ON THE FUNCTIONS OF JUDICIAL REVIEW AND THE DOCTRINE OF POLITICAL QUESTIONS *

FLORENTINO P. FELICIANO **

I should like to start by disclaiming any intent to present to you a finished lecture and by that I mean a demonstrated and documented position on a specified problem. I view my task much more modestly. My task is merely to furnish a prologue to a series of lectures to be given by those who shall be holding the Malcolm chair after me. As such my task I take to be the opening up of areas possibly worthy of extended exploration rather than the exposition and demonstration of a particular viewpoint, the suggesting of possibly relevant questions rather than the giving of answers.

By judicial review I refer to the assaying by a court, in an appropriate case, of the constitutional quality of a legislative or executive act. Recent studies on judicial review in the United States [1] suggest that courts—in particular the Supreme Court—may be usefully conceived as performing at least three functions in exercising the power of judicial review: the first is the checking function; the second the legitimating function; and the third is the symbolic function. To my mind, there appears nothing to suggest that this trichotomy is inapplicable in respect of our Supreme Court and I proceed upon the assumption that it is so applicable.

The checking function is of course the best known being the most obvious. There are at least two distinguishable dimensions to this function. There is, firstly, the reading of the constitutional map, as it were, and the allocation of constitutional authority among the major structures of government. This may be described as the umpire function that comes into play where conflicting claims are made by two or more agencies of government to the same area of authority. The classical illustration in the Philippines is *Angara*

---

* This paper substantially reproduces the first Malcolm Lecture delivered at the College of Law, University of the Philippines, last August 1963.

** B.A., LL.B. University of the Philippines; LL.M., J.S.D. Yale University: George A. Malcolm Professor of Constitutional Law, University of the Philippines.

[1] *Black, The People and the Court: Judicial Review in a Democracy* (1960); *Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962); and *Rostow, The Sovereign Prerogative: The Supreme Court and the Quest for Law* (1962) are the most thoughtful and provocative. That I have drawn most heavily from these three studies will be apparent throughout this paper.

v. Electoral Commission[2] which involved, it may be recalled, a conflict of claims by the National Assembly on the one hand and the Electoral Commission or Tribunal on the other with respect to the authority to fix time limits for the filing of election contests involving members of the Assembly. In the United States, the umpire function has been most frequently exercised in recent years in connection with the problems of federalism which call for the marking out of the shifting boundaries between federal authority and states' rights. There is, secondly, the determination of whether the particular agency or department concerned has stayed within its own sphere of authority observing the constitutional limitations projected for actions within such sphere, or whether it has trespassed into the zone of immunity or privacy guaranteed to individuals by the Constitution.[3]

Given the basic assumption of our community that constitutional government means a government of limited power, the necessity for an institution performing this checking function would seem reasonably clear. Binding appraisal by an outside entity (outside, that is, of the Community governed by the institutions to be appraised) is not feasible; there are no international organs equipped and authorized to carry out such appraisal and even if there were, their intervention—given our prevailing patterns of nation-oriented attitudes— is likely to be fiercely resented. It would appear an equally difficult position that the very agencies subjected to prohi-

---

[2] 63 Phil. 139 (1936). Speaking for the Court, Mr. Justice Laurel said:

"But in the main, the Constitution has blocked out with deft strokes and in bold lines, allotment of power to the executive, the legislative and the judicial departments of the government. The overlapping and interlacing of functions and duties between the several departments, however, sometimes makes it hard to say just where the one leaves off and the other begins. In times of social disquietude or political excitement, the great landmarks of the Constitution are apt to be forgotten or marred, if not entirely obliterated. In cases of conflict, the judicial department is the only constitutional organ which can be called upon to determine the proper allocation of powers between the several departments and among the integral or constituent units thereof.

* * *

The Constitution is a definition of the powers of government. Who is to determine the nature, scope and extent of such powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way. And when the judiciary mediates to allocate constitutional boundaries, it does not assert any 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. This is in truth all that is involved in what is termed 'judicial supremacy' which properly is the power of judicial review under the Constitution. x x x" (63 Phil. at 157, 158.)

[3] See *Freund, The Supreme Court of the United States: Its Business, Purposes, and Performances* 18 (Meridian ed., 1961).

bitions should have the final word as to the reach of such prohibitions; such a position would be too close to saying that those prohibitions are auto-limitations and, at least in terms of the Austinian analysis, not legal limitations at all. It has been well said by Professor Charles L. Black, Jr. that the institution of judicial review represents the effort of the people to establish the constitutional limitations projected on legislative and executive action as *legal* limitations.[4] While sovereign or final power rests in the people, and while control on final power must be *self*-control, judicial review is the institutionalization of community self-control under and in accordance with law—that is to say control by an institution kept separate and independent from the very bodies to be judged and controlled, applying standards specified and developed through reasoned techniques within the confines of a professional tradition.

The above propositions are of course venerable platitudes. It seemed to me seasonable to recall them, however, because of fairly recent polemics, both here and in the United States, about a postulated inconsistency between judicial review and the democratic character of representative political institutions, about what has been described as the "counter-majoritarian" nature of judicial review. Speaking of the United States Supreme Court, Professor Bickel posed the difficulty with lucidity and vigor: [5]

> "The root difficulty is that judicial review is a counter-majoritarian force in our system. There various ways of sliding over ineluctable reality. Marshall did so when he spoke of enforcing, in behalf of 'the people', the limits that they have ordained for the institutions of a limited government. x x x But the word 'people' so used is an abstraction. Not necessarily a meaningless or a pernicious one by any means; always charged with emotion, but nonrepresentational—an abstraction obscuring the reality that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens. It is an altogether different kettle of fish, and it is the reason the charge can be made that judicial review is undemocratic." [6]

---

[4] *Black, op. cit., supra* note 1 at 106-7. It is *apropos* Professor Black's point to note that the institution of judicial review has, since the last world war, found acceptance in Western Europe where it had previously been rejected. The acceptance of judicial review has been attributed to two main factors: "[i]t sprung from a distrust of a parliamentarism under which, during the previous decades, a Mussolini, a Hitler, and a Petain were able to rise to power, and was a consequence of the revival of natural law against the juridical positivism of the past generations". Dietze, *Judicial Review in Europe*, 55 *Mich. L. Rev.* 539, 539 (1957).

