# MR. CHIEF JUSTICE CONCEPCION ON JUDICIAL REVIEW

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What prompted us to embark on this study is the necessity for a thorough understanding of the different legal approaches followed by the men who comprise our Highest Tribunal and whose opinions profoundly influence the attitude of the Court on the subject of judicial review. An understanding of these differing philosophies of judicial action is especially helpful in this period of national emergency when there seems to be a locking of horns between the forces of judicial activism and judicial self-restraint.

This essay seeks to analyze the juristic thinking of Mr. Chief Justice Concepcion in judicial review cases. Our choice of the Chief Justice was largely due to his landmark opinions which make him a partisan of judicial activism.

We shall first concentrate on his opinions on the origin and basis of judicial review, sufficiency of interest, political questions and the principle of separation of powers. We shall then proceed to assess his inclination towards judicial activism.

## I. ORIGIN AND BASIS OF JUDICIAL REVIEW

The Philippines was happily spared the traumatic birth of judicial review in the United States.[1] The power of judicial review is firmly rooted in our country. It finds express recognition in both the 1935[2] and 1973[3]

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[1] Boyd, "The Chasm That Separated Thomas Jefferson and John Marshall", ESSAYS ON THE AMERICAN CONSTITUTION (Gottfied Dietze ed. 1964); *cf.* Mace, "The Antidemocratic Character of Judicial Review", 60 CAL. L. REV. 1140, 1145 (1972) who quotes Jefferson's statements that, although the judiciary, was "at first considered the most harmless and helpless of all organs," it had developed to the point "sapping and mining . . . the foundation of the Constitution."

[2] ART. VIII, sec. 2(1), ". . . All cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question." ART. VIII, sec. 10, "All cases involving the constitutionality of a treaty or law shall be heard and decided by the Supreme Court en banc, and no treaty or law may be declared unconstitutional without the concurrence of two-thirds of all the members of the Court."

[3] ART. X, sec. 2(2) and ART. X, sec. 5(2), the only change being that in all "cases involving the constitutionality of a treaty, executive agreement, or law shall be heard and decided by the Supreme Court en banc and no treaty, executive agreement, or law may be declared unconstitutional without the concurrence of at least ten members."

Constitutions. In *Gonzales v. Hechanova,* Chief Justice Concepcion did not hesitate to declare:[4]

> "As regards the question whether an international agreement may be invalidated by our courts, suffice it to say that the Constitution of the Philippines has clearly settled it in the affirmative; by providing, in Section 2 of Article VIII thereof, that the Supreme Court may not be deprived "of its jurisdiction to review, revise, reverse, modify, or affirm, on appeal, certiorari, or writ of error as the law or the rules of court may provide, final judgments and decrees of inferior courts in — (1) are cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question." In other words, our Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, but, also, when it was counter to an act of Congress."

In *Gonzales v. Commission on Elections,*[5] *Planas v. Commission on Elections,*[6] and in *Javellana v. The Executive Secretary,*[7] he found no trouble in rooting the power of judicial review upon the express provision of the Constitution.

He also cited a long list of cases as authority that the issue of the constitutionality of statutes and acts of the Executive is inherently and essentially justiciable.[8] He rejects the political-question theory propounded by the respondents in *Javellana v. The Executive Secretary*[9] on the basis of the fact that the decision in *Lansang v. Garcia,*[10] "gained added weight by its virtual reiteration in the plebiscite cases"[11] and partook of the nature and effect of *stare decisis.*

## II. SUFFICIENCY OF INTEREST

As part of the case and controversy requirements, it is a general rule that the person who impugns the validity of a 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.[12]

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[4] G.R. No. L-21897, October 22, 1963, 9 SCRA 230, 243 (1963).
[5] G.R. No. L-28196, November 9, 1967, 21 SCRA 774, 787 (1967).
[6] G.R. No. L-35925, January 22, 1973, 49 SCRA 105, 125-126 (1973).
[7] G.R. No. L-36142, March 31, 1973, 50 SCRA 30, 79-80 (1973).
[8] *Supra,* notes 6 & 7 at 81-82.
[9] *Supra,* note 7 at 82-84.
[10] G.R. No. L-33964, December 11, 1971, 42 SCRA 448 (1971).
[11] *Supra,* note 6.
[12] People v. Vera, 65 Phil. 56, 86 (1937). The general rule in the United States is the same. See Standard Stock Food Co. v. Wright, 225 U.S. 540, 32 S.Ct. 784, 56 L.Ed. 1197 (1921); Coleman v. Miller, 307 U.S. 433, 59 S.Ct. 972, 122 A.L.R. 695, 83 E.Ed. 1385 (1939); Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1950); Teleston v. Ullman, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943).

This general rule was relaxed in *Pascual v. The Secretary of Public Works.*[13] In this case, the petitioner, as a taxpayer and the Provincial Governor of Rizal, challenged the constitutionality of a law appropriating funds for the construction, reconstruction, repair, extension and improvements of a feeder road passing through a private-owned subdivision on the ground that such appropriation of public revenue was not for a public purpose. The respondents questioned the personality of the petitioner to bring the suit. The Supreme Court, in a decision penned by then Associate Justice Concepcion followed the rule adopted by most American state courts and rejected the rule laid down in *Frotingham v. Mellon.*[14] Justice Concepcion declared that the petitioner had sufficient interest in the case as to allow him standing in courts:[15]

> "The relation between the people of the Philippines and its taxpayers, on the one hand, and the Republic of the Philippines, on the other, is not identical to that obtaining between the people and taxpayers of the U.S. and its Federal Government. It is closer, from a domestic viewpoint, to that existing between the people and taxpayers of each state and the government thereof, except that the authority of the Republic of the Philippines is more fully direct than that of the States of the Union, insofar as the simple and unitary type of our national government is not subject to limitations analogous to those imposed by the Federal Constitution upon the states of the Union, and those imposed upon the Federal Government in the interest of the states of the Union. For this reason, the rules recognizing the right of taxpayers to assail the constitutionality of a legislation appropriating local or state public funds — which has been upheld by the Federal Supreme Court (Crampton v. Zabriskie, 101 U.S. 601) — has greater application in the Philippines than that adopted with respect to acts of Congress of the United States appropriating federal funds."

