THE 2004 CANVASS: IT IS EMPHATICALLY THE PROVINCE AND DUTY OF CONGRESS TO SAY WHAT CONGRESS IS

Oscar Franklin B. Tan

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"Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."
—Justice Oliver Wendell Holmes, Jr., Missouri, Kansas and Tennessee Railroad v. May (1904)[1]

"[Coordinacy theory] recognizes that the President and Congress also have an obligation to interpret the Constitution.... Coordinacy means courts listen to the voice of the President and Congress but their voice does not silence the judiciary."
—Justice Reynato Puno, Francisco v. House of Representatives[2]

"Dred Scott v. Sandford is a grim illustration of how catastrophic improvident judicial incursions into the legislative domain could be."
—Justice Josue Bellosillo[3]

Standing over the body of Julius Caesar, Marcus Junius Brutus told the assembled crowd:

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[*] "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803). This article was awarded First Place in the PHILIPPINE LAW JOURNAL's 2004 Editorial Examination. *Cite as* Oscar Franklin Tan, *The 2004 Canvass: It is Emphatically the Province and Duty of Congress to Say What Congress Is*, 79 PHIL. L.J. 39, (page cited) (2004).

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The author would like to acknowledge his informal Constitutional Law professors: Carmelo Sison, Salvador Carlota, Marvic Leonen, Rudyard Avila, and Florin Hilbay. He would also like to present the piece as a tribute to the positions taken by *Francisco v. House of Representatives amici curiae* Deans Pacifico Agabin and Raul Pangalangan, his Constitutional Law I and II professors, respectively. This paper would not have come into being without the spark lit by these two great scholars during the author's freshman year, nor without the opportunity to carry their papers and watch from the gallery during the *Francisco* hearings. This author would also like to dedicate this piece to the late Professor Samilo Barlongay, whose gentle presence will be missed.

This author would also like to thank Atty. Rodel Cruz, then an undersecretary in the Office of the Presidential Legal Counsel, for his incisive, Bickel-esque political commentary during the *Francisco* hearings. Finally, the author still insists to the beautiful people of the Class of '06, Section B that he *also* mentioned the 1987 Constitution's changed wording when he showed them *Avelino v. Cuenco*, shortly before Dean Agabin's 2002 midterm.

This author thanks Josh Trocino and GJ Jumamil, his PLJ interns from the Class of '08, for double-checking the handful of sources cited here after the article was submitted for publication.

[1] 194 U.S. 267 (1904).

[2] Francisco v. House of Representatives, G.R. No. 160261, Nov. 10, 2003 (hereinafter "Francisco") (Puno, J., *concurring and dissenting*).

[3] Francisco (Bellosillo, J., *separate opinion*).

> As Caesar loved me, I weep for him;
> As he was fortunate, I rejoice at it;
> As he was valiant, I honour him;
> But as he was ambitious, I slew him.[4]

Citing his experience with *Francisco v. House of Representatives* and the impeachment case filed against Chief Justice Hilario Davide, Senator Aquilino Pimentel expressed confidence that the Supreme Court would rule on the opposition's petition to stop the 2004 presidential canvass.[5] Perhaps a prudent slave slipped a timely whisper in the Justices' ears,[6] however, for the Court refused to intervene. As Dean Raul Pangalangan wrote:

> I was asked... whether Filipinos would have accepted a *Bush vs. Gore* decision. I said no, I didn't think we would have. I felt that America's devotion to law, its 'secular religion,' had saved it in its crisis of legitimacy. I doubted then that law had become a secular religion for us, or if we had clung on to the real religion by which our bishops today purport to proclaim to us the mandate of heaven.[7]

Not that the Court must be slain, of course. Rather, under the 1987 Constitution, judicial supremacy arguably elevates the Court to a Caesar-like, First Among Equals stature in the State's Triumvirate,[8] and the results may counsel a closer balance instead. As Dean Pacifico Agabin warned in 1989:

> Our experience under martial law has swung the pendulum of judicial power to the other extreme where the Supreme Court can now sit as "superlegislature" and "superpresident." If there is such a thing as judicial supremacy, then this is it.[9]

The very recent *Francisco* and the Canvass Resolutions[10] both involved powers textually committed by the Constitution to Congress, but led to different

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[4] WILLIAM SHAKESPEARE, JULIUS CAESAR, Act III, Scene 2, Lines 25-27, *in* THE COMPLETE WORKS OF WILLIAM SHAKESPEARE 250 (hereinafter "SHAKESPEARE") (Kingsport Press, Cambridge University text 1983).

[5] Philip Tubeza, *SC won't stop canvass*, PHIL. DAILY INQUIRER, Jun. 5, 2004, at A8.

[6] "For over a thousand years, Roman conquerors returning from the wars enjoyed the honor of a triumph – a tumultuous parade... The conqueror rode in a triumphal chariot, the dazed prisoners walking in chains before him... A slave stood behind the conqueror, holding a golden crown, and whispering in his ear a warning: that all glory is fleeting." Internet Movie Database, Inc., *Memorable Quotes from Patton (1970) at* http://www.imdb.com/title/tt0066206/quotes (last visited Jul. 4, 2004).

[7] Raul Pangalangan, *Passion for Reason: Bush vs. Gore, Philippine Version?*, PHIL. DAILY INQUIRER, Jun. 4, 2004, ¶8 *at* http://www.inq7.net/opi/2004/jun/04/text/opi_rpangalangan-1-p.htm. For a history of the Philippine electorate, see Anna Castaneda, *Philippine Elections: The Right to Political Participation in an Elite Democracy*, 41 ATENEO L.J. 314 (1997).

[8] In 60 B.C., Julius Caesar allied with Marcus Licinius Crassus and Gnaeus Pompey to form the First Triumvirate that ruled Rome. Caesar eventually consolidated his power, and defeated Pompey's army in Pharsalus, Greece in 48 B.C. *Julius Caesar, in* 3 THE WORLD BOOK ENCYCLOPEDIA 13 (World Book, Inc., 1985).

[9] Pacifico Agabin, *The Politics of Judicial Review Over Executive Action: The Supreme Court and Social Change*, 64 PHIL. L.J. 189, 209-10 (1989).

[10] Lopez v. Senate of the Philippines, G.R. No. 163556, Jun. 8, 2004 (hereinafter "Ruy Lopez"); Pimentel v. Joint Committee of Congress to Canvass the Votes Cast for President and Vice-President in the

outcomes. This presents a rare opportunity to scrutinize the same Bench's mix of fortune, valor, and a lack of restraint criticized by some as seeming ambition.

THE TRIPARTITE SYSTEM OF GOVERNMENT, PHILIPPINE STYLE

The separation of powers that underlies Philippine society today differs greatly from its original incarnation.[11] In his landmark treatise, Baron de Montesquieu identified the executive, legislative, and judicial powers, and the evil sought to be avoided:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.[12]

James Madison later proposed the same formula for a fledgling America.[13] However, Montesquieu himself opined, "Of the three powers above mentioned, the judiciary is in some measure next to nothing."[14] In practical terms, Alexander Hamilton explained it was "the least dangerous"[15] branch because it "has no influence over either the sword or the purse,"[16] and even ultimately depends upon the executive for the efficacy of its judgments.[17] The deeper weakness, however, is seen in how Hamilton took for granted that judicial independence entailed insulation from "ill humours"[18] and "a disposition to consult popularity."[19] The judiciary is thus necessarily counter-majoritarian.[20] Justice Felix Frankfurter argues it

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May 10, 2004 Elections, G.R. No. 163783, Jun. 22, 2004 (hereinafter "Pimentel"). These refer to the slip opinions released by the Court in booklet form.

[11] Enrique Fernando, *The Doctrine of Separation of Powers: Its Past Primacy and its Present Relevance*, 24 U.S.T. L.J. 8, 17-19 (1974).

[12] CHARLES DE MONTESQUIEU, THE SPIRIT OF LAWS, Book XI, Chap. 6, *in* 38 GREAT BOOKS OF THE WESTERN WORLD 70 (hereinafter "GREAT BOOKS") (Encyclopedia Britannica, Inc., Maynard Hutchins ed. 1982). Sir William Blackstone similarly pointed to the combination of executive and legislative in a single entity. Steven Calabresi & Saikrishna Prakesh, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 605 (1994).

[13] JAMES MADISON, *The Federalist No. 47 ("The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts")*, *in* 43 GREAT BOOKS 153.

[14] MONTESQUIEU, *supra* note 12, at 71-72.

[15] ALEXANDER HAMILTON, *The Federalist No. 78 ("The Judiciary Department")*, *in* 43 GREAT BOOKS 230. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986).

[16] *The Federalist No. 78*, *supra* note 15, *at* 230.

[17] Mark Graber, *Establishing Judicial Review: Marbury and the Judicial Act of 1789*, 38 TULSA L. REV. 609, 617 (2003).

[18] *The Federalist No. 78*, *supra* note 15, *at* 232.

[19] *Id.* at 233.

[20] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 n.1 (1998). *Id.* at 335, *citing* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962) ("The root difficulty is that judicial review is a counter-majoritarian force..."). *See* Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1513-17 (1990); Martin Redish, *Taking a Stroll Through Jurassic Park: Neutral Principles and the Originalist-Minimalist Fallacy in Constitutional Interpretation*, 88 NW. U. L. REV. 165, 171-74 (1993); Jeffrey Stempel, *Malignant Democracy: Core Fallacies Underlying Election of the Judiciary*, 4 NEV. L.J. 35 (2003).

"ultimately rests on sustained public confidence in its moral sanction"[21] in lieu of a popular mandate.[22] Thus, in the greater context of republicanism, each "institutional check upon the electoral victors"[23] deserves serious thought by the citizenry and electorate.[24]

However judicial supremacy has evolved in the United States,[25] it was textually strengthened in the Philippines when the "expanded *certiorari* jurisdiction"[26] was engraved onto the 1987 Constitution in reaction to Martial Law abuses. Further, a mere simple majority was allowed to declare a law or regulation unconstitutional.[27] This textual augmentation is all the more pronounced when the current provision on jurisdiction is compared to its American forebear,[28] which does not explicitly assign the power of constitutional interpretation.[29] Further, judicial review was explicitly denominated as a duty more than a power,[30] as *Francisco* quotes convention delegate Fr. Joaquin Bernas, S.J.:

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[21] Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., *dissenting*). Bickel said as much. Stephen Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 843 (1985). *See* Benjamin Handler, *Abandoning the Cause: An Interstate Comparison of Candidate Withdrawal and Replacement Laws*, 37 COLUM. J.L. & SOC. PROBS. 413, 439 (2004).

[22] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 868 (1992). "Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time." BICKEL, LEAST DANGEROUS BRANCH, *supra* note 20, at 112. "...the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from."

[23] Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 463 (1989). Ackerman counts many distinguished thinkers in this restraint-oriented school of thought, such as Woodrow Wilson, James Bradley Thayer, Charles Beard, Oliver Wendell Holmes, Robert Jackson, Alexander Bickel, and John Ely.

[24] Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 7 (2003); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1061 (1975); Robert Bennett, *Counter-Conservationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845, 846-47 (2001).

[25] *See* Rachel Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C.L. REV. 1203 (2002); Robert Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989).

[26] *See* Co v. House of Representatives Electoral Tribunal, G.R. No. 92191, 199 SCRA 692, Jul. 30, 1991.

[27] Agabin, *supra* note 9, at 209, *citing* CONST. art. VIII, § 4(2).

[28] Unlike the 1987 Constitution, the American Constitution's framers and ratifiers never understood the Supreme Court as textually designated to be the supreme Constitutional interpreter. In the American tradition, this authority is grounded in later acceptance by the citizenry and in jurisprudence. Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 459-60 (2000).

[29] *Compare* CONST. art. VIII, § 1 *and* UNITED STATES CONST. art. III, § 1. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1369 (1997); Barkow, *supra* note 25, at 253; Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 952 (2004); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 373-74 (1988). Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 2-6 (1959); Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 100-01 (1988). Both quote LEARNED HAND, THE BILL OF RIGHTS (1958).

[30] CONST. art. VIII, § 1; Francisco, *citing* I RECORD OF THE CONSTITUTIONAL COMMISSION 434-36 (1986).

> "[J]urisdiction is not just a power; it is a solemn duty which may not be renounced. To renounce it, even if it is vexatious, would be a dereliction of duty."[31]

The Philippine Court has boldly wielded this broad jurisdiction even with respect to executive and legislative acts. It has consequently attracted controversy in recent years, not in the least when it declared that former President Joseph Estrada had resigned in 2001 and paved the way for the Macapagal-Arroyo administration.[32] In 2003 alone, it nullified the contract for the new Ninoy Aquino International Airport terminal[33] and evoked shadows of the 1997 *Manila Prince Hotel* decision,[34] ordered the Manila Electric Company to refund P28 billion in excess charges,[35] and blocked the impeachment complaint against Chief Justice Davide.[36]

Francisco and the Canvass Resolutions, however, set themselves apart because they both addressed acts of Congress itself whose legality hinged on the minutiae of Constitutional powers textually committed to the legislature. Several *amici curiae* and Justices counseled judicial restraint in *Francisco*, also considering the possibilities that the House might withdraw the complaint, or that the Senate might reject it.[37] Justice Reynato Puno was the strongest voice for such deferment:

> Coordinacy theory rests on the premise that within the constitutional system, each branch of government has an independent obligation to interpret the Constitution....
>
> ...
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> ...[The] correct calibration will compel the conclusion that this Court should defer the exercise of its ultimate jurisdiction... and respect to the initial exercise by the legislature of its jurisdiction over impeachment proceedings.... At its core, impeachment is political in nature and hence its initiation and decision are best left, at least initially, to Congress, a political organ of government.[38]

Moving to the Canvass Resolutions and beyond the textbook discussions of political question doctrine, it is argued that Justice Puno's coordinacy theory is the best foundation for the Court's nonintervention. Had the Court instead imposed its own Constitutional construction, this would have at best been a counter-majoritarian intrusion into the most political of exercises, the presidential elections. At worst, the Court would have left itself vulnerable to accusations of

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[31] Francisco. The case also cited Estrada v. Desierto, G.R. No. 146710, 356 SCRA 108, 155-56, Mar. 2, 2001; Abbas v. Senate Electoral Tribunal, G.R. No. 83767, 166 SCRA 651 Oct., 27, 1988; Vargas v. Rilloraza, 80 Phil. 297, 315-16 Feb. 26, 1948; Planas v. Comm'n on Elections, G.R. No. 35925, 49 SCRA 105, January 22, 1973 (Concepcion, J., *concurring*).

[32] Estrada v. Desierto, G.R. No. 146710, 356 SCRA 108, 141, Mar. 2, 2001.

[33] Agan v. Philippine International Air Terminals Co., Inc., G.R. No. 155001, 402 SCRA 612, 664, May 5, 2003.

[34] Manila Prince Hotel v. Gov't Service Insurance System, G.R. No. 122156, 267 SCRA 408, Feb. 3, 1997.

[35] Energy Regulatory Board v. Manila Electric Co., G.R. No. 141314, 401 SCRA 130, 143, Apr. 9, 2003.

[36] Francisco.

[37] *Id.* (Puno, J., *concurring and dissenting*).

[38] *Id.*

reckless partisanship, *a la Bush v. Gore*.[39] As Yale Professor Jack Balkin pointedly summarized the Court's credibility at the time:

> [O]ne member of the majority, Associate Justice Clarence Thomas, addressed a group of students in the Washington, D.C., area. He told them that he believed that the work of the Court was not in any way influenced by politics or partisan considerations... Afterwards the question on many legal scholars' minds was not whether Justice Thomas had in fact made these statements. The question was whether he also told the students that he believed in Santa Claus, the Easter Bunny, and the Tooth Fairy. (internal citations omitted)[40]

This paper seeks to use the 2004 Canvass to emphasize the need for a greater emphasis on Congress's role in Constitutional interpretation. First, it shall discuss the background facts and how both the majority and the minority bloc positions were within the Constitution's plausible range. Second, it shall discuss Congress's majoritarian, consensus-building nature, and the significance of delegating the canvass to it in particular. Third, it shall discuss the basis of coordinacy theory, trace it back to James Bradley Thayer's landmark *Harvard Law Review* essay in 1893, and discuss recent political question scenarios in a coordinate interpretation context. It shall then conclude that the Court could have refrained from intervening, as it in fact did not, but could also have pointed to Congressional action as a conscious interpretation of the Constitution. Finally, it shall conclude that such coordinate interpretation has many positive consequences for the rule of law.

Reacting to *Bush*, Professor Larry Kramer cautioned, "To nudge popular institutions out of the life of the Constitution is to impoverish both the Constitution and the republican system it is meant to establish."[41] For the Philippines, it must be emphasized that this is especially important given the 1987 Constitution's many expansive policy statements that are not deemed self-executing, and have yet to be given cohesive interpretation.[42]

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[39] *See Non Sub Homine? A Survey and Analysis of the Legal Resolution of Election 2000*, 114 HARV. L. REV. 2170 (2001).

[40] Jack Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1407 (2001). *See* Lawrence Tribe, *Erog v. Hsub: Freeing Bush v. Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001); Peter Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535 (2001); David Coar, *"It is Emphatically the Province and Duty of the Judicial Department to Say" Who the President Is?*, 34 LOY. U. CHI. L.J. 121 (2002).

[41] *The Supreme Court 2000 Term Foreword: We The Court*, 115 HARV. L. REV. 4, 16 (2001).

[42] *See* Tanada v. Angara, G.R. No. 118295, 272 SCRA 18, 54, May 2, 1997; Manila Prince Hotel v. Gov't Service Insurance System, G.R. No. 122156, 267 SCRA 408, 431, Feb. 3, 1997; Oposa v. Factoran, G.R. No. 101083, 224 SCRA 792, 805, Jul. 30, 1993.

I. THE STAGE CONGRESS SET FOR THE 2004 CANVASS

FACTUAL BACKGROUND

The 2004 canvassing of votes was arguably a drawn-out albeit televised agony dubbed "*daldal-bawas*,"[43] perhaps a maddening wait for Birnam wood to come to Dunsinane:

> Life's but a walking shadow, a poor player
> That struts and frets his hour upon the stage
> And then is heard no more: it is a tale
> Told by an idiot, full of sound and fury,
> Signifying nothing.[44]

The nature of the sessions made it difficult to extract the precise legal issues raised and the positions taken. Some points arguably strutted about, but were mere posturing "full of sound and fury" and were quickly "heard no more." The canvass is governed by the Constitution:

> The returns of every election for President and Vice-President, duly certified by the board of canvassers of each province or city, shall be transmitted to the Congress, directed to the President of the Senate. Upon receipt of the certificates of canvass, the President of the Senate shall, not later than thirty days after the day of the election, open all the certificates in the presence of the Senate and the House of Representatives in joint public session, and the Congress, upon determination of the authenticity and due execution thereof in the manner provided by law, canvass the votes.
>
> ...
>
> The Congress shall promulgate its rules for the canvassing of the certificates.
>
> The Supreme Court, sitting en banc, shall be the sole judge of all contests relating to the election, returns, and qualifications of the President or Vice-President, and may promulgate its rules for the purpose.[45]

Section 30 of Republic Act No. 7166 supplements this provision, which gives the phrase "determination and due execution thereof" was a limited interpretation.[46]

In practice, Congress assigns a joint committee to perform the actual canvass,[47] as seen in 1957, 1961, 1965, 1969, 1992, and 1998.[48] Canvassing done this

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[43] Carlito Pablo, *New buzzword in Congress: 'Daldal-bawas'*, PHIL. DAILY INQUIRER, Jun. 10, 2004, at A1.

[44] WILLIAM SHAKESPEARE, MACBETH, Act V, Scene 5, Lines 24-28, *in* SHAKESPEARE 880. At one point, a bored Congressman simply offered to help carry ballot boxes so as not to fall asleep during the proceedings. PHIL. DAILY INQUIRER, Jun. 2, 2004, at A1 (front page photo by Edwin Bacasmas).

[45] CONST. art. VII, § 4(4), 4(6)-4(7).

[46] Rep. Act. No. 7166, § 30 ("An Act Providing for Synchronized National and Local Elections and for Electoral Reforms, Authorizing Appropriations Therefore, and for Other Purposes").

[47] Philip Tubeza, *Junk opposition's canvass petition, SC asked*, PHIL. DAILY INQUIRER, Jun. 22, 2004, at A1.