[5] *Bickel, op. cit., supra* note 1 at 16-17.

[6] See, further, *Jackson, The Supreme Court in the American System of Government* 57-58 (Harper TB ed., 1963).

Speaking of the Supreme Court of the Philippines, a former Secretary of Justice said:

> " x x x Let not the members of the Supreme Court, take unto themselves the right and the power to judge the reasonableness or unreasonableness of the acts of their President—because in a democracy this right and power belong exclusively to the sovereign people.
>
> "x x x
>
> "I dread to see the day when the Supreme Court would virtually run the affairs of government under the guise of judicial review for then the Court will cease to be the ultimate court of law and become a third 'political agency', x x x." [7]

In our case, the short answer would seem to be that our constitutional founding fathers explicity wrote judicial review into the Constitution;[8] in the United States, that it is so integral with the living processes of community authority that its excision would very probably require a constitutional amendment. The short answer is, however, only a partial one[9] and it is not to be supposed that the notion that the judicial review is "counter-majoritarian" is an abstract, scholastic issue of political theory. On the one hand, there is the insistent demand by the critics of judicial review for "judicial statesmanship" through "judicial self-restraint".[10] It is sometimes difficult to resist the impression that the judicial restraint so urged may be indistinguishable from judicial catalepsy. On the other hand, the notion that there is something "undemocratic" about judicial review may at times generate, at least in lower courts, too ready deference to the executive or legislative judgment and too easy recourse to the presumption of constitutionality even in the area of fundamental individual liberties.[11]

Recently, scholars have pointed out that judicial review performs a second function—that of legitimation or validation— as im-

---

[7] Liwag, *The Supreme Court and the Rule of Law*, 6, 7 (Address delivered before the Manila Lions Club, January 9, 1963; private print).

[8] Article VIII, section 2(1), Constitution of the Philippines.

[9] *McCloskey, The American Supreme Court* 228 (1960) asks:

"[W]hat are the boundaries of modesty on the one hand and 'activism' on the other, even in the civil rights field?

Only a rhetorical purpose is served by answering this query in terms that simply ignore the patterns of history. From time to time it is urged that the Court should carry the virtue of modesty to an extreme, adopting a policy of self-restraint that would leave other branches of the government almost entirely immune from constitutional restriction. Whatever the theoretical merits of such a suggestion, the short answer is that it asks the Court to take leave of its heritage. The Court of history has never assessed itself so modestly, and there is not much reaon to expect that the Court of the future will deliberately choose such a policy of renunciation. In fact we might almost think that the argument in its pure form had been foreclosed by the passage of time."

[10] Liwag, *supra*, note 7 at 8-9; see further, Liwag, *Is Our Supreme Court Really the "Weakest"?* (Private print; *circa* February, 1963).

[11] Cf. Rostow, *The Democratic Character of Judicial Review (I)*, in *Rostow, op. cit., supra* note 1 at 147.

portant as and intimately related to the checking function. Where the courts sustain as constitutional a legislative or executive act, whether affirmatively or through double negatives, or refrain from intervening in a particular matter or proceeding upon the ground that such matter or proceeding is political in character and leave the legislature or the executive in possession of the field, the courts are, it is said, legitimating the legislative or executive act.[12] The power to legitimatize necessarily involves the power to reject as illegitimate and thus it is that subjection to judicial review is regarded as a necessary condition, "psychologically if not logically", of a system or process of power which would present itself as legitimate or authoritative.[13]

It is important for a constitutional government—that is, a government of limited, rather than of totalitarian, power—to demonstrate to the satisfaction of those subject to it that it has respected or has done all it can honestly do to respect their fundamental expectations about the what and the how of the exercise of power, that its actions even when detested and deplored by some are authorized and legitimate rather than usurpations and invasions of areas closed to it.[14] The ability to bring about this feeling of legitimacy, and constantly to recreate it, is vital for the continuing life of a polity that would rest on a consensual basis.[15] The legitimating function of judicial review at once reflects and implements a community consensus about how important decisions are to be made, if not about the content of such decisions. The performance of that function makes possible continuing identifications with the community, and may itself, through time, generate consent to the reality of the de-

---

[12] See *Black, op.cit., supra* note 1 at c. 3.

[13] Cf. the position eloquently stated in Jaffe, *The Right to Judicial Review I*, 71 *Harv. L. Rev.* 401, 406 (1958):

> "The guarantee of legality by an organ independent of the executive is one of the profoundest, most pervasive premises of our system. Indeed I would venture to say that it is the very condition which makes possible, which makes so acceptable, the wide freedom of our administrative system, and gives it its remarkable vitality and flexibility. x x x The need for judicial protection has undoubtedly varied and the risks of judicial sabotage under the guise of protection are considerable. But we are dealing with basic institutions and basic attitudes; we must take the bad with the good, the fortuitous with the exigent, the trivial with the necessary. We are dealing here not with what might be, but with what are in fact, the psychological assumptions which sustain cohesion and security."

