy what with the increasing and multifarious activities now considered legitimately within the governmental sphere. This is so whether the government is that of a service or welfare state on the one hand or of a police or garrison state on the other. He cannot, then, even if he wishes to, avoid the responsibilities of leadership.

As for the legislative branch, it, too, by itself or in combination with the Executive, is easily in a position to be the controlling agency. Its approval is usually requisite to transform policies into legislation. If led by strong personalities and pitted against a relatively weak Executive, it can make its wishes prevail. It finances governmental operations and can make its disapproval felt with reference to projects it does not approve. It can, if it is so minded, as a matter of fact the constitution may require it, legislate to supervise the administration of government and the conduct of its affairs by the Executive. It may lend its support to the Executive on terms of its own making. Together with the Executive then, it participates in the making of fateful decisions. There is not one aspect of the major task of each that does not have a bearing on the lives of all. Together they determine the course of government. Together, or

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much more likely, one following the lead of the other, with the circumstances of the times calling more for Executive leadership, they in actual fact control governmental action. So it has been in the Philippines for almost half a century.

Why then talk of judicial supremacy? The judiciary under a tripartite division of powers has the relatively unspectacular role of determining cases and controversies. Its duty is to decide, to apply the law to the litigation before it. It is not supposed to meddle in the active conduct of affairs. In the Philippines at least there is respectable tradition to looking for leadership either in the executive or legislative branches. To repeat, could the judiciary, more specifically, the Supreme Court, be the dominant agency of government?

If the possession of the power to pass upon the validity of statutes is the sole consideration, the answer may well be in the affirmative. It would seem however that for judicial supremacy to exist, there is one other relevant factor in addition to the existence of the power of judicial review over legislation. That is its approach to constitutional questions. Of more importance than the possession of the power of judicial review is its exercise.

Possession of the power of judicial review.—The Constitution of the Philippines in defining the appellate jurisdiction of the Supreme Court of which it may not be deprived by the Congress of the Philippines includes all "cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question".[1] This is an express recognition of the power of judicial review.[2] In addition, the Constitution likewise regulates the exercise of such power by providing that in all cases involving the constitutionality of a law, treaty, executive order or regulation or ordinance, no treaty or law may be declared unconstitutional without the concurrence of two-thirds of all the members of the Supreme Court.[3]

In a series of cases starting from *Angara v. Electoral Commission*,[4] Justice Laurel of the Supreme Court, who was one of the most prominent members of the Constitutional Convention, explained the rationale of the power of judicial review. He refers to the peculiarly American doctrine of imposing upon the judiciary the duty of enforcing the Constitution in the determination of actual cases and con-

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[1] Sec. 2, par. 1, Art. VIII, Constitution of the Philippines.

[2] "In our case, this moderating power is granted, if not expressly, by clear implication from section 2 of Article VIII of our Constitution." Angara v. Electoral Commission, 63 Phil. 139, at 158.

[3] Sec. 10, Art. VIII, Constitution of the Philippines.

[4] 63 Phil. 139.

troversies before it.[5] The doctrine postulates the supremacy of the Constitution with the Supreme Court as its guardian called upon to apply its provisions in cases before it where it deems such cases call for their application.[6] It will not shirk from its own sworn duty; it will not hesitate to give effect to the supreme law.[7] It must not sanction a constitutional breach.[8] It will strike down legislative acts in conflict with the fundamental law.[9] For the Supreme Court may be the last bulwark of constitutional government.[10] In appropriate cases then, it enforces the Constitution.[11]

> "And when the judiciary mediates to allocate constitutional boundaries, it does not assert superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them." [12]

Reduced to its simplest terms therefore this "peculiarly American doctrine" simply means that in performing its function under the theory of separation of powers, which is to decide actual cases before it, the judiciary must apply the appropriate constitutional provision and disregard any executive or legislative act in conflict with it. Such act is thereby considered unconstitutional and void.

The rhetoric is that of Justice Laurel, but the reasoning is straight from that of Chief Justice Marshall in the case of *Marbury v. Madison*,[13] the case where the doctrine of judicial review first had explicit statement and application by the Supreme Court of the United States.[14] In declining to issue mandamus to the Secretary of State Madison on the ground that the Supreme Court did not have such original jurisdiction under the Constitution of the United States and that the authority conferred by a Congressional act was not warranted by the Constitution, Chief Justice Marshall stated:

> "It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary Act.

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[5] *Angara v. Electoral Commission*, 63 Phil. 139 and *People v. Vera*, 37 O. G. 164.

[6] 1 Story on the Constitution, 5th Ed., 275-276; 1 Willoughby on the Constitution, 3; Lerner, "The Constitution and Court as Symbols" in 1 Selected Essays on Constitutional Law 754.

[7] *People v. Vera*, 37 O. G. 164.

[8] Laurel, diss., *Government v. Hongkong and Shanghai Bank*, 37 O. G. 2784.

[9] Laurel, con., Zandueta v. De la Costa, 38 O. G. 2352.

[10] Laurel, con., Zandueta v. De la Costa, 38 O. G. 2352.

[11] *Angara v. Electoral Commission*, 63 Phil. 139.

[12] Idem.

[13] *Marbury v. Madison*, 1 Cranch 137.

[14] 1 Willoughby on the Constitution, 3; Jackson, *The Struggle for Judicial Supremacy*, 24.

"Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative Acts, and, like other Acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative Act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

x x x.

"If an Act of the Legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was law? x x x

"It is emphatically the province and the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

"So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary Act of the Legislature, the Constitution, and not such ordinary Act, must govern the case to which they both apply." [15]

It is to be noted that when the authority of the Supreme Court to declare an act of Congress void was distinctly announced for the first time in 1803, the opinion did not single out the specific source of such authority but instead proceeded from assumed fundamental principles underlying the Constitution and constituting the essence of judicial duty. Marshall's thought and words bear the imprint of one of Hamilton's essays in *The Federalist*.[16] Ken [17] and Webster [18] later on spoke in similar vein.

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[15] 1 Cranch 137.
[16] Essay No. 78.
[17] Kent's Commentaries, Chapter 20.
[18] 3 Works 30.

It is not to be lost sight of however that the opinion in *Marbury v. Madison*, in the words of Professor Corwin, "bore the earmarks of a deliberate partisan coup." [19] It must be viewed in the light of the then raging strife between the Federalists of which Marshall was one of the leaders before he became Chief Justice and from which he was never to be dissociated in belief if not in acts and the then Republicans under Jefferson and Madison.[20] The Chief Justice was able to seize the occasion to lecture to Madison, then Secretary of State, as to the performance of his duties and by denying the power of the court to issue a writ of mandamus to avoid placing the Supreme Court in the embarrassing position of having its writ disregarded by the Executive and to claim at the same stroke the much greater power of adjudging Acts of Congress void.

No doubt the partisan setting out of which the decision arose in the case of *Marbury v. Madison* plus the failure of the Chief Justice to point out the specific grants of power under the Constitution enabling the Court to invalidate acts of Congress have provided ammunition for those not enamoured of the institution of judicial review to denounce it as an instance of judicial usurpation.[21] Other critics, less bitter in tone, content themselves with the observation that the matter was left unprovided for.[22] "The problem was given no answer by the Constitution. A hole was left where the Court might drive in the peg of judicial supremacy, if it could. And that is what John Marshall did." [23]

This on the one side. On the other there is the categorical declaration of Chief Justice Taney, Marshall's successor on the bench, that the power to pass on the validity of legislative acts "was conferred on the general Government in clear, concise and comprehensive terms." [24] He had in mind the "supremacy clause" of the American Constitution providing:

> "This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." [25]

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[19] Corwin, "Marbury v. Madison and the Doctrine of Judicial Review" reprinted in 1 Selected Essays on Constitutional Law 128, 133.