[48] Ruy Lopez, at 36 (Quisumbing, J., *separate opinion*).

way took less than a month in 1992, and three days in 1998 after Speaker Jose de Venecia conceded defeat early.[49]

For the 2004 canvass, Congress convened in joint session on June 1, but even before this, opposition legislators already claimed the dominant administration parties would manipulate it in favor of incumbent President Gloria Macapagal-Arroyo. Senator Edgardo Angara opined, "The proposed rules are so written that it ensures a railroading."[50] Other opposition leaders planned to question irregularities in several Certificates of Canvass (CoCs),[51] while Rep. Bellaflor Angara-Castillo disclosed plans to have the Supreme Court declare the proposed rules unconstitutional.[52]

On June 2, Davao Rep. Ruy Elias Lopez petitioned the Supreme Court to declare the 22-man canvassing panel that was formed unconstitutional, arguing that only the plenary can canvass the votes.[53] The Senate half of the panel was split between the administration and the opposition, while eight out of eleven members of the House half represented the administration.[54] Senator Angara proposed, instead, that a tabulation committee count the votes while the entire Congress approved the canvass.[55] On June 8, the Court unanimously ruled that Lopez had "failed to show that Congress gravely abused its discretion" and dismissed his petition.[56] That same day, accusations that the opposition was attempting to delay the canvass came to a head as Senator Pimentel engaged in a four-hour filibuster,[57] and fears were voiced that a president might not be proclaimed before Arroyo's term ended on June 30.[58]

On June 17, Senator Pimentel filed a second petition with the Court, this time alleging that the canvass committee had become "a legal non-entity and likewise passed out of legal existence"[59] with the 12th Congress's adjournment on June 11. He added that the canvass was a matter for the next term. The next day, lawyers for opposition standard bearer Fernando Poe, Jr. withdrew from the

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[49] Christine Avendano et al., *Poe camp cries foul over joint committee*, PHIL. DAILY INQUIRER, Jun. 1, 2004, at A14.

[50] Carlito Pablo et al., *'Canvass rules favor GMA'*, PHIL. DAILY INQUIRER, May 30, 2004, at A1.

[51] Paolo Romero, *Opposition to question up to 25 COCs*, *The Philippine Star*, Jun. 2, 2004, at 1.

[52] *Id.* at A22.

[53] Philip Tubeza, *Canvassing rules challenged at high court*, PHIL. DAILY INQUIRER, Jun. 3, 2004, at A1.

[54] Cynthia Balana & Christine Avendano, *Opposition to ask SC to stop canvass*, PHIL. DAILY INQUIRER, Jun. 2, 2004, at A21.

[55] Cynthia Balana & Christine Avendano, *Opposition to propose 25-member tabulation committee*, PHIL. DAILY INQUIRER, Jun. 4, 2004, at A1.

[56] Philip Tubeza & Cynthia Balana, *SC upholds tally by 22-man panel*, PHIL. DAILY INQUIRER, Jun. 9, 2004, at A1.

[57] Carlito Pablo, *Sin to Pimentel: Stop filibustering*, PHIL. DAILY INQUIRER, Jun. 10, 2004, at A1.

[58] Carlito Pablo & Christine Avendano, *Canvassing entering critical week, says solons*, PHIL. DAILY INQUIRER, Jun. 14, 2004, at A1.

[59] Philip Tubeza & Cynthia Balana, *Stop canvassing, Poe ally asks SC*, PHIL. DAILY INQUIRER, Jun. 18, 2004, at A1.

canvass sessions, citing "harassment and bias."[60] On June 22, the Court dismissed the second petition as baseless.[61]

The canvass finished at 8:21 PM of June 20, and 180 Certificates of Canvass showed Arroyo winning over Poe by 1,123,576 votes.[62] A last motion to open the election returns of three provinces with allegedly questionable CoCs was voted down.[63] By June 22, Arroyo's proclamation was deemed "unstoppable," and the United States announced it was sending a high-level delegation.[64]

From this tale full of sound and fury, one distills four main legal questions, some proving weighty, and others actually "signifying nothing" in the end. A necessary fifth, the political question doctrine, will be discussed separately and in greater detail, later in this paper.

QUESTION 1: WHAT KIND OF BODY IS THE NATIONAL BOARD?

One must begin by settling the preliminary issue of the National Board of Canvassers' genus and species. An Ateneo Law professor, for example, discussed Republic Act No. 7166 and opined the Board was "'an administrative body' and 'no longer a legislative body' or co-equal branch of government."[65] This, however, flies in the face of Kenneth Culp Davis's classic definition:

> [A] governmental authority other than the court and *other than a legislative body*, which affects the rights of private parties through either adjudication or rule-making. (emphasis added)[66]

Rather, the Board, with a membership and leadership identical to Congress, must be nothing other than Congress itself, designated with an additional, non-legislative function.[67] This follows, by parallel application, from *Lopez v. Roxas*, where the Presidential Electoral Tribunal was deemed the Supreme Court itself with additional functions assigned by Republic Act No. 1793.[68] Simply, there can be only

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[60] TJ Burgonio et al., *After pullout, FPJ lawyers assail canvass*, PHIL. DAILY INQUIRER, Jun. 20, 2004, at A18.

[61] Philip Tubeza et al., *GMA proclamation a go*, PHIL. DAILY INQUIRER, Jun. 23, 2004, at A1.

[62] Christine Avendano et al., *Plenary session seen as next battleground*, PHIL. DAILY INQUIRER, Jun. 21, 2004, at A1.

[63] Fe Zamora & Blanche Rivera, *Bid to open ballot boxes holding ERs voted down*, PHIL. DAILY INQUIRER, Jun 21, 2004, at A1.

[64] Philip Tubeza et al., *GMA proclamation a go*, PHIL. DAILY INQUIRER, Jun. 23, 2004, at A1.

[65] Cynthia Balana & Christine Avendano, *Opposition to ask SC to stop canvass*, PHIL. DAILY INQUIRER, Jun. 2, 2004, at A21.

[66] The Court has adopted: "A government body charged with administering and implementing particular legislation. Examples are workers' compensation commissions... and the like. ... The term 'agency' includes any department, independent establishment, commission, administration, authority board or bureau..." Republic v. Court of Appeals and Ibay-Somera, G.R. No. 90482, 200 SCRA 226, 237 Aug. 5, 1991. Both definitions necessarily imply that Congress is not an administrative agency.

[67] Stephen Siegel, *The Conscientious Congressman's Guide to the Electoral Count Act of 1887*, 56 FLA. L. REV. 541, 567 (2004).

[68] Lopez v. Roxas, G.R. No. 25716, 17 SCRA 756, 762, Jul. 28, 1966.

one Supreme Court, as held in *Vargas v. Rilloraza*[69] where an attempt was made to replace some Justices in certain cases, and in *Manila Electric Co. v. Pasay Transportation Co.*[70] where the Justices were asked to sit as a board of arbitrators. In the same vein, the powers of veto and pardon partake of the legislative and the judicial powers, respectively, but the President cannot conceivably be anyone other than the Chief Executive when he exercises these. All the *Ruy Lopez* opinions concur in this; and when Justice Puno opined that Congress as the Board and as a lawmaking body are different, it was only to counsel that the legislators ought to set aside partisan interests in the former function.[71]

Thus, if the Board is clearly Congress itself, then it remains a co-equal branch whose acts deserve utmost deference, and are canalized[72] only by the Constitution's text itself.

QUESTION 2: WAS THE 22-MAN CANVASS COMMITTEE VALID?

One moves to the first question the opposition raised: Were the rules that created the *preliminary* joint canvass committee invalid?[73] The question defeats itself, since Rules VIII-X regarding the joint committee left final approval of the canvass results and the actual proclamation to Congress.[74] Thus, there was no invalid delegation to speak of, as no discretion was actually transferred to another officer or body, and delegation of mere preliminary fact-finding is not the kind of delegation the Constitution would proscribe.[75] As the Court held:

> The rule that requires an administrative officer to exercise his own judgment and discretion does not preclude him from utilizing, as a matter of practical administrative procedure, the aid of subordinates to investigate and report to him the facts, on the basis of which the officer makes his decisions. It is sufficient that the judgment and discretion finally exercised are those of the officer authorized by law.[76]

Otherwise, the President would be precluded from retaining advisers who make preliminary studies, and neither should the Court leave a single *ponente* to

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[69] Vargas v. Rilloraza, 80 Phil. 297, 318 (1948).

[70] Manila Electric Co. v. Pasay Trans. Co., 57 Phil. 600, 602 (1932).

[71] Ruy Lopez, at 26-27 (Puno, J., *separate opinion*).

[72] Panama Refining Co. v. Ryan, 293 U.S. 388, 440 (1933) (Cardozo, J., *dissenting*); ALA Schecter Poultry, Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., *concurring*).

[73] Ruy Lopez, at 1.

[74] *Id.* at 16-19 (Puno, J., *separate opinion*); Tolentino v. Sec. of Finance, G.R. No. 115455, 249 SCRA 628, Oct. 30, 1995.

[75] Lovina v. Moreno, G.R. No. 17821, 9 SCRA 557, 561, Nov. 29, 1963; Taleon v. Sec. of Public Works and Comm'ns, G.R. No. 24281, 20 SCRA 69, 73, May 16, 1967; Santos v. Sec. of Public Works and Comm'ns, G.R. No. 16949, 19 SCRA 637, 642, Mar. 18, 1967; Philippine Ass'n of Labor Unions v. Sec. of Labor, G.R. No. 22228, Feb. 27, 1969; Pastoral v. Sec. of Public Works and Communications, G.R. No. 44485, 162 SCRA 619, 626, Jun. 27, 1988. *See* Cardona v. Binangonan, 36 Phil. 547, 549 (1917).

[76] American Tobacco Co. v. Director of Patents, G.R. No. 26803, 67 SCRA, 287, 295, Oct. 13, 1975, *quoted in* Skyworld Condominium Owners Ass'n, Inc. v. Securities and Exchange Comm'n, G.R. No. 95778, 211 SCRA 565, 576, Jul. 17, 1992; Mollaneda v. Umacob, G.R. No. 140128, 358 SCRA 537, 547-48, Jun. 6, 2001.

frame a decision it will be adopting.[77] In fact, as legislatures grew more complex, committees evolved from *ad hoc* bodies to the basic structure of Congress by the 19th century,[78] and today's bicameral conference committees wield great influence even though the actual drafting is performed by only a fraction of Congress's membership.[79] Justice Leonardo Quisumbing goes so far as to argue that depriving the Board of a committee system amounts to obstructing its work.[80]

Ruy Lopez unanimously dismissed this question, with some Justices further noting that joint committees had been employed after past elections without a hint of protest.[81]

QUESTION 3: COULD THE CANVASS COMMITTEE FUNCTION AFTER CONGRESS HAD ALREADY ADJOURNED?

One then turns to Senator Pimentel's eleventh hour objection: Should the canvass have been turned over to the next term because Congress had already adjourned on June 11 and "passed out of legal existence"?[82] The question is again misleading, because the legislators' terms lapsed only on June 30.[83] Although the Constitution has a mandatory 30-day recess prior to the next term, this deals only with lawmaking sessions and does not affect its non-legislative functions, such as the Board.[84] This is supported by the fact that Congress is given thirty days after the elections, held on the second Monday of May, to begin the canvass, and it could easily remain uncompleted when the mandatory recess takes effect.[85] Moreover, while some non-legislative functions such as the Commission on Appointments and initiation and trial of impeachment may only be performed when Congress is in session, others clearly do not, such as when the President transmits a declaration that he is unable to exercise his powers, suspends the privilege of the write of *habeas corpus*, declares martial law, or declares a state of war.[86]

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[77] SHEILA CORONEL, *The High Price of Justice*, *in* PHILIPPINE CENTER FOR INVESTIGATIVE JOURNALISM, BETRAYALS OF THE PUBLIC TRUST 226-27 (Shiela Coronel ed. 2000).

[78] MATTHEW MOEN & GARY COPELAND, THE CONTEMPORARY CONGRESS 95 (1999).

[79] *Id.* at 105-08; Tolentino v. Sec. of Finance, G.R. No. 115455, 249 SCRA 628, Sep. 23, 1995; Ruy Lopez, at 53 (Carpio-Morales, J., *separate concurring opinion*), *citing* Philippine Judges Ass'n v. Prado, G.R. No. 105371, 227 SCRA 703, Nov. 11, 1993.

[80] Ruy Lopez, at 37 (Quisumbing, J., *separate opinion*). *See, however,* Matthew Adler & Michael Dorf, *Constitional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1182-84 (2003). The article discusses *Nixon v. United States*, and the validity of an impeachment before a panel, which was deemed to be a political question.

[81] Ruy Lopez, at 14 (Davide, C.J., *separate opinion*); *Id.* at 36 (Quisumbing, J., *separate opinion*).

[82] Pimentel, at 1.

[83] CONST. art. VI, § 4; Pimentel, at 5.

[84] CONST. art. VI, § 15; Pimentel, at 5; *Id.* at 8-10 (Davide, C.J., *separate opinion*); *Id.* at 14 (Puno, J., *separate opinion*); *Id.* at 20 (Sandoval-Gutierrez, J., *separate opinion*); *Id.* at 37 (Azcuna, J., *separate opinion*); *Id.* at 39 (Tinga, J., *separate opinion*).

[85] CONST. art. VII, § 4; Pimentel, at 10 (Davide, C.J., *separate opinion*).

[86] CONST. art. VI, § 18, 23, Art. VII, § 11, 18, Art. XI, § 3; Pimentel, at 27 (Carpio-Morales, J., *separate opinion*); *Id.* at 37 (Azcuna, J., *separate opinion*).

Pimentel's petition was unanimously dismissed. *Pimentel* even implied that the Board might be forced to continue canvassing even if its members' terms expired,[87] citing *Pelayo v. Commission on Elections*.[88]

QUESTION 4A: IS THE PRESIDENTIAL CANVASS A MINISTERIAL TASK?

Outside the petitions to the Court – pundit Amando Doronilla called the first a "cheap delaying tactic"[89] – the above legal points were never seriously considered. Rather, the opposition's sole recurring refrain was that source documents should be reviewed, given their allegations of fraud.[90] The joint committee's minority report, in fact, claimed that a conspiracy "was hatched long before the first election return was manufactured... in order to inflict on the nation an Arroyo victory through a majority report proclaiming a bogus election tally."[91] Should Congress should have gone beyond the summaries in the CoCs? In legal terms, this asks whether Congress was charged with a ministerial, mechanical review of the returns, or held the discretion to investigate more thoroughly.

Intriguingly, while the manner of canvass was never raised this way in *Ruy Lopez*, the Justices nonetheless discussed the issue while taking up delegation. Davide and Justices Conchita Carpio-Morales and Dante Tinga argued the Board had but ministerial duties. This view is adopted by Constitutional Law commentators,[92] which cite the 1966 case *Lopez v. Roxas:*

> Congress merely acts as a national board of canvassers, charged with the ministerial and executive duty to make said declaration, on the basis of the election returns... [T]he Presidential Electoral Tribunal has the judicial power to determine whether or not said duly certified election returns have been irregularly made or tampered with, or reflect the true result of the elections in the areas covered by each, and, if not, to recount the ballots cast, and, incidentally thereto, pass upon the validity of each ballot or determine whether the same shall be counted, and, in the affirmative, in whose favor...[93]

Although *Lopez* was decided under the 1935 Constitution, several deliberations in the 1986 Constitutional Commission records explicitly referred to the case and assumed it as the general understanding.[94] Fr. Bernas further explains

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[87] Pimentel, at 5-6; *Id.* at 14 (Puno, J., *separate opinion*); *Id.* at 32 (Sandoval-Gutierrez, J., *separate opinion*).

[88] G.R. No. 28869, 23 SCRA 1374, 1385, Jun. 29, 1968.

[89] Amando Doronilla, *Poe's pals must stop delaying canvassing*, PHIL. DAILY INQUIRER, Jun. 7, 2004, at A4.

[90] Christine Avendano, *Angara: It would've been different story if we opened ERs*, PHIL. DAILY INQUIRER, Jun. 23, 2004, at A10.

[91] Christine Avendano, *Minority report says Poe had won*, PHIL. DAILY INQUIRER, Jun. 24, 2004, at A6.

[92] JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 812 (2003 ed.); HECTOR DE LEON, PHILIPPINE CONSTITUTIONAL LAW: PRINCIPLES AND CASES 249 (1999). Justice Isagani Cruz takes the same view, but without citing *Lopez v. Roxas*. PHILIPPINE POLITICAL LAW 187 (6th ed. 2001 prtg.).

[93] Lopez v. Roxas, G.R. No. 25716, 17 SCRA 756, 769, Jul. 28, 1966.

[94] II RECORD OF THE CONSTITUTIONAL COMMISSION 390, 413, 775 (Constitutional Commission of 1986, 1986). Some of these deliberations are cited in Ruy Lopez, at 12 (Davide, C.J., *separate opinion*); *Id.* at 46

that the changed wording of the 1987 Constitution serves only to empower Congress to specify what flaws in CoCs should be taken cognizance of by the Board in determining "authenticity and due execution," and the addition does not alter the canvass's ministerial nature.[95] Justice Carpio-Morales stated that Republic Act No. 7166 "removes all doubt" when it promulgated a purely mechanical list:[96]

> Congress shall determine the authenticity and due execution of the certificate of canvass for President and Vice-President as accomplished and transmitted to it by the local boards of canvassers, on a showing that: (1) each certificate of canvass was executed, signed and thumbmarked by the chairman and members of the board of canvassers and transmitted or caused to be transmitted to Congress by them; (2) each certificate of canvass contains the names of all of the candidates for President and Vice-President and their corresponding votes in words and in figures; and (3) there exists no discrepancy in other authentic copies of the certificate of canvass or discrepancy in the votes of any candidate in words and figures in the certificate.

Finally, she added that the Rules for the joint committee itself focus on tabulation and counting, and even empower the committee to avail of an independent accounting/auditing firm.[97]

Even a broader examination of legal material bears out this argument. The Court strives to interpret words in Constitutional provisions using their plain meaning,[98] and Black's Law Dictionary defines "canvass" as the act of counting returns "to determine authenticity."[99] Philippine Election Law has always held the function of provincial, city, and municipal canvassers as purely ministerial,[100] and the same has been true of most American jurisdictions,[101] even when the canvass is performed by a Speaker of the House.[102] This understanding has been taken for granted in even the most recent Supreme Court cases. Philippine Election Law

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(Carpio-Morales, J., *separate opinion*); BERNAS, *supra* note 92, at 813. Ambiguity in the Constitution must be interpreted according to the framers' intent, since it is assumed that the people's adoption was guided by their understanding of the text. Francisco; Civil Liberties Union v. Exec. Sec., G.R. No. 83896, 194 SCRA 317, 325, Feb. 22, 1991; Nitafan v. Commission on Internal Revenue, G.R. No. 78780, 152 SCRA 284, 291, Jul. 23, 1987.

[95] BERNAS, *supra* note 92, at 813, *citing* II RECORD, *supra* note 30, at 391. *See* Ruy Lopez, at 47 (Carpio-Morales, J., *separate opinion*).

[96] Rep. Act. No. 7166, § 30; Ruy Lopez, at 47 (Carpio-Morales, J., *separate opinion*).

[97] Ruy Lopez, at 49 (Carpio-Morales, J., *separate opinion*).

[98] Francisco; J.M. Tuason & Co., Inc. v. Land Tenure Administration, G.R. No. 21064, 31 SCRA 413, Jun. 30, 1970.

[99] BLACK'S LAW DICTIONARY 207 (6th ed. 1990).

[100] ANTONIO NACHURA, OUTLINE REVIWER IN POLITICAL LAW 442-43 (2002), *citing* Guiao v. Comm'n on Elections, 137 SCRA 366. HECTOR DE LEON & HECTOR DE LEON, JR., THE LAW ON PUBLIC OFFICERS AND ELECTION LAW 701-02 (5th ed. 2003), *citing* Lucman v. Dimaporo, G.R. No. 31558, 33 SCRA 388, May 29, 1970; Abes v. Comm'n on Elections, G.R. No. 28348, 21 SCRA 1252, Dec. 15, 1967.

[101] 26 AM. JUR. 2D 123, § 300, *citing* Kindel v. Le Bert, 23 Colo. 385, 48 P. 641; Thompson v. Talmadge, 201 Ga. 867, 41 SE2d 883; People ex rel. Woods v. Green, 265 Ill. 39, 106 NE 304; Jay v. O'Donnell, 178 Ind. 282, 98 NE 349; Rosenthal v. State Canvassers, 50 Kan. 129, 32 P. 129; People ex rel. Atty. Gen. v. Van Cleve, 1 Mich 362; State ex rel. Carpenter v. Sup. Ct. 118 Wash. 664, 204 P. 797.

[102] 26 AM. JUR. 2D 123 n.14, *citing* State ex rel. Donnell v. Osburn, 347 Mo. 469, 147 SW2d 1065, 136 ALR 667.

commentaries on the canvass of votes for president, in fact, cite *only* the above mechanical section of Republic Act No. 7166.[103] Finally, to cite American practice, the United States' Electoral Count Act (ECA) of 1887 prohibits objections addressed to the joint session, requires these to instead be reduced to writing, and even limits the time for debate in separate sessions to discuss these. It even limits the presiding officers' role to one as ministerial as possible.[104]

Speaking in terms of public interest, the evil to be avoided is undue delay, which Justice Carpio-Morales opined frustrates the will of the people as surely as electoral fraud.[105] This is *precisely* the reason a canvass is left a ministerial task, as held by a century-old New York opinion:

> [T]he necessity for a speedy disposition of the question of which candidate is entitled to the office is of far more importance than whether the person elected shall lose it.[106]

Accordingly, the Court has deemed canvass proceedings summary in nature to avoid vacancies in key positions,[107] and has ruled that canvassers should not look beyond returns that appear authentic and duly accomplished.[108] This policy goal is further reflected in Republic Act No. 7166,[109] which prohibits a number of pre-proclamation cases with respect to the presidential elections; and even, more generally, in the Election Code,[110] which requires trial courts to give preference to election cases.