[14] *Black, op.cit., supra* note 1 at 52.

[15] "For the people", Dean Rostow wrote with characteristic eloquence, "and not the courts, are the final interpreters of the Constitution. The Supreme Court and the Constitution it expounds cannot survive unless the people are willing, by and large, to live under it. And this is the ultimate issue to consider, as we review the relationship between the work of the Court and the state of public opinion. For in a political system resting on popular sovereignty, obedience to the law is not a sufficient rule." *The Supreme Court and the People's Will*, in *Rostow, op. cit.*, note 1 at 142.

cisions even among the segments of the population that may heartily dislike the contents thereof. In our community, constitutional legitimacy is a highly revered quality; indeed, it is sometimes accepted as a substitute for justness, for wisdom, for efficiency.[16]

Perhaps the most conspicuous recent example in the United States is *Brown v. Board of Education,*[17] better known as the School Segregation Cases, where the United States Supreme Court, overruling *Plessy v. Ferguson,*[18] held that racially segregated public educational facilities constituted a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. That the School Segregation Cases precipitated increased demands for "judicial restraint" and considerable soul-searching about the institution of judicial review, does not detract from the principal point we are making. In the Philippines, we have so far been happily spared exposure to issues as deeply divisive as the school segregation issue. But *Avelino v. Cuenco* [19] provides an approximate illustration. Fourteen years after *Avelino v. Cuenco,* it may be a little difficult to recapture the intensity and bitterness of the partisan feelings incited by the contest for power in the Senate between Senator Avelino's band and Senator Cuenco's group, the public disquietude over the extraordinary spectacle of two groups each claiming to be the lawful Senate of the Philippines, of Senators of the Republic resisting compulsory process to secure their attendance at Senate sessions, and over the threats of revolution freely made. It will be recalled that our Supreme Court, after refusing jurisdiction over the *quo warranto* suit because of the political nature of the controversy,[20] took account of the extraordinary state, in Mr. Justice Perfecto's words, "of con-

[16] The adjuration of Mr. Justice Frankfurter in his concurring opinion in *Dennis v. United States* 341 U.S. 494, 95 L. ed. 1137 at 1176-77 (1950) has as much point for Filipinos as for Americans:

> ". . . Preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or of executive action is preoccupation with a false value. Even those who would most freely use the judicial brake on the democratic process by invalidating legislation that goes deeply against their grain, acknowledge, at least by paying lip service, that constitutionality does not exact a sense of proportion or the sanity of humor or an absence of fear. Focusing attention on constitutionality tends to make constitutionality synonymous with wisdom. When legislation touches freedom of thought and freedom of speech, such a tendency is a formidable enemy of the free spirit. Much that should be rejected as illiberal, because repressive and envenoming, may well be not unconstitutional. The ultimate reliance for the deepest needs of civilization must be found outside their vindication in courts of law; apart from all else, judges, howsoever they may conscientiously seek to discipline themselves against it, unconsciously are too apt to be moved by the deep undercurrents of public feeling. ***"

[17] *Brown v. Board of Education; Briggs v. Elliott; Davis v. County School Board; Gebhart v. Belton,* 347 U.S. 483, 98 L. ed. 583 (1954).

[18] 136 U.S. 537, 41 L. ed. 256 (1896).

[19] 83 Phil. 17 (1949).

[20] 83 Phil. at 21-22.

fusion, of alarm, of bewilderment, of strife",[21] reversed itself, assumed jurisdiction and placed the seal of legitimacy on Mr. Cuenco's brow as the validly elected President of the Senate.

The third function of judicial review may be termed the symbolic or educational function. It is this function that the Supreme Court discharges when it acts, as it should, as the "pronouncer and the guardian" [22] of the more fundamental values that the community seeks. In a sense, this symbolic function is *sui generis*. Whether the Supreme Court be invalidating or validating a legislative or executive measure, the demand of the community is that the resulting decision shall embody and implement its basic values. The symbolic function of judicial review is of course most easily observable in the field of civil liberties; it is chiefly for his work in this field that Mr. Justice Malcolm will be permanently remembered. "[The Supreme Court]", Professor Meiklejohn wrote,

> "is commissioned to interpret to us our own purposes, our own meanings. To a self-governing community it must make clear what, in actual practice, self-governing is. And its teaching has peculiar importance because it interprets principles of fact and of value, not merely in the abstract, but also in their bearing upon the concrete, immediate problems which are, at any given moment, puzzling and dividing us. But it is just those problems with which any vital system of education is concerned. And for this reason, the Court holds a unique place in the cultivating of our national intelligence. Other institutions may be more direct in their teaching influence. But no other institution is more deeply decisive in its effect upon our understanding of ourselves and our government." [23]

---

[21] 83 Phil. at 88.

[22] "It is a premise", Professor Bickel wrote (*supra* note 1 at 24), "we adduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law. But such values do not present themselves ready-made. They have a past always, to be sure, but they must be continually derived, enunciated, and seen in relevant application. And it remains to ask which institution of our government—if any single one in particular—should be the pronouncer and guardian of such values."

Professor Jaffe, with a slight variation in nuance of meaning, has written of courts as "the acknowledged architects and guarantors of the integrity of the legal system. I use integrity here in its specific sense of unity and coherence and in its more general sense of the effectuation of the values upon which this unity and coherence are built. In a society so complex, so pragmatic as ours, unity is never realized, nor is it necessary that it should be. Indeed there is no possibility of agreement on criteria for absolute unity; what is contradiction to one man is higher synthesis to another. But within a determined context there may be a sense of contradiction sufficient to create social distress; and it is one of the grand roles of our constitutional courts to detect such contradictions and to affirm the capacity of our society to integrate its purposes." *Jaffe, Judicial Review: Question of Law*, 69 *Harv. L. Rev.* 239, 274 (1955).