He cited *Province of Tayabas v. Perez,*[16] *Rodriguez v. Treasurer of the Philippines,*[17] and *Barredo v. Commission on Elections*[18] as precedents. He added:[19]

> "Moreover, the reason that impelled this Court to take such position in said two (2) cases — the importance of the issues therein raised — is present in the case at bar. Again, like the petitioners in the Rodriguez and Barredo cases, petitioner herein is not merely

[13] 110 Phil. 331 (1960).
[14] 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923).
[15] *Supra,* note 13 at 344-345.
[16] 56 Phil. 257 (1931).
[17] 84 Phil. 368 (1949).
[18] 45 O.G. 4411, G.R. No. L-3056, August 26, 1919, 84 Phil. 368 (1949).
[19] *Supra,* note 13 at 345.

> a taxpayer. The Province of Rizal, which he represents officially as its Provincial Governor, is our most populated political subdivision and the taxpayers therein bear a substantial position of the burden of taxation in the Philippines."

Justice Concepcion reiterated the *Pascual* doctrine in *Gonzales v. Hechanova*.[20] In this case, the petitioner questioned the legality of the authorization given by the President to import rice. The Court, in upholding the sufficiency of petitioner's interest, stated:[21]

> "x x x Apart from prohibiting the importation of rice and corn "by the Rice and Corn Administration or any other government agency," Republic Act No. 3452 declares, in Section 1 thereof, that "the policy of the Government" is to "engage in the purchase of these basic foods directly from those tenants, farmers, growers, producers and landowners in the Philippines who wish to dispose of their products at a price that will afford them a fair and just return for their labor and capital investment . . ." Pursuant to this provision, petitioners, as a planter with a rice land of substantial proportion, is entitled to a chance to sell to the Government the rice it now seeks to buy abroad. Moreover, since the purchase of said commodity will have to be effected with public funds mainly raised by taxation, and as a rice producer and landowner petitioner must necessarily be a taxpayer, it follows that he has sufficient personality and interest to seek judicial assistance with a view to restraining what he believes to be an attempt to unlawfully disburse said funds."

In liberalizing the requirements for a taxpayer to gain standing in court, Justice Concepcion was instrumental in the lowering of the barriers to public actions.[22] Indeed, these traditional barriers to American Federal taxpayers have definitely been lowered in *Flast v. Cohen*.[23] In that case, the United States Supreme Court speaking through Chief Justice Warren, held that a federal taxpayer is with standing to challenge the constitutionality of a federal statute and that this taxpayer's action does fulfill the constitutional requisites of case or controversy.

The doctrine laid down in the *Frotingham* case[24] has been criticized by Professor Jaffe as being questionable.[25] He advocates the acceptance

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[20] *Supra*, note 14 at 235.

[21] *Ibid*

[22] Jaffe evaluates a taxpayer's suit as more of a 'public' than a 'private' type of suit and therefore calls it a public action. See Jaffe, *Standing to Secure Judicial Review*, 74 HARV. L. REV. 1265, 1267 (1961).

[23] 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed. 2d 947 (1968).

[24] *Supra*, note 14.

[25] *Supra*, note 22 at 1266. Professor Davis also argues for the extension of standing to federal taxpayers, noting that, due to the increase of the federal tax burden, the interest in the application of federal funds is becoming more direct

of public actions:[26]

> "To sum up, then, we can say that the most congent arguments against public actions are that they strain the judicial function, and the political process. On the other hand, they provide a modest measure of control of official action; there are probably better ways, but we have not yet seen fit to adopt them, and it may be that public actions are a valuable supplement to even the best system of control. They are, at the least, not inconsistent with our democratic premises, and arguably they reinforce them. The widespread and ever-growing acceptance of public actions by the State Courts and legislature attest to a deeply felt need and provides adequate support of their use."

Professor Berger goes even further.[27] He maintains that allowance of a suit by a stranger who takes a personal interest to challenge an unconstitutional action is historically a matter of right.[28] He proves that in the English practice relied upon in *Coleman v. Miller*,[29] *Joint-Anti-Fascist Refugee Commission v. McGrabt*,[30] *Frotingham v. Mellon*,[31] and even in *Feast v. Cohen*,[32] a mere stranger was allowed to initiate and maintain an 'adversary' proceeding in the public interest to challenge a constitutional usurpation. He concludes that *locus standi* is not mentioned in the Constitution and is a judicial construct pure and simple.[33]

As to the doctrine of separation of powers, Berger observes:[34]

> "Overemphasis of the "separation of powers" however, is apt to obscure the no less important system of "checks and balances". Judicial checks on legislation excesses represent a deliberate and considered departure from an abstractly perfect separation of powers, part of what Madison called a necessary blending of powers that was required to make the separation work (Federalist 47). Litigation that challenges unconstitutional legislation does not constitute an "improper interference" with nor an "intrusion" into the legislative domain. No authority to make laws in excess of granted powers was "committed" to Congress; instead courts were authorized to check

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and immediate. See Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 386-391 (1955).

[26] *Ibid.*, at 1292.

[27] Berger, *Standing to Sue in Public Action: Is It A Constitutional Requirement?*, 78 YALE L. J. 816 (1969).

[28] *Ibd.*, at 817-818.

[29] 307 U.S. 433, 59 S.Ct. 972, 122 A.L.R. 695, 83 L.Ed. 1385 (1939) (Frankfurter, J., concurring).

[30] 341 U.S. 123, 150, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

[31] *Supra*, note 14.

[32] *Supra*, note 23.

[33] *Supra*, note 27 at 818.

[34] *Supra*, note 27 at 823-830.