As *Lopez v. Roxas* outlined, the more time-consuming objections and investigations should be ventilated in an election protest.[111] Indeed, Rep. Constantino Jaraula proclaimed, "We will not allow the conversion of the [canvassing committee] into an electoral tribunal,"[112] and that issues of fraud should be reserved for the Presidential Electoral Tribunal.[113] More practically, the judicial

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[103] NACHURA, *supra* note 100, at 442-43; DE LEON, *supra* note 100, at 718-19

[104] Siegel, *supra* note 67, at 635, 641-45.

[105] Ruy Lopez, at 58 (Carpio-Morales, J., *separate opinion*). *See id.* at 68 (Tinga, J., *separate opinion*); *Id.* at 38 (Quisumbing, J., *separate opinion*).

[106] People ex rel. Brink v. Way, 179 N.Y. 174, 181, 71 N.E. 756, 758 (1904), *quoted in* Leslie Southwick, *A Judge Runs for President*, 5 GREEN BAG 2D 37, 40 (2001). It referred to canvass proceedings as ministerial, largely exempt from judicial review.

[107] Siquian v. Comm'n on Elections, 320 SCRA 440, 443, G.R. No. 135627, Dec. 9, 1999; Sandoval v. Comm'n on Elections, G.R. No. 133842, 323 SCRA 403, 418, Jan. 26, 2000; Baltazar v. Comm'n on Elections, G.R. No. 140158, 350 SCRA 518, 527, Jan. 29, 2001

[108] Loong v. Comm'n on Elections, G.R. No. 107814, 257 SCRA 1, 29, May 16, 1996; Balindong v. Comm'n on Elections, G.R. No. 124041, 260 SCRA 494, 500, Aug. 9, 1996; Lee v. Comm'n on Elections, G.R. No. 157004, Jul. 4, 2003.

[109] § 15, *quoted in* Sandoval v. Comm'n on Elections, G.R. No. 133842, 323 SCRA 403, 418, Jan. 26, 2000.

[110] § 258, *quoted in* Baltazar v. Comm'n on Elections, G.R. No. 140158, Jan. 29, 2001. 350 SCRA 518, 526, *See* Quintos v. Comm'n on Elections, G.R. No. 149800, 392 SCRA 489, 502, Nov. 21, 2002.

[111] *See* Velayo v. Comm'n on Elections, G.R. No. 135613, 327 SCRA 729, 732 Mar. 9, 2000, *citing* Rep. Act. No. 7166, § 18.

[112] Carlito Pablo et al., *24 ballot boxes opened; 199 to go*, PHIL. DAILY INQUIRER, Jun. 1, 2004, at A14

[113] CONST. art. VII, § 4(7).

body has the greater institutional capacity, and time for that matter, to investigate.[114] The Tribunal and the Board must be seen as two parts of a single whole, as Senator George Edmunds explained with respect to the American ECA:

> [I]n the presidential election process, ministerial decisions should be prima facie binding; only judicial determinations may bind "finally."... Edmunds's belief was that "[t]he experience of governments seems to have proved that, on the whole, judicial tribunals are best calculated to hear and decide disputed questions of law and fact, although they may involve inquiries extending into the domain of politics and the decision of the fact of an election."[115]

The findings of Philippine canvassers are held merely *prima facie* evidence of a victor's title, following this logic.[116]

Indeed, some feared the canvass might not be completed before the new president's term began,[117] something the ECA sought to avoid.[118] A lawyer for President Arroyo even estimated that allowing the opposition to challenge just 25 CoCs would entail a review of 60,000 election returns and take roughly two years.[119] Parenthetically, the Court cautioned in the past against candidates who feel "that the only way to fight for a lost cause is to delay the proclamation of the winner."[120] Finally, on another policy point, the 2004 presidential canvass cost half a million pesos a day, based only on legislators' and staff members' basic salaries.

QUESTION 4B: BUT SHOULD THE NATIONAL BOARD OF CANVASSERS NEVERTHELESS EXERCISE DISCRETION?

Despite the precedents, framers' deliberations, and ancient policy goals arrayed against him, Justice Puno's widely-quoted separate opinion bewailed a canvass "done in a robotic manner," with lawmakers "as unthinking slot machines."[121] He called for the judicious exercise of discretion beyond Congress acting as a mere rubber stamp,[122] arguing that accuracy was the canvass' primary

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[114] Siegel, *supra* note 67, at 576.

[115] *Id.* at 599 *quoting* George Edmunds, Presidential Elections, 12 AM. L. REV. 1, 19-20 (1877).

[116] DE LEON, *supra* note 100, at 701-02, *citing* FLOYD MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS 138-39 (1890).

[117] Carlito Pablo &Christine Avendano, *Canvassing entering critical week, says solons*, PHIL. DAILY INQUIRER, Jun. 14, 2004, A1.

[118] Siegel, *supra* note 67, at 634, *citing* John Burgess, *The Law of the Electoral Count*, 5 POL. SCI. Q. 633, 651-52 (1888).

[119] Carlito Pablo & Christine Avendano, *Canvassing entering critical week, says solons*, PHIL. DAILY INQUIRER, Jun. 14, 2004, at A4 (quoting Atty. Romulo Macalintal).

[120] Siquian v. Comm'n on Elections, G.R. No. 135627, 320 SCRA 440, 443, Dec. 9, 1999.

[121] Lopez, 27 (Puno, J., *separate opinion*), *quoted in* Ducky Paredes, *The church and politics*, *Malaya*, Jun. 12, 2004, *at* http://www.malaya.com.ph/jun12/edducky.htm; Raul Pangalangan, *Passion for Reason: Philippine democracy: Bushed but not gored*, PHIL. DAILY INQUIRER, Jun. 18, 2004, *at* http://www.inq7.net/opi/2004/jun/18/text/opi_rpangalangan-1-p.htm.

[122] Blanco v. Board of Examiners, G.R. No. 22911, 46 Phil. 190, 192, Sep. 23, 1924.

consideration even if it entailed full-blown debate on the CoCs' due execution and authenticity:

> The need to fast track the determination of the will of the people pales in comparison with [accuracy]... The nation can endure a slow but trustworthy tally. It may not survive an indefensible count, however speedy it might be.[123]

However, the last part of Justice Puno's opinion was bereft of all legal citation, and rested only on its eloquence and "indubitable postulates."[124] Justice Puno was joined only by Justice Romeo Callejo, Sr., who cited the same Constitutional Commission deliberations that explained Congress's expanded authority to scrutinize due execution.[125] Contrary to Fr. Bernas's and other Justices' conclusions, he argued the expansion meant canvassing could not be a "purely ministerial duty."[126] He quoted:

> [C]anvassers are given quasi-judicial powers to determine whether the return is genuine and to disregard one which is obviously a forgery.[127]

Again, however, the general jurisprudential and statutory rule is that Philippine boards of canvass possess only ministerial duties, and may only correct errors in their tallies that do not involve a reexamination of the ballots, such as in cases of manifest mathematical error. Such boards have quasi-judicial functions only in the limited sense that they may reject election returns that are patently forged or spurious, are illegible, or in other cases where it is unsatisfied that they are genuine.[128] Thus, Justice Callejo actually cites the exception, not the rule. With the legality of the 22-man canvassing panel settled, and with both the opposition and the press doggedly guarding its every move, one must accept the majority conclusion that no CoC contained irregularity so blatant that the exception would have to be invoked.

Nevertheless, one might argue that had the majority instead chosen to delve into the CoCs' source documents, no one could have stopped them. Again, as the Board is Congress and no mere administrative agency, it is a co-equal branch whose acts are accorded great respect. Thus, an oppositor who questions its authority bears the burden of showing a proscription or restraint against it. One

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[123] Ruy Lopez, at 28 (Puno, J., *separate opinion*).

[124] *Id.* at 26.

[125] II RECORD, *supra* note 30, at 390-91.

[126] Ruy Lopez, at 60-61 (Callejo, Sr., J., *separate opinion*).

[127] Lopez, 61 (Callejo, Sr., J., *separate opinion*) *quoting* Espino v. Zaldivar, G.R. No. 22325, 21 SCRA 1204, Dec. 11, 1967; Salvacion v. Comm'n on Elections, G.R. No. 84673, 170 SCRA 513, Feb. 2, 1989.

[128] DE LEON, *supra* note 100, at 721-22, *citing* MECHEM, *supra* note 116, at 135, 137-38; Purisima v. Salanga, G.R. No. 22335, 15 SCRA 704, Dec. 31, 1965; Lagumbay v. Comm'n on Elections, G.R. No. 25444, 16 SCRA 175, Jan. 31, 1966; Abes v. Comm'n on Elections, G.R. No. 28348, 21 SCRA 1252, Dec. 15, 1967; Espino v. Zaldivar, G.R. No. 22325, 21 SCRA 1204, Dec. 11, 1967; Ong v. Comm'n on Elections, G.R. No. 28415, 22 SCRA 241, Jan. 29, 1968; Felix v. Comm'n on Elections, G.R. No. 28378, 23 SCRA 1288, Jun. 29, 1968; Lucman v. Dimaporo, G.R. No. 31558, 33 SCRA 387, May 29, 1970; Abella v. Larrazabal, G.R. Nos. 87721, 180 SCRA 509, Dec. 21 1989; Tatlonghari v. Comm'n on Elections, G.R. No. 86645, 199 SCRA 849, Jul. 31, 1991; Grego v. Comm'n on Elections, G.R. No. 125955, 274 SCRA 481, Jun. 19, 1997.

may, for example, argue that greater scrutiny of election documents partakes of a judicial function which the Constitution has left to the Supreme Court acting as Presidential Electoral Tribunal. However, one may be rebuffed by pointing out that the House and Senate Electoral Tribunals are not composed solely of Justices,[129] and that in any case, the canvass results are merely *prima facie* and not the actual adjudication. The clearest Constitutional bar is the implicit June 30 deadline, which arguably leaves Congress with a good deal of latitude with respect to the actual canvass. An oppositor might cite, finally, Republic Act No. 7166, but one might argue that Section 30 is addressed only to Congress and is thus an internal rule in statute form, much like the American ECA is considered to be.[130] Congress is free to change its rules, and is in any case free to repeal that particular provision.

Justice Puno's postulate is grounded on a deeper, residual authority that a co-equal branch can appeal to. This was a view taken even by 19th century American congressmen:

> Congress was a political body reviewing, on behalf of the nation and all the states... Some nationalistic congressmen took this difference to mean that Congress was not bound by the norms of administrative law and could go behind both ministerial and discretionary decisions of state officials to police the purity of national elections.[131]

This view was sharpened by Justice Puno in *Pimentel*. For example, he cited *Benito v. COMELEC*, which held that in an election, "the people's choice is the paramount consideration and their expressed will must, at times, be given effect."[132] Thus, in a democracy, Congress would be well-justified to exert whatever effort it wishes to ascertain the truth lest the sovereignty reposed in the people be undermined by an erroneous proclamation.[133] Justice Puno ended his *Pimentel* opinion, "half the truth is a full lie."[134] Moreover, humanities professor Felipe de Leon, Jr. theorized that Filipinos have a very trusting, personal, and transparent approach to conflict, and the prolonged canvass caused tensions because the majority was perceived as having something to hide.[135]

It must be emphasized, nevertheless, that it remains unsettled whether the National Canvass proceedings are ministerial or discretionary in nature. Both petitions were dismissed and neither, in any case, squarely raised the issue. Moreover, both sides are legally defensible. One further notes that Justice Quisumbing deemed the issue one that "need not... preoccupy us now,"[136] while

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[129] CONST. art. VI, § 17.

[130] Siegel, *supra* note 67, at 546

[131] *Id.* at 574.

[132] Pimentel, at 17 (Puno, J., *separate opinion*) *quoting* Benito v. Comm'n on Elections, 235 SCRA 436, 441 (1994).

[133] *See* Buckley v. Valeo, 424 U.S. 1, 257-58 (White, J., *concurring and dissenting*).

[134] Pimentel, at 17 (Puno, J., *separate opinion*).

[135] Volt Contreras, *Canvass feud? Experts point to Pinoy psyche*, PHIL. DAILY INQUIRER, Jun. 21, 2004, at A1.

[136] Ruy Lopez, at 37 (Quisumbing, J., *separate opinion*).

Justice Dante Tinga felt it was a textually demonstrable constitutional commitment to Congress the Court should not make a pronouncement on.[137]

II. THE ROLE OF CONGRESS AND THE ROOTS OF REPUBLICANISM

Amidst the subtle ministerial versus discretionary debate, Justice Puno hinted at a much deeper issue:

> The Judiciary is composed of unelected members and by its nature, is unfit to discharge the duty of canvassing which is basically non-judicial in nature... As direct representatives of the people, the members of Congress are better suited to determine their sovereign will as expressed through the ballot.[138]

Taking another perspective, Professor Perfecto Fernandez outlined that the executive power involves mobilizing administration, the legislative power involves creating general duties by passing laws, and the judicial power involves creating specific duties through adjudication.[139] One then inquires into the significance of assigning the canvass to the political, consensus-building branch. Certainly, it is no accident of history, since the American Congress is given the same task, and past proposals to transfer this to a tribunal were never acted on.[140]

John Locke began such an inquiry into political power from the premise that all men are naturally in a state of freedom.[141] However:

> [M]en give up all their natural power to the society they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of Nature.[142]

Similarly, James Madison began with the postulate that it is in man's nature to fall into faction; "Liberty is to faction what air is to fire, an aliment without which it instantly expires."[143] He nevertheless embraces this tendency, and instead counsels:

> Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive

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[137] *Id.* at 64 (Tinga, J., *separate opinion*).

[138] Pimentel, at 16 (Puno, J., *separate opinion*).

[139] Perfecto Fernandez, *The Philippine Legal System and its Adjuncts: Pathways to Development*, 67 PHIL. L.J. 21, 32 (1992). *See* M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1172 (2000).

[140] Siegel, *supra* note 67, at 586 n.278; Barkow, *supra* note 25, at 288-89.

[141] JOHN LOCKE, *An Essay Concerning the True Original Extent and End of Civil Government*, *in* 35 GREAT BOOKS 25.

[142] *Id.* at 56.

[143] James Madison, *The Federalist No. 10 ("The Union as a Safeguard Against Domestic Faction and Insurrection, Continued")* *in* 43 GREAT BOOKS 50. Madison also notes that representative government may be traced even to ancient societies. *The Federalist No. 63 ("The Senate, Continued")* *in* 43 GREAT BOOKS 193-94.

> exists, it will be more difficult for all who feel it to discover their own strength.[144]

Thus, the toll for entering ordered society is a sacrifice of freedom, one that arises from acquiescence to the majority, as determined by the refined forms of power struggle in modern society.[145] And so Locke called the consensus-building legislature "the supreme power in every commonwealth."[146] Of course, a Constitution is inherently a restraint on power, and has always protected minority and individual rights:

> [T]he purpose of the Bill of Rights is to withdraw "certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts..." Laski proclaimed that "the happiness of the individual, not the well-being of the State, was the criterion by which its behavior was to be judged." (internal citations omitted)[147]

In this vein, some of the greatest Constitutional moments were played out by judiciaries in a counter-majoritarian role. For example, "the Negro has made his greatest gains by way of the courts rather than legislatures."[148] However, there are many cases that are distant from democracy's supposed "fundamental tension with minority rights."[149] One may thus take the well-accepted thesis that the Court primarily safeguards individuals and minorities when majoritarian political processes cannot,[150] and group decisions that do this into the first of two categories.[151]

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[144] *Id.* at 52.

[145] Agabin, *supra* note 9, at 189.

[146] LOCKE, *supra* note 141, at 55.

[147] Philippine Blooming Mills Employment Organization v. Philippine Blooming Mills Co., G.R. No. 31195, 51 SCRA 191, 201, Jun. 5, 1973.

[148] Thomas Christopher, *Segregation in the Public Schools: Introduction*, 3 J. PUB. L. 5, 6 (1954), *quoted in* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 187 n.137 (2002). *See* Albert Sacks, *The Supreme Court, 1953 Term Foreword*, 68 HARV. L. REV. 96, 96 (1954). Note, however, that the justices have also been criticized for inserting its moral views into supposed liberal defenses of individual rights. ROBERT BORK, THE TEMPTING OF AMERICA 15-132 (1990).

[149] Morton Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 62-63 (1993).

[150] Henry Monaghan, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court*, 94 HARV. L. REV. 246, 297-98, 308 (1980) (book review); Robert Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L. Rev. 393, 501-02 (1996); William Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2402-05 (2002); Dworkin, *supra* note 24, at 1063-64. *See* Cruz v. Sec. of Env't and Natural Resources, G.R. No. 135385, 347 SCRA 128, Dec. 6, 2000 (Mendoza, J., *separate opinion*). Calabresi puts it in practical terms: "such entities tend to be less important in winning re-election." Steven Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 273 (1993).

[151] However, Monaghan argues Congress has greater institutional competence in protecting civil liberties. Henry Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 28-29 (1975). Redish points out that the Bill of Rights was not in the original American Constitution, so judicial review could not have been primarily contemplated for it. Martin Redish & Karen Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 34-35 (1987).

Instead of the citizen attempting to shut the door of his humble cottage in the face of the monarch,[152] the second category of decisions deal with undercurrents at the highest echelons of government and the ripples caused by the actions of broad sectors. These would be the most political and decidedly majoritarian aspects of democracy, of which the national elections are the prime example. Unlike in the first, counter-majoritarian judicial maneuvers here must be conducted with the utmost caution.[153]

Thus, the role of the State's most majoritarian branch in the people's most majoritarian exercise is not difficult to infer. Simply, it is the ultimate arbiter of the people's will, the body tasked to determine its expression because it is in theory the branch "able to plead their cause most successfully with the people."[154] The canvass remains part of a political exercise, although it is all too tempting to demand that an absolute ideal of impartiality underlie it. Indeed, framing the century-old rules for the American canvass, Senator Benjamin Hill noted:

> [Rather than] rise above party and remember [their] country and only [their] country,... [a]ble men, learned men, distinguished men, great men in the eyes of the nation, seemed intent only on accomplishing a party triumph, without regard to the consequences to the country. That is human nature. That is, unfortunately, party nature.[155]

Representative Thomas Browne added he would even:

> fear myself... if I were supreme judge upon such a question. I should fear to take upon myself the responsibility of settling a question of this character; I should fear that my judgment might be found in the line of my political convictions and party prejudices.[156]

In summary:

> Congress faced a fundamental dilemma. On the one hand, in determining the outcome of a closely contested presidential election, Congress knew that there had to be a final decision-maker, be it a person, tribunal, or institution. As Senator Thomas Bayard reminded his colleagues near the outset of Congress's long struggle to enact the ECA, "[e]very human dispute, every human right, however important, must reach a finality to be controlled by human methods." On the other hand, Congress also knew that in a close presidential election, no decision-maker, be it a person, tribunal, or

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[152] United States v. Arceo, 3 Phil. 381, 384 (1904).

[153] Dworkin, however, posits that judicial decisions are political decisions in a broader sense in that they must show coherence with a larger societal backdrop. Dworkin, *supra* note 24, at 1065, 1079-82. *See* Michael Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 192 (1998).

[154] ALEXANDER HAMILTON OR JAMES MADISON, *The Federalist No. 49 ("Method of Guarding Against the Encroachments of Any One Department of Government by Appealing to the People Through a Convention")*, *in* 43 GREAT BOOKS 160.

[155] Siegel, *supra* note 67, at 548.

[156] *Id.*

> institution, could be trusted to render a neutral decision according to rules laid down in advance.[157]

Given human frailties, Congress thus plays a legitimizing role in the most essential of democratic exercises, and by its very nature, it is the only body capable of doing so.[158] Indeed, "few matters of statecraft were more important than public 'confidence' in the 'legitima[cy]' of the 'transmission of the supreme executive authority from one person to another.'"[159] This is readily illustrated in *Bush v. Gore*,[160] where the United States Supreme Court tread on Congressional ground and ended up transforming a majoritarian electoral exercise into a counter-majoritarian equal-protection question.[161]

As Justice Stephen Breyer wrote:

> Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.[162]

> The decision by both the Constitution's Framers and the 1886 Congress to minimize this Court's role in resolving close federal Presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about.[163]

Justice Ruth Joan Ginsberg added:

> In sum, the Court's conclusion that a constitutionally adequate recount is impractical is a prophecy the Court's own judgment will not allow to be tested. Such an untested prophecy should not decide the Presidency of the United States.[164]

Taking the opposite end of the Court's lack of a popular mandate, such intervention is especially high-handed because Justices are not directly accountable to the electorate. Where fixed terms and reelection are a requisite for the legislature by its nature, tenure is precisely granted to judges because of the judiciary's

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[157] *Id.* at 547.