[20] See in this connection the picturesque if highly partisan account of Beveridge in volume 3 of his *The Life of John Marshall*, 103-156. Cf. 1 Warren, *The Supreme Court in United States History*, 231-261.

[21] See Boudin, *Government by Judiciary*, and Roe, *Our Judicial Oligarchy*.

[22] Cf. Black's *Constitutional Law*, 3rd ed 56 and Jackson's *The Struggle for Judicial Supremacy*, 3-11.

[23] Curtis, *Lions Under the Throne* 12.

[24] *Ableman v. Booth*, 21 How. 517.

[25] Article VI, clause 2.

Construed together with the clauses under Art. III conferring the judicial power to the Supreme Court and extending such power to the cases and controversies therein enumerated, it would seem that there exists specific provisions upon which the grant of judicial review may be predicated.

Textwriters on the United States Constitution among whom are Justice Story,[26] Tucker,[27] and Watson [28] do not view it differently. Chief Justice Hughes in his book, *The Supreme Court of the United States*, speaks to the same effect.[29]

In any event the decision in *Marbury v. Madison* received acceptance from the legal profession. It became a part of the tradition of the judiciary. And the course of history has confirmed the existence of the power of judicial review. The growing cult of constitution-worship coupled with the belief that the judiciary, more specifically the Supreme Court, was its guardian, imparted to it an aspect of inevitability.

The power of judicial review was not however made use of to nullify Congressional legislation again until 1857 in the Dred Scott [30] decision, where the Supreme Court held that the act known as the Missouri Compromise was void as Congress was without power to legislate on the issue of slavery. This attempt on the part of the Supreme Court to settle the slavery question proved singularly ineffective. It was in the crucible of the Civil War that the issue was decided.

The concept of judicial review was not thereby discredited though. It demonstrated continuing vitality. It found expression in such decisions as *Ex parte Garland* [31] in 1867 where the Supreme Court held the test oath act invalid as applied to lawyers previously admitted to practice before the federal courts on the ground of its being violative of the bill of attainder and *ex post facto* clauses of the Constitution; *Hepburn v. Griswold* [32] in 1870 where the Supreme Court annulled the legal tender acts, only to reverse itself a year later in the case of *Knox v. Lee*;[33] the *Civil Rights Cases* [34] in 1883 where the Supreme Court declared unconstitutional an act intended to secure the full and equal enjoyment of the accommodations and facilities of inns, public conveyances, theatres, and other places of

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[26] 1 Story on the Constitution, 5th Ed., 275-276.
[27] 1 Tucker on the Constitution, 376.
[28] 2 Watson on the Constitution, 1192.
[29] At 78.
[30] *Dred Scott v. Sandford* (19 How. 393).
[31] 4 Wall. 333.
[32] 8 Wall. 603.
[33] 12 Wall. 457.
[34] 109 U. S. 3.

public amusements to citizens of every race and color; and *Pollock v. Farmers' Loan and Trust Co.*[35] where the Supreme Court held void the income tax law. Justice Brewer, speaking for the Supreme Court in 1901, put the matter accurately when he said:

> "The judicial duty of upholding the provisions of the Constitution as against any legislation conflicting therewith has become now an accepted fact in the judicial life of this nation." [36]

At the time the United States acquired the Philippines from Spain therefore at the end of the century, one of the principles of constitutional law binding on the territorial government established by her in the Philippines was this same concept of judicial review. The American lawyers who were admitted to practice in the Philippines took it as a matter of course that litigants could in proper cases question the validity of statutes or executive orders. The Filipino justices and judges who with their American brethren administered justice were soon made aware that the power to pass on the constitutionality of such statutes and executive orders was part of their judicial function. And the Filipino lawyers vied with the American members of the bar in raising the question of constitutionality whenever appropriate. The American practice therefore of appealing to courts through the form of lawsuits decisions reached by either the executive or legislative branches of the government became a part of the accepted practices of government in the Philippines early in the period of American sovereignty.

While it was not until March 22, 1907, that the Supreme Court of the Philippines set aside an act of the legislative branch in the case of *Casanovas v. Hord,*[37] as early as February 14, 1902, the Supreme Court in the case, *In re Prautch,*[38] dismissed as untenable the objection that there was an impairment of contractual obligation. And a year later, on May 16, 1903, the Supreme Court of the Philippines in the case of *U.S. v. Dorr* [39] likewise rejected the assertion that the judgment of the lower court did not grant jury trial as provided by the American Constitution. Likewise in a disbarment proceeding in 1904, *In re Montagne,*[40] the plea by respondent attorney that he was denied due process of law met with no sympathetic response from the Supreme Court. Various other cases could be

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[35] 157 U.S. 429 and 158 U.S. 601. This decision no longer controls after the passage of the Sixteenth Amendment to the Constitution of the United States.

[36] *Fairbanks v. United States,* 181 U. S. 286.

[37] 8 Phil. 125.

[38] 1 Phil. 132.

[39] 2 Phil. 269.

[40] 3 Phil. 577.

cited to show the readiness with which counsel would seize upon an alleged infrigement of constitutional right and call upon the court to exercise the power of judicial review.

As previously noted the power of judicial review is predicated upon the supremacy of the constitution, the provisions of which are to be applied by the judiciary in deciding cases where there was presented a conflict between such provisions and legislative or executive acts deemed controlling. While prior to 1935 the Philippines had no constitution, the invocation of a supreme or higher law was made possible by the application in the Philippines of certain fundamental rights in the American Constitution applicable wherever American sovereignty reigns [41] and the existence of organic laws for the Philippines, which defined and limited the powers of the governmental agencies therein established.[42] The basis was thus laid for the exercise by the judiciary of the power of judicial review.

Before the adoption of the Constitution of the Philippines in 1935, the Supreme Court had annulled thirteen legislative acts. In seven of those cases, the decisions turned upon the powers to be exercised by courts of the Philippines under the organic acts.[43] Property rights were safeguarded in four cases.[44] One case had serious political implications, the Supreme Court being appealed to decide a conflict between the American Governor-General and the Filipino legislative leadership in the government.[45] In its decision the Supreme Court was divided along racial lines, all the Americans on the bench and one Filipino sustaining the power of the Governor-General and the remaining Filipino members upholding the contention of the legislative leaders. After the Constitution was adopted, only two decisions had so far been rendered annulling a statute.[46]

The Supreme Court was likewise appealed to in other cases to restrain or to compel action on the part of the legislative [47] or executive [48] branches, but it had wisely refrained from doing so.

It is in such a background that the power of judicial review in the Philippines as granted by the Constitution should be viewed.

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[41] *United States v. Bull*, 15 Phil. 7;; *Downes v. Bidwell*, 182 U. S. 244.

[42] *Concepcion v. Paredes*, 42 Phil. 599.

[43] *Omo v. Insular Government*, 11 Phil. 67; *Weigall v. Shuster*, 11 Phil. 340; *Barrameda v. Moir*, 25 Phil. 44; *Hamilton v. McGirr and Abreu*, 30 Phil. 563; *Concepcion v. Paredes*, 42 Phil. 599; *Agcaoili v. Suguitan*, 48 Phil. 676; *Pasay Trans. v. Manila Electric*, 57 Phil. 600.

[44] *Compañia v. Board*, 34 Phil. 136; *U.S. v. Ang Tang Ho*, 43 Phil. 1; *People v. Pomar*, 46 Phil. 440; *Casanovas v .Hord*, 8 Phil. 125.

[45] *Government v. Springer*, 50 Phil. 259; See 277 U.S. 189.

[46] *People v. Vera*, 37 O. G. 164; *Vargas v. Rilloraza*, G. R. No. L-1612.

[47] *Abueva v. Wood*, 45 Phil. 612 and *Alejandrino v. Quezon*, 46 Phil. 83.