[23] *Meiklejohn, Free Speech* 32 (1948).

II

Having recalled the above generalizations about the institution of judicial review, I should like to focus upon the doctrine of political questions and to essay a few observations about the doctrine.

The first thing about the political question doctrine that bears explicit mention is that it is one of a family of technical "devices for not doing", so to speak.[24] These devices include the requirement of a "genuine case or controversy", the requirement of "standing", the requirement of a seasonable raising of the constitutional issue, and the discretionary nature of declaratory relief and of the extraordinary equitable remedies of certiorari, prohibition, mandamus and injunction. Still other related devices are primary jurisdiction, exhaustion of administrative remedies, finality of executive or administrative action, and the doctrine of ripeness.[25] One cumulative import of this family of technical doctrines, including political questions, is that the courts have a very substantial area of discretion in accepting or declining jurisdiction to review the constitutionality of

---

[24] See *Bickel, op. cit., supra* note 1 at c. 4. Cf. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 *Harv. L. Rev.* 255, 304 (1961):

> "[T]he central function of the courts—as I, myself, concede—is the enforcement of individual right and duty. Judicial action taken against public officers, and particularly the legislature, may inject the judiciary into political controversy which may end either by weakening the authority of the courts or of the political process. Mindful of the political, rational, and practical limits of the judicial power, the courts have evolved criteria of limitation: the intensity of the plaintiff's claim to justice (standing); the degree and legitimacy of the public's claim to a judicial solution (public interest); the clarity with which the issues have emerged so as to be seen in all their bearings (ripeness); the possibility of deriving a governing rule from authoritative norms and of framing an enforceable decree (political question)."

The ordinary consequence of a finding that the issue raised is a "political question" is a disclaimer of jurisdiction over the case. A refinement should be noted in respect of cases where two or more separable issues are raised and the characterization of "political question" is made in respect of only of such issues. Taylor, *Legal Action to Enjoin Legislative Malapportionment: The Political Question Doctrine*, 34 *So. Cal. L. Rev.* 179, 183 (1961) notes this refinement:

> "It will be observed from the cases that a determination of the existence of a political question does not necessarily prevent the Court from assuming jurisdiction of a plaintiff's cause of action. This result obtains only when the claimant's suit directly challenges an action of a non-judicial branch of government which the Court determines it has no authority to review. In other situations, the political question doctrine may act simply to bar the admission of evidence on an issue to challenge what is established by a legislative or executive decision, such as, that a treaty is in effect or a war has been terminated."

[25] A good survey of the operation of these devices is offered in Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 *Fordham L. Rev.* 1 (1959). See also Moore and Adelson, *The Supreme Court: 1938 Term. II Rule-making, Jurisdiction and Administrative Review*, 26 *Va. L. Rev.* 697 (1940); Marschall, *Timing of Judicial Review*, 33 *Tex. L. Rev.* 701 (1955); Jaffe, *Primary Jurisdiction*, 77 *Harv. L. Rev.* 1037 (1964). Philippine cases relating to these devices are collected in *Cortes, Philippine Administrative Law: Cases and Materials* c. 7 (1963).

a particular challenged congressional or executive measure, and in deferring and controlling the timing of constitutional adjudication.[26]

From this point of view, the celebrated statement of Chief Justice Marshall in *Cohens v. Virginia*[27] would seem almost simplistic:

> "It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. *With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.* The one or the other would be treason to the constitution."[28]

The more realistic contemporary view, to my mind, was expressed by Judge Learned Hand in his 1958 Oliver Wendell Holmes Lecture:

> "[S]ince this power is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution. *It is always a preliminary question how importunately the occasion demands an answer.* It may be better to leave the issue to be worked out without authoritative solution; or perhaps the only solution available is one that the court has no adequate means to enforce."[29]

Professor Wechsler, delivering the 1959 Holmes Lecture, took issue with Judge Hand on this point and insisted that

> "For [him], as for anyone who finds the judicial power anchored in the Constitution, there is no such escape from the judical obligation; the duty cannot be attenuated this way.
>
> x x x

---

[26] Cf. *Frankfurter, Law and Politics* 25 (Capricorn ed., 1962).

[27] 6 Wheaton 264, 5 L. ed. 257 (1821).

[28] 6 Wheaton at 403, 5 L. ed. at 291. Note the following comparable strictures of Mr. Justice Perfecto in *Avelino v. Cuenco* 83 Phil. 17 (1949):

> "The questions raised in the petition, although political in nature, are justiciable because they involve the enforcement of legal precepts, such as the provisions of the Constitution and of the rules of the Senate. The power and authority to decide such questions of law form part of the jurisdiction, not only expressly conferred on the Supreme Court, but of which, by express prohibition of the Constitution, it cannot be divested." (83 Phil. at 36.)
>
> "Judicial determination of all constitutional or legal controversies is the inherent function of courts. x x x." (83 Phil. at 56.)
>
> "For the Supreme Court to refuse to assume jurisdiction in the case is to violate the Constitution. Refusal to exercise the judicial power vested in it is to transgress the fundamental law. This case raises vital constitutional questions which no one can settle or decide if this Court should refuse to decide them. x x x.
>
> "Our refusal to exercise jurisdiction in this case is as unjustifiable as the refusal of senators on strike to attend the sessions of the Senate and to perform their duties. x x x. (83 Phil. at 78.)