[158] *See id.* at 555. "They regarded the only arbiter that had ever been appointed – the Electoral Commission of 1877 on which five Supreme Court justices held the deciding votes – as a dismal failure never to be repeated. As Senator George Hoar, one of the ECA's main proponents, concluded: '[I]n the present state of political and public sentiment,' it was 'impossible to expect an agreement on... an arbiter between the two branches' of Congress. There was simply no person or institution that could be trusted."

[159] *Id.* at 547.

[160] 531 U.S. 98 (2000).

[161] This invited "a new generation of constitutional challenges to the electoral process." *Southwest Voter Registration Project v. Shelley, 344 F.3d 914 (9th Cir. 2003)*, 117 HARV. L. REV. 2023, 2023 (2004).

[162] Bush, 531 U.S. at 152 (2000) (Breyer, J., *dissenting*).

[163] *Id.* at 155.

[164] *Id.* at 144 (Ginsberg, J., *dissenting*).

nature.[165] Thus, in the end, *Bush v. Gore* tainted the American Court with the partisanship they were supposed to be above, allowed five Justices to effectively overturn an entire electorate,[166] and "leveraged Republican control of the judiciary to secure control of another branch,"[167] playing the Consitution as "the trump card in American politics."[168] However, nothing short of impeachment could rein the Justices back in.

Finally, Justice Breyer outlined the Hayes-Tilden controversy in 1886, where Supreme Court Justice Joseph Bradley was forced to cast the deciding vote between two presidential candidates:

> The Commission divided along partisan lines, and the responsibility to cast the deciding vote fell to Justice Bradley. He decided to accept the votes by the Republican electors, and thereby awarded the Presidency to Hayes.
>
> Justice Bradley immediately became the subject of vociferous attacks. Bradley was accused of accepting bribes, of being captured by railroad interests, and of an eleventh-hour change in position after a night in which his house "was surrounded by the carriages" of Republican partisans and railroad officials. Many years later, Professor Bickel concluded that Bradley was honest and impartial. He thought that "the great question' for Bradley was, in fact, whether Congress was entitled to go behind election returns or had to accept them as certified by state authorities," an "issue of principle." Nonetheless, Bickel points out, the legal question upon which Justice Bradley's decision turned was not very important in the contemporaneous political context. He says that "in the circumstances the issue of principle was trivial, it was overwhelmed by all that hung in the balance, and it should not have been decisive." (internal citations omitted)[169]

Justice Breyer concluded that the involvement of Supreme Court Justices added no legitimacy to the process, and served only to embroil them in politics and undermine the judiciary. After the Hayes-Tilden affair, Congress enacted the ECA, which greatly diminished the Court's role.[170]

The gravity of a Bush-Gore or Hayes-Tilden scenario recalls Dean Agabin's words:

> The judiciary is in politics because it cannot avoid it. The fact that it makes important decisions which impinge on the interests of the most powerful segments of society necessarily involves it in power politics.[171]

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[165] *Federalist No. 78*, *supra* note 15, at 230; Balkin, *supra* note 40, at 1432.

[166] Russel Miller, *Lords of Democracy: The Judicialization of "Pure Politics" in the United States and Germany*, 61 WASH. & LEE L. REV. 587, 589 (2004).

[167] Balkin, *supra* note 40, at 1455.

[168] BORK, *supra* note 148, at 3.

[169] Bush v. Gore, 531 U.S. 98, 154-57 (2000) (Breyer, J., *dissenting*). *See* Barkow, *supra* note 25, at 290.

[170] Tribe, *supra* note 40, at 281.

[171] Agabin, *supra* note 9, at 190.

III. JAMES BRADLEY THAYER AND THE POLITICAL BRANCHES' CONCURRENT DUTY TO INTERPRET THE CONSTITUTION

The *Bush v. Gore* scenario only becomes more distasteful when one realizes it occurred precisely under the auspices of judicial review – and the famous *Carolene Products* footnote ironically hints that judicial review is a tool against political entrenchment by Hamilton feared.[172] Many seeming policy doctrines have been imposed by the judiciary in the guise of constitutional interpretation. One has *Lochner v. New York*[173] and *People v. Pomar*,[174] where Justice Oliver Wendell Holmes, Jr. protested the seeming engraftment of Herbert Spencer's *Social Statics* onto the Constitution.[175] One even has the *Legal Tender cases*[176] and the conclusion against the use of paper money which Holmes criticized as "the curious spectacle of the Supreme Court reversing the determination of Congress on a point of political economy."[177] *Bush v. Gore*, however, amounted to a far more direct usurpation of a Congressional power, and the American Congress had in fact enacted laws in 1845 and in 1887 to guide its handling of such a close presidential contest.[178] In the context of such overreach in the guise of interpretation, Justice Puno's thesis of coordinate constitutional interpretation becomes all the more attractive. It must be noted that although *Ruy Lopez* curtly dismissed the opposition petition, the Justices were arguably close to *Bush v. Gore* with their individual pronouncements, and *Bush v. Gore* was in fact cited by one opinion.[179]

A. THAYER'S ORIGINAL CONCEPTION

Coordinacy theory is summarized:

> Under the coordinacy theory, a distinction exists between the Constitution and the judicial construction of the Constitution. The Judiciary is not the exclusive oracle of constitutional meaning. Other branches may interpret the Constitution independently of the Judiciary.[180]

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[172] Balkin, *supra* note 40, at 1455, *citing* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938); Jack Balkin, *The Footnote*, 83 NW. L. REV. 275 (1989).

[173] 198 U.S. 45 (1905).

[174] 46 Phil. 440, 456 (1924).

[175] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., *dissenting*).

[176] Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869); Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870); Julliard v. Greenman, 110 U.S. 421 (1884).

[177] Thomas Grey, *Thayer's Doctrine: Notes on its Origin, Scope, and Present Implications*, 88 NW. U. L. REV. 28, 34 (1993).

[178] Bush v. Gore, 531 U.S. 98, 153-54 (2000) (Breyer, J., *dissenting*); Balkin, *supra* note 40, at 1433. *See* Barkow, *supra* note 25, at 290-91; William Josephson & Beverly Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 184 (1996). *See also* Russel Miller, *supra* note 166, at 620.

[179] Ruy Lopez, at 35 (Quisumbing, J., *separate opinion*).

[180] Robert Schapiro, *Judicial Deference and Interpretative Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 662-63 (2000). *See* Edwin Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 981 (1987); Gary Apfel, *Whose Constitution Is It Anyway? The Authority of the Judiciary's Interpretation of the Constitution*, 46 Rutgers L. REV. 771, 773 (1994).

It is reconciled with judicial supremacy by qualifying that the Supreme Court need not provide the Constitutional interpretation in every question;[181] although the Court's interpretation is the one that will finally bind, it may always choose to defer or to uphold another branch's construction just as it may reject them.[182] Justice Puno discusses the underpinnings of deference, linking coordinacy theory directly to the majoritarian concerns discussed in the preceding section:

> As a judicial stance, it is anchored on a heightened regard for democracy. It accords intrinsic value to democracy based on the belief that democracy is an extension of liberty into the realm of social decision-making. Deference to the majority rule constitutes the flagship argument of judicial restraint which emphasizes that in democratic governance, majority rule is a necessary principle.[183]

The theory traces its roots to a brief but influential 1893 essay by James Bradley Thayer:[184]

> [T]he court was so to discharge its office as not to deprive another department of any of its proper power, or to limit it in the proper range of its discretion... [T]hey require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide margin of consideration which address themselves only to the practical judgment of a legislative body. Within that margin, as among all these legislative considerations, the constitutional law-makers must be allowed a free foot.[185]

He continues that the legislature, not the judiciary, is the Constitution's primary interpreter, in the sense that it continually enacts laws that affect every aspect of daily life, yet whose constitutionality will not be reviewed unless brought to a court.[186] Had the judiciary been intended for the primary role, it would have more than a belated power of review. The Executive may be viewed similarly, and Professor Fernandez likewise distinguished that judicial power may only be

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[181] *See, however,* Alexander & Schauer, *Defending Judicial Supremacy, supra* note 28, at 1387. "If we can expect legally and constitutionally trained lower court judges to subjugate their best professional judgment about constitutional interpretation to the judgments of those who happen to sit above them, then expecting the same of nonjudicial officials is an affront neither to morality nor to constitutionalism. It is but the recognition that at times good institutional design requires norms that compel decisionmakers to defer to the judgments of others with which they disagree. Some call this positivism. Others call it formalism. We call it law."

[182] Schapiro, *supra* note 180, at 665-66.

[183] Francisco (Puno, J., *separate opinion*).

[184] Over a century later, this early essay on judicial restraint continues to spark debate. Henry Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 7 (1983); *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. v, v (1993); Jay Hook, *A Brief Life of James Bradley Thayer*, 88 NW. U. L. REV. 1, 5-8 (1993).

[185] James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893).

[186] *See* Paul Brest, *Congress as Constitutional Decisionmaker and its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 64 (1986); Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9, 24-25 (1993); G. Edward White, *Revisiting James Bradley Thayer*, 88 NW. U. L. REV. 48, 75 (1993); Tolentino v. Sec. of Finance, G.R. No. 115455, 249 SCRA 628, Sep. 23, 1995.

exercised when a "Primary Duty" is violated, unlike executive power.[187] Thus, judicial review is arguably best employed narrowly.[188]

As a corollary, as Justice Tinga in fact pointed out,[189] the parameters mapped out by Constitutional provisions may contain a range of possibilities and different interpretations, and when appropriate, the Court should stop review when it is satisfied that the act in question is within those parameters, rather than imposing its own interpretation. Put another way, "The judicial function is merely that of fixing the outside border of reasonable legislative action;"[190] otherwise the legislature might "divide its duty with the judges."[191] As Justice Holmes quoted an old bishop's sermon:

> Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them.[192]

As another corollary, a judge should "make the hammer fall, and heavily"[193] only when legislatures have "not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question,"[194] considering its acts must be carried by a majority.[195] "The ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not."[196] Thus, it should be possible for the judiciary to leave a legislative act untouched not because they believe it represents the best Constitutional interpretation, but merely because they have doubts as to its error.[197]

Finally, it is submitted that Thayer's ideas did not contradict *Marbury v. Madison*, which he referred to.[198] *Marbury's* oft-quoted pronouncement read:

> It is emphatically the province and duty of the judicial department to say what the law is.[199]

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[187] Perfecto Fernandez, *Separation of Powers as Juristic Imperative*, 58 PHIL. L.J. 245, 248-49 (1983).

[188] Thayer, *supra* note 185, at 136-37.

[189] Ruy Lopez, at 64 (Tinga, J., *separate opinion*).

[190] Thayer, *supra* note 185, at 148.

[191] *Id.*

[192] Bishop Hoadly's Sermon on "The Nature of the Kingdom or Church of Christ," Mar. 31, 1717 (London, James Knapton 1717), *quoted in* Thayer, *supra* note 185, at 152. *See* Cruz v. Sec. of Env't and Natural Resources, G.R. No. 135385, Dec. 6, 2000 (Mendoza, J., *separate opinion*).

[193] Ass'n of Small Landowners of the Philippines, Inc. v. Sec. of Agrarian Reform, G.R. No. 78742, 175 SCRA 343, 365, Jul. 14, 1989, *quoted by* Osmena v. Comm'n on Elections, G.R. No. 100318, 199 SCRA 750, Jul. 30, 1991; Fernandez v. Sec. of Labor, G.R. No. 102940, Nov. 6, 1992 (Cruz, J., *concurring*).

[194] Thayer, *supra* note 185, at 144. *See* Schapiro, *supra* note 180, at 668; Thomas Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 522 (2004); Robert Nagel, *Name-Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193, 200-02 (1993).

[195] Thayer, *supra* note 185, at 145-46.

[196] *Id.* at 150.

[197] *Id.* at 151; Martin Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1828 (1996).

[198] *See* Barkow, *supra* note 25, at 239; Monaghan, *Marbury*, *supra* note 184, at 7-8. *See, however,* Gary Lawson, *Thayer v. Marshall*, 88 NW. U. L. REV. 221, 224-25 (1993).

[199] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

However, *Marbury* preceded this statement with:

> "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."[200]

Alexander Hamilton, in fact, had already laid the seeds of this thought:

> "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents."[201]

James Madison likewise stated that "each [branch] must in the exercise of its functions be guided by the text of the Constitution according to its own interpretation of it."[202]

Thayer influenced Holmes,[203] and wisps of his ideas float in some of his decisions:

> While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a

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[200] *Id.* at 170. "Marshall did not take that approach because he understood that the important, essential corollary to judicial review was judicial self-restraint. He knew that if the Court did not defer on occasion to Congress's determinations, that rather than being the co-equal branch that Charles Hobson described, the Court would start to become more than equal; the Supreme Court would truly become supreme." Susan Herman, *Splitting the Atom of Marshall's Wisdom*, 16 ST. JOHN'S J. LEGAL COMMENT. 371, 375 (2002).

[201] *Federalist No. 78*, *supra* note 15, at 231.

[202] Brian Feldman, *Evaluating Public Endorsement of the Weak and the Strong Forms of Judicial Supremacy*, 89 VA. L. REV. 979, 982 (2003). "I acknowledge, in the ordinary course of Government, that the exposition of the laws and Constitution devolves upon the Judiciary. But I beg to know, upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments? The Constitution is the charter of the people to the Government; it specifies certain great powers as absolutely granted, and marks out the departments to exercise them. If the Constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point." Brest, *supra* note 186, at 84 (quoting James Madison).

[203] Grey, *Thayer's Doctrine*, *supra* note 177, at 35.

> particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*[204]

Later adherents included Louis Brandeis,[205] Felix Frankfurter,[206] John Harlan,[207] and Learned Hand.[208] More recently, this sort of judicial minimalism has been associated with Alexander Bickel[209] and Cass Sunstein.[210] Support for Thayer's brand of judicial deference today may also be gleaned from parallel practices. Courts, for example, often defer to administrative agencies' legal interpretations, owing to the latter's specialized knowledge and particular expertise:[211]

> Courts should not intervene in that administrative process, save upon a very clear showing of serious violation of law or of fraud, personal malice or wanton oppression. Courts have none of the technical and economic or financial competence which specialized administrative agencies have at their disposal, and in particular must be wary of intervening in matters which are at their core technical and economic in nature but disguised, more or less artfully, in the habiliments of a "question of legal interpretation."[212]

The Court has, further, specifically upheld the doctrine of primary

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[204] Otis v. Parker, 187 U.S. 606, 608-09 (1903).

[205] Francisco (Puno, J., *concurring*); Louis Jaffe, Comment, *Was Brandeis an Activist? The Search for Intermediate Premises*, 80 HARV. L. REV. 986 (1967); Morton Horwitz, *The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 63 (1993); Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (1936) (Brandeis, J., *concurring*).

[206] Francisco (Puno, J., *concurring*); Hook, *supra* note 184, at 8; Schapiro, *supra* note 180, at 668, *citing* Wallace Mendelson, *The Influence of James B. Thayer upon the Work of Holmes, Brandeis, and Frankfurter*, 31 VAND. L. REV. 71, 71 (1978); Colegrove v. Green, 328 US 549, 556 (1946) (Frankfurter, J.); Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J.). "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."

[207] Oregon v. Mitchell, 400 U.S. 112, 207 (Harlan, J., *concurring*).

[208] Edward Purcell, *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFF. L. REV. 873, 874 (1995). HAND, *supra* note 29.

[209] J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 774 (1971); Anthony Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1569 (1985). *See* Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

[210] Michael Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 893 (2003); Cass Sunstein, *Constitutionalism After the New Deal*, 103 HARV. L. REV. 421 (1987).

[211] Schapiro, *supra* note 180, at 680-81; Thomas Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 1032-33 (1992); Peter Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121-22 (1987); Cass Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2093-94 (1990); Kevin Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 356-58; Nicholas Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, 321-25 (1993); Robert Anthony, *Why Agency Interpretations Should Bind Citizens and Courts*, 7 YALE J. ON REG. 1, 7 (1990); Kenneth Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 292-95 (1986); Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 453 (1989); Note, *Powers of Congress and the Court Regarding the Availability and Scope of Review*, 114 HARV. L. REV. 1551, 1560-61 (2001); Laurence Silberman, *Chevron—The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990); Frank Easterbrook, *The Demand for Judicial Review*, 88 NW. U. L. REV. 372, 372 (1993). *See* Linda Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 Nw. U. L. Rev. 646, 685-86 (1988); Richard Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1582-87 (1983).

[212] Philippine Long Distance Telephone Co. v. Nat'l Telecomm'ns Comm'n, G.R. No. 94374, 241 SCRA 486, 500, Feb. 21, 1995.

jurisdiction:

> The Trial Court does not have the competence to decide matters concerning activities relative to the exploration, exploitation, development and extraction of mineral resources like coal... It behooves the courts to stand aside even when apparently they have statutory power to proceed in recognition of the primary jurisdiction of an administrative agency.[213]

> [I]f the case is such that its determination requires the expertise, specialized skills and knowledge of the proper administrative bodies because technical matters or intricate questions of facts are involved, then relief must first be obtained in an administrative proceeding before a remedy will be supplied by the courts even though the matter is within the proper jurisdiction of a court. This is the doctrine of primary jurisdiction.[214]

This line of discussion has been extended to the Constitutional Commissions. For example, *Macalintal v. Commision on Elections*[215] held:

> The Commission on Elections... should be allowed considerable latitude in devising means and methods that will insure the accomplishment of the great objective for which it was created — free, orderly and honest elections. We may not agree fully with its choice of means, but unless these are clearly illegal or constitute gross abuse of discretion, this court should not interfere. Politics is a practical matter, and political questions must be dealt with realistically – not from the standpoint of pure theory. The Commission on Elections, because of its fact-finding facilities, its contacts with political strategists, and its knowledge derived from actual experience in dealing with political controversies, is in a peculiarly advantageous position to decide complex political questions.[216]

AKBAYAN v. Commission on Elections[217] similarly accorded great weight to the Commission on Elections' conclusion that an extended registration for new voters was infeasible, and even phrased this, "The law obliges no one to perform an impossibility." Significantly, the recent case of *Pimentel v. House of Representatives Electoral Tribunal*[218] explicitly applied the doctrine of primary jurisdiction to the House.

Finally, courts may defer out of a belief that the legislature intended to vest jurisdiction over the matter in the agency when it created the latter.[219]

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[213] Philippine Nat'l Bank v. Court of Appeals, G.R. No. 118357, 272 SCRA 291, 309, May 6, 1997.

[214] Industrial Enterprises, Inc. v. Court of Appeals, G.R. No. 88550, 184 SCRA 426, 431-32, Apr. 18, 1990, *citing* United States v. Western Pacific Railroad Co., 352 U.S. 59.

[215] G.R. No. 157013, 405 SCRA 614, Jul. 10, 2003.

[216] *Id.*

[217] G.R. No. 147066, 355 SCRA 318, 342, Mar. 26, 2001.

[218] G.R. No. 141489, 393 SCRA 227, 237, Nov. 29, 2002.

[219] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516-17.

B. HISTORICAL EXAMPLES: ABRAHAM LINCOLN AND FRANKLIN ROOSEVELT

United States Senator Sam Ervin professed:

> [E]very Congressman is bound by his oath to support the Constitution, and to determine to the best of his ability whether proposed legislation is constitutional when he casts his vote in respect to it.[220]

Coordinate interpretation might be inferred from laws, executive regulations, and other acts, but the United States has actually experienced titanic, inter-branch Constitutional debates. Quite unlike the Constitutional crisis that has become a media buzzword in recent years, these episodes have involved the political branches respecting a Supreme Court decision, but publicly challenging its logic.

Coordinacy takes on a very practical significance with respect to the President's powers of veto and pardon. In 1804, to cite an early example, Thomas Jefferson pardoned several people convicted for libeling John Adams under the Alien and Sedition Act of 1801. He later explained to Abigail Adams that he felt the law was unconstitutional and should not be enforced, and that:

> [N]othing in the Constitution has given [the judiciary] a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence... But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power had been confined to them by the Constitution... [T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.[221]

Jefferson would repeat this practice several times.[222] Similarly, in 1832, Andrew Jackson vetoed the renewal of the Bank of the United States' charter, citing not sound economics but a belief that such was unconstitutional despite the

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[220] P. SCHUCK, THE JUDICIARY COMMITTEES 175 (1975), *quoted in* Brest, *supra* note 186, at 61. This follows from the Constitution itself. Congress draws its lawmaking power from the fundamental document, and must refer to it to gauge the scope of the power conferred. For example, the Constitution prohibits specific enactments, such as bills of attainder. *Id.* at 63.