[48] *Barcelon v. Baker*, 5 Phil. 87; *Severino v. Governor-General*, 16 Phil. 366; *Forbes v. Chuoco Tiaco*, 16 Phil. 534; *Abueva v. Wood*, 45 Phil. 612.

Judicial approach to constitutional questions.—Under the Constitution the tendency of parties to test the legality of acts both of the executive and legislative branches goes on unchecked. Prior to World War II, the Supreme Court of the Philippines was appealed to in order to check executive power believed to be without constitutional sanction. In a series of decisions,[49] the Supreme Court refused the thankless role of acting as a brake to such assumption of executive authority. Even when the Executive and the National Assembly put through a scheme whereby the judiciary in its lower hierarchy was reorganized, the Supreme Court through the invocation of the doctrine of estoppel was able to avoid passing upon the legality of the act.[50] Justice Laurel, however, in a concurring opinion, was for meeting the issue of constitutionality squarely and for holding the measure constitutional.[51] Likewise it was to the Supreme Court that the determination of the question of the extent of the power of the Electoral Commission, Electoral Tribunal now, over all contests relating to the election, returns, and qualifications of members of the National Assembly, now the Congress of the Philippines, was left.[52]

As in the United States, corporate enterprises not satisfied with social welfare legislation, threatening to cut into their profits, laid their grievances before the Supreme Court. Unfortunately for them, the Supreme Court enforcing a Constitution that accords due protection to property but which at the same time is explicit in its concern for labor,[53] showed scant sympathy to their litany of grievances. Thus it sustained legislation providing for collective bargaining,[54] security of tenure,[55] minimum wages,[56] compulsory

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[49] *Planas v. Gil*, 37 O. G. 1228; *Villena v. Secretary of the Interior*, 38 O. G. 527; *Cristobal v. Labrador*, 40 O. G. 9th Sup., 298; *Pelobello v. Palatino*, 40 O. G. 1466.

[50] *Zandueta v. De la Costa*, 38 O. G. 2352.

[51] "I think the constitutional issue thus squarely presented should be met courageously by the Court, instead of applying to the petitioner the doctrine of estoppel which, in my humble opinion, is entirely inapplicable. The life and welfare of this government depends upon close and careful observance of constitutional mandates. x x x I am of the opinion that Commonwealth Act No. 145 insofar as it reorganizes, among other judicial districts, the ninth judicial district, and establishes an entirely new district comprising Manila and the provinces of Rizal and Palawan, is valid and constitutional. This conclusion flows from the fundamental proposition that the legislature may abolish courts inferior to the Supreme Court and therefore may reorganize them territorially or otherwise thereby necessitating new appointments and commissions." *Zandueta v. De la Costa*, 38 O. G. 2352, at 2357.

[52] *Angara v. Electoral Commission*, 63 Phil. 139.

[53] Sec. 5, Art. II and Sec. 6, Art. XIV.

[54] *Pampanga Bus Co. v. Pambusco Employees' Union*, 38 O. G. 984.

[55] *Manila Trading v. Zulueta*, 40 O. G., 6th Sup. 183.

[56] *International Hardwood v. Pangil Federation*, 40 O. G., 9th sup., 118.

arbitration,[57] and tenancy regulation.[58]. Of course, the interpretation of at least two of the above statutes, that on collective bargaining and security of tenure, was not too satisfactory for labor. Nor did the objections interposed by business concerning the constitutionality of measures regulating the issuance of securities [59] and public services or utilities [60] fare any better at the hands of the Supreme Court.

After the liberation of the Philippines from Japan and up to the moment of writing, the Supreme Court still has its hands full of cases decisive in its effects on the political and economic future of the Philippines. The presence of the American Army in the Philippines has complicated its problems. Instances of its none too tender regard for the liberties of individuals have been cited in appropriate cases before the Supreme Court.[61] This ticklish problem the Supreme Court has met without escaping criticism among its members and from the bar because of what they believe to be a failure of the Supreme Court to be zealous enough in its defense of civil liberties. The legality of proceedings against those Filipinos who collaborated with the Japanese of such intensity and degree as to qualify their collaboration as treasonable was dumped in its lap.[62] Fortunately for the policy then adopted by the political branches, the Supreme Court found nothing in international law, deemed a part of the Constitution of the Philippines, to stay the proceedings. That the policy to prosecute, at first relentlessly and later not too relentlessly applied, became finally one to condone "political and economic collaboration" [63] does not change the fact that at one time the whole question was transformed into a legal issue the final determination of which was left solely to the Supreme Court.

In addition, when the first presidential election post liberation showed a surprising strength in certain provinces of elements in the population who because of grievances avowed and of a more radical cast of thought in economic beliefs were stigmatized as dissidents, another grave national problem arose. The majority party countered with suspension of members asserted to be elected by their votes pending investigation of alleged election anomalies preventing a free expression of popular will. The minority took the matter to the Supreme Court and lost, that High Tribunal refusing to be

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[57] *Antamok Goldfields v. Court*, 40 O. G., 8th. Sup. 173.
[58] Tapang v. Court (40 O. G. 3107).
[59] People v. Rosenthal, 38 O. G. 988.
[60] *Pangasinan Trans. v. Public Service Comm.*, 40 O. G., 8th Sup. 57.
[61] *Raquiza v. Bradford*, 41 O. G. 676; Tubb v. Greiss, G. R. No. L-1325.
[62] *Laurel v. Misa*, G. R. No. L-409.
[63] Message of amnesty of the President of the Philippines.

dragged into what it considered to be purely a matter for legislative determination.[64] And when the suspension of such elective members became decisive factors in determining whether or not enough votes were mustered to allow a plebiscite on an amendment to the Constitution of the Philippines providing for equal rights to the Americans, the Supreme Court was again resorted to for the final word on the matter. Again the Supreme Court refused to intervene.[65]

Likewise it was to the Supreme Court that the nation looked for the determination of the question whether under the Constitution of the Philippines aliens could acquire residential lands. Considering the rather large number of resident aliens in the Philippines and the current policy to invite foreign capital to invest in the Philippines, this issue affects vitally the economic future of the Philippines. The Supreme Court true to its role of guardianship of the Constitution answered in the negative.[66] At present pending determination in the Supreme Court are cases wherein the validity of a legislative act granting preference to Filipinos in the renting of stalls in public markets, a measure which if effectively and vigorously enforced would end Chinese domination in that field,[67] and wherein the validity of an executive order of the President validating all withdrawal of bank deposits made during the Japanese Occupation and annulling all deposits.[68] In both cases, constitutional objections have been strongly interposed against their validity.

It would seem evident then that the Supreme Court of the Philippines can no more escape being a "political agency" [69] than can the Supreme Court of the United States. The power of judicial review makes that inevitable. Its "political nature", to use the words of Justice Jackson, gives it "significance" and cannot be "ignored".[70] Through it, the Supreme Court is more than a court of law. It is an arbiter of policy. Along with the executive and legislative branches it can chart the course of the state. That role is thrust upon it. It is no intruder in the field of active management of affairs. It has the opportunity of deciding issues "that touch the nerve centers of economics and social conflict." [71] It mediates between "the individual and government." [72]

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[64] Vera v. Avelino, G. R. No. L-543.
[65] *Mabanag v. Lopez Vito*, 43 O. G. 2079.
[66] *Krivenko v. Register of Deeds*, L-630.
[67] *Co Chiong v. Cuaderno*, G. R. No. L-1440.
[68] *Hilado v. Phil. National Bank.*
[69] *Haines, The Role of the Supreme Court in American Government and Politics*, 41.
[70] Jackson, *The Struggle for Judicial Supremacy*, 311.
[71] Frankfurter, *Mr. Justice Holmes and the Supreme Court*, 23.
[72] Frankfurter, *Mr. Justice Holmes and the Supreme Court*, 5.