> Congressional excesses. "Case or controversy", to be sure, seeks to confine the courts to what Madison termed cases of "judiciary nature" as distinguished from a roving revision of legislation. Legislation is emphatically not for the courts; but after the legislative process is completed the courts may decide in the frame of litigation that a statute is invalid as a legislative usurpation. A legislative usurpation does not change character, when it is challenged by a stranger; and judicial restraint thereon remains a "judicial function", not an "intrusion", though undertaken at the call of one without a personal stake. No hint that judicial restraint of legislative usurpation was to hinge on the suitor's interest is to be found in the records of the Constitutional Convention. Having made review available to curb usurpations of powers not "committed" to Congress, the Founders could assume that traditional remedies in "cases" of a "judiciary nature" would be available to curb such excesses, particularly in light of their desire to leave all channels open for attacks in Congressional self-aggrandizement."

However, he concedes that there may well be policy arguments in favor of a "personal interest", limitation on standing.[35] As Sealer aptly puts it:[36]

> "It must be realized that it is generally wise to limit standing to assert rights to those persons whose rights have been violated by the action in question. However, there are instances where in order to perpetuate other significant values, there must be a relaxation of the standing requirement."

It is in the Court's sound discretion to deny or allow *locus standi* in taxpayer's suits.[37]

## III. POLITICAL QUESTIONS

Justice Concepcion defined political questions in *Tañada v. Cuenco*[38] as "all questions that lie outside the scope of judicial questions, which under the constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government,"[39] or questions "concerned with issues dependent upon the wisdom, not legality of a particular measure.[40] In a similar vein, he quoted *In re McConaughy*[41]

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[35] *Ibid.*, at 840.
[36] *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L. J. 599 (1962).
[37] Tan v. Macapagal, G.R. No. L-34161, February 29, 1972, 43 SCRA 677 (1972).
[38] 103 Phil. 1051, 1066 (1957).
[39] Quotency 16 C.J.S., 413.
[40] *Supra*, note 38 at 1967.
[41] 119 N.W. 408, 411, 417 (1909).

in defining a political question as ". . . a matter which is to be exercised by the people in their primary political capacity, or that it has been specifically delegated to some other department or particular officer of the government, with discretionary power to act". The Court resolved the case:[42]

> "Such is not the nature of the question for determination in the present case. Here, we are called upon to decide whether the election of Senators Cuenco and Delgado by the Senate, as Members of the Senate Electoral Tribunal, upon nomination by Senator Primicias — a member and spokesman of the party having the largest number of votes in the Senate in behalf of its Committee on Rules, contravenes the constitutional mandate that said members of the Senate Electoral Tribunal shall be chosen "upon nomination . . . of the party having the second largest number of votes" in the Senate, and hence, is null and void. This is not a political question. The Senate is not clothed with full discretionary authority" in the choice of members of the Senate Electoral Tribunal. The exercise of its powers thereon is subject to constitutional limitations which are claimed to be mandatory in nature. It is clearly within the legitimate province of the judicial department to pass upon the validity of the proceedings in connection therewith."

For, although the Senate had, under the 1935 Constitution, the executive power to choose the Senators who shall form part of the Senate Electoral Tribunal, the fundamental law prescribed the manner in which the authority would be exercised.[43] Finkelstein supports this view:[44]

> "The courts are called upon the say, on the other hand, by whom certain powers shall be exercised, and on the other hand, to determine whether the powers thus possessed have been validly exercised. In performing the latter function, they do not encroach upon the powers of a coordinate branch of the government, since the determination of the validity of an act is not the same thing as the performance of the act. In the one case we are seeking to ascertain upon whom devolves the duty of the particular service. In the other case we are merely seeking to determine whether the Constitution has been violated by anything done or attempted by either an executive official or the legislative."

The definition is similar to that advanced by Weston:[45]

> ". . . [T]he line between judicial and political questions in a given constitutional situation is the line drawn by constitutional delegation, and none other . . . We are dealing with cases third class, where the

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[42] *Supra*, note 38 at 1068.

[43] *Ibid.*, at 1060.

[44] Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221, 224, 244 (1926) as quoted in Tañada v. Cuenco, *supra*, note 38 at 1060.

[45] Weston, *Political Questions*, 38 HARV. L. REV. 296, 331-332 (1925).

> 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 powers as in fact delegated to the other branches of government. But they also use the term 'political' argumentatively in deciding this issue of delegation. While to some extent they thus import their 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 unquestionable and unequivocably delegated to the executive and legislative departments. In none of these cases have the arguments needed to stray far from the constitution itself."

It could thus be gleaned from the decision that the Court was slowly abandoning its hands-off policy and was attempting to reduce the distinction between political and justiciable cases to the minimum.[46]

However, Feliciano suggests that the political question doctrine enunciated in *Tañada v. Cuenco*[47] does not "afford in itself indicia of significant specificity for determining the question of whether jurisdiction should be assumed or declined in a specific case."[48] Indeed the line between political and justiciable controversies is ofen very thin.[49] Thus, the political question, although an ancient concept,[50] is not yet precisely defined. At most authorities have listed various considerations that determine the appropriateness of judicial review. According to Taylor,[51] 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 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". Finkelstein suggests that "it is the fear of the consequences or the lack of adequate data that has compelled the courts to refrain from entering

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[46] Manalad & Labayen, *The Court's Attitude Towards "Political Questions" Revisited*, 36 PHIL. L.J. 599, 604-605 (1961).

[47] *Supra*, note 38.

[48] Feliciano, *On the Functions of Judicial Review and the Doctrine of Political Questions*, 39 PHIL. L.J. 444, 459 (1964).

[49] Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 227-228 (1955).

[50] For an extensive discussion of the ancient and pre-Marbury v. Madison origins of Judicial review, see Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338-344 (1923).

[51] Taylor, *Legal Action to Enjoin Legislative Malapportionment: the Political Question Doctrine*, 34 SO. CAL. REV. 179, 184 (1961).

upon the discussion of the merits of prickly issues.'"[52] Bickel ventures similar considerations:[53]

> "Such is the basis of the political-question doctrine: the court's sense of lack of capacity, compounded in unequal parts of the strangeness of the issue and the suspicion that it will have to yield more often and more substantially to expediency than the principle; the sheer momentousness of it, which unbalances judgment and prevents one from submitting the normal calculations of probabilities; the anxiety not so much that judicial judgment will be ignored, as that perhaps it should be, but won't; finally and in sum ("in a mature democracy"), the inner vulnerability of an institution which is electorally irresponsible and has no earth to draw strength from."