[221] Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463, 1490 (2003). *See* Brest, *supra* note 186, at 67; Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 712 (1985). David Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 338 (1992). "Jefferson added:

> [T]he constitution moreover, as a further security for itself, ... has provided for it's own reintegration by a change of the persons exercising the functions of those department. Succeeding functionaries have the same right to judge of the conformity or non-conformity of an act with the constitution, as their predecessors who past it "

[222] Mulhern, *supra* note 29, at 125.

positive ruling in *McCulloch v. Maryland*.[223] He stated:

> The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.[224]

Dred Scott v. Sandford[225] held that Congress could not prevent slavery in the territories, and further held that blacks could not qualify for citizenship. In doing so, it sparked what Attorney General Edwin Meese called "the greatest political debate"[226] in American history. Stephen Douglas, Abraham Lincoln's opponent in the 1858 Senate campaign, defended *Dred Scott* and further argued that it was final and binding on the government and all citizens. Lincoln, however, responded that judicial review and the people's inherent right to self-governance could function together. He argued that while *Dred Scott* was binding on the parties concerned,

> We nevertheless do oppose *[Dred Scott]*... as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision.[227]

Following Lincoln's formulation, Meese would distinguish the Constitution itself from Constitutional Law, "that body of law that has resulted from the Supreme Court's adjudications involving disputes over constitutional provisions or doctrines."[228] Otherwise, as Lincoln argued, the people would cease to govern themselves and practically allow government to lapse solely into the Court's hands.[229]

President Franklin Delano Roosevelt's New Deal provided the backdrop for another passionate Constitutional clash. When new laws expanding the federal government's role in the economy were passed, a Court resting on its *laissez-faire* influenced jurisprudence struck them down.[230] Roosevelt responded by debating

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[223] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[224] White, *Constitutional Journey*, *supra* note 221, at 1495; Brest, *supra* note 186, at 67-68; Mulhern, *supra* note 29, *at* 126; Fisher, *Constitutional Interpretation*, *supra* note 221, at 713-14.

[225] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

[226] Meese, *supra* note 180, at 984. This 1986 address at Tulane University sparked intense debate. Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 29, at 1360-61; Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 723 (1989); Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071, 1072 (1987); Mulhern, *supra* note 29, at 126-27; Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991, 991-93 (1987); Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137, 137-38 (1993).

[227] Meese, *supra* note 226, at 985.

[228] *Id.* at 981.

[229] Brest, *supra* note 186, at 77-78 *quoting* Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) *reprinted in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 585 (Basler ed. 1969). Fisher, *Constitutional Interpretation*, *supra* note 221, at 714-15; Mulhern, *supra* note 29, at 126.

[230] *See generally* Lochner v. New York, 198 U.S. 45 (1905); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

the decisions in public, arguing not the outcomes, but dissecting the Court's own Constitutional reasoning. Reacting to *Schechter Poultry*, for example, he quipped, "We have been relegated to the horse-and-buggy definition of interstate commerce,"[231] an expression soon repeated by newspapers. Taking up this refrain, he insisted in his inaugural State of the Union address that "means must be found to adapt our legal forms and our judicial interpretation to the actual present national needs of the largest progressive democracy in the modern world."[232]

Eventually, this line of criticism found its way into letters and the Senate halls, and the criticism was vividly captured by the label "nine old men," after the title of a book by Drew Pearson and Robert Allen. Practically taking his questions of Constitutional interpretation to the electorate, Roosevelt won a broad mandate in 1936, and quickly sprang the Court-packing plan that would add a justice to the Court for every justice over seventy that failed to retire. With the "switch in time" that saved nine, the Court eventually changed its philosophy and the impasse was broken.[233]

Columbia professor Bruce Ackerman distinguishes between ordinary, everyday politics, and a higher form of constitutional politics,[234] a view traced back to *The Federalist* itself, which speaks of "a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions."[235]

Ackerman further argues that the Constitutional thinking that won out in the New Deal was an example of a pivotal, transformational Constitutional moment as important as the original ratification itself.[236] Nevertheless, the above examples also highlight that the political branches have specific Constitutional tools with which to debate the judiciary on Constitutional interpretation, tools found in ordinary politics and debates, and well short of rallying the electorate to amend the charter. Specifically, Congress can actually enact laws designed to subvert a judicial holding without challenging it head on,[237] including the explicit power to contract courts' subject matter jurisdiction,[238] or impeach Justices outright.[239] Less directly, it

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[231] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1019 (2000).

[232] *Id.*

[233] *Id.* at 1020-31; Salvador Esguerra, *The Need for a New Perspective on the Power of Judicial Review*, 28 U.S.T. L.J. 4, 10-11 (1977). *See* Mulhern, *supra* note 29, at 126.

[234] *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1039 (1984).

[235] *The Federalist No. 49*, *supra* note 154, at 159.

[236] Ackerman, *Constitutional Politics*, *supra* note 23, at 503-07; Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 476, 568-73 (1995).

[237] Brest, *supra* note 186, at 93-97. *See* Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56-AUT LAW & CONTEMP. PROBS. 273 (1993); Peter Strauss, Comment, *Was There a Baby in the Bathwater?*, A Comment on the Supreme Court's Legislative Veto Decision, 1983 DUKE L.J. 789.

[238] CONST. art. VIII, § 2; Lawrence Sager, *The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 18 (1981); Steven Calabresi & Kevin Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1175 (1992); Mulhern, *supra* note 29, at 122; Abner Mikva, *How Well Does Congress Support and*

maintains its own legal advisers, and may summon legal experts and advocates to Congressional hearings.[240]

The President, on the other hand, may veto laws that support a particular holding,[241] refuse to enforce such laws[242] or judgments,[243] pardon individuals convicted under a particular law upheld by the Court,[244] or influence agency-level legal interpretation and rulemaking.[245] In this last respect, it thus helps to look at agents such as the Secretary of Justice, Presidential Legal Counsel, and Solicitor General as holding a significant interpretative role, and focusing on their inherent lack of independence and insulation from political factors misses the point since the political branches necessarily do not function like the judiciary.[246] Finally, he may also appoint judges who support a particular interpretation,[247] a process heavily scrutinized in the United States by the media and lobby groups alike,[248] and highlighted by Judge Robert Bork's blocked confirmation.[249]

Defend the Constitution?, 61 N.C. L. REV. 587, 589 (1983); Roger Davidson, *The Lawmaking Congress*, 56-AUT LAW & CONTEMP. PROBS. 99, 99-100 (1993).

[239] CONST. art. XI, § 3.

[240] Fisher, *Constitutional Interpretation*, *supra* note 221, at 729-30. *See* Michael Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567 (1988).

[241] CONST. art. VI, § 27; Michael Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 766-71 (1993).

[242] Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 378-80 (1994); Geoffrey Miller, *The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, 56-AUT LAW & CONTEMP. PROBS. 35, 50-51 (1993); Gary Lawson & Christopher Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1286-88 (1996); Christopher May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 992-93 (1994).

[243] Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law is*, 83 GEO. L.J. 217, 251 (1994).

[244] CONST. art. VII, § 19.

[245] CONST. art. VII, § 16-17. *See* Lawrence Lessig, *Readings by our Unitary Executive*, 15 CARDOZO L. REV. 175, 186-89 (1993).

[246] John McGinnis, Review Essay, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 801-04 (1992); John McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 378-406 (1993); Samuel Alito, Jr., *Change in Continuity at the Office of Legal Counsel*, 15 CARDOZO L. REV. 507, 510-11 (1993); Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56-AUT LAW & CONTEMP. PROBS. 63, 63-64 (1993); Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 267-70 (1993); Douglas Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 338-39 (1993); Nelson Lund, *Rational Choice at the Office of the Legal Counsel*, 15 CARDOZO L. REV. 437, 488 (1993). Moreover, only the judiciary issues its interpretations systematically. Rogers Smith, *The "American Creed" and Constitutional Theory*, 95 HARV. L. REV. 1691, 1694-95 (1982) (book review).

[247] CONST. art. VIII, § 9. *See* Vik Amar, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1119-20 (1988). Amar states that American Senators, as confirming authorities, have a duty to scrutinize the constitutional viewpoints of appointees.

[248] Stephen Wermiel, *Confirming the Constitution: The Role of the Senate Judiciary Committee*, 56-AUT LAW & CONTEMP. PROBS. 121, 122-25 (1993); John McGinnis, *The President, The Senate, The Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 652-59 (1993).

[249] Bruce Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1164-70 (1988); Walter Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985, 986-87 (1990).

It also follows that the Executive and Legislative may challenge each other's interpretations;[250] for example, Congress can overrule an Executive Order simply by passing a law on the subject, which the President may opt to veto. This, in turn, follows the larger pattern of judicial noninterference in constitutional claims of these two branches against each other. Such claims are often part of the political bargaining between the two, and are rarely meant to be resolved before a judge rather than through political tools, such as threats by Congress not to pass the national budget.[251]

Of course, the political branches and the President in particular may simply refuse to enforce a decision of the least dangerous branch,[252] reminiscent of Andrew Jackson's retort to *Worcester v. Georgia*:[253] "John Marshall has made his decision; now let him enforce it!"[254] When practiced by administrative agencies, this has been called nonacquiescence. For example, the American Social Security Administration blatantly disregarded late 1970s appellate court rulings that would make it more difficult for the agency to reduce the number of its beneficiaries, to the point that the Ninth Circuit promulgated a statewide injunction and Congress considered legislation to put an end to the conflict.[255] In the Philippines, one can glean its existence from rulings such as *Lapinid v. Civil Service Commission:*

> We note with stern disapproval that the Civil Service Commission has once again directed the appointment of its own choice in the case at bar. We must therefore make the following injunctions which the Commission must note well and follow strictly.
>
> ...Up to this point, the Court has leniently regarded the attitude of the public respondent on this matter as imputable to a lack of comprehension and not to intentional intransigence. But we are no longer disposed to indulge that fiction. Henceforth, departure from the mandate of *Luego* by the Civil Service Commission after the date of the promulgation of this decision shall be considered contempt of this Court...
>
> ...
>
> The Commission on Civil Service has been duly warned. Henceforth, it disobeys at its peril.[256]

Nonacquiescence may persist in part because a single court branch or division will rarely exercise exclusive jurisdiction over an agency, short of the Supreme Court itself, in part because of multiple decisionmakers in an agency, and

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[250] *See* Thomas Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430 (1987).

[251] Monaghan, *Judicial Review*, *supra* note 150, at 302.

[252] *See* Dawn Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63-SPG LAW & CONTEMP. PROBS. 7 (2000).

[253] Worcester v. Georgia, 31 U.S. 515 (1832) (Marshall, C.J.).

[254] I HORACE GREELEY, THE AMERICAN CONFLICT, A HISTORY OF THE GREAT REBELLION 106 (1864).

[255] Estreicher & Revesz, *supra* note 226, at 681-82, 703; Lopez v. Heckler, 725 F.2d 1489 (9th Cir., 1984).

[256] Lapinid v. Civil Service Commission, G.R. No. 96298, 197 SCRA 106, 113-14, May 14, 1991. *Lapinid's* scathing rebuke was reiterated three years later in *Mauna v. Civil Service Commission*. G.R. No. 97794, 232 SCRA 388, 396-97, May 13, 1994.

in part because the government is not estopped from relitigating issues short of a Supreme Court ruling.[257] This brand of defiance can be very effective when one considers that unless an administrative decision is brought to a court, the agency is effectively the final interpreter of the subject. Nevertheless, New York University professors Samuel Estreicher and Richard Revesz propose that prior to a final pronouncement by the Supreme Court, nonacquiescence has the positive effect of sharpening issues by giving different courts the opportunity to rule on them, and allows an agency greater latitude in seeking to validate its legal position.[258]

History bears out that the United States benefited from the dissent voiced at the highest levels,[259] the right to dissent is close to the crux of democracy after all. Arguably, the Philippines has not experienced the brand of sustained debate described, despite several controversial decisions including a number that touched on economic policy. Perhaps the country comes closest when legislators intervene before the Court and speak there. Senator Pimentel did this, for example, in the hearings for *Francisco*, and bluntly opined to the Court that it had no authority to tell the House it was mistaken in its interpretation of the Constitution. He even assured the Justices Davide would receive an impartial trial at the Senate if it came to that.[260]

In *Francisco*, Justice Consuelo Ynares-Santiago opined, "The common-law principle of judicial restraint serves the public interest by allowing the political processes to operate without undue interference,"[261] a good argument for coordinacy in this context.[262] Moreover, Judge Abner Mikva argues that legislatures should not take the more politically convenient course of rerouting difficult moral debates to the judiciary, and the Supreme Court should not allow the resulting political pressure to be shunted onto it.[263]

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[257] Estreicher & Revesz, *supra* note 226, at 684-85, 690-92; United States v. Mendoza, 464 U.S. 154 (1984).

[258] Estreicher & Revesz, *supra* note 226, at 737, 771.

[259] Bernard Bell, *Marbury v. Madison and the Madisonian Vision*, 72 GEO. WASH. L. REV. 197, 204-08 (2003).

[260] Inquirer News Service, *Contrasting views given at Supreme Court hearing*, PHIL. DAILY INQUIRER, Nov. 7, 2003 *at* http://www.inq7.net/nat/2003/nov/07/text/nat_4-1-p.htm.

[261] Francisco (Ynares-Santiago, J., *concurring and dissenting*). *See, e.g.*, Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1225 (1978).

[262] The counterargument against coordinacy is the opposite of this kind of flexible, dynamic interpretation. Law, it is argued, must have authority and the ability to foster uniform action given a multiplicity of views. Alexander & Schauer, *Extrajudicial Interpretation*, *supra* note 29, at 1375-79; Alexander & Schauer, *Defending Judicial Supremacy*, *supra* note 28, at 482; Allan Ides, Essay, *Judicial Supremacy and the Law of the Constitution*, 47 UCLA L. Rev. 491, 514-17 (1999).

[263] Mikva, *Support and Defend*, *supra* note 238, at 588-89.

IV. APPLYING COORDINACY THEORY TO THE 2004 CANVASS

A. RECONCILING COORDINACY AND THE POLITICAL QUESTION

Columbia professor Herbert Wechsler's reconciliation of the political question doctrine and an absolute view of judicial review readily applies to coordinacy:

> [T]he only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of government than the courts.... what is involved is in itself an act of constitutional interpretation... That, I submit, is toto caelo different from a broad discretion to abstain or intervene.[264]

It must be emphatically asserted that coordinate constitutional interpretation is closely related, but is not identical, to the political question doctrine, or at the very least takes a very different perspective. The former is founded on the political branches' positive duty of contemporaneous interpretation, and fits within the expanded *certiorari* jurisdiction because the Court need only check if the interpretation is permissible and thus not a grave abuse of discretion. The latter is one of the means of declining jurisdiction Alexander Bickel enumerated.[265] This subtle distinction is reflected in Justice Puno's *Francisco* separate opinion, which also mirrors Wechsler's framework:

> [T]he 1987 Constitution adopted neither judicial restraint nor judicial activism as a political philosophy to the exclusion of each other. The expanded definition of judicial power gives the Court enough elbow room to be more activist in dealing with political questions but did not necessarily junk restraint in resolving them.
>
> The antagonism between judicial restraint and judicial activism is avoided by the coordinacy theory of constitutional interpretation. This coordinacy theory gives room for judicial restraint without allowing the judiciary to abdicate its constitutionally mandated duty to interpret the constitution.[266]

However, the political question doctrine "reflects a constitutional design that does not require the judiciary to supply the substantive content of all the Constitution's provisions,"[267] and in this sense, lays a foundation for coordinate interpretation. Indeed, the more positive nature of coordinacy beautifully undercuts the two principal assumptions used to disbelieve the political question doctrine: 1) that the judiciary has a monopoly on Constitutional interpretation; and 2) even

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[264] Wechsler, *supra* note 29, at 9.

[265] Alexander Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). The other "passive virtues" are the standing, actual case and controversy, and ripeness requirements.

[266] Francisco (Puno, J., *concurring*).

[267] Barkow, *supra* note 25, at 239.

assuming it does not, attempting to restrict its power of interpretation has dire consequences.[268] Further:

> It is no coincidence that judges and scholars have relied on the existence of the political question doctrine to support their theories that other branches are charged with the responsibility of interpreting the Constitution. Justice Scalia has cited the political question doctrine to support the argument that not all constitutional violations must be remediable in the courts. Paul Brest, arguing against a theory of judicial exclusivity in interpretation, notes that such a theory 'takes no account of so-called 'political questions." Lawrence Sager has observed that '[t]he very existence of the political question doctrine in our constitutional jurisprudence thus reflects a partial recognition' of his thesis of judicially underenforced constitutional norms. Erwin Chemerinsky has similarly relied on the political question doctrine to support his claim 'that for each part of the Constitution one branch of government is assigned the role of final arbiter of disputes.' Archibald Cox has asserted that '[t]he underlying considerations... are hardly different' between the deference accorded 'political determinations under the commerce, due process or equal protection clauses,' and the determination 'whether a question is political.' Michael McConnell has used political question doctrine cases to support his view that Congress has the power to interpret the Fourteenth Amendment to enforce Section 5 of that amendment. (internal citations omitted)[269]

The problem with this foundation is that it has been all but eroded in practice.[270] In the United States, for example, one need look no further than *Bush v. Gore*.[271] However, this is only the culmination of a trend that began with the Warren and Burger Courts, until the Rehnquist Court adhered to an absolutist sense of judicial supremacy.[272] For example:

> "[T]he Framers," Rehnquist wrote, "crafted the federal system of government so that the people's rights would be secured by the division of power." They were concerned "that the Constitution's provisions... not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint." For those propositions Rehnquist cited *Marbury v. Madison*. "No doubt the political branches have a role in interpreting and applying the Constitution,"

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[268] Mulhern, *supra* note 29, at 100-01

[269] *Id.* at 318. *Compare id. and* Francisco (Puno, J., *concurring*). "Coordinacy theory rests on the premise that within the constitutional system, each branch of government has an independent obligation to interpret the Constitution. This obligation is rooted on the system of separation of powers. The oath to 'support this Constitution,' ... proves this independent obligation."

[270] Melissa Blair, *Terrorism, America's Porous Borders, and the Role of the Invasion Clause Post-9/11/2001*, 87 MARQ. L. REV. 167, 196 (2003).

[271] Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663, 675 n.38 (2004). Professor Sanford Levinson goes so far as to call it a "judicial putsch." *Why I Still Won't Teach Marbury (Except in a Seminar)*, 6 U. PA. J. CONST. L. 588, 600 (2004).

[272] Barkow, *supra* note 25, at 302-03; Theodore Ruger, *"A Question Which Convulses the Nation": The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826, 896-97 (2004).

> Rehnquist noted, "but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text."[273]

The same is true in the Philippines, considering heavy blows dealt it by the stigma of Martial Law abuses such as *Javellana v. Executive Secretary*[274] and the expanded *certiorari* jurisdiction.[275] Cases such as *Tanada v. Cuenco* remain good law, and this decision held:

> It is well-settled doctrine that political questions are not within the province of the judiciary... It is frequently used to designate all questions that lie outside the scope of the 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.[276]

This formulation was honed in *Baker v. Carr*:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for questioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[277]

Francisco and *Lopez* were both covered by the first phrase. As Justice Tinga argued in *Lopez*, the Court should have determined whether the act alleged went outside the text's bounds, and then stop if it did not. Criticizing the methodology of these cases, however, they all appear to parade political question precedents by rote, and proceed to give the doctrine short shrift so long as some violation of a specific Constitutional provision is alleged. Justice Puno, for example, simply wrote in *Lopez*:

> We have a continuous river of rulings that the political question doctrine cannot be invoked when the issue is whether an executive act or a law violates the Constitution.[278]

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[273] White, *Constitutional Journey*, *supra* note 221, at 1466 *quoting* United States v. Morrison, 529 U.S. 598 (2000).

[274] Francisco; Javellana v. Exec. Sec., G.R. No. 36142, 50 SCRA 30, Mar. 31, 1973.

[275] Francisco; Cruz v. Sec. of Env't and Natural Resources, G.R. No. 135385, 347 SCRA 128, Dec. 6, 2000 (Mendoza, J., *separate opinion*).

[276] Tanada v. Cuenco, 103 Phil 1051, 1067 (1957).

[277] Baker v. Carr, 369 U.S. 186, 217 (1962), *quoted in* Francisco; Estrada v. Desierto, G.R. No. 146710, 353 SCRA 452, 490, Mar. 2, 2001. *Baker* is cited in many other Philippine precedents, down to its expression "political thicket."

[278] Lopez, 20 (Puno, J., *separate opinion*), *citing* Gonzales v. Comm'n on Elections, 129 Phil. 7 (1967).