That is why the question of approach to constitutional questions becomes decisive in the ascertainment of whether or not it is the dominant agency of government. Through the occasion and the manner of its exercise of judicial review, it may be determined whether it usurps the function properly belonging to the other two branches. It may restrain both, but the only check on the exercise of its power is its "own sense of self-restraint".[73] It may, if it wants to, decline to assume jurisdiction. It may, if it is so minded, fail to see any violation of constitutional guaranties. It can refuse to extend the borders of its competence. "A judicial retreat means an advance by the executive or the legislative; a surrender of authority by the Court means its assumption somewhere else." [74] That is why, to repeat, its approach to constitutional questions decided which of the main agencies of government will play the dominant role.

This approach to constitutional questions may best be discerned by an inquiry into the occasion and the manner of the exercise by the Supreme Court of its power of judicial review.

1. *Occasion for the exercise of judicial review.*—In language that heavily leans on principles previously announced by the Supreme Court of the Philippines and the United States Supreme Court, Justice Laurel in the leading case of People v. Vera announces the occasion that calls for the examination of the validity of statutes:

> "It is a well-settled rule that the constitutionality of an act of the legislature will not be determined by the courts unless that question is properly raised and presented in appropriate cases and is necessary to a determination of the case; i.e., the issue of constitutionality must be the very lis mota presented." [75]

As to who can properly raise and present the question of constitutionality, the opinion goes on to state:

> "The unchallenged rule is that the person who impugns the validity of the statute must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement." [76]

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[73] Justice Stone, diss., in *United States v. Butler*, 297 U. S. 1.

[74] Hamilton and Braden, *Special Competence of the Supreme Court*, 50 Yale L. J. 1319-1374. See also Dodd, *Judicially Nonenforcible Provisions of Constitutions* in 1 Selected Essays on Constitutional Law 356 at 357.

[75] *People v. Vera*, 37 O. G. 164. See also concurring opinion of Justice Brandeis in the case of *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288.

[76] *People v. Vera*, 37 O. G. 164. The opinion in the case of *Massachusetts v. Mellon*, 262 U.S. 447, puts it thus: "The party who invokes the power must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."

The existence of the above requirements for the power of judicial review to come into play provides avenues of escape for the Supreme Court in cases where for one reason or another it is unwilling to pass on the validity of a challenged statute. There must be an appropriate case; the constitutional question must be raised and presented by the proper party; and the issue of constitutionality must be the very *lis mota* presented.[77] The flexible character of each of the above requirements enables the judiciary to avoid passing on the validity of an act if it is so inclined.

a. *Appropriate case*—Judicial power, and judicial power alone, is what the Supreme Court possesses. And judicial power is limited to the decision of actual cases and controversies. The authority to pass on the validity of statutes is incidental to the decision of such cases where conflicting claims under the constitution and under a legislative act assailed as contrary to the constitution are raised.[78] It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between litigants.[79] However much a decision on a constitutional question may give vitality to or cut short the life of a policy determined upon by the political branches of the government, the judiciary cannot act unless there is an appropriate case. The Supreme Court cannot exercise any power or perform any trust or duty not pertaining to or connected with the administering of judicial functions.[80] So the theory of separation of powers prescribes.

In the language of the craft, it must have jurisdiction. There must be an appropriate legal proceeding.[81] There must be the proper cases with the appropriate parties.[82] The Supreme Court, like any other judicial body, has no jurisdiction to compel nor restrain legis-

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[77] The case of *People v. Vera* speaks of another requirement that the question must be presented at the earliest opportunity, so that if not raised by the pleadings, ordinarily it may not be raised at the trial, and if not raised in the trial court, it will not be considered on appeal. The opinion admits however that courts may in the exercise of sound discretion determine when a question affecting the constitutionality should be presented. Thus in a criminal case, the question may be raised for the first time at any stage of the proceedings, either on the trial court or on appeal. And in civil cases it may be raised for the first time on appeal if determination of the question is necessary to a decision of the case. Also where jurisdiction is involved, appellate court necessarily must pass upon it. As thus interpreted nothing much is left of the rule. It is to be noted however that in a later case, Robb v. People, 38 O. G. 831, the Supreme Court through the same Justice considered the constitutional question waived when raised for the first time in the oral argument on appeal.

[78] *Angara v. Electoral Comm.*, 63 Phil. 139; *Marbury v. Madison*, 1 Cranch 137.

[79] *Chicago and Grand Trunk Railway v. Wellman*, 143 U.S. 339.

[80] *Manila Electric Co. v. Pasay Transportation*, 57 Phil. 600.

[81] *Planas v. Gil*, 37 O. G. 1228.

[82] *Vera v. Avelino*, G. R. No. L-543.

lative [83] or executive [84] action. The legislative and executive branches are not bound to submit to the mandates of the court as to what to do or not to do. Even after they have acted, the validity of their acts may be beyond judicial scrutiny. If the action were brought against the President or the Congress, the courts under the theory of separation of powers may rightfully consider themselves as devoid of jurisdiction over coordinate agencies. Even if the suit were instituted against subordinate officials not enjoying the executive [85] or congressional [86] immunity and therefore rightfully within the personal jurisdiction of the courts, still jurisdiction over the subject-matter of the action may be lacking. The question raised may be political in character in the opinion of the court. There is then no appropriate legal proceeding.

What are political questions? In a concurring opinion in the case of *Vera v. Avelino*,[87] Justice Hilado of the Supreme Court of the Philippines adopts as criterion of distinction between such questions and controversies of a justiciable character the fact that the former are left to the sole cognizance and jurisdiction of the political branches of the government, the executive and the legislative, the decisions of which when made are binding on the courts. This is the view of Dodd, who speaks of political questions as a term "to designate certain types of functions committed to the political organs of government (the legislative or executive departments or either of them) and not subject to judicial investigation." [88] But the criterion as thus set forth is not entirely satisfactory.[89] For the next question is what are such matters that are thereby removed from judicial scrutiny?

Since the Constitution furnishes the measure and the extent of judicial power, it is the obvious and appropriate source from which the answer may be found. Thus under the Constitution of the Philippines the question of whether or not the writ of *habeas corpus* may be suspended rests exclusively with the President, and his decision on the matter cannot be inquired into by the courts.[90] Even under the previous organic acts, judicial non-interference had already been announced.[91] Likewise the question of whether or not nationai

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[83] *Alejandrino v. Quezon*, 46 Phil. 83; *Vera v. Avelino*, G. R. No. L-543.

[84] *Severino v. Governor-General*, 16 Phil. 366; *Abueva v. Wood*, 45 Phil. 612; *Planas v. Gil*, 37 O. G. 1228.

[85] *Planas v. Gil*, 37 O. G. 1228.

[86] *People v. Vera*, G. R. No. L-543.

[87] G. R. No. L-543.

[88] Dodd, *Judicially Non-enforcible Provisions of Constitutions*, in 1 Selected Essays on Constitutional Law, 356 at 387.

[89] *Mabanag v. Lopez Vito*, 43 O. G. 2079.

[90] Section 10, par. 2, Art. VII, Constitution of the Philippines.

[91] *Barcelon v. Baker*, 5 Phil. 87.

emergency exists seems to be left under the Constitution of the Philippines to the sole determination of the Congress.[92] It is merely stating the obvious to state that all functions left to the uncontrolled discretion of the other branches of the government fall outside of judicial competence.[93]

In those cases however where the Constitution does not speak in terms sufficiently clear to ward off judicial intereference, what criterion is there to determine what are political questions? Dodd says that "they must be issues so political in character that courts regard it as improper to seek to exercise control." [94] While the phrase "issues so distinctly political in character" hardly serves the cause of clarity, the reference to such issues as the judiciary may regard "as improper to seek to exercise control" is revealing.