However, in his concurring and dissenting opinion in *Aytona v. Castillo*,[54] Mr. Justice Concepcion believed that the "question whether certain appointments should be sanctioned or turned down by reason of the improper, immoral or malevolent motives with which said matters were allegedly handled, is, likewise, clearly political, and, as such, its determination belongs, not to the court of justice. . . ., but to the political organ established precisely to check possible abuses in the exercise of the appointing power — the Commission on Appointments."

Likewise, the question of whether or not "public interest" demands the exercise of the power to incorporate was regarded by Justice Concepcion as the ponente in *Pelaez v. Auditor General*[55] as a purely legislative and, hence, a political question.[56]

In *Gonzales v. Commission on Elections*,[57] the Chief Justice led the court in its departure from the *Mabanag v. Lopez Vito*[58] doctrine:

> "Since, when proposing, as a constituent assembly, amendments to the Constitution, the members of Congress derive their authority from the Fundamental Law, it follows, necessarily, that they do not have the final say on whether or not their acts are within or beyond constitutional limits. Otherwise, they could brush aside and set the same at naught, contrary to the basic tenet that ours is a government of laws, not of men, and to the rigid nature of our Constitution.

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[52] *Supra*, note 50 at 363.

[53] Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 75 (1961).

[54] G.R. No. L-19313, January 19, 1962, 4 SCRA 1, 26, (1962).

[55] G.R. No. L-23825, December 24, 1965, 15 SCRA 569, 580, (1965).

[56] Citing Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority, 74 S.E. 2d 310-313, 315-318 (1953); Udal v. Severn, 79 P. 2d 347-349 (1938); and *In re* Village of North Milwaukee, 67 N.W. 1033, 1035-1037 (1896) as authorities.

[57] *Supra*, note 5.

[58] 78 Phil. 1 (1947). For a view that the Mabanag doctrine is still controlling, see V.V. Mendoza, Judicial Review of the Effectivity of a New Constitution and the Political Question Doctrine, 50 SCRA 393, 406-409 (1973).

> Such rigidity is stressed by the fact that, the Constitution expressly confers upon the Supreme Court, the power to declare a treaty unconstitutional, despite the eminently political character of treaty-making power."

Again, in *Lansang v. Garcia*[59] the members of the court led by the Chief Justice were unanimous in holding that the Court had the authority to inquire into the factual basis underlying Presidential Proclamation No. 889 suspending the privilege of the writ of *habeas corpus*. The Chief Justice reasoned out:[60]

> "Indeed, the grant of power to suspend the privilege is neither absolute nor unqualified. The authority confered by the Constitution, both under the Bill of Rights and under the Executive Department, is limited and conditional. The precept in the Bill of Rights establishes a general rule, as well as an exception thereto. What is more, it postulates the former in the negative, evidently to stress its importance, by providing that "the privilege of the writ of *habeas corpus* shall not be suspended x x x." It is only by way of exception that it permits the suspension of the privilege "in cases of invasion, insurrection, or rebellion," or; under Article VII of the Constitution, "imminent danger thereof" — "when the public safety requires it, in any of which events the same may be suspended whenever during such period the necessity for such suspension shall exist." Far from being full and plenary, the authority to suspend the privilege of the writ is thus circumscribed, confined and restricted, not only by the prescribed setting or the conditions essential to its existence, but, also, as regards the time when and the place where it may be exercised. These factors and the aforementioned setting or conditions work, establishes and define the extent, the confines and the limits of said power, beyond which it does not exist. And, like the limitations and restrictions imposed by the Fundamental Law upon the legislative department, adherence thereto and compliance therewith may, within proper bounds, be inquired into by the courts of justice. Otherwise, the explicit constitutional provisions thereon would be meaningless. Surely, the frames of our Constitution could not have intended to engage in such a wasteful exercise in futility."

He continued by stressing the importance of private rights as intimated in *Sterling v. Constantin*:[61]

> "Much less may the assumption be indulged in when we bear in mind that our political system is essentially democratic and republican in character and that the suspension of privilege affects the most fundamental element of that system, namely, individual freedom. Indeed, such freedom includes and connotes, as well as demands, the

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[59] *Supra*, note 10.
[60] *Ibid.*, at 473-474.
[61] 287 U.S. 375, 385, 53 S.Ct. 190, 77 L.Ed. 375 (1932).

> right of every single member of our citizenry to freely discuss and dissent from, as well as criticized and denounce, the views, the policies and the practices of the government and the party in power that he deems unwise, improper or inimical to the commonwealth, regardless of whether his own opinion is objectively correct or not. The untrammelled enjoyment and exercise of such right — which, under certain conditions, may be a civic duty of the highest order — is vital to the democratic system and essential to its successful operation and wholesome growth and development."[62]

Hence, the Court refused to follow the hands-off doctrine laid down in *Barcelon v. Baker*[63] and *Montegro v. Castañeda.*[64]

And in *Planas v. Commission on Elections,*[65] Chief Justice Concepcion declared that the Court had authority to pass upon the validity of Presidential Decree No. 73 which submitted to the Filipino people for ratification or rejection the Constitution proposed by the 1971 Constitutional Convention.