Francisco distinguished between "truly" political and "not truly" political questions. However, despite the clear textual assignment of a power to Congress in all three cases, the Court almost automatically asserted a "not truly" political scenario given a specific provision raised in the pleadings. Thus, in *Francisco*, the Court promulgated a very detailed interpretation regarding the filing and initiation of impeachment complaints, such that there could only be one possible interpretation regarding a "second" impeachment complaint. Impeachment is the "prototypical"[279] political question, and "[i]f the political question doctrine has no force where the Constitution has explicitly committed a power to a coordinate branch and where the need for finality is extreme, then it is surely dead."[280] Nevertheless, *Francisco* merely distinguished impeachment under the Philippine Constitution by citing additional restrictions not applicable to the American model. As for *Ruy Lopez* and *Pimentel*, every separate opinion claimed an assumption of jurisdiction would be proper, and proceeded to volunteer an interpretation.

B. THE POLITICAL QUESTION DOCTRINE'S MERITS

As the dark shroud of Martial Law slowly dissipates and fades into the mists of history, it is imperative that the Court reevaluate the positive but now overlooked reasons for the political question doctrine's existence. Due to its relation with this doctrine, coordinacy shares many of the same forgotten merits. Fr. Bernas culls three kinds of political questions from *Baker*:

> 1) *textual:* where there "is found a textually demonstrable constitutional commitment of the issue to a political department."
>
> 2) *functional:* where there is "a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion."
>
> 3) *prudential:* where there is "the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."[281]

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[279] Ronald Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 KY. L.J. 707, 728 (1988).

[280] Nixon v. United States, 938 F.2d 239, 246 (D.C. Cir., 1991).

[281] BERNAS, *supra* note 92, at 953-54; Janice Ramirez, *Congress as a Constituent Assembly: Examining the Extent of its Discretion in the Amendatory Procedure*, 48 ATENEO L.J. 506, 528-29, 545-47 (2003). *See* Joaquin Bernas, S.J., *Separation of Powers: The Supreme Court and the Political Departments*, 11 ATENEO L.J. 1, 8-29 (1961); Joaquin Bernas, S.J., *The Faces and Uses of the "Political Questions" Doctrine: Reflections on Habeas Corpus, the "PCO" and Bail*, 28 ATENEO L.J. 1, 1-9 (1983).

The first textual question is arguably the most familiar segment of *Baker* in Philippine jurisprudence,[282] an observation borne out by *Francisco's* focus on its "truly political" and "not truly political" distinction. Its rationale is simply the majoritarian nature of textual commitments to political branches argued in this article, including the importance of promoting political debate outside the courts. This has been effectively rejected by the Court, again, by pointing to a specific Constitutional provision put in issue by a party and its own duty to delimit the Consitution.[283] Further, this approach has been expansive in practice. *Marcos v. Manglapus*, for example, resolved the broad question of whether or not there was any legal foundation for the President to bar the Marcoses' return, without focusing on any particular provision.[284]

The second functional question is the inverse of the first,[285] where a lack of explicit rules implies a Constitutional leave to those concerned to act as they see fit.[286] This author proposes, however, that this is the same line of political question whose academic foundations were laid by Wechsler.[287] As Bernas's designation implies, these are questions better answered by a political branch with greater institutional competence in a particular task.[288] This also goes back to majoritarian concerns, since these branches enjoy greater proximity and direct accountability to the electorate in the Madisonian vision.[289] One also recalls Thayer's proposition that Congress actually functions as the fundamental law's primary interpreter.[290] The functional argument is more visible in judicial deference to administrative agencies, which it admits are intrinsically more capable of handling technical issues in specialized fields.

Bernas declares the third prudential question extinct under the 1987 Constitution,[291] which holds judicial review as a duty more than a power. These are the questions which Professor Erwin Chemerinsky states are declined in

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[282] Scrutinize, for example, the line of cases cited in the preliminary discussion of the doctrine in *Estrada v. Desierto*, G.R. No. 146710, 356 SCRA 452, Mar. 2, 2001. This mirrors the preliminary discussion of other precedents.

[283] *Francisco* cited post-1987 examples given by Dean Pacifico Agabin during the oral arguments. Francisco, *citing* Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, 695, Sep. 15, 1989; Bengzon v. Senate Blue Ribbon Committee, G.R. No. 89914, 203 SCRA 767, 776, Nov. 20, 1991; Daza v. Singson, G.R. No. 86344, 180 SCRA 496, 501, Dec. 21, 1989.

[284] Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, 696, Sep. 15, 1989.

[285] BERNAS, *supra* note 92, at 956.

[286] *See* Peter Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions – A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 489 (1987).

[287] Louis Michael Seidman, *The Secret Life of the Political Question Doctrine*, 37 J. MARSHALL L. REV. 441, 444 (2004).

[288] Christopher Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 352 (1994); Charles Tiefer, *The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357, 380-82 (1992).

[289] Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1341 (2001). Sherry, however, argues that the American Founders distrusted the common people. Suzanna Sherry, *An Originalist Understanding of Minimalism*, 88 NW. U. L. REV. 175, 176 (1993).

[290] Schapiro, *supra* note 180, at 700-08; Jonathan Macey, *Thayer, Nagel, and the Founders' Design: A Comment*, 88 NW. U. L. Rev. 226, 231 (1993).

[291] BERNAS, *supra* note 92, at 959.

preservation of the judiciary's "political capital,"[292] when a case is simply beyond a court's practical limits to adjudicate.[293] The significance of prudential concerns were most famously articulated by Bickel, who posited that "abstention is appropriate when 'the sheer momentousness' of a decision 'unbalances judgment and prevents one from subsuming the normal calculations of probabilities.'"[294] He proposed adherence to the "passive virtues" because:

> It follows that courts... may give no opinions, even in a concrete case, which are advisory because they are not finally decisive, the power of ultimate disposition of the case having been reserved elsewhere... These are ideas at the heart of the reasoning in *Marbury v. Madison*. They constitute not so much limitations of the power of judicial review as necessary supports for the argument which established it.[295]

Bickel subsumed these virtues into "the words of art that are shorthand,"[296] the case and controversy and the standing requirements,[297] and the Court's increasing liberality in taking jurisdiction has not gone without protest. For example, Justice Puno criticized *Kilosbayan, Inc. v. Guingona*:[298]

> By its decision, the majority has entertained a public action to annul a private contract. In so doing, the majority may have given sixty (60) million Filipinos the standing to assail contracts of government and its agencies. This is an invitation for chaos to visit our law on contract...[299]

Justice Vicente V. Mendoza likewise criticized *Cruz v. Secretary of Environment and Natural Resources:*

> To decline the exercise of jurisdiction in this case is no more a 'cop out' or a sign of 'timidity' than it was for Chief Justice Marshall in *Marbury v. Madison* to... declare in the end that after all mandamus did not lie...
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> ...
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> To decline, therefore, the exercise of jurisdiction where there is no genuine controversy is not to show timidity but respect for the judgment of a coequal

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[292] Erwin Chemerinsky, *The Supreme Court, Public Opinion, and the Role of the Academic Commentator*, 40 S. TEX. L. REV. 943, 948 (1999). *See* Harold Hongju Koh, *Protecting the Office of Legal Counsel From Itself*, 15 CARDOZO L. REV. 513, 514-15 (1993). Koh reasons that the American President's Office of Legal Counsel must preserve its political capital as well. *See* Tom Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703 (1994).

[293] Scott Birkey, *Gordon v. Texas and the Prudential Approach to Political Questions*, 87 CAL. L. REV. 1265, 1266 (1999).

[294] Barkow, *supra* note 25, at 295. *See* Fritz Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517, 566-83 (1966); Martin Redish, *Judicial Review and the 'Political Question'*, 79 NW. U. L. REV. 1031, 1032 (1984).

[295] Bickel, *supra* note 265, at 42.

[296] *Id. See* Kilosbayan, Inc. v. Guingona, G.R. No. 113375, 232 SCRA 110, May 5, 1994 (Puno, J., *dissenting*).

[297] Professor Simard argues that the political question doctrine may be subsumed into standing. Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303, 333 (1996).

[298] G.R. No. 113375, 232 SCRA 110, May 5, 1994.

[299] *Id.* at 178.

> department of government whose acts, unless shown to be clearly repugnant to the fundamental law, are presumed to be valid.[300]

Nevertheless, returning to the prudential arguments specifically, the Court has squarely rejected the notion that it may be powerless in reality to render a decision. *Francisco* most recently stated: "Justices cannot abandon their constitutional duties just because their action may start, if not precipitate, a crisis."[301] This cavalier bravado would, despite Bickel's arguments, have the Court theoretically standing fast in the face of, "John Marshall has made his decision; now let him enforce it!"[302]

This type of reasoning entered jurisprudence very shortly after the 1987 Constitution took effect. *Marcos v. Manglapus*, for example, held:

> The framers of the Constitution believed that the free use of the political question doctrine allowed the Court during the Marcos years to fall back on prudence, institutional difficulties, complexity of issues, momentousness of consequences or a fear that it was extravagantly extending judicial power in the cases where it refused to examine and strike down an exercise of authoritarian power... The Constitution was accordingly amended. We are now precluded by its mandate from refusing to invalidate a political use of power through a convenient resort to the question doctrine.[303]

More vividly, *Bondoc v. Pineda*[304] opened:

> In the past, the Supreme Court, as head of the third and weakest branch of our Government, was all too willing to avoid a political confrontation with the other two branches by burying its head ostrich-like in the sands of the 'political question' doctrine....[305]

As already discussed, citations of Justice Concepcion's comments during the Constitutional deliberations were cited all the way to *Francisco*, and the specter of Martial Law seems to explain why even invocations of non-prudential questions are routinely rejected.[306] Seemingly, only the formation of a revolutionary government[307] could be a prudential concern momentous enough to validly give

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[300] Cruz v. Sec. of Env't and Natural Resources, G.R. No. 135385, 347 SCRA 128, Dec. 6, 2000 (Mendoza, J., *separate opinion*). The majority opinion explicitly made the separate opinion an integral part of it.

[301] Francisco. Redish argues, "The moral cost of such a result, both to society in general and to the Supreme Court in particular, far outweighs whatever benefits are thought to derive from the judicial abdication of the review function." Redish, *supra* note 294, at 1059-60.

[302] I GREELEY, *supra* note 254, at 106 (quoting Andrew Jackson). *See* Worcester v. Georgia, 31 U.S. 515 (1832).

[303] Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, 695, Sep. 15, 1989. Compare Justice Irene Cortes's phrasing to that of Bickel's.

[304] G.R. No. 97710, 201 SCRA 792, Sep. 26, 1991.

[305] *Id.* at 795.

[306] *See* BERNAS, *supra* note 92, at 959-61; Oposa v. Factoran, G.R. No. 101083, 224 SCRA 792, Jul. 30, 1993; Tolentino v. Sec. of Finance, G.R. No. 115455, 249 SCRA 628, Sep. 23, 1995; Integrated Bar of the Philippines v. Zamora, G.R. No. 141284, 338 SCRA 81, Aug. 15, 2000.

[307] *See* Lawyers League for a Better Philippines v. Aquino, G.R. No. 73748, May 22, 1986.

rise to a political question, as implied by *Estrada v. Desierto*[308] and its citation of how the Freedom Constitution explicitly stated defiance to the 1973 Constitution.

Finally, there is intangible merit in effectively postponing a judicial declaration for a better time, one when a clearer precedent might be penned. As Justice Robert Jackson wrote in *Korematsu v. United States*, echoing Thayer:

> But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle... The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic...' But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.[309]

For example, after the Court took jurisdiction in *Estrada v. Desierto*, Justice Ynares-Santiago wrote:

> *It cannot be overlooked that this Court's legitimation through sufferance of the change of administration may have the effect of encouraging People Power Three, People Power Four, and People Power ad infinitum.* It will promote the use of force and mob coercion by activist groups expert in propaganda warfare to intimidate government officials to resolve national problems only in the way the group wants them to be settled. Even now, this Court is threatened with the use of mob action if it does not immediately proclaim respondent Arroyo as a permanent and *de jure* President.... (emphasis in original) [310]

C. POLITICAL QUESTION DECISIONS THROUGH THE LENS OF COORDINACY

The political question doctrine presents a seeming enigma: indubitable merits on the one hand, and the 1987 Constitution's near absolute bar on the other. Again, because coordinacy shares the same merits but arguably not the Marcos dictatorship's stigma, one wonders whether recent landmark decisions could have instead been decided from the coordinacy perspective. Perhaps one also wonders whether the Court consciously or unconsciously recognizes these merits but achieves similar results by framing decisions using other grounds, in which case coordinacy might be a more palatable solution that avoids the embedding Justice Jackson cautions against. One recalls the dictum in *Estrada v. Desierto:*

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[308] Estrada v. Desierto, G.R. No. 146710, 356 SCRA 452, 492, Mar. 2, 2001.
[309] Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., *dissenting*).
[310] Estrada, 356 SCRA at 570 (Ynares-Santiago, J., *separate opinion*).

> To be sure, courts here and abroad, have tried to lift the shroud on political question but its exact latitude still splits the best of legal minds. Developed by the courts in the 20th century, the political question doctrine which rests on the principle of separation of powers and on prudential considerations, continue to be refined in the mills constitutional law.[311]

The sections that follow seek to revisit each of the Court's post-1987 political question pronouncements, but focuses on those dealing with the President or Congress.[312] Preliminarily, the discussion excludes the many decisions that refer to *Luego v. Civil Service Commission*,[313] since these involved not constitutional interpretation but the discretion of appointing authorities.[314] It likewise excludes decisions made directly by the electorate, such as those made pursuant to the plebiscite requirement,[315] or expressing loss of confidence through recall elections under the Local Government Code:

> [T]his Court issued a TRO... but the signing of the petition for recall took place just the same on the scheduled date through no fault of the respondent COMELEC...
>
> ...
>
> Whether or not the electorate of the Municipality of Sulat has lost confidence in the incumbent mayor is a political question.... The constituents have made a judgment and their will to recall the incumbent mayor (Evardone) has already been ascertained and must be afforded the highest respect.[316]

It also excludes a handful of other miscellaneous issues, such as the demarcation of boundaries between municipalities.[317] On the other hand, given the waning invocation of the political question doctrine after the early 90's, it includes cases with hints of the doctrine but no explicit mention of it.

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[311] *Id.* at 490.

[312] For a thorough discussion of judicial interference in Philippine executive and legislative action, see Agabin, *supra* note 9, at 193-208.

[313] G.R. No. 69137, 143 SCRA 327, Aug. 5, 1986.

[314] "The power of appointment is essentially a political question involving considerations of wisdom which only the appointing authority can decide." Central Bank v. Civil Service Comm'n, G.R. No. 80455, 171 SCRA 744, Apr. 10, 1989. Patagoc v. Civil Service Comm'n, G.R. No. 90229, 185 SCRA 411, May 14, 1990; Teologo v. Civil Service Comm'n , G.R. No. 92103, 191 SCRA 238, Nov. 8, 1990; Lopez v. Civil Service Comm'n, G.R. No. 92140, 194 SCRA 269, Feb. 19, 1991; Cortez v. Civil Service Comm'n, G.R. No. 92673, 195 SCRA 216, Mar. 13, 1991; Lapinid v. Civil Service Comm'n, G.R. No. 96298, 197 SCRA 106, May 14, 1991; Abila v. Civil Service Comm'n, G.R. No. 92573, 198 SCRA 102, Jun. 3, 1991; Barrozo v. Civil Service Comm'n, G.R. No. 93479, 198 SCRA 487, Jun. 25, 1991; Lusterio v. Intermediate Appellate Court, G.R. No. 74814, 199 SCRA 255, Jul. 16, 1991; Cayetano v. Monsod, G.R. No. 100113, 201 SCRA 210, Sep. 3, 1991; Dela Cruz v. Civil Service Comm'n, G.R. No. 88333, 204 SCRA 419, Dec. 2, 1991; Espanol v. Civil Service Comm'n, G.R. No. 85479, 206 SCRA 715, Mar. 3, 1992; Medalla, Jr. v. Sto. Tomas, G.R. No. 94255, 208 SCRA 351, May 5, 1992; Home Insurance and Guaranty Corp. v. Civil Service Comm'n, G.R. No. 95450, 220 SCRA 148, Mar. 19, 1993; Felix v. Buenasada, G.R. No. 109704, 240 SCRA 139, Jan. 17, 1995.

[315] Miranda v. Aguirre, G.R. No. 133064, 314 SCRA 603, Sep. 16, 1999. The Court struck down a law converting an independent component city into a component city without the Constitutionally required plebiscite, and ruled this did not involve a political question. This was only proper in the sense that the Constitution vested discretion in the city residents and not in Congress.

[316] Evardone v. Comm'n on Elections, G.R. No. 94010, 204 SCRA 464, 471-72, Dec. 2, 1991. *See* Garcia v. Comm'n on Elections, G.R. No. 111511, 227 SCRA 100, 118, Oct. 5, 1993.

[317] Municipality of Kapalong v. Moya, G.R. No. 41322, 166 SCRA 70, Sep. 29, 1988.

1. The President's Powers of Veto and Pardon

Gonzales v. Macaraig[318] upheld President Corazon Aquino's veto of specific provisions in the General Appropriations Bill for 1989, despite a Senate resolution that opined this was unconstitutional. The Court cited jurisprudence under the 1935 Constitution and held these still applicable to the 1987 Constitution,[319] and noted that some portions of the bill were Constitutionally inappropriate for an appropriations bill. The case appears laudable from the point of view of coordinacy as both political branches had made their interpretations very clear and the Court intervened when congressmen sought a final ruling from it. Further, the decision reminded Congress that it had the option to override the President's veto if it truly believed it was unconstitutional, but made no attempt to do so. Finally, the decision hardly strayed into an evaluation of the soundness of either side's proposed policy, a restraint not all later decisions up to the Canvass Resolutions adhered to.

Llamas v. Orbos[320] upheld President Aquino's pardon of Governor Mariano Ocampo III in an administrative case, holding that the Constitution only qualified the power to pardon by excluding impeachment cases from it. In a similar discussion, it found no grave abuse of discretion.

2. Social Justice and State Policies

Ass'n of Small Landowners in the Philippines, Inc. v. Secretary of Agrarian Reform[321] was one of the earliest pronouncements on the 1987 Constitution's Social Justice provisions,[322] and upheld President Aquino's agrarian reform program and the Comprehensive Agrarian Reform Law of 1988. Among other things, it upheld the expropriation of privately-owned land for redistribution, and upheld the public purpose claimed. The Court may be said to have deferred to the political branches' united interpretation:

> The legislature and the executive have seen fit, in their wisdom, to include in the CARP the redistribution of private landholdings... The Court sees no justification to interpose its authority, which we may assert only if we believe that the political decision is not unwise, but illegal. We do not find it to be so.[323]

Cruz v. Secretary of Environment and Natural Resources[324] could have been a rough parallel[325] of *Ass'n of Small Landowners*, but the Court split 7-7 and dismissed the case. Six Justices voted to sustain the Indigenous Peoples Rights Act of 1997 based on what seemed to be their positions regarding the law's provisions, the

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[318] G.R. No. 87836, 191 SCRA 450, 464, Nov. 19, 1990.

[319] Bengson v. Sec. of Justice, 62 Phil. 912, 915 (1936); Bolinao Electronics v. Valencia, G.R. No. 20740, 11 SCRA 486, 493, Jun. 30, 1964.

[320] G.R. No. 99031, 202 SCRA 844, 857, Oct. 15, 1991.

[321] Ass'n of Small Landowners of the Philippines, Inc. v. Sec. of Agrarian Reform, G.R. No. 78742, 175 SCRA 343, Jul. 14, 1989.

[322] CONST. art. XIII, § 4.

[323] Ass'n of Small Landowners, 175 SCRA at 377-78.

[324] Cruz v. Sec. of Env't and Natural Resources, 347 SCRA 128, G.R. No. 135385, Dec. 6, 2000.

[325] CONST. art. II, § 22; Art. XII §5; Art. XIII §1, 6; Art. XIV §17; Art. XVI §12.

Constitution, and ancestral domains vis-à-vis the Regalian doctrine.[326] Reference to Congress' Constitutional vision was limited to excerpts from the law's legislative deliberations. Seven Justices voted to strike down the law with a similar methodology,[327] while Justice Mendoza voted to dismiss the case because the petitioners had no standing.

Unlike in *Ass'n of Small Landowners*, one might criticize the Justices for going well beyond determining whether the IPRA was passed arbitrarily and straying well into the realm of policymaking.[328] Justice Artemio Panganiban, for example, wrote:

> Based on ethnographic surveys, the solicitor general estimates that ancestral domains cover 80 percent of our mineral resources and between 8 and 10 million of the 30 million hectares of land in the country. *This means that four fifths of its natural resources and one third of the country's land will be concentrated among 12 million Filipinos constituting 110 ICCs, while over 60 million other Filipinos constituting the overwhelming majority will have to share the remaining.* These figures indicate a violation of the constitutional principle of a 'more equitable distribution of opportunities, income, and wealth' among Filipinos.[329]

The Constitution's Social Justice provisions were meant to be realized through majoritarian legislation and not through judicial fiat.[330] Judge Bork quotes Justice Holmes as explaining it was never his job to render justice, but to apply the law, and restates this thesis:

> [W]e administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law.[331]

Again, the Court's expanded jurisdiction coupled with the 1987 Constitution's many policy statements that can be casually invoked, as the above excerpt does, and makes it all too tempting to engage in what Bork decries as "disguised activism,"[332] or the application of social preconceptions in what purport to be interpretations of law and Constitution.[333] Bickel likewise decried this as

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[326] Cruz v. Sec. (Kapunan, J.); *id.* (Puno, J.)