It shows how far the judiciary can go if it wishes not to pass on the constitutionality of a statute. It may fail to see before it an appropriate legal proceeding. The question raised may be political. Thus in the Philippines, the question of whether or not there was obtained the requisite three-fourths majority in each branch of Congress to compel submission of the proposed constitutional amendment granting the Americans for a certain period equal rights to exploit natural resources was avoided by the Supreme Court by labelling the matter political.[95] Shortly before that decision, the Supreme Court likewise refused to pass on the legality of suspension of certain Senators pending determination of how far their election was due to alleged acts of intimidation and violence.[96] The Supreme Court did not particularly have too difficult a time reaching that conclusion because of a previous ruling during the period of American sovereignty involving the suspension of an appointive senator.[97]

The judicial decisions of the United States are even more prolific in instances of litigations denominated political. Thus the conduct of foreign relations is adjudged to be removed from judicial control.[98] Other cases follow: the question of the political status of a State of the Union;[99] the question which of two contending bodies is the legitimate state government;[100] the question of whether a state government is republican in form;[101] the question of who is

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92 Section 26, Art .VI, Constitution of the Philippines.
93 See Dodd, *supra*, 357-363.
94 Dodd, *supra*, 387.
95 *Mabanag v. Lopez Vito*, 43 O. G. 2079.
96 *Vera v. Avelino*, G. R. No. L-543.
97 *Alejandrino v. Quezon*, 46 Phil. 83.
98 *Oetjen v. Central Leather Co.*, 246 U.S. 297; *Commercial Trust Co. v. Miller*, 262 U.S. 51.
99 *Georgia v. Stanton*, 6 Wall. 50.
100 *Luther v. Borden*, 7 How. 1.
101 *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118.

the sovereign *de jure* or *de facto*;[102] the question of the ratification of a constitutional amendment;[103] and the question of redistricting to assure contiguity of territory and approximately equal population.[104] Nor is the above list by any means exhaustive. It is just a sample of the few cases already adjudged to be political in character.

If the above examples prove anything at all, it is that the courts are not unduly hampered or restricted in their choice of what cases to accept and what to reject. They cannot be insensible to the effects of judicial pronouncement on the atrophy or the growth of any policy determined upon by the other two branches. They can take care not to meddle where they are not sure of their ground. They may lack adequate data on which an informed decision may be based. They may be deterred by a realistic appraisal of the untoward consequences that will flow from judicial control.[105] They may doubt for any other reason their competence in the handling of the particular issue involved. It may even be awareness that the executive and legislative branches may not accord deference to their decisions.[106] At any rate under vague contours of the catch-all political questions, the court can beat a retreat without undue loss of prestige. And this failure to see a justiciable case may furnish the occasion for the political branches to carry through a policy deemed by them desirable.

b. *Proper party to raise constitutional question*—Further implementing the broad range of discretion that the judiciary possesses in taking upon itself the task of passing upon the validity of statute is the equally well-settled rule that the party raising the constitutional question must be able to show direct injury to or invasion of his constitutional rights arising from the operation or enforcement of the questioned act.[107] Here again is a recognition

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[102] *Jones v. United States*, 156 U.S.

[103] *Coleman v. Miller*, 307 U.S. 433.

[104] *Colegrove v. Green*, 328 U.S. 549.

[105] See Finkelstein, *Judicial Self-Limitation* in 1 Selected Essays on Constitutional Law, 397-418 and *Coleman v. Miller*, 307 U.S. 433.

[106] *Alejandrino v. Quezon*, 46 Phil. 83. "Yet in spite of its apparently vulnerable position, this Court (American Supreme Court) has repeatedly overruled and thwarted both the Congress and the Executive. It has been in angry collision with the most dynamic and popular Presidents in our history. Jefferson retaliated with impeachment; Jackson denied it authority; Lincoln disobeyed a writ of the Chief Justice; Teodore Roosevelt after his Presidency, proposed recall of judicial decisions; Wilson tried to liberalize its membership; and Franklin D. Roosevelt proposed to "reorganize it." Jackson, The Struggle for Judicial Supremacy, lx-x.

[107] *People v. Vera*, 37 O. G. 164; *Massachusetts v. Mellon*, 262 U.S. 447; *Austin v. The Aldermen*, 7 Wall. 694.

of the delicacy of the discharge of the function of judicial review. Through the judicious utilization of this rule, the judiciary can lessen the occasion for its exercise.

The requirement for a showing on the part of the litigant contesting the validity of an act that he has suffered some direct injury to his constitutional rights hardly needs any explanation. Unless he can show that the Constitution and not the questioned act governs the situation to which they may both apply, there is no occasion for a court to pass on its constitutionality. In the absence of such a conflict, the duty of the judiciary is plain. It applies the law to the facts before it. Nor is the assertion of the possible invasion of a constitutional right sufficient. If the provision of the constitution alleged to be violated is judicially non-enforcible, evidently the case is not one for the courts.

Or having suffered a direct injury to his constitutional rights and therefore having been in the position to raise the question of constitutionality, a party is not thereby assured that such an issue will be passed upon. He may have waived the right.[108] Or may have placed himself in estoppel.[109] Thus in a Philippine case, the Supreme Court avoided having to pass on the validity of an act reorganizing the inferior courts and legislating out of office incumbent judges by its finding that the judge who questioned the act accepted an *ad interim* appointment under the questioned act and thereafter discharged his duties under such appointment.[110]

The United States Supreme Court has not been niggardly in availing itself of this rule and its various implications to escape the need for passing upon the validity of statute. Thus it has failed to see a compliance with the rule where the objections are premature;[111] urged by public officials only in their governmental capacity;[112] based on discrimination in the statute favoring the complainant [113] or not concerning him.[114] With equally good reason it had refused to act where the interest even if shown was too remote[115] or too minute and conjectural.[116] It stood on unassailable ground

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108 Failure to assert the constitutional question in time may amount to a waiver. See note 77 and 1 Cooley, *Constitutional Limitations* 368-371.

109 *Zandueta v. De la Costa*, 38 O. G. 2352.

110 *Zandueta v. De la Costa*, supra.

111 *Ohio ex rel. Lloyd. v. Dollison*, 194 U.S. 445; *Adams v. Milwaukee*, 228 U.S. 572; *New Jersey v. Sargent*, 269 U.S. 328.

112 *Smith v. Indiana*, 191 U.S. 138; *Braxton County Court v. West Virginia*, 208 U.S. 192.

113 *Standard Stock Food v. Wright*, 225 U.S. 540; *Oliver Iron Co. v. Lord*, 262 U.S. 172.

114 *Clark v. Kansas City*, 176 U.S. 114.

115 *Fairchild v. Hughes*, 258 U.S. 126.

116 *Frothingham v. Mellon*, 262 U.S. 447.

when it refused to consider the constitutional objection to a statute prohibiting the giving of professional advice relating to the use of contraceptives made by a physician alleging the danger to the lives of his patients.[117]

The flexibility of the rule regarding the raising of the constitutional question by a party able to show a direct injury to his personal and substantial interest is further demonstrated by the state itself being recognized by the judiciary as satisfying that requirement and therefore being in a position to contest the validity of its acts. On two occasions, the Supreme Court of the Philippines gave its approval to such a step. On its face such a situation bespeaks of a conflict between the executive and the legislative branches. If they could see eye to eye on the question, a simple repealing act would accomplish the purpose. So it was in the first case in the Philippines where the Supreme Court allowed the government to impugn the validity of an act.[118] There was then a dispute intense and deep-seated between the American Governor-General and the Filipino legislative leaders. The act giving the Filipino leaders participation in the choice of who should manage government owned corporations was enacted when a more cooperative Governor-General was at the helm. The precedent thus supplied was seized upon in the other case when the Supreme Court annulled the Probation Law at the instance of the City Fiscal appearing for the People of the Philippines. Here the legislature had actually repealed the measure, but the President of the Philippines could not bring himself to sign the measure notwithstanding his public stand in favor of the repeal of the measure. The Supreme Court had the opportunity to lend its helping hand.[119] It did not miss it. Moreover it was able to cite United States decisions in the process.[120]

c. *Constitutional question must be unavoidable.*—Given the appropriate case with the proper party to raise the constitutional question, it does not thereby follow that the courts are called upon to pass upon the validity of the questioned act. They can refuse to do so unless in their opinion the case cannot be disposed of without touching upon the constitutional question. So judicial decisions, Philippine and American, have held.