[29] *Hand, The Bill of Rights*, 15 (1958).

> [The] courts cannot escape the duty of deciding whether actions of the other branches of the government are consistent with the Constitution, when a case is properly before them . . . ."[30]

I venture to suggest that in the last clause quoted from Prof. Wechsler may be found the difficulty of his position. For the techniques of judicial restraints we referred to above to relate to the formal ability of a court to find, or decline to find, a case properly before it in differing circumstances. The appropriate management of these techniques should commonly permit great flexibility in selecting the properly ripened case, in determining the appropriate timing and quantum of constitutional adjudication that the court should engage in, and indeed in determining whether or not the court should engage in constitutional review at all.[31] Rarely will a sophisticated court find great difficulty in adducing a technical basis for declining jurisdiction to review a matter which it wishes to avoid on some other non-technical grounds. There is, in other words, little effective judicial compulsion for the exercise of constitutional review. Upon the other hand, where our Supreme Court has wished to speak on the merits of the constitutional question raised, the availability of one or more of the technical grounds for declining jurisdiction has not prevented it from so speaking. For instance, in *Alejandrino v. Quezon*[32] and in the original resolution in *Avelino v. Cuenco*,[33] the Court held itself without jurisdiction because of the political nature of the controversy and promptly went on to unburden itself of its views on the substance of the controversy. Again, in *Philippine Association of Colleges and Universities v. Secretary of Education*,[34] the Court dismissed the case on the ground that no justiciable controversy existed, the petitioner not having the necessary standing to raise issues relating to the extent of the constitutional authority of the state over private educational institutions. Nonetheless, it proceeded to consider the constitutional issues and to define its position thereon.

In *Tañada, et al. v. Cuenco, et al.*,[35] Mr. Justice Concepcion, writing the majority opinion, defined the term "political question" in the following manner:

> "In short, the term 'political question' connotes, in legal parlance, what it means in ordinary parlance, namely, a question of policy. In other words, . . . it refers to 'those questions which, under the Constitution, are to be *decided by the people* in their sovereign capacity, or in

---

[30] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harv. L. Rev.* 1, 6, 10 (1959).

[31] *Bickel, supra* note 1 at c. 4, *passim*.

[32] 46 Phil. 83 (1924).

[33] 83 Phil. 17 (1949).

[34] G.R. No. L-5279, October 31, 1955; 51 Official Gazette 6230 (1955).

[35] G.R. No. L-10520, February 28, 1957.

> regard to which *full discretionary* authority has been delegated to the Legislature or executive branch of the Government.' It is concerned with issues dependent upon the wisdom, not legality, of a particular measure."

This definition is useful as a base for analysis. Thus, to the extent that the definition implicitly contraposes a "question of policy" with a "question of law", it would appear to suggest that a political question is one for the resolution of which there are no rules of law applicable, or perhaps one in which legal rules play but a secondary and relatively insignificant role.[36] In this sense, of course, the question of whether or not Congress should subject a particular interest or activity of a segment of the population to regulation by statute is a political one. In the same sense, whether the President should appoint a particular person rather than any other person to a particular public office is a political question. In these cases, we recognize that legal rules have but minimal relevance in the making of these types of decisions. These are the issues which, in traditional judicial rhetoric, are dependent upon wisdom and not legality. I venture to suggest, however, that questions are commonly unlikely to come up before the Supreme Court in this form. For it would in the first place be most difficult in such cases to comply with the requirements of a "genuine case or controversy" and of "standing" and there would then be adequate doctrinal grounds for the court to decline review; there would seem no need to invoke the political questions doctrine.

In certain types of cases, the conception of a political question as a question in respect of which no legal rules are applicable may be useful in explaining the results reached by the courts. These relate to the external relations of the state and the point should be stressed that the reference of legal rules must here be understood to be rules of domestic or internal, as distinguished from international, law. For instance, in *Foster v. Neilsen*,[37] the United States Supreme Court held that the question of which of two countries had sovereignty over a given territory was a political one. Similarly, which of two contending governments is to be recognized, whether

---

[36] Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 *Harv. L. Rev.* 1265, 1303 (1961) makes the point with great clarity:

> "What is there about questions concerning foreign affairs that leads to a presumption that they are 'political'? We have seen that the Constitution grants to the President certain powers which imply certain further auxiliary powers. But there may be something about the nature of these powers which, in addition to their constitutional assignment, marks them as 'political.' Many of the questions that arise are of the sort for which we do not choose, or have not been able as yet to establish, strongly guiding rules. We may believe that the job is better done without rules, or that even though there are applicable rules, these rules should be only among the numerous relevant considerations."

[37] 2 Pet. 253, 7 L. ed. 415 (1829).

de jure or *de facto*, was regarded as political matter in *Oetjen v. Central Leather Co.*[38] and *U.S. v. Pink.*[39]

There is a point of legal theory that may be pertinently made here. It is that our internal or civil law is a formally complete system that enjoins, in case of the absence of constitutional or statutory norms, the use of alternative bases for legal decision—customary law and general principles of law.[40] Put a little differently, there is no problem of *non-liquet* in internal law.[41] Consequently, it would seem difficult to conceive of a controversy upon which absolutely no rule or standard or principle of law can be brought to bear.