Likewise, following the theory of legal validity[66] in *Javellana v. The Executive Secretary,*[67] the Chief Justice did not hesitate to conclude that the issue on whether the Constitution proposed by the 1971 Constitutional Convention has been ratified in accordance with the provisions of Article XV of the 1935 Constitution was *not* a political question. For him the Supreme Court decision in the *habeas corpus* cases[68] partook of the nature and effect of *stare decisis,* which gained added weight by its virtual reiteration in the plebiscite cases.[69] As in *Tañada v. Cuenco,*[70] he quoted with approval *In re McConaughy*[71] in holding that *Luther v. Borden*[72] did not have the slightest application to the case at bar. He distinguished between the two cases:[73]

> "It is thus apparent that the context within which the case of Luther v. Borden was decided is basically and fundamentally different from that of the cases at bar. To begin with, the case did not involve Federal question, but one purely municipal in nature. Hence, the Federal Supreme Court was "bound to follow the decisions of the

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[62] *Supra,* note 10 at 474-475.
[63] 5 Phil. 87 (1905).
[64] 91 Phil. 882 (1952) in which the court following the precedent established by Barcelon v. Baker, held that the authority to decide whether the exigency has arisen requiring the suspension of the privilege of the writ of habeas corpus belongs to the President and that his decision is final and conclusive upon the courts and upon all other persons.
[65] *Supra,* note 6 at 125-126.
[66] Fernandez, *Political Law,* 49 PHIL. L.J. 223, 227 (1974).
[67] *Supra,* note 7 at 81.
[68] *Supra,* note 10.
[69] *Supra,* note 6.
[70] *Supra,* note 38.
[71] *Supra,* note 41.
[72] 7 How. 1, 12 L.Ed. 581 (1849).
[73] *Supra,* note 7 at 91.

> State Tribunals" of Rhode Island upholding the Constitution adopted under the authority of the charter government. Whatever else was said in that case constitutes, therefore, an obiter dictum. Besides, no decision analogous to that rendered by the State Court of Rhode Island exists in the cases at bar. Secondly, the states of the Union have a measure of internal sovereignty upon which the Federal Government may not encroach, whereas ours is a unitary form of government, under which our local governments derive their authority from the national government. Again, unlike our 1935 Constitution, the charter or organic law of Rhode Island contained no provision on the manner, procedure or conditions for its amendment.
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> Then, too, the case of Luther v. Borden hinged more on the question of recognition of government, than on recognition of constitution, and there is a fundamental difference between these two (2) types of recognition, the first being generally conceded to be a political question, whereas the nature of the latter depends upon a number of factors, one of them being whether the new Constitution has been adopted in the manner prescribed in the Constitution in force at the time of the purported ratification of the former, which is essentially a justiciable question. There was, in Luther v. Border, a conflict between two (2) rival governments, antagonistic to each other, which is absent in the present cases. Here, the Government established under the 1935 Constitution is the very same government whose Executive Department has urged the adoption of the new or revised Constitution proposed by the 1971 Constitutional Convention and now alleges that it has been ratified by the people."

He therefore differs with authorities who cite *Luther v. Borden*[74] as the origin of the political question doctrine in constitutional law. Finkelstein, for one, considers the said case as the first important case in the United States to apply the doctrine of judicial non-interference with political questions.[75] The author explains:[76]

> "It has been said that the above quotations are merely dicta and not the real decision of the court was its adoption of the decision of the court below. This argument is adduced from the fact that Chief Justice Taney says in his opinion that the Supreme Court has no jurisdiction to reverse the state courts in matters relating to the determination of whether or not the state government exists. This does not mean that the state courts have jurisdiction to determine such questions. Conceivably they must have under certain state constitutions. A careful reading of this opinion can leave very little doubt that the crux of the decision in the unwillingness of the court to enter into the fray."

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[74] *Supra*, note 72.
[75] *Supra*, note 50 at 344.
[76] *Ibid.*, at 343-344, underscoring ours.

Corwin also maintains that the doctrine, originating in the field of international relations, was extended on the said leading case to constitutional law.[77]

The Chief Justice's view that the issue of the validity of the ratification of the 1973 Constitution is a judiciable controversy is surprisingly close to that expressed by Weston:[78]

> "In this branch of the inquiry, therefore, there is but one situation where there is a question of law whether the power to decide a given question has been delegated to the courts. That situation occurs where a constitutional charge has been attempted along procedural lines laid down in the amending clause of the old Constitution, and the charge does not affect the existence of the court. It probably is safe to say that there is no authority against the position that the ultimate issue of whether this change has occurred in conformity with the requirements of the constitution is a question for the courts to decide. Every step of the irrefutable logic which requires the courts to construe the constitution when question arise under it, and to ignore statutes which conflict with it, calls for a rejection of an alleged amendments which does not conform to it — so far as the fact of change remains a matter of law at all."[79]

## IV. Separation of Powers

Mr. Chief Justice shows in his opinions a profound respect for the principle of separation of powers. In his concurring and dissenting opinion in *Aytona v. Castillo*,[80] he regarded the majority decision as a reversal of the Court's stand on the principle of separation of powers. He considered the decision as an inquiry into the motives or wisdom of the Executive Department in making the questioned appointments.[81]

*Gonzales v. Commission on Elections*[82] is an excellent example of the legitimating or validating function of judicial review.[83] In the said case,

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[77] Corwin, *Judicial Review in Action*, 74 U. Pa. L. Rev. 639 (1926) as reproduced in Selected Essays in Constitutional Law (Associations of American Law Schools, ed. 1938) 449 at 456. The author emphasized the ruling of the United States Supreme Court that the Court could not question a previous determination by the President and the U.S. Congress that the then existing governments of Rhode Island was "republican in form," within the requirements of Article IV, Section 4 of the Federal Constitution.

[78] *Supra*, note 45 at 309-310

[79] This quotation follows an exposition on the logical and embarrasing difficulties which may confront a Court in deciding the validity of both a revolutionary and non-revolutionary revision of a Constitution. See *Ibid.*, at 305-309.

[80] *Supra*, note 54 at 26-28.

[81] *Ibid.*, at 28.

[82] *Supra*, note 5 at 801-802.

[83] On the legitimating function of judicial review, see Black, The People and the Court: Judicial Review in a Democracy (1960) and Jaffe, *The Rights to Judicial Review*, 71 Harv. L. Rev. 401 (1958).