> "It is a well-established rule that a court should not pass upon a constitutional question and decide a law to be unconstitutional or invalid, unless such question is raised by the parties, and that when it is raised, if the record also presents some other ground

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117 *Tileson v. Ullman*, 318 U.S. 44.
118 *Government v. Springer*, 50 Phil. 259.
119 *People v. Vera*, 37 O. G. 164.
120 *Attorney-General v. Perkings*, 73 Mich. 305, 41 N.W. 426; *State v. Doone*, 98 Kan. 435; 148 Pac. 38.

> upon which the court may raise its judgment, that course will be adopted and the constitutional question will be left for consideration until a case arises in which a decision upon such question will be unavoidable." [121]

It must be the very *lis mota* presented; it must be pressing and inescapable on the court.[122] If there is any other ground upon which the case may be decided, that will suffice for the court to shun discussion of the constitutional question.[123] Much less will it anticipate a question of constitutional law in advance of the necessity of deciding it.[124] The last principle moreover justifies the action of a court in passing on the constitutional question notwithstanding the fact that the act assailed had been previously applied by it. The mere fact that the law has been applied and given full force and effect precisely the same as if it were valid does not deprive a court of the power to pass on its validity when the question is properly presented.[125]

And to end the uncertainty that hangs over a law of dubious validity, and it is no exaggeration to say that a party adversely affected by such law is likely to entertain grave doubts about its constitutionality, the Supreme Court of the Philippines has on at least two occasions welcomed the institution of an original proceeding wherein the issue of validity was squarely and unavoidably presented. In one case the Supreme Court, fully aware of the political implications of its task of judicial review frankly acknowledged the interest of public welfare and the advancement of public policy, required that a law affecting the personal and property rights of nearly twelve thousand merchants should receive judicial appraisal as to its constitutionality. It thus brushed aside the jurisdictional question raised.[126] In the other case wherein the Probation Act of the Philippines was attacked on constitutional grounds, the Supreme Court displayed the same attitude. It wanted to erase all doubts. This it did by annulling the statute.[127]

Moreover, the Supreme Court of the Philippines, only a few months ago, frowned upon the effort of the parties before it, one of them being the Register of Deeds represented by the Solicitor General, to withdraw the appeal wherein a constitutional question was squarely raised after it had already deliberated on the case but before

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[121] *Sotto v. Commission on Elections*, 43 O. G. 72. See also *Co Chiong v. Dinglasan*, G. R. No. L-1266.
[122] *McGirr v. Hamilton and Abreu*, 30 Phil. 563.
[123] *Berea College v. Kentucky*, 211 U.S. 45.
[124] *Burton v. United States*, 196 U.S. 283.
[125] *McGirr v. Hamilton and Abreu*, 30 Phil. 563.
[126] *Yu Cong Eng v. Trinidad*, 47 Phil. 385.
[127] *People v. Vera*, 37 O. G. 164.

the decision was promulgated. Chief Justice Moran, speaking for the Court said that the attempt to withdraw involved the question of:

> "whether or not we should allow interference with the regular and complete exercise by this Court of its constitutional functions, and whether or not after having held long deliberations and having reached a clear and positive conviction as to what the constitutional mandate is, we may still allow our conviction to be silenced, and the constitutional mandate to be ignored or misconceived, with all the harmful consequences that might be brought upon the national patrimony." [128]

As in the asserted requirement therefore of an appropriate case as well as in that of a proper party to raise the constitutional question, the court likewise in determining whether the constitutional question has to be faced enjoys a discretion that gives it wide freedom. The occasion for the exercise of the power of judicial review is left largely to its judgment. It is all the more important then that its effects on governmental policies be within its contemplation in case it decides to act in the capacity of censor over legislation. And equally important, if not more so, is its manner of discharging such function.

2. *Manner of exercise of the power of judicial review.*—Having determined to pass on the validity of a legislative or executive act, how does the court go about it? The answer to this question is crucial to the inquiry of which agency in actual fact is supreme in the government. For what matters if the executive and legislative branches may initiate policies if the courts could thereafter set them at naught. The judiciary may merely be "the brake on other men's actions, the judge of other men's decisions." [129] But a brake may be employed too often. And this particular brake is self-operating.

How it exercises its power of judicial review then determines to what extent the judiciary, and ultimately the Supreme Court, is dominant in the field of government. It may speak with finality on what policies shall prevail, what values shall be promoted. It may on the authority of its understanding of the Constitution divert governmental action to channels of its own choosing. Lacking the formal authority to govern under the Constitution of which it is the proclaimed guardian, it may yet have the last word and the final say on what shall and shall not be done. All this the exercise of its power to pass on the validity of statutes may enable it to do.

This is not to indulge in empty theorizing. On various occasions it has been said of the government of the United States that its most

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[128] *Krivenko v. Register of Deeds*, L-630.
[129] Frankfurter, *Mr. Justice Holmes and the Supreme Court*, 30.

distinctive and significant feature is judicial supremacy.[130] There had been talk of a "judicial oligarchy," [131] of a "government by judiciary," [132] of a "government by lawsuit," [133] of the "divine right of judges." [134] The statement of Chief Justice Hughes, made while he was State Governor, "We are under a Constitution but the Constitution is what the judges say it is" [135] was referred to as the "most understandable and comprehensive summary of American constitutional law" by Justice Jackson.[136] The Supreme Court of the United States under such a view becomes a "super-legislature" [137] or "a continuous constitutional convention." [138] Judges have been spoken of in a Presidential message of Congress as the "chief lawmakers" because they are "the final seat of authority." [139]

Of the Supreme Court of the Philippines, as much cannot be said. At a time when the Americans were sovereign, the preeminence of the Governor-General as the mouthpiece of the sovereign power was accepted by the Supreme Court.[140] The Filipino leaders who after 1916 were solely in command of the legislative arm pressed their claims more and more vigorously as autonomous powers began to be granted in an increasing degree.[141] But the Supreme Court, headed by a Filipino Chief Justice, but not until 1935 with an American majority in its membership, did not join the fray for supremacy. With the Commonwealth after 1935, Executive leadership, mainly through the dominant personality of President Manuel Quezon and also because of a constitution that provides for a strong executive, was the rule.[142] After independence, there has been no shifting in the center of political gravity, although on one grave question the Supreme Court took a courageous stand against the official view of the Executive.[143]

It is not that the Supreme Court of the Philippines had a different set of principles to guide it in the exercise of its power of judicial review. Until the grant of independence at least, it felt

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130 Haines, *The American Doctrine of Judicial Supremacy*, 24.
131 Roe, G., *Our Judicial Oligarchy*.
132 See Boudin, *Government by Judiciary*, 2 v.
133 Jackson, *The Struggle for Judicial Supremacy*, c. IX.
134 Lerner, "*The Constitution and Court as Symbols*," reprinted in 1 Selected Essays on Constitutional Law, 754.
135 Addresses and Papers of Charles Evans Hughes, pp. 139-140.
136 Jackson, *The Struggle for Judicial Supremacy*, 3.
137 Brandeis, diss., *Burns Baking Co. v. Bryan*, 264 U.S. 504.
138 Beck, *The Constitution of the United States*, 221.
139 Message of President Roosevelt, Dec. 8, 1908, 43 *Congressional Record*, Part I, 21.
140 *Severino v. Governor-General*, 16 Phil. 366.
141 Hayden, *The Philippines*, Ch. XIV.
142 Hayden, *The Philippines*, Ch. III.
143 *Cf. Krivenko v. Register of Deeds*, L-630.