Referring once more to the definition given in *Tañada v. Cuenco*, there, questions in regard to which "full discretionary authority" has been delegated to the legislature or executive branch of the government were dominated political questions. It is perhaps apparent that, apart from matters like choice in the enactment of laws and the making of appointments, there are very few matters affecting private persons, if indeed there are any, in respect of which "*full* discretionary authority" has been given to Congress or to the executive. There is the preliminary point that absolutely unlimited governmental discretion is alien to the very notion of constitutional government. There are always available the great and comprehensive constitutional standards of "due process" and "equal protection". Further, from one viewpoint, wherever the Constitution has spoken at all, "full" discretionary authority can hardly be said to exist. This was the viewpoint adopted in the *Tañada* case, where, because the Constitution speaks of the selection of members of the Senate Electoral Tribunal "upon the nomination . . . . of the party having the second largest number of votes in the Senate",[42] the Court was unable to find that the Senate was clothed with "full discretionary authority" in the matter of such selection. The Court instead held the exercise of the power to select members of the Electoral Tribunal as subject to

[38] 246 U.S. 297, 62 L. ed. 726 (1918).

[39] 315 U.S. 203, 86 L. ed. 796 (1942). For additional citations, see 3 *Willoughby, The Constitutional Law of the United States* 1329-1334 (2nd ed., 1929).

The majority opinion in *Baker v. Carr* 369 U.S. 186, 7 L. ed. 2d 663 at 682-84 (1962) canvasses the more frequently cited cases and makes the caveat that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating anaysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case and of the possible consequences of judicial action."

[40] See Art. 9 and 11-12, Civil Code of the Philippines; see, further, the commentaries referred to in 1 *Tolentino, Commentaries and Jurisprudence on the Civil Code of the Philippines* 38-42 (1960 ed.).

[41] As to *non-liquet* in international law see *Stove, Legal Controls of International Conflict* 153-64 (1954).

[42] Article VI, sec. 11.

constitutional limitations within the legitimate province of the judicial department to enforce. There would appear implicit in this ruling the assumption that all constitutional limitations are judicially enforceable. This assumption was earlier explicitly rejected by the Court in *Mabanag v. Lopez Vito* [43] when Mr. Justice Tuason quoted with approval the following passage where Dean Wigmore referred to:

> ". . . the fallacious notion that every constitutional provision is 'per se' capable of being enforced through the Judiciary and must be safeguarded by the Judiciary because it can be in no other way. Yet there is certainly a large field of constitutional provision which does not come before the Judiciary for enforcement, and may remain unenforced without any possibility or judicial remedy. x x x
>
> "These instances illustrate a general situation in which the judicial function of applying and enforcing the Constitution ceases to operate. That situation exists where the Constitution enjoins duties which affect the motives and judgment of a particular independent department of government—Legislature, Executive, and Judiciary. Such duties are simply beyond enforcement by any other department if the one charged fails to perform them. x x x" [44]

Osmeña v. Pendatun, et al.[45] and *Advincula and Avelino v. Commission on Appointments, et al.*[46] illustrate a type of matter in respect of which the Supreme Court has held the legislature possessed of "full discretionary authority". In the *Osmeña* case, decided three years after *Tañada*, the petitioner sought to prevent a special committee created by the House of Representatives from sitting and requiring the petitioner to prove certain serious accusations he had made against the President of the Philippines on the floor of Congress, and, failing such proof, to show cause why he should not be suspended. The Supreme Court held that each house of Congress has "exclusive power" to determine what acts shall constitute punishable "disorderly behaviour" on the part of its members and that consequently courts have no jurisdiction to "interfere" and shield a member from the collective wrath of the house. The Court in effect was unable to find any relevant constitutional limitation upon the exercise of that "exclusive power" of a legislative chamber to discipline its members. The Rules of the House of Representatives which were in force at the time Mr. Osmeña delivered the privileged address the House found offensive to its dignity, and under which a member could not be held to account for his utterances if some other business or debate had supervened, were regarded by the Court as merely "procedural" rules. As such, the Rules of the House gen-

[43] 78 Phil. 1 (1947).
[44] 4 *Wigmore on Evidence* 700-701 (3rd ed., 1940).
[45] G.R. No. L-17144, October 28, 1960.
[46] G.R. No. L-19823, August 31, 1962.

erated no immunity from subsequent punishment by the House. In sharp contrast with this position, the two dissenting Justices believed that the subsequent resolution punishing Mr. Osmeña with suspension, when he was no longer punishable under the House Rules, collided with the constitutional prohibition against *ex post facto* legislation. Justices J. B. L. Reyes and Labrador, in urging that the Court take jursidiction of the petition for a writ of prohibition, were in essence saying that even the "exclusive power" of the House and Senate to discipline their members was circumscribed by judicially enforceable inhibitions of the Bill of Rights. I suggest, accordingly, that the theoretical assumptions of both the majority and minority in *Osmeña v. Pendatun* do not represent a deviation from *Tañada v. Ceunco.*

The *Advincula and Avelino* case, decided two years after *Osmeña,* is analogous to *Osmeña.* There the petitioners asked the court in effect to control the discretion of the Commission on Appointments to confirm or not to confirm the petitioners' *ad interim* appointments. The petitioners sought mandamus with preliminary injunction to compel the Secretary of the Commission on Appointments to issue the corresponding certifications of confirmation. They did not of course urge the Supreme Court simply and nakedly to supersede the judgment of the Commission on Appointments; the petitioners raised the semblance of a legal question by asking the Court to pass upon the correctness of an interpretation placed by the Commission on section 21 of the Rules of Procedure, relating to those within which reconsideration of a resolution of the Commission confirming any appointment may be had. The Court refused to intervene in a matter which Mr. Justice Barrera characterized as "the internal business" of a commission of a coordinate department of government.[47] The Commission on Appointments is literally endowed with "full discretionary authority" to grant or withhold confirmation of appointments. The Constitution does not purport to lay down any prescriptions, however general, on this matter. No individual right can, in this context, be put forward for judicial vindication at this stage, the appointment process is incomplete and hence can vest no enforceable right.