Chief Justice Concepcion, speaking for the minority,[84] validated the legislative action.[85]

> "We are impressed by the factors considered by our distinguished and esteemed brethren, who opine otherwise, but we feel that such factors affect the wisdom of Republic Act No. 4913 and that of R.B.H Nos. 1 and 3, not of the authority of Congress to approve the same.
>
> The system of checks and balances underlying the judicial power to strike down acts of the Executive or of Congress transcending the confines set forth in the fundamental laws is not in derogation of the principle of separation of powers, pursuant to which each department is supreme within its own sphere. The determination of the conditions under which the proposed amendments shall be submitted to the people is concededly a matter which falls within the legislative sphere. We do not believe it has been satisfactorily shown that Congress has exceeded the limits thereof in enacting Republic Act No. 4913. Presumably, it would have done something better to enlighten the people in the subject-matter thereof. But, then, no law is perfect. No product of human endeavor is beyond improvement. Otherwise, no legislation would be constitutional and valid."

In *Lansang v. Garcia*,[86] the Chief Justice gave further weight to the principle of separation of powers by holding that the proper standard with which the court could judge the constitutional bases of the Presidential action suspending the privilege of the writ of *habeas corpus* is not its correctness, but its arbitrariness. He explained the checking function[87] of judicial review:[88]

> "In the exercise of such authority, the function of the Court is merely to check — not to supplant — the Executive, or to ascertain merely whether he has gone beyond the constitutional limits of his jurisdiction, not to exercise the power vested in him or to determine the wisdom of his act. To be sure, the power of the Court to determine the validity of the contested proclamation is far from being identical to, or even comparable with, its cases elevated thereto by ordinary appeal from inferior courts, in which cases the appellate court has all the powers to the court of origin."

He put the difference between the judicial authority to review decision of administrative bodies performing quasi-judicial functions and its authority

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[84] The majority were two votes short of the eight-vote requirement laid down by the 1935 Constitution to declare R.A. 4913, providing that the amendments to the Constitution proposed in the Resolution of Both Houses (RBH) Nos. 1 and 3 be submitted for approval by the people, at the general elections to be held on November 14, 1967 unconstitutional and invalid.

[85] *Supra*, note 5.

[86] *Supra*, note 59 at 481-482.

[87] *Supra*, note 48 at 444-447.

[88] *Supra*, note 59 at 480.

to test the validity of an act of Congress or of the Executive:[89]

> "Under the principle of separation of powers and the system of checks and balances, the judicial authority to review decisions of administrative bodies or agencies is much more limited, as regards findings of fact made in said decisions. Under the English law, the reviewing Court determines only whether there is some evidentiary basis for the contested administrative finding: no quantitative examination of the supporting evidence is undertaken. The administrative finding can be interfered with only if there is no evidence whatsoever in support thereof, and said finding is, accordingly, arbitrarily, capricious and obviously unauthorized. This view has been adopted by some American courts. It has, likewise, been adhered to in a number of Philippine cases. Other cases, in both jurisdictions have applied the "substantive evidence" rule, which has been construed to mean "more than a mere scintilla" or "relevant evidence as a reasonable mind might accept as adequate to support a conclusion even if other minds equally reasonable might conceivably opine otherwise.
>
> Manifestly, however, this approach refers to the review of administrative determinations involving the exercise of quasi-judicial functions calling for or entailing the reception of evidence. It does not and cannot be applied, in its aforesaid form in testing the validity of an act of Congress or of the Executive, such as the suspension of the privilege of the writ of habeas corpus, for, as a general rule neither body takes evidence — in the sense in which the term is used in judicial proceedings — before enacting a legislation or suspending the writ. Referring to the test of the validity of a statute, the Supreme Court of the United States, speaking through Mr. Justice Roberts expressed in the leading case of *Nebbia v. New York* (291 U.S. 502) the view that: "x x x If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and use neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio x x x With the wisdom of the policy adopted, with the adequacy or practicality of the law enacted to forward it, the courts are both incompetent and unauthorized to deal x x x"
>
> x x x x x x x x x
>
> No cogent reason has been submitted to warrant the rejection of such test. Indeed, the co-equality of coordinate branches of the Government, under our Constitutional system, seems to demand that the test of the validity of acts of Congress and those of the Executive be mutatis mutandi fundamentally the same."

The Court validated the Presidential suspension of the privilege of the writ of *habeas corpus* by declaring that the President had not acted arbitrarily.[90]

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[89] *Ibid.*, at 480-481.
[90] *Ibid.*, at 488.

The above test is in accordance with the presumption of validity of the acts of co-equal departments of the government.[91] Indeed, a legislative or executive declaration as to the underlying question of fact is entitled to great respect on the part of the Court.[92] To go beyond the test of arbitrariness would therefore result in substitution of the policies or ideas of the political departments with those of the Court.[93] The Court must therefore decide not that a statute or an act of the Chief Executive is unwise, but that its provisions fall outside the area of reasonable judgment or that the inferences from the data upon which they rest have been irrationally drawn.[94]

In his full adherence to the enrolled bill theory, Justice Concepcion again manifested his commitment to the principle of separation of powers. As the ponente in *Casco Philippine Chemical Co., Inc. v. Jimenez*,[95] he declared:

> "[I]t is well settled that the enrolled bill — which uses the term "urea fermaldehyde" instead of "urea and fermaldehyde" — is conclusive upon the courts as regards the tenor of the measure passed by Congress and approved by the President. If there has been any mistake in the printing of the bill before it was certified by the officers of Congress and approved by the Executive — on which we cannot speculate, without jeopardizing the principle of separation of powers and undermining one of the cornerstones of our democratic system — the remedy is by amendment or curative legislation, not by judicial decree."

This is in accord with the rule enunciated in *Field v. Clark*[96] that the purpose of Constitutional requirement of a journal is not to contradict the enrollment but to give publicity and that the respect due to the coordinate departments requires the judiciary to act upon the assurance of the presiding officers of the legislature and of the President. The three branches of government should give full faith and credit to each other's official records. For, aside from the respect due to the political branches of government, there is the practical need for finality, certainty and reliability.[97]

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[91] *Supra*, note 77 at 454-455.

[92] Black & Hirsh, 256 U.S. 135, 154 (1921).