bound by decisions of the United States Supreme Court. The difference in result may be accounted for then by the wide range of discretion which those principles allow. Likewise, the confidence of the judicial body concerned that its assumption of authority would prove acceptable seems to be another factor. Even the Supreme Court of the United States had to call a halt to its propensity to nullify New Deal measures because of a fighting President and an aroused public opinion.[144]

To trust that restraints to judicial authority lie in the rigidity of the principles applicable to its exercise of judicial review is to indulge in unwarranted optimism. The very nature of the power to consider the validity of statutes militates strongly against such a hope. What must be emphasized, what cannot be lost sight of, is the fact that while a court in discharging this delicate function acts as a tribunal of law, its judgment has repercussions in the broad realm of policy. "Questions of law present symbols through which political issues are resolved, and the political terms do vicarious duty for economic interests." [145]

Very few are the judges so oblivious of the true nature of the function of judicial review as to believe that to lay the article of the Constitution beside the statute to see if they square is all there is to it. So to characterize the function is to degrade the judicial office. It is to deprive it of its most distinctive characteristic: judgment. That quality must manifest itself in the disposition of every case. It is not less important when what is involved is the annulment of executive or legislative policy. The question then is not merely one of law but of statesmanship. "However its opinions are dressed for appearance in public, the Court either decides with an eye to consequences or chooses between doctrines proffered by rival attorneys, whose briefs exhibit a pragmatic architecture, and whose use of doctrine is dictated by non-legal interests." [146]

Public welfare will be the gainer in the long run if there is a more widespread knowledge of the fact that a court in passing on the validity of an executive order or statute is a policy-determining branch of the government. Parties and their counsel and the public alike will be in a better position to appraise in terms of the public good adjudications on constitutional questions. The court likewise may be more cautious in overriding executive or legislative prefer-

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[144] Jackson, *The Struggle for Judicial Supremacy*, Ch. VII.

[145] Hamilton and Braden, *The Special Competence of the Supreme Court*, 50 Yale Law Journal, 1319, 1325.

[146] Hamilton and Braden, *The Special Competence of the Supreme Court*, 50 Yale Law Journal, 1319, 1325.

ences. And should it feel inclined to do so, it could ask counsel for all the aid they can furnish on the matter under dispute.

There is no disputing the principle announced by the Supreme Court of the Philippines that when the courts pronounce an act of the executive or legislative department of the government illegal and contrary to the fundamental law, it is because the act of the executive department of the government or the statute adopted by the legislative department falls within some of the inhibitions of the constitution.[117] Unless there is some contrariety or repugnancy, there is no occasion for the power of judicial review to come into play. Its exercise is justifiable only when a party raising the constitutional question can show that his constitutional rights which are judicially enforcible are infringed by the executive order or statute complained of.

Clearly then the court must determine whether or not there has been such a breach of the constitution. If the provisions of the constitution are definite and precise, the mechanistic theory of the function of judicial review might suffice. As Justice Roberts puts it: "The judicial branch of the government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." [118] Obviously though, when the language of the constitution is that specific, questions are not likely to arise.[149]

When a litigant, whether corporation or private individual, resists governmental action, he may invoke his rights to "due process" before he can be deprived of his "liberty" or his "property". Again he may complain that he is denied "equal protection of the laws." Then again he may protest at what he considers to be "impairment" of the "obligation of contracts" by the "law" which works to his injury. If his counsel were astute enough, a claim of injury by any or all of the above or of some provisions not mentioned could plausibly be made out. And while previous judicial decisions may to some extent, cabin and confine judicial discretion in determining whether such injury has been sustained, there is no denying the fact that the courts still enjoy a wide leeway in giving content to the above constitutional rights as determined by the situation before them.

Likewise a person accused of a crime may invoke his right to "due process". He may claim that he is subjected to "double jeopardy". Or if convicted he may plead that his sentence was "cruel

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[147] *Abueva v. Wood*, 40 Phil. 612.
[148] *United States v. Butler*, 297 U.S. 1.
[149] See Powell, *The Logic and Rhetoric of Constitutional Law*, reprinted in 1 Selected Essays on Constitutional Law, 474.

and unusual." The meanings of some of these constitutional guaranties have been fixed by history,[150] nonetheless judicial discretion has not altogether vanished. To mention but one instance, "ex post facto law" or "bill of attainder" are phrases that have their roots in history, but these concepts were torn from their ancient moorings and made to cover new terrain when the policy that commanded the approval of the majority of the Supreme Court made such a step inevitable.[151]

And whatever the nature of the actions, and from whichever quarter on infringement of the other civil liberties may come, the courts in appropriate cases may find it unavoidable to re-define their meanings and infuse them with continuing vitality in a more complex society.

The complainant may be a legislator alleging that his rights as such had been violated. In one case [152] where the conflict was between an individual who claimed he was duly confirmed by the National Assembly and a constitutional agency vested with power and charged with the duty of determining electoral contests, the Supreme Court of the Philippines assumed jurisdiction. The Court in its own words had to "allocate constitutional boundaries." In doing so it could not escape the "obligation of interpreting the Constitution" insofar as relevant.

Or the constitutional question may be raised by the government itself. In the two cases [153] it has been thus in the Philippines, it was really the Executive branch that sought judicial determination of the validity of acts of which it did not approve. The task of the judiciary remains the same—the interpretation of provisions in or principles underlying the constitution. In the first of the above cases, there was a judicial inquiry into the meaning of "separation of powers" as relevant to the issue before it.[154] In the other case, another constitutional principle, "nondelegation of legislative powers" received an elaborate dissertation from the Supreme Court.[155]

Unless there is anything then in the Constitution, either express or implied, to inhibit the particular manifestation of legislative or executive will, the judiciary has no occasion to play the role of censor. But precisely because of the lack of precision of many of the constitutional provisions relied upon to invalidate executive or legislative acts, the court may itself in the guise of interpretation find the

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150 *Kepner v. United States*, 195 U.S. 1.
151 *Ex parte Garland*, 4 Wall. 333 and *United States v. Lovett*, 328 U.S. 303.
152 *Angara v. Electoral Commission*, 63 Phil. 139.
153 *Government v. Springer*, 50 Phil. 259 and *People v. Vera*, 37 O. G. 164.
154 *Government v. Springer*, 50 Phil. 259.
155 *People v. Vera*, 37 O. G. 164.

inhibition.[156] It does not matter then that it proclaims time and time again that its sole concern is with power. [157] It does not matter much either that it disclaims inquiry into the wisdom, justice, advisability,[158] expediency, motive, or results,[159] or propriety.[160] In view of the lack of specific and definite content of the constitutional provisions most relied upon, the court cannot close its "eyes to consequences" [161] or fail to make use of "personal values as an animating spark" [162] in determining whether or not the executive or legislative body had the authority to promulgate the measure under fire. Against individual preference, not even higher law is insulated.[163]

If the foregoing analysis of the nature of the power of judicial review reflects the realities of the situation, it would seem to follow that its exercise is a constant temptation to the assumption of a more dominant role by the judiciary, more specifically the Supreme Court.