Macias v. Commission on Elections,[48] decided last September 1961, indicates that outside the area of "internal business" of a coordinate department, it may be an exacting task, given the conception of political question set out in *Tañada v. Cuenco,* to find a question which is *not* a legal question and therefore *not* justiciable.

[47] In its Resolution on a motion for reconsideration, the Supreme Court affirmed its original decision: G.R. No. L-19823, January 12, 1963.

[48] G.R. No. L-18684, September 14, 1961.

The petitioners sought injunction to prevent the respondents from implementing Republic Act No. 3040 that sought to apportion representative districts in this country. The statute was attacked on several constitutional grounds, the relevant one for our purposes being that it apportioned districts unequally without regard to the number of inhabitants of the several provinces. The Court assumed jurisdiction holding the issue at stake to be a non-political question, and struck down Republic Act No. 3040 on grounds of inequality of apportionment. The Court regarded the constitutional reference to equality in representation as a judicially enforceable standard, and read such standard as a limitation upon the discretionary authority of Congress in respect of legislative re-apportionment.

The Court said:

> "Equalty of representation in the legislature, being such an essential feature of republican institutions and affecting so many lives, the judiciary may not with a clear conscience stand by to give free rein to the discretion of the political departments of the government."

Thus the Court entered what Mr. Justice Frankfurter described in *Colegrove v. Green*[49] as a "political thicket". Justice Frankfurter expressed his conviction in *Colegrove* that controversies concerning legislative reapportionment would "bring courts into *immediate and active relations* with party contests" and that "it is hostile to a democratic system to involve the judiciary in the politics of the people".[50] Almost by way of retort to Justice Frankfurter, our Supreme Court in the *Macias* case observed that the "mere impact" of the suit upon the political situation does not render such suit political rather than judicial. The retort certainly reflects sound principle, for it would be difficult to think of a legislative or executive act, regarded as significant enough to warrant a court test, that would have no impact at all upon the fluid alignments of political power existing at a given time.[51] There may be, however, a wide continuum of degrees of impact and at some level, the degree of the demanded involvement of the Court in party competitions for political power may be too great to be an acceptable cost of judicial policing of access to electoral processes. At that stage, the "po-

---

[49] 328 U.S. 549, 90 L. ed. 1432 (1945).

[50] 90 L. ed. at 1434.

[51] *Colegrove v. Green* was subjected to searching analysis; see, e.g., Lewis, *Legislative Apportionment and the Federal Courts*, 71 *Harv. L. Rev.* 1057 (1958). *Baker v. Carr*, 369 U.S. 186, 7 L. ed. 2d 663 (1962) has all but overruled *Colegrove*. "Of course", Mr. Justice Brennan said for the majority in *Baker*, "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." 7 L. ed. 2d at 681.

litical thicket" may be too dense to permit judicial entry and passage without infliction of unacceptable lacerations.

The inference that emerges from all our foregoing observations is that the doctrine of political questions is most realistically viewed as pressing at once a conclusion and a justification; the conclusion that a particular suit or issue in a suit is not meet for judicial determination and to be regarded outside the jurisdiction of the courts; and the justification that the resolution of such issue was intended, so far as constitutional construction may yield any relevant intent, to be resolved by either the legislative or the executive department. The political question doctrine does not, in other words, afford in itself indicia of significant specificity for determining the question of whether jurisdiction should be assumed or declined in a specific case.[52] I venture to suggest—and the suggestion is scarcely revolutionary—that because the characterization of a particular question as "political" may import no more than a conclusion as to the constitutional location of the authority to resolve such question, and because the ascertainment of the situs of the authority to determine the question at stake is frequently itself a matter of constitutional construction,[53] there would seem like need for an autonomous doctrine of political question. I submit, wih respect, that the orthodox rhetoric of political questions may be as unnecessary as it is obfuscating.

---

[52] Taylor, *supra* note 24 at 184 makes comparable summary:

"Perhaps the most important generalization to be made about the political question cases is that there is no test readily available for determining whether a particular matter is without the realm of judicial competence. The Constitution may indicate clearly enough in some cases, which areas are within the province of the various branches of government, but it does not provide any obvious guidelines for determining when decisions in those areas are to be accorded a finality above challenge on any grounds. Thus, the holding that an executive or legislative decision is to be accorded finality because it involves a 'political question' is, in reality, a conclusion which follows from a weighing of various considerations concerning the appropriateness of judicial review. These considerations may include the inability of the court to secure the facts; its inability to devise controlling principles of law; the superiority of political checks as guides to decision; special dangers such as having the government speak with more than one voice in its foreign relations; the interest of the plaintiff in the action; or the inability of the courts to deal with the consequences of a decision, such as a holding that a state government is unconstitutional."

[53] Cf. Weston, *Political Questions*, 38 *Harv. L. Rev.* 296, 331-2 (1924):

". . . [T]he line between judicial and political questions in a given constitutional situation is the line drawn by the constitutional delegation, and none other. . . . We are dealing with cases of this third class, where the court's jurisdiction or lack of jurisdiction of the whole case or of some subordinate issue therein is governed by provisions of not absolutely patent certainty. In many of these cases the courts in denying their own jurisdiction use the language of 'political questions'. When they do so, they unquestionably mean to a considerable extent merely to describe the power as in fact delegated to the other branches of government. But

If then the doctrine of political questions does not of itself determine the issue of jurisdiction or no jurisdiction, the relevant empirical question would appear to be this: What factors, or types of factors, variable or constant, have courts taken into account in deciding to accept or to reject jurisdiction in what kinds of cases? This is of course a matter for sustained investigation.[54]

The scientific performance of this task would require the careful examination, feature by feature, of the specific contexts of facts to which courts respond in making specific decisions. Clearly, a theoretical framework for characterizing, or intellectually breaking down a context into its component features is necessary if the search for relevant factors is to be more than an impressionistic and desultory survey. One framework for contextual analysis developed in recent years and which has fruitfully been applied in other areas of the law employs key categories such as: the characteristics of *participants;* the *objectives* sought to be realized; the *methods* or instruments by which the participants interact and affect each other; the *conditions* of their interaction; and the *effects* and *outcomes* achieved.[55] It is not possible here to attempt more than a hasty illustrative reference to these tentative working categories.