[327] *Id.* (Panganiban, J.); *id.* (Vitug, J.).

[328] Dworkin proposes a framework for distinguishing policymaking from principle. The latter demand consistency, hence the importance of precedent in the judiciary, while the former may be left to have an aggregative influence on decisionmaking. Dworkin, *supra* note 24, at 1064.

[329] *Id.* at 333 (Panganiban, J.).

[330] Alberto Muyot, *Social Justice and the 1987 Constitution: Aiming for Utopia?*, 70 PHIL. L.J. 310, 354 (1996); Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 254-55 (1993).

[331] Hohri v. United States, 793 F.2d 304, 313 (D.C. Cir. 1986) (Bork, J., *dissenting*), *quoted in* BORK, *supra* note 148, at 6.

[332] *Id.* at 70. *See* Lino Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019, 1041 (1992).

[333] Thomas Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 24-25 (1984); Lino Graglia, Essay, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631, 636 (1993). *See* Philip Kurland, Book Review, *Earl Warren: Master of the Revels*, 96 HARV. L. REV. 331, 338 (1982). "Warren thus equated judicial lawmaking with... his own reconstruction of the ethical structure of the Constitution."

"irreconcilable with... political democracy,"[334] and makes it all too easy to upset legislative compromises. Parenthetically, this was arguably not a case where the Court needed to protect a minority's rights from majority action, since the petition sought to nullify a law that embodied the majority action for their benefit.

Arguably, the expanded *certiorari* jurisdiction can prove a textual trap for the Court, and its refusal to invoke the political question has led it to use the other Bickelian escape tools in some cases. For example, the 2002 decision *Montesclaros v. Commission on Elections*[335] involved an invocation of the Constitutional policy on youth against a Congressional plan to postpone the Sangguniang Kabataan elections, but the Court held that there was no actual justiciable controversy because the petitioners were assailing a bill that had not yet been passed. It also held that the petitioners would be overaged for the SK and thus no longer had a personal interest in the issue. While the Constitutional question tangentially put forth was unassailably resolved by noting that it is up to Congress to define a youth for SK purposes and that no one has a proprietary right to public office, one does note Justice Antonio Carpio's use of these jurisdictional issues after so many liberal precedents on standing.

Finally, one might expect the intervening case *Oposa v. Factoran*[336] to be examined as the above cases were. However, *Oposa* is arguably different in that it involved not a challenge against a law, but a group of minors asserting the concept of inter-generational rights and a new right to a healthful ecology under the 1987 Constitution. Justice Davide wrote:

> Policy formulation or determination by the executive or legislative branches of Government is not squarely put in issue. What is principally involved is the enforcement of a right *vis-a-vis* policies already formulated and expressed in legislation.[337]

Oposa, it might further be argued, carefully stopped after establishing the existence of the right claimed, and left much room for the political branches to determine environmental policy from the Constitutional foundation it outlined. This is gleaned from Justice Florentino Feliciano's concurrence:

> There is no question that 'the right to a balanced and healthful ecology' is 'fundamental' and that, accordingly, it has been 'constitutionalized.' But although it is fundamental in character, I suggest, with very great respect, that it cannot be characterized as 'specific,' without doing excessive violence to language...
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> ...
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> ...It seems to me important that the legal right which is an essential component of a cause of action be a specific, operable legal right, rather than a constitutional or statutory *policy*... unless the legal right claimed to have

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[334] BICKEL, LEAST DANGEROUS BRANCH, *supra* note 20, at 80, *quoted in* BORK, *supra* note 148, at 71.
[335] G.R. No. 152295, 384 SCRA 269, Jul. 9, 2002.
[336] Oposa v. Factoran, G.R. No. 101083, 224 SCRA 792, Jul. 30, 1993.
[337] *Id.* at 809

> been violated or disregarded is given specification in operational terms, defendants may well be unable to defend themselves intelligently and effectively...[338]

Thus, there was no identifiable majoritarian action directly scrutinized by *Oposa*, though the petitioners there did display the methodology of canvassing every relevant Constitutional provision, one criticized for leading to strained results later in this article.

3. The President as Commander-in-Chief

Integrated Bar of the Philippines v. Zamora[339] upheld President Joseph Estrada's deployment of Marines in shopping malls, to augment police forces preserving peace and order. The Court held:

> When the President calls the armed forces to prevent or suppress lawless violence, invasion or rebellion, he necessarily exercises a discretionary power solely vested in his wisdom. This is clear from the intent of the framers and from the text of the Constitution itself. However, this does not prevent an examination of whether such power was exercised within permissible constitutional limits or whether it was exercised in a manner constituting grave abuse of discretion.[340]

Thus, the Court went on to assert jurisdiction over what it readily admitted was a purely political decision. It eventually stated that the petitioner had brought no evidence that the President had acted arbitrarily, concluding, "To doubt is to sustain."[341]

IBP v. Zamora is interesting from a political question perspective, because one argues that the Court applied the doctrine in all but name. However, the prudential question is extinct, and the functional question was declined due to the qualifier, "to prevent or suppress lawless violence, invasion or rebellion," even though the Court readily admitted the President's institutional competence in questions of national security:

> [T]he President as Commander-in-Chief has a vast intelligence network to gather information, some of which may be classified as highly confidential or affecting the security of the state. In the exercise of the power to call, on-the-spot decisions may be imperatively necessary in emergency situations...[342]

The Court thus had to go through the belabored textual acrobatics of upholding what Dean Pacifico Agabin jokingly refers to as "the power to call out such armed forces to prevent or suppress lawless violence in the central business

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[338] *Id.* at 815 (Feliciano, J., *concurring in the result*).
[339] Integrated Bar of the Philippines v. Zamora, G.R. No. 141284, 338 SCRA 81, Aug. 15, 2000.
[340] *Id.* at 106-07.
[341] *Id.* at 107.
[342] *Id.* at 111.

district." It was arguably forced into this when it refused to find a textual question with respect to the Integrated Bar's tying of the issue onto the text:

> [T]he IBP admits that the deployment of the military personnel falls under the Commander-in-Chief powers of the President... What the IBP questions, however, is the basis for the calling of the Marines under the aforestated provision. According to the IBP... no lawless violence, invasion or rebellion exist to warrant the calling of the Marines.[343]

Applying coordinacy, this author ventures that the Court may simply have accepted the President's interpretation of his Commander-in-Chief powers[344] or the role of the Armed Forces as "protector of the people and the State"[345] as within the Constitutionally permissible range. Certainly, using the Marines to increase police visibility was far more benign than the Martial Law situation the framers feared.

The coordinate alternative is arguably closer to the approach in the earlier national security case, *Marcos v. Manglapus*.[346] In upholding President Aquino's refusal to allow the Marcos family to return to the country, Justice Irene Cortes took the approach *IBP v. Zamora* used:

> [T]he question for the Court to determine is whether or not there exist factual bases for the President to conclude that it was in the national interest to bar the return of the Marcoses to the Philippines...
>
> We find that from the pleadings filed by the parties, from their oral arguments, and the facts revealed during the briefing in chambers by the Chief of Staff of the Armed Forces of the Philippines and the National Security Adviser... there exist factual bases for the President's decision.[347]

However, in finding that the power involved was "the President's residual power to protect the general welfare of the people," *Marcos v. Manglapus* evidenced great deference to the President's interpretation of her powers, and spoke of an "exercise of a broader discretion"[348] on her part. The decision even opened with a quote from Schlesinger:

> [T]he American Presidency was a peculiarly personal institution... more than most agencies of government, it changed shape, intensity and ethos according to the man in charge... The executive branch, said Clark Clifford, was a chameleon, taking its color from the character and personality of the President. The thrust of the office, its impact on the constitutional order, therefore altered from President to President.[349]

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[343] *Id.* at 102.
[344] CONST. art. VII, § 18.
[345] CONST. art. II, § 3.
[346] Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, Sep. 15, 1989.
[347] *Id.* at 697.
[348] *Id.* at 694.
[349] *Id.* at 690-91.

It may be argued that *IBP v. Zamora* quoted *Marcos v. Manglapus'* pronouncement on the President's wide discretion on one hand, yet insisted on justifying itself with a reading of the narrower phrase, "to suppress lawless violence." The arguably strained handling of *IBP v. Zamora* may be a cause for concern because the President's power to call out the armed forces is a stone's throw from his role as Commander-in-Chief in times of war. Given that such decisions made in that wartime role are classic political questions,[350] how might the Court, for example, handle a hypothetical wartime petition against what is alleged to be an offensive action? Note, for example, *Arroyo v. De Venecia's*[351] citation of *Marcos v. Manglapus* in its statement:

> For while Art. VIII, § 1 has broadened the scope of judicial inquiry into areas normally left to the political departments to decide, *such as those relating to national security*, it has not altogether done away with political questions.... (emphasis added)[352]

Again, such a petitioner easily quotes the Constitutional renunciation of war[353] to establish a "not truly" political question, and invoke the Court's own transcendental interest doctrine to sidestep a challenge to standing. This situation, moreover, is the most vivid example of prudential concerns, and one where the Court would inevitably be told, "Now let him enforce it!"[354]

Further, the Philippine Constitutional policy against war aside, Berkeley professor John Yoo proposes that the President has the initiative in prosecuting war, and is checked by Congress' power over the purse. The other political branch and not the judiciary is the real counterweight,[355] and the latter was not intended to have a role in a flexible decision-making process intentionally left without textual standards.[356] This framework reflects even Montesquieu's ancient one.[357] And while Yoo considers himself a "pro-Executive" scholar, compared to "pro-Congress" thinkers such as Louis Henkin, John Hart Ely, Louis Fisher, Michael Glennon, and Harold Koh, all argue over the degree of Congressional oversight and agree that the

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[350] Abner Mikva, *The Political Question Revisited: War Powers and the "Zone of Twilight,"* 76 KY. L.J. 329 (1987); John McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56-AUT LAW & CONTEMP. PROBS. 293, 311-14 (1993).

[351] G.R. No. 127255, 277 SCRA 268, Aug. 14, 1997.

[352] *Id.* at 289-90.

[353] CONST. art. II, § 2.

[354] *See, however,* Michael Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT'L L. 814, 817 (1989). "[I]t must be remembered that not to stop an illegal war can also be a 'politically loaded task.' It is not self-evident that public respect for the courts would be enhanced if the courts sat idly by in the face of a manifest constitutional violation."

[355] Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1034 (2003).

[356] John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 295, 300 (1996); John Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1683-84 (2002).

[357] *See* Fernandez, *supra* note 187, at 249-50; ALEXANDER HAMILTON OR JAMES MADISON, *The Federalist No. 51 ("The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments")*, *in* 43 GREAT BOOKS 163.

courts have a decreased role in the highly political business of war.[358] Further, Ackerman proposes that the judiciary's role comes after the crisis, during reappraisal and correction of individual abuses.[359] He also proposes that Constitutional design must both allow the Executive to respond decisively to exigencies such as war and allow the Court to prevent emergency powers from becoming long-term entrenchments.[360]

IBP v. Zamora was most recently cited in *Lacson v. Perez*[361] where the Court was invited to rule on the so-called "EDSA 3" and President Arroyo's declaration of a "state of rebellion." *Lacson* likewise hinted that the Court would take jurisdiction over a war powers question. However, while it declined the political question, it employed the rest of the "passive virtues" arsenal. First, it cited *IBP's* recognition of the President's wide discretion and greater competence in responding swiftly with the military. Then, it stated that individuals facing warrantless arrest enjoy other safeguards, that no charges had been filed against Senator Panfilo Lacson and company, that the government had categorically stated that Senator Miriam Santiago would not be arrested without a warrant, that the Laban ng Demokratikong Pilipino party was not a real party in interest, and that it was no longer feasible to examine the factual basis for declaring a "state of rebellion" as this had been lifted.

Arguably, this was another invocation of the political question in all but name, and again, the coordinacy perspective may have been less awkward than these Bickelian escape devices. Note was there no longer any mention of the transcendental exception to standing, for example.

4. The President as Appointing Authority

Cayetano v. Monsod[362] upheld Christian Monsod's appointment to the Commission on Elections despite allegations that he was a lawyer who had not "engaged in the practice of law" as required by the Constitution.[363] Specifically, after a stint in his father's law firm, Monsod worked in the World Bank, in the Manila Electric Co., as chief executive officer of an investment bank, and as a national chair of NAMFREL. The Court impliedly declined the prudential and functional questions, and the textual as well. This made for a colorful decision that belabored the idea that the modern lawyer need not fit the television litigator stereotype, complete with citations to periodicals and an interview of Washington SyCip.

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[358] *See, e.g.*, Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1339-40 (1988); Michael Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1544-46 (2002).

[359] Bruce Ackerman, *This is Not a War*, 113 YALE L.J. 1871, 1894-95 (2004).

[360] Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1042-43 (2004). *See* Neal Katyal & Lawrence Tribe, Essay, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1284-85 (2002).

[361] G.R. No. 147780, 357 SCRA 756, May 10, 2001.

[362] Cayetano v. Monsod, G.R. No. 100113, 201 SCRA 210, Sep. 3, 1991.

[363] CONST. art. IX-C, § 1.

Again, the desired result might have been reached without as much awkwardness had the Court simply deemed the President's interpretation of the Constitution's prescribed qualifications permissible, and Monsod was at the very least a lawyer. This could have avoided the strained reiterations that a World Bank employee acquaints himself with the laws of other countries, and that a NAMFREL officer familiarizes himself with election law. One notes *Cayetano v. Monsod* quoted in passing the *Luego* holding that an appointment is discretionary and a political question.

5. The President as Prime Mover in Foreign Affairs

Strangely enough, although the Court was ready to make inroads into highly political powers such as the President's role as Commander-in-Chief and the power to initiate impeachment, there remains one realm where the political question doctrine might be allowed to freely rear its perceived ugly head.[364] This is foreign affairs, one characterized by "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"[365] and where the separation of powers finds far less application.[366] Early dicta already cited examples of "truly political" questions from this sphere:

> [T]here remain issues beyond the Court's jurisdiction... We cannot, for example, question the President's ***recognition of a foreign government***... We cannot set aside a presidential pardon... Nor can we amend the Constitution under the guise of resolving a dispute brought before us because the power is reserved to the people. (emphasis added)[367]

More recently, *Arroyo v. De Venecia*[368] reiterated:

> [W]hile Art. VIII, § 1 has broadened the scope of judicial inquiry... it has not altogether done away with political questions such as those which arise in the field of foreign relations.[369]

Thus, *International Catholic Migration Commission v. Calleja*[370] readily conceded:

> The foregoing opinions constitute a categorical recognition by the Executive Branch of the Government that ICMC and IRRI enjoy immunities accorded to international organizations, which determination has been held to be a

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[364] Spiro, however, argues this is less necessary in an age of globalization. Peter Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 653 (2002).

[365] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936). *See* Ruth Wedgwood, *The Uncertain Career of Executive Power*, 25 YALE J. INT'L L. 310, 311, 314 (2000); Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 216 (1985). *See, however,* Saikrishna Prakash & Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 237 (2001).

[366] *Id.* at 316.

[367] Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, 696, Sep. 15, 1989.

[368] G.R. No. 127255, 277 SCRA 268, Aug. 14, 1997.

[369] *Id.* at 289-90.

[370] G.R. No. 85750, 190 SCRA, 130, Sep. 28, 1990.

> political question conclusive upon the Courts in order not to embarrass a political department of Government.[371]

Holy See v. Rosario,[372] *Lasco v. United Nations Revolving Fund for Natural Resources Exploration*,[373] *Callado v. International Rice Research Institute*,[374] and *Dep't of Foreign Affairs v. National Labor Relations Commission*[375]all reiterated the same holding, and all five quoted the pre-1987 Constitution decision *World Health Organization v. Aquino*.[376] The broad ICMC ruling was only restricted by *Liang v. People*[377] when it refused to recognize diplomatic immunity extended to defeat a criminal charge against a Chinese Asian Development Bank economist:

> [T]he slander of a person, by any stretch, cannot be considered as falling within the purview of the immunity granted to ADB officers and personnel.[378]

Liang may even be interpreted as reversing the preceding line of political question rulings, noting the phrasing of the first *Liang* decision:

> The DFA's determination that a certain person is covered by immunity is only preliminary which has no binding effect in courts.[379]

This is dictum, however, because *Liang* accepted that ADB enjoyed immunity; the holding cited the Vienna Convention on Diplomatic Relations and it did not extend immunity beyond official functions, which slander was clearly not. Thus, assuming foreign affairs presents political question's last refuge, one must analyze what makes this area different.

Arguably, it is because the 1987 Constitution does not explicitly deal with the President's power over foreign affairs, and the closest are his explicit power to contract foreign loans, appoint ambassadors, and set tariffs, and his implicit power to conclude treaties.[380] Bernas thus considers the *ICMC* ruling not as invoking a textual question, but a related matter traditionally vested in the Executive, and implies that it may be a functional one.[381] Further, *ICMC's* phrasing reflects a clear prudential concern from *Baker* as well, although this is now supposedly impossible.

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[371] *Id.* at 140.

[372] G.R. No. 101949, 238 SCRA 524, Dec. 1, 1994.

[373] G.R. No. 109095, 241 SCRA 681, Feb. 23, 1995.

[374] G.R. No. 106483, 241 SCRA 681, May 22, 1995.

[375] G.R. No. 113191, 262 SCRA 38, Sep. 18, 1996.

[376] G.R. No. 35131, 48 SCRA 242, Nov. 29, 1972.

[377] G.R. No. 125865, 355 SCRA 125, Mar. 26, 2001. This *Liang* decision dealt with the Motion for Reconsideration.

[378] *Id.* at 133.

[379] Liang v. People, G.R. No. 125865, 323 SCRA 692, 695, Jan. 28, 2000.

[380] CONST. art. VII, § 16, 20-21, Art. VI, § 28(2); Louis Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1302-03 (1961).

[381] BERNAS, *supra* note 92, at 955-56.

One might thus argue that the political question is preserved in foreign affairs only because, for all its length, the 1987 Constitution failed to elaborate on it. *Liang* may be interpreted as a foreign affairs scenario that nevertheless involved manageable standards, such as the Vienna Convention on Diplomatic Relations,[382] or an implied finding of grave abuse of discretion. This seems to be borne out by *Tanada v. Angara*,[383] where the Court took jurisdiction over a treaty because the petitioners invoked the Constitution's new nationalist economic clauses. *Tanada*, nevertheless, is readily read from coordinacy's perspective. It concluded:

> As to whether [consenting to the World Trade Organization agreement] was wise, beneficial or viable is outside the realm of judicial inquiry and review. That is a matter between the elected policy makers and the people. As to whether the nation should join the worldwide march toward trade liberalization and economic globalization is a matter that our people should determine in electing their policy makers. After all, the WTO Agreement allows withdrawal of membership, should this be the political desire of a member.[384]

Tanada held that many of the 1987 Constitution's policy statements served as guidelines for the legislature as well as the judiciary to actualize, and it is submitted that this is a prudent, coordinate interpretation. One may argue that *Tanada* found a political question in all but name and used the non self-executing holding as a Bickelian escape device, but assuming it was, the coordinate view casts this more positively. One may further argue that such a device was not available in *Lim v. Executive Secretary*[385] where the Balikatan military exercises with the United States were assailed using the Constitutional policy against war.[386] *Lim* actually employed another escape device, first discussing Balikatan's Terms of Reference and concluding they did not violate the Constitution *in theory*, then declining to rule on whether the exercises *in fact* violated the Constitution, as it is not a trier of facts. And even then, the decision inserted a kernel of doubt into itself:

> Yet a nagging question remains: are American troops actively engaged in combat alongside Filipino soldiers under the guise of an alleged training and assistance exercise? ... we cannot accept, in the absence of concrete proof, petitioners' allegation that the Arroyo government is engaged in 'doublespeak' in trying to pass off as a mere training exercise an offensive effort by foreign troops on native soil. The petitions invite us to speculate on what is really happening....[387]

Lim eventually dismissed the petition because it found no grave abuse of discretion on the President's part, similar to *Marcos v. Manglapus*. It is again submitted that had the Court not wanted to call it a political question, then perhaps it would have been less awkward to use coordinacy and rule it was Constitutionally

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[382] *Id.* at 955.
[383] G.R. No. 118295, 272 SCRA 18, May 2, 1997.
[384] *Id.* at 81.
[385] G.R. No. 151445, 380 SCRA 739, Apr. 11, 2002.
[386] CONST. art. II, § 2. The case also tackled CONST. art. II, § 7-8.
[387] Lim v. Exec. Sec., G.R. No. 151445, 380 SCRA 739, 759-60, Apr. 11, 2002.

permissible for the President to interpret her Commander-in-Chief and foreign affairs powers as allowing joint military exercises in Mindanao, or that the state policy against war did not preclude these.