Presumption of validity.—How could this tendency be checked then? The realization by the judiciary of the political implications of this function seems to furnish as good a check as any. The Supreme Court of the Philippines just after the Commonwealth was quite explicit on the matter. It admits that the "judiciary in the determination of actual cases and controversies must reflect the wisdom and justice of the people as expressed through their representatives in the executive and legislative departments of the government." [164] And it realizes that the "responsibility of upholding the Constitution rests not on the courts alone but on the legislatures as well." [165] It adheres therefore to the well-settled principle that "all reasonable doubts should be resolved in favor of the constitutionality of a statute" for which reason it will not set aside a law as violative of the Constitution "except in a clear case." [166]

The presumption is always in favor of constitutionality. To doubt is to sustain. So that if the statute be susceptible of two constructions one of which will maintain and the other destroy it, the court will adopt the former.[167]

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[156] See in this connection Corwin, *Judicial Review in Action*, in 1 Selected Essays on Constitutional Law, 449.
[157] *Abueva v. Wood*, 40 Phil. 612; *Manila Trading and Supply Co. v. Reyes*, 62 Phil. 461.
[158] *Abueva v. Wood*, 40 Phil. 612.
[159] *Manila Trading and Supply Co. v. Reyes*, 62 Phil. 461.
[160] *Sumulong v. The Commission on Elections*, 40 O. G. 3663.
[161] Hamilton and Braden, *The Special Competence of the Supreme Court*, 50 Yale Law Journal, 1319, 1325.
[162] Hamilton and Braden, *op. cit.*, at 1325.
[163] Hamilton, *Preview of a Justice*, 48 *Yale Law Journal*, 819, 821.
[164] *Angara v. Electoral Commission*, 63 Phil. 139.
[165] *People v. Vera*, 37 O. G. 164.
[166] *People v. Vera*, 37 O. G. 164.
[167] *Yu Cong Eng v. Trinidad*, 47 Phil. 385.

The above principle finds its origin in American judicial decisions. As early as 1796, Justice Chase of the Supreme Court of the United States, without then determining whether the judiciary may annul an act of Congress, declared that such a power if it could be exercised at all would be exercised by him only in a "clear case." [168] And in 1800 Justice Patterson of the same court announced that to be justified in pronouncing any law void, there must be "a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication." [169] American courts "are practically unanimous in saying that laws shall not be declared invalid unless the conflict with the Constitution is clear beyond a reasonable doubt." [170]

The difference between Philippine and American courts seems to be that the former are inclined to take this principle a little more seriously. This difference in attitude cannot be better shown than in the fate that befell the so-called Chinese Bookkeeping Act enacted by the Philippine Legislature penalizing the keeping of any book of accounts by merchants except in English, Spanish, or a native language.[171] By construing the statute as a revenue measure designed to prevent fraud on the government and by relying on the presumption of validity, the Supreme Court of the Philippines found the statute unobjectionable from the constitutional standpoint.[172] On appeal however to the United States Supreme Court, the statute was condemned as arbitrary and oppressive to Chinese merchants and therefore contrary to due process and equal protection. The presumption of validity could not save the statute.[173]

It is submitted that a judicious reliance on the presumption of validity may go very far in avoiding judicial dominance. It is a principle of caution and circumspection in the exercise of the grave and delicate function of judicial review. It tends to leave to the political branches the responsibility for the task of governing. The principle has been explained by Thayer in words whose relevance and pertinence, the lapse of fifty-five years has not impaired. Then as now those words carry conviction:

> "It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative acts; that is the test which they apply—not merely their own judgment as to constitutionality, but their conclusion as to what judg-

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[168] *Ware v. Hylton*, 3 Dall. 171.
[169] *Cooper v. Telfair*, 4 Dall. 14.
[170] Dodd, *Cases on Constitutional Law*, 3rd. ed., 56.
[171] Act No. 2972.
[172] *Yu Cong Eng v. Trinidad*, 47 Phil. 385.
[173] *Yu Cong Eng v. Trinidad*, 271 U.S. 500.

> ment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open their range of choice; and that whatever choice is rational is constitutional. x x x." [174]

The fate of social welfare legislation enacted in the United States at the close of the century and up to the New Deal era would have been different if the American Supreme Court had accorded due respect to the political branches of the government, which is what this principle stands for. Instead the Lochner,[175] Adair,[176] Coppage,[177] Adkins,[178] Retirement Board,[179] Butler,[180] and the Carter Coal [181] cases tell a different and a regrettable story of judicial dominance in the field of policy-making. That the sting of such decisions had been drawn off by the Supreme Court in 1937 and after only adds confirmation to the view that due deference to the presumption of validity may preserve to the political branches their primacy in the formulation and execution of policies.

One other aspect of this presumption of validity deserves mention. It places the burden of proving unconstitutionality where it properly belongs: to the party assailing the act or statute. The assumption must be that if evidence was required to establish the necessity for the law, it was before the legislature when the act was passed. If there is a probable basis for sustaining the conclusion reached, its findings are not subject to judicial review.[182] The factual foundation to demonstrate invalidity must be laid by the litigant challenging its constitutionality.[183] There is nothing to prevent the champion of the measure though from furnishing the court with all relevant data to show the existence of factual conditions supporting the legislation.[184]

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[174] Thayer, James B., *The Origin and Scope of the American Doctrine of Constitutional Law*, in 1 Selected Essays on Constitutional Law, 503.
[175] 198 U.S. 45.
[176] 208 U.S. 161.
[177] 236 U.S. 1.
[178] 261 U.S. 525.
[179] 295 U.S. 330.
[180] 297 U.S. 1.
[181] 298 U.S. 238.
[182] *Lorenzo v. Director of Health*, 50 Phil. 595.
[183] *O'Gorman and Yong v. Hartford Fire Insurance*, 282 U.S. 251.
[184] Kales, Albert M., *New Method in Due Process Cases*, in 1 Selected Essays on Constitutional Law, 488.

In civil liberties cases though, the American Supreme Court seems to have ignored completely this presumption of validity. Certain state and local statutes had been condemned as being on its face violative of freedom of speech and of the press.[185] On the assumption that the civil liberties protect the rights of minorities, from the intolerance and bigotry of the current majority, as sometimes happen, there is no objection to the Supreme Court being on the alert to maintain the constitutional rights. As noted by an acute critic, "Legislation designed to promote a larger capacity for freedom by the relaxation of economic compulsion may, indeed, be presumed valid. But a contrary presumption seems eminently proper when legislation constricts the existing larger capacity by imposing new governmental restraints." [186]

The foregoing brief survey would seem to show that the judiciary through the exercise of the power of judicial review may well be the controlling branch of the government. The propensity of litigants to utilize a lawsuit to frustrate governmental policies deemed inimical may be expected to continue as long the stakes are big enough and the ability of counsel could make out a plausible case of injury to personal and property rights protected by the constitution. The losing party before administrative or legislative agency in such cases will not just stand idly by. He can be trusted to utilize all the resources the law affords. The judiciary cannot escape being dragged into the field of policy. The opportunity to assume leadership is there for it to seize or to reject. What its reaction would be would depend upon the personnel of the current bench; their philosophy as to the role that the judiciary should play; their appraisal of how far public opinion would stand judicial supremacy. Not to be ignored also would be the personalities in the political branches of the government.

There must be a fuller awareness of the political character of judicial review. The independence that judges ought to possess, the respect that they so easily inspire may free them from popular check and surveillance even when they in actual fact are in a position of control. As long as their militancy is confined to the guardianship of the civil liberties, all is as it should be. But when it goes further, it poses a serious problem in a democratic community.

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[185] *Near v. Minnesota*, 283 U.S. 697; *Lovell v. City of Griffin*, 303 U.S. 444; *Stromberg v. California*, 283 U.S. 359.

[186] Shulman, *The Supreme Court's Attitude Toward Freedom of Contract and Freedom of Speech*, 41 Yale Law Journal, 262, 271.

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