---

they also use the term 'political' argumentatively in deciding this issue of delegation. While to some extent they thus import their own notions of what ought to be delegated, a comparison of the cases shows that they have chiefly in mind that the power relates to a subject usually dealt with by political as contrasted with judicial methods, and is one with, or included in, matters unquestionably and unequivocably delegated to the executive and legislative departments. In none of the cases have the arguments needed to stray very far from the Constitution itself. The process is interpretative . . . ."

See, further, Finkelstein, *Further Notes on Judicial Self-Limitation,* 39 *Harv. L. Rev.* 221 (1925) and Basye, *The Scope of Judicial Power in Matters of a Political Nature,* 33 *Va. L. Rev.* 625 (1947).

The majority opinion in *Baker v. Carr,* 369 U.S. 186, 7 L. ed. 2d 663 (1962) put the point succinctly:

". . . The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibilty of this Court as ultimate interpreter of the Constitution. . . . ." (7 L. ed. 2d at 682).

[54] The formulations in *Baker v. Carr,* 7 L. ed. 2d at 685-86 afford a good starting point. The impact of *Baker* upon "political questions" as "a major doctrine of our constitutional jurisprudence", is assessed in McCloskey, *Foreword: The Reapportionment Case,* 76 *Harv. L. Rev.* 54 (1962).

[55] The applications include: *McDougal and Associates, Studies in World Public Order* (1960); *McDougal and Feliciano, Law and Minimum World Public Order: Legal Regulation of International Coercion* (1961); *McDougal and Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea* (1962); *McDougal, Lasswell and Vlasic, Law and Public Order in Space* (1963); *Arens and Lasswell, In Defense of Public Order: The Emerging Field of Sanction Law* (1961).

Inquiry into the characteristics of *participants* may indicate that courts have responded in one way where the head of a coordinate department of government is sought to be compelled to do or refrain from doing something, and in another way where a subordinate member of such department is sought to be ousted from a particular position or asserts a claim to authority to perform a particular function.[55a]

Consideration of the *objectives* sought to be realized by the participants suggests multiple relevant dimensions. One such dimension may be the kind of value or interest at stake in the controversy: it may suffice here to mention the still current debate about the "preferred position" of certain constitutional rights over certain others.[56] A second dimension would be the relative importance or consequentiality of the value at stake. A relatively trivial issue such as that raised in *Advincula and Avelino v. Commission on Appointments* [57] would seem likely to be passed over and left to the agency concerned as part of its "internal business". One plausible hypothesis may be that the more consequential the interest or issue, the more inclined may the Supreme Court be to assume jurisdiction.[58] Thus, the question involved in *Macias v. Commission on Elections* [59] where the Supreme Court did accept jurisdiction, was of high importance affecting as it did maintenance of access to the electoral process itself. Examination of the *methods* or instruments employed by participants in their mutual relationship may suggest that courts have been more prone to accept jurisdiction where interaction was carried on through certain instruments or strategies rather than where certain other instruments or strategies were resorted to. The relevant *conditions* under which both interaction and adjudication take place may include the variable capacity of the court to inform itself of the facts necessary for a rational determination of the issues presented. The cases raising questions relating to foreign relations suggest awareness of the courts that they are in a poor position to secure the necessary factual bases for decision and that the executive is best equipped to resolve such questions. The expected *effects* and *outcomes* would seem of both fairly obvious relevance. The apprehension of profound and portentous consequences flowing from acceptance or rejection of jurisdiction

---

[55a] See: Hochman, *Judicial Review of Administrative Processes in Which the President Participates*, 74 *Harv. L. Rev.* 684 (1961).

[56] See e.g. *Ullmann v. United States* 350 U.S. 422, 100 L. ed. 511 (1956) and *Barenblatt v. United States* 360 U.S. 109, 3 L. ed. 2d 1115 (1959).

[57] *Supra*, note 46.

[58] See, in this connection, the thoughtful and suggestive study of Givens, *Chief Justice Stone and the Developing Function of Judicial Review*, 47 *Va. L. Rev.* 1321 (1961).

[59] *Supra*, note 48.

has an observable impact upon judicial decision.[60] In *Luther v. Borden*[61] which involved the legitimacy of the government established in Rhode Island during the so-called "Dorr Rebellion", such apprehension led the United States Supreme Court to refuse to pass upon the issues raised. In *Avelino v. Cuenco*,[62] the same apprehension on the part of our Supreme Court resulted in the eventual assumption of jurisdiction upon a motion for reconsideration.

The above, as I have said, is intended only to suggest the potentialities of a contextual approach. I think the task of exploring such potentialities in depth may be left to those who will come after me.

---

[60] This is a principal emphasis of Finkelstein, *Judicial Self-Limitation*, 37 *Harv. L. Rev.* 338, 346 (1923).

[61] 7 How. 1, 12 L. ed. 581 (1849).

[62] *Supra*, note 33.