[93] Ct. Bickel, *Judicial Determination of Facts Affecting the Constitutionality of Legislative Action*, 38 HARV. L. REV. 6 at 17 (1924). See the dissenting opinion of Mr. Justice Holmes in Lochner v. New York, 198 U.S. 75. See also Schwartz, THE SUPREME COURT at 14 (1954) in which the author quotes part of Mr. Justice Harlan's lecture to law students: "I want to say to you young gentlemen that if we don't like an act of Congress, we don't have much trouble to find grounds for declaring it unconstitutional."

[94] Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 50 (1951).

[95] G.R. No. L-13931, February 28, 1963, 7 SCRA 347, 350 (1963).

[96] 143 U.S. 649, 12 S.Ct. 495, L.Ed. 294 (1892).

[97] *Supra*, note 45 at 315. The author refers to United Drug Co. v. Cordley and Hayes, 239 Mass, 334, 339, 132 N.E. 56, 58 (1921).

## V. Judicial Activism

Unlike his predecessor, Mr. Chief Justice Cesar Bengzon, who is an exponent of judicial self-restraint,[98] Mr. Chief Justice Concepcion definitely belongs to the camp of activism.[99] Justice Fernando credits him for reflecting the activist approach in two major opinions which he penned for the court in the late fifties: *Tañada v. Cuenco*[100] and *Hebron v. Reyes.*[101] In the *Tañada* case, he spoke with approval of the notion of judicial supremacy as enunciated by Justice Laurel in *Angara v. Electoral Commission*[102] by asserting judicial competence to inquire into matters involving the Electoral Commission inspite of the existence of a dispute between the Commission and the Senate. In *Hebron v. Reyes,* the court assumed jurisdiction over vital institutional questions even if the suit could have been dismissed for being moot and academic. Justice Concepcion explains the activism of the Court:[103]

> "Although the term of office of petitioner herein expired on December 31, 1955, his claim to the Office of Mayor of Carmona, Cavite has not thereby become entirely moot, as regard such rights as may have accrued to him prior thereto. For this reason, and, also, because the question of law posed in the pleadings concerns a vital feature of the relations between the national government and the local government, and the Court has been led to believe that the parties, specially the executive department, are earnestly interested in a clear-cut settlements of said question, for the same will, otherwise, continue to be a constant source of friction, disputes and litigations to the detriment of the smooth operation of the government and of the welfare of the people, the members of this Court deem it necessary to express thier view, thereon, after taking ample time to consider and discuss fully every conceivable aspect thereof."

The Court then held that the Presidential suspension of the petitioner mayor was null and void for non-compliance with the procedure established by law. In assuming jurisdiction over the said cases the Court stressed its active role in settling with decisiveness and finality issues bearing on the proper discharge of executive and legislative authority.

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[98] Fernando, Judicial Review 55, 70 (1967).

[99] The labels "judicial activism" on the one hand and "judicial self-restraint" or "judicial passivism" on the other are used merely to identify main trends or describe differing philosophies of judicial action. They are not used to describe a discipline or an orthodoxy. See Black, Perspective in Constitutional Law 3-5 (1963). Compare with Rostow, The Supreme Court as a Legal Institution, Perspectives on the Court (1967) who cautioned against the indiscriminate use of said labels.

[100] *Supra,* note 38.

[101] 104 Phil. 175 (1958.

[102] 63 Phil. 139 (1937).

[103] *Supra,* note 101 at 181.

The Chief Justice often refers to the judicial duty to determine conflicting claims of authority under the constitution as a function partaking more of an obligation than a power.[104] He quotes *Angara v. Electoral Commission*,[105] *Miller v. Johnson*,[106] and *Marbury v. Madison*[107] in stressing this solemn and sacred obligation. For him the duty "cannot be evaded without violating the fundamental law and paving the way to its eventual destruction."[108]

He approves of the following dictum in *In re McConaughy*:[109]

> "But every officer under a Constitutional government must act according to law and subject to its restrictions, and every departure therefrom or disregard thereof must subject him to that restraining and controlling power of the people, acting through the agency of the judiciary; for it must be remembered that the people act through the executive or the legislature. One department is just as representative as the other and the judiciary is the department which is charged with the special duty of determining the limitations which the laws places upon all official action. The recognition of this principle, unknown except in Great Britain and America, is necessary, to "the end that the government may be one of the laws and not of men" — words which Webster said were the greatest contained in any written constitutional document."

He therefore harbors no doubts regarding the democratic character of judicial review.[110]

Chief Justice Concepcion's type of judicial activism, however, is not the rampant one that takes pride in not avoiding anything. He displayed a remarkable degree of self-restraint in *Aytona v. Castillo*.[111] He persisted in his refusal to inquire into the wisdom of the acts of the political depart-

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[104] Tañada v. Cuenco, *supra*, note 38 at 1061 and 1068; Javellana v. The Executive Secretary, *supra*, note 7 at 87. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 6 (1959) who disagrees with Judge Learned Hand as to the justification of judicial review and argues that courts have the power and the duty to decide all constitutional cases in which the jurisdictional and procedural requirements are met.

[105] *Supra*, note 102 at 1062.

[106] 92 Ky 589, 18 S.W. 522, 523 (1892).

[107] 1 Cranch. 137, L.Ed. 60 (1803).

[108] *Supra*, note 38 at 1062.

[109] 119 N.W. 408, 411, 417 as quoted in Tañada v. Cuenco, *supra*, note 38 at 1067 and Javellana v. The Executive Secretary, *supra*, note 7 at 86.

[110] Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952). Compare with Mace, *The Anti-Democratic Character of Judicial Review*, 60 CAL. L. REV. 140 (1972) who emphasizes the counter-majoritarian and therefore anti-democratic character of judicial review, but argues that this does not make the system of which it is a part undemocratic. Compare further with Jaffe, CRISES OF THE HOUSE DIVIDED (1959) who theorized that Lincoln's "government of, by and for the people" was also a principled government with the counter-majoritarian restraints that this implies.

[111] *Supra*, note 49.

ments.[112] He does not tend to make constitutionality synonymous with wisdom.[113]

But he is certainly at odds with Judge Learned Hand's proposal "to leave the issue to be worked out without authoritative solution."[114] He could not be consoled by the majority opinion in *Baker c. Carr*,[115] which succinctly pointed out that ". . . [D]eciding 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 which were authority has been committed, is itself a delicate exercise in constitutional interpretation and is a responsibility of this Court a ultimate interpreter of the Constitution . . ." For a man of the Chief Justice's persuasion, the legal validity[116] of the acts of the political departments would always be examined where the Constitutional grant of power is neither absolute nor unqualified.

The Chief Justice's emphasis on the Rule of Law underscores his belief that it is the fundamental law that determines political power and not the other way around.[117] He eloquently closes his dissenting opinion in *Javellana v. The Executive Secretary*.[118]

> "Perhaps another would feel that my position in these cases overlooks what they might consider to be the demands of "judicial statesmanship," whatever may be the meaning of such phrase. I am aware of this possibility, if not probability; but "judicial statesmanship" . . . though consistent with Rule of Law, cannot prevail over the latter. Among consistent ends or consistent values, there always is a hierarchy, a rule of priority.
>
> We must realize that the New Society has many achievements which would have been very difficult, if not impossible, to accomplish under the old dispensation. But, on and for the judiciary, statesmanship should not prevail over the Rule of Law. Indeed, the primacy of the law of the Rule of Law and faithful adherence thereto are basic, fundamental and essential parts of statesmanship itself."

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[112] *Supra*, note 10.

[113] See concurring opinion of Mr. Justice Frankfurter in Dennis v. United States, 95 L.Ed. 1137 at 1176-1177 (1950) on the preoccupation by people with the constitutionality, instead of with the wisdom of legislation or of executive action.

[114] L. HAND, THE BILL OF RIGHTS 15 (1958).

[115] 7 L.Ed. 2d 663, 682 (1962).

[116] See Fernandez, *Political Law*, 49 PHIL. L.J. 223, 227 on the theory of Legal validity which the 'Concepcion Group' followed in the Javellana case. See also WYZANSKI, CONSTITUTIONALISM: LIMITATION AND AFFIRMATION, WHEREAS — A JUDGE'S PREMISES 67 (1965).

[117] Gonzales v. Commission on Elections, *supra*, note 5.

[118] *Supra*, note 7 at 137.

He rejects political expediency in favor of legal principle[119] and emphasizes the rigidity of our constitutional system.[120] Constitutional issues are to to be resolved according to only one framework — that of constitutional validity. For him, the substantive content of constitutional limitations will gradually be eroded by yielding to the more convenient practice of judicial statemanship.[121]

## VI. CONCLUSION

In a regime of martial law where the Chief Executive wields both the legislative as well as the executive powers of government, one may be tempted to ask: Would the Court be entering into what Mr. Justice Frankfurter called a "political thicket"[122] which may be "too dense to permit judicial entry and passage without the infliction of unacceptable lacerations,"[123] not to mention mortal wounds, by adhering to Mr. Chief Justice Concepcion's philosophy of judicial activism? There is obviously no clear-cut answer to this question.

In *Aquino v. Enrile,*[124] the Court seemed to be veering away from activism towards self-restraint. Departing from the doctrine laid down in *Lansang v. Garcia,*[125] six out of eleven justices *in effect* held that the question of whether the conditions claimed to justify the presidential exercise of the power to declare martial law do in fact exist is not subject to judicial inquiry and is political in character.[126] Only four justices were on the side of justiciability.[127]

However, in *Sanidad v. Commission on Elections,*[128] the pendulum seemed to swing back in favor of judicial activism. Seven out of ten justices held that the question of whether the President has the power to propose amendments to the 1973 Constitution in the absence of the *interim* National Assembly is justiciable. The majority opinion penned by Justice Martin cited the opinions of Chief Justice Concepcion in *Pascual v. Secretary*

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[119] See also Bickel, *The Supreme Court, 1960 Term Foreword: The Passive Virtues,* 75 HARV. L. REV. 40, 49 *et. sequel* (1961) who expounds on the balance between principle and expediency (*i.e.*, prudence) in explaining the basis of the political-question doctrine.

[120] Gonzales v. Commission on Elections, *supra,* note 5.

[121] *Supra,* note 45 at 332.

[122] Colegrove v. Green, 328 U.S. 549, S.Ct. 1198, 90 L.Ed. 1452 (1945).

[123] Feliciano, *supra,* note 48 at 459.

[124] G.R. No. L-35546, September 17, 1974, 59 SCRA 183 at 238-239 (1974).

[125] *Supra,* note 10.

[126] In addition, Chief Justice Makalintal opined that any inquiry into the constitutional sufficiency of the factual bases for the proclamation of martial law has become moot and purposeless as a consequence of the general referendum of July 27-28, 1973. See *Ibid.*, at 241-42.

[127] *Ibid.*, at 239.

[128] G.R. No. L-44640, October 12, 1976.

*of Public Works,*[129] *Javellana v. The Executive Secretary,*[130] *Planas v. Comelec,*[131] and *Lansang v. Garcia*[132] as precedents.

While it is true that law — particularly political law — is one field of human endeavor where fixity of principles and certainty of judicial approaches is a remote proposition,[133] Chief Justice Concepcion has already left an indelible imprint in constitutional law. His opinions exemplifying the activist approach cultivated our national intelligence.[134] He performed the symbolic or educational function[135] of judicial review and fulfilled the role of the Court as "teachers to the citizenry."[136]

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[129] *Supra,* note 13.
[130] *Supra,* note 7.
[131] *Supra,* note 6.
[132] *Supra,* note 10.
[133] In the words of Justice Holmes in Truax v. Corrigan, 257 U.S. 312, 343, 42 S.Ct. 124, 27 A.L.R. 375, 66 L.Ed. 254 (1921), "delusive exactness is a source of fallacy throughout the law".
[134] MEIKLEJOHN, FREE SPEECH 32 (1948).
[135] Jaffe, *Judicial Review: Question of Law,* 69 HARV. L. REV. 239, 274 (1955).
[136] WYZANSKI, CONSTITUTIONALISM: LIMITATION AND AFFIRMATION, WHEREAS — A JUDGE'S PREMISES 111 (1965).