6. Congress and Economic Policy

Examining *Tanada v. Angara*, one notes that many early cases relating to economic policy do not discuss the political question outright, but rephrase the doctrine by concluding the matter is best left to the wisdom of legislators, and that laws enjoy a presumption of constitutionality. This was how *Basco v. Philippine Amusements and Gaming Corp.*[388] handled assertions that gambling's legalization through the formation of PAGCOR contravened the Constitutional policies in favor of the family and youth.[389] *Basco* also squarely held that the degree of decentralization pursuant to the Constitution's Local Autonomy clauses[390] was a political question, and Congress had the sole prerogative of how to apportion the power to tax gambling. These holdings mesh perfectly with a consciously coordinate framework.

Similarly, *Guingona v. Carague*[391] ruled that Congress did not contravene the Constitutional priority on education merely by allotting to it a third of the amount allocated to debt servicing. This was clearly more deferential to Congress' interpretation of the policy's degree of priority compared to Justice Paras's one-sentence dissent: "Any law that undermines our economy and therefore our security is per se unconstitutional."[392]

Next, *Garcia v. Executive Secretary*[393] declined to strike down the Foreign Investments Act of 1991[394] as contravening the Constitution's nationalist economic provisions:

> [W]e find that the constitutional challenge must be rejected for failure to show that there is an indubitable ground for it, not to say even a necessity to resolve it... the acts of the political departments are valid in the absence of a clear and unmistakable showing to the contrary. To doubt is to sustain...
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> ...
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> The petitioner is commended for his high civic spirit and his zeal in the protection of the Filipino investors against unfair foreign competition... But his views are expressed in the wrong forum. The Court is not a political arena. His objections to the law are better heard by his colleagues in the Congress of the Philippines, who have the power to rewrite it, if they so please, in the fashion he suggests.[395]

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[388] G.R. No. 91649, 197 SCRA 52, May 14, 1991.
[389] CONST. art. II, § 11-13. The case also raised CONST. art. XIII, § 1; CONST. art. XIV, § 2.
[390] CONST. art. X, § 5.
[391] G.R. No. 94571, 196 SCRA 221, Apr. 22, 1991.
[392] *Id.* at 239 (Paras, J., *dissenting*).
[393] G.R. No. 100883, 204 SCRA 516, Dec. 2, 1991.
[394] Rep. Act. No. 7042.
[395] Garcia v. Exec. Sec., G.R. No. 100883, 204 SCRA 516, 522-23, 524, Dec. 2, 1991.

Bagatsing v. Committee on Privatization[396] took a similar approach to a challenge against the privatization of Petron Corp., as did *Lim v. Pacquing*[397] dealing with a jai alai franchise. Both did not explicitly mention the political question doctrine.

The judicial trajectory veered off sharply, however, with *Tatad v. Secretary of Energy*[398] and its nullification of the Oil Deregulation Act[399] vis-à-vis the Constitutional policy against monopolies.[400] Amidst dissents that vigorously invoked the separation of powers, *Tatad* described its methodology:

> Prescinding from these baseline propositions, we shall proceed to examine whether the provisions of R.A. No. 8180 on tariff differential, inventory reserves, and predatory prices imposed substantial barriers to the entry and exit of new players in our downstream oil industry. If they do, they have to be struck down for they will necessarily inhibit the formation of a truly competitive market.[401]

Not only did the dissenters argue that this was taking the wisdom of the law into the majority's hands, but *Tatad* attempted to explain:

> With this Decision, some circles will chide the Court for interfering with an economic decision of Congress. Such criticism is charmless for the Court is annulling R.A. No. 8180 not because it disagrees with deregulation as an economic policy but because as cobbled by Congress in its present form, the law violates the Constitution. The right call therefor should be for Congress to write a new oil deregulation law that conforms with the Constitution and not for this Court to shirk its duty of striking down a law that offends the Constitution.[402]

Moreover, one can almost hear a cry against Herbert Spencer's Social Statics[403] in the face of:

> *Kaya't sa mga kababayan nating kapitalista at may kapangyarihan, nararapat lamang na makiisa tayo sa mga walang palad at mahihirap sa mga araw ng pangangailangan. Huwag na nating ipagdiinan ang kawalan ng tubo, o maging ang panandaliang pagkalugi. At sa mga mangangalakal na ganid at walang puso: hirap na hirap na po ang ating mga kababayan. Makonsiyensya naman kayo!* (emphasis in original)[404]

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[396] G.R. No. 112399, 246 SCRA 334, Jul. 14, 1995.

[397] G.R. No. 115044, 240 SCRA 649, Jan. 27, 1995.

[398] G.R. No. 124360, 281 SCRA 330, Nov. 5, 1997.

[399] Rep. Act. No. 8180.

[400] CONST. art. XII, § 19.

[401] Tatad v. Sec. of Energy, G.R. No. 124360, 281 SCRA 330, 359, Nov. 5, 1997.

[402] *Id.* at 370.

[403] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., *dissenting*).

[404] Tatad, 281 SCRA at 379 (Panganiban, J., *concurring*). "To our capitalist and influential countrymen, it is but right that you express solidarity with the poor in times of need. Let us not emphasize a lack of profit or temporary losses. To unscrupulous and heartless businessmen: our countrymen are in dire straits. Listen to your consciences!"

Shortly before *Tatad*, the Court also nullified the sale of a majority share of the Manila Hotel to a Malaysian bidder, invoking the Constitutional policy that gave preference to qualified Filipinos.[405] The political question was not raised in *Manila Prince Hotel v. Government Service Insurance System*,[406] however, and it dealt with an agency and not Congress. Most recently, anti-monopoly Constitutional provisions were also raised in the nullification of the PIATCO contract for the Ninoy Aquino International Airport Terminal 3.[407]

From a coordinacy perspective, these much-criticized economic decisions might be assailed for no longer just searching for grave abuse of discretion, but in handing down the meaning of economic policy statements arguably addressed to Congress. One notes, however, that the 2003 decision *Eastern Assurance and Surety Corp. v. Land Transportation Franchising and Regulatory Board*[408] returns to the *Marcos v. Manglapus* framework of merely searching for grave abuse. Here, Justice Panganiban held that given reports of unscrupulous tactics by insurance agents, there was factual basis for the agency involved to authorize two consortia of insurance companies to issue passenger insurance, and this did not amount to a violation of the Constitution's policy against monopolies. However, one may also argue that this framework is now being used only when the Court decides not to strike down an economic decision.[409]

7. Congress and its Internal Workings

Fr. Bernas wrote:

> The firm direction now, in fact, in quite a number of decisions of the Supreme Court is towards assumption of jurisdiction whenever the Court finds constitutionally-imposed limits on powers or functions conferred upon political bodies. This direction will affect even those which in the past were seen as beyond judicial reach such as disciplinary action over members of Congress.[410]

This is, in part, due to additional phrases in the 1987 Constitution that pertain to the structure of Congress. For example, *Avelino v. Cuenco*[411] contained dicta regarding the counting of a Senate quorum under the 1935 Constitution provision:

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[405] CONST. art. XII, § 10.

[406] G.R. No. 122156, 267 SCRA 408, Feb. 3, 1997.

[407] Agan v. Philippine International Air Teinals Co., Inc., G.R. No. 155001, May 5, 2003.

[408] G.R. No. 149717, Oct. 7, 2003.

[409] Of course, one must note the proposition that law is not a product of majoritarian consensus, but an imposition by a ruling elite onto the majority, especially considering the present concentration of Philippine economic power in the hands of a few. *See, e.g.*, Pacifico Agabin, *Economic Interest Groups and Power Politics in the Philippines*, 70 PHIL. L.J. 291, 308-309 (1996). "For what is law among friends?" *Id.* at 309.

[410] BERNAS, *supra* note 92, at 813.

[411] 83 Phil. 17 (1949).

> (1) The Senate shall elect its President and the House of Representatives its Speaker. Each House shall choose such other officers as may be required.[412]

The 1987 Constitution, however, now has a slightly more detailed provision:

> (1) The Senate shall elect its President and the House of Representatives its Speaker, by a majority vote of all its respective Members.
>
> Each House shall choose such other officers as it may deem necessary.[413]

Clearly, in addition to the Court's expanded jurisdiction, the framers intended such a change to remove the matter from Congress' discretion, making it a readily justiciable issue. The political question decisions regarding Congress' internal structure are hardly the most controversial, since many turn on whether or not a straightforward Constitution provision may be referred to, and the Court is forced to make an adjudication between two conflicting interpretations from different factions.

Coseteng v. Mitra,[414] for example, was straightforward in holding that a party that represented 0.4% of the House membership was not entitled to one of twelve Commission on Appointments seats. This follows from the most logical, mathematical meaning of "proportional" in the Constitution's proportional representation requirement. Applying similar basic mathematics, the Court was constrained to rule against the recognition of half-seats for Senator-Commissioners in *Guingona v. Gonzales*,[415] since there was no way to split a seat between two parties equally entitled to it. *Bondoc v. Pineda*[416] held that a House Electoral Tribunal member could not be replaced because he displeased his party with his vote in a case, because of a tribunal's inherent need for independence and insulation from majoritarian politics. *Arroyo v. House of Representatives Electoral Tribunal* was a simple matter of finding grave abuse of discretion:

> [T]he procedural flaws which marred the proceedings... render the public respondent HRET's majority decision... a complete nullity. The persistent and deliberate violation of the Tribunal's own governing rules and of even the most basic rules of evidence cannot be justified by simply invoking that procedural rules should be liberally construed.[417]

Sandoval v. House of Representatives Electoral Tribunal[418] had a similar rationale.

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[412] 1935 CONST. art. VI, § 10.
[413] CONST. art. VI, § 10.
[414] G.R. No. 86649, 187 SCRA 377, Jul. 12, 1990.
[415] G R. No. 106971, 214 SCRA 789, Oct. 20, 1992.
[416] G.R. No. 97710, 201 SCRA 792, Sep. 26, 1991.
[417] *Id.* at 808.
[418] G.R. No. 149380, 383 SCRA 770, Jul. 3, 2002.

In the cases, however, where the textual support is not as straightforward, the Court has impliedly respected coordinacy in the sense that it upheld interpretations that favor the majority in that majoritarian body. Even *Avelino*, for example, dismissed a petition by a claimant to the Senate presidency who was backed by only eleven out of twenty-three senators, noting that the majority could change the Senate President at any time it desired. Thus, *Daza v. Singson*[419] upheld the reorganization of the Commission on Appointments to reflect permanent political realignments in Congress instead of insisting that representatives of a party whose membership was drastically reduced retain their posts.

Finally, it was *Arroyo v. De Venecia*[420] that ruled:

> If, then, the established rule is that courts cannot declare an act of the legislature void on account merely of noncompliance with rules of procedure made by itself, it follows that such a case does not present a situation in which a branch of the government has "gone beyond the constitutional limits of its jurisdiction' so as to call for the exercise of our Art. VIII. §1 power."[421]

It recognized a political question with respect to House internal rules, unless these violated Constitutional restraints or fundamental rights,[422] particularly if third persons were involved.[423] Curiously, however, *Santiago v. Guingona*[424] did not follow Justice Mendoza's methodology and insisted on taking jurisdiction, only to conclude that there were no Constitutional standards that could govern the election of the Senate Minority Leader:

> While the Constitution is explicit on the manner of electing a Senate President and a House Speaker, it is, however, dead silent on the manner of selecting the other officers in both chambers of Congress... To our mind, the method of choosing who will be such other officers is merely a derivative of the exercise of the prerogative... Therefore, such method must be prescribed by the Senate itself, not by this Court.[425]

It is again submitted that the coordinate approach, or the finding of a political question for lack of manageable standards as in *Arroyo*, would have obviated the need for a lengthy discourse on what a majority and a minority are.

More recently in *Pimentel v. House of Representatives Electoral Tribunal*,[426] Justice Carpio used the Bickelian escape device of ripeness to give the House the first opportunity to determine how to count party-list representatives under the Constitution's proportional representation requirement. He wrote:

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[419] G.R. No. 86344, 180 SCRA 496, Dec. 21, 1989.
[420] G.R. No. 127255, 277 SCRA 268, Aug. 14, 1997.
[421] *Id.* at 290.
[422] *Id.*, *citing* United States v. Ballin, Joseph & Co., 144 U.S. 5 (1891).
[423] Arroyo (Puno, J., *concurring*), *citing* United States v. Smith, 286 U.S. 6 (1932).
[424] G.R. No. 134577, 298 SCRA 756, Nov. 18, 1998.
[425] *Id.* at 780.
[426] G.R. No. 141489, 393 SCRA 227, Nov. 29, 2002.

> [T]heir *primary* recourse clearly rests with the House of Representatives... Only if the House fails to comply with the directive of the Constitution on proportional representation of political parties in the HRET and the CA can the party-list representatives seek recourse to this Court under its power of judicial review. Under the doctrine of primary jurisdiction, prior recourse to the House is necessary before petitioners may bring the instant case to the court.[427]

This arguably simulated the political question since there is no explicit guideline, for example, on how party-list groups may form alliances to nominate common nominees for themselves. However, one may also argue this illustrates the positive aspects of coordinacy theory, beyond the political question, since the Court gives way to Congress' initial interpretation, but clearly reserves the power to make a final judgment if warranted later.

8. Transitions in the Presidency

Fr. Bernas ends his textbook's discussion of the political question with three of the most important political transitions in recent history: 1) the 1973 Constitution's ratification;[428] 2) the 1986 People Power overthrow of Ferdinand Marcos and the installation of Corazon Aquino's revolutionary government;[429] and 3) the EDSA II protests that ended Joseph Estrada's presidency.[430]

The Court declined the political question doctrine in the third, and emphasized that Gloria Macapagal-Arroyo had not formed a revolutionary government. Thus, *Estrada v. Desierto* failed to produce a majority explanation, with the various opinions split on resignation, permanent disability, and a simple acceptance of reality.[431] All appeared strained reasoning as Estrada had left Malacanang Palace with no explicit indication of resignation and healthy. *Estrada's* majority opinion settled on resignation, anchored on excerpts from the diary of Estrada's Executive Secretary that were published in a newspaper. The decision's "totality test" and rationale remain heavily criticized until today, albeit not its result.

It is argued that *Estrada* was really a case involving truly momentous prudential factors, yet the Court felt that the Constitution had taken away the prudential question option.[432] *Estrada's* separate opinions indicated that Arroyo had already taken control of the government, many countries had already recognized her administration, and a majority of the population had acquiesced to her ascension. Moreover, a ruling in favor of Estrada would have been like putting out a fire with

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[427] *Id.* at 237.

[428] Javellana v. Exec. Sec., G.R. No. 36142, 50 SCRA 30, Mar. 31, 1973.

[429] Lawyers League for a Better Philippines v. Aquino, G.R. No. 73748, May 22, 1986.

[430] Estrada v. Desierto, G.R. No. 146710, 356 SCRA 108, 155-56, Mar. 2, 2001

[431] *Id.*; BERNAS, *supra* note 92, at 817-27.

[432] *See* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 639 (2001), *quoting* Colegrove v. Green, 328 US 549, 556 (1946) (Frankfurter, J.). "[T]he 'Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.'"

gasoline, given the polarized state of the population in the aftermath of Estrada's highly-publicized, aborted impeachment trial.

It is submitted that coordinacy might have been a tempered solution, and the Court might have honored Arroyo's recognition by both the Senate and the House, finding no grave abuse in their action under the extenuating circumstances, for any of the many reasons put forward. At the very least, this would have avoided further complicating the issues with its new doctrines on evidence and resignation.

D. RECONCILING COORDINACY AND PHILIPPINE JUDICIAL REVIEW

To summarize Philippine political question doctrine as applied in *Francisco* and the Canvass Resolutions, Justice Holmes' "bad man"[433] would surmise that the Court will almost automatically take jurisdiction so long as the petitioner points to a specific Constitutional provision.[434] It will then beat its breast, refuse to decline to exercise jurisdiction, and then discuss its interpretation.[435] In theory, coordinacy should nevertheless fit will in the Philippine framework because all the Court has to do is find that a political branch's Constitutional interpretation is within the permissible range, hence no grave abuse of discretion is properly found.[436] While this was observed in early post-1987 cases, wily petitioners soon learned to cite whatever Constitutional provision in the long 1987 document was arguably relevant, and force the Court into strained textual acrobatics.

Especially when dealing with textually committed powers which are extremely political in nature, such a result stands to be dangerously high-handed and counter-majoritarian.[437] This also flirts with *Bush v. Gore*, and one might argue that a Philippine *Bush* was avoided by the expedient of having the official resolutions merely state that no grave abuse of discretion was found. It is in this context that the political question doctrine and its respect for majority action practically lose all meaning.

These were precisely Kramer's criticisms regarding *Bush v. Gore*, related to popular constitutionalism:

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[433] Oliver Wendell Holmes, Jr., *The Path of the Law*, *in* LAW: A TREASURY OF ART AND LITERATURE 276 (Hugh Lauter Levin Associates, 1990).

[434] Parallel to this, many American decisions have likewise been criticized for merely quoting *Baker v. Carr* and its requisites, without more incisive analysis. Nzelibe, *supra* note 29, at 963; Mulhern, *supra* note 29, at 107-08. "If a strategy for judicial review is to be truly deferential, it will cause those using it to appear deferential. Such an appearance can always cloak intentional deviations from deference or mislead nondevious judges into a sense of self-satisfaction and, therefore, unwarranted deviations from deference." Neil Komesar, *Slow Learning in Constitutional Analysis*, 88 NW. U. L. REV. 212, 213 (1993).

[435] Parenthetically, *Marbury* enlightens law students regarding the irony that the landmark case on judicial supremacy is also a landmark case grounded on politics. Consciously or unconsciously, the judiciary does act politically, and has perhaps done so since the very dawn of judicial supremacy. Agabin, *supra* note 9, at 191; Eric Segall, *Why I Still Teach Marbury (And So Should You): A Response to Professor Levinson*, 6 U. PA. J. CONST. L. 573, 582 (2004).

[436] *See* Mulhern, *supra* note 29, at 129-30.

[437] Russel Miller, *supra* note 166, at 596-97, 624.

> If the Justices truly were serious in their 'admiration' of the Constitution's design, they could have allowed the process that had been created for precisely this sort of problem to run its course, in which case the dispute eventually would have been decided by Congress. But that would have left the Court on the sidelines, trusting other, more democratic institutions to solve a constitutional dilemma. And that is something these Justices do not like to do.[438]

Further, he argues:

> The Founding generation did not solve the problem of constitutional interpretation and enforcement by delegating it to judges. Their thinking was more complex and, frankly, more imaginative than that. They were too steeped in republicanism to think that the solution to the problem of republican politics was to chop it off at the knees. Their structural solutions were meant to operate in politics: elections, bicameralism, an executive veto, political connections between state and national governments, and, above all, the capacity of politicians with competing interests to appeal for support to the people who made the Constitution.[439]

Thus, the challenge is to stay loyal to the duty of judicial review, while maintaining the will of the majority and the accountability of the political branches' officials.[440] It is submitted that Justice Puno's coordinacy theory would have also hurdled this enigma in *Francisco* and the Canvass Resolutions. In all these, the Court could have assumed jurisdiction as they already did, but instead of handing down its own interpretation, it may be more inclined to point to the political branch's actions as permissible under the Constitution.

Thus, with respect to impeachment, the Court could have given the legislators the benefit of the allegedly vague provision contested in *Francisco*, then wait for the Senate to decide the validity of the "second" impeachment complaint.[441] Since it has full discretion in interpreting the Constitution's grounds for impeachment,[442] it would hardly have been unreasonable to allow the Senate to interpret the provisions governing submission of an impeachment complaint to it as well. This would mirror Justice Carpio's application of the primary jurisdiction in *Pimentel v. House of Representatives Electoral Tribunal*.[443] The actual *Francisco* decision

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[438] Kramer, *supra* note 41, at 157-58.

[439] *Id.* at 162. *See* Martin Redish & Elizabeth Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 461 (1991). Further, Mark Tushnet argues that even without courts, Congress would be held in check by democratic accountability. Joan Larsen, Book Review, *Constitutionalism Without Courts?*, 94 NW. U. L. REV. 983, 993 (2000). *See* John Yoo, *Lawyers in Congress*, 61-SPG LAW & CONTEMP. PROBS. 1, 19 (1998).

[440] *See* Stephen Goldberg, *Putting the Supreme Court Back in its Place: Ideology, Yes; Agenda, No*, 17 GEO. J. LEGAL ETHICS 175, 176 (2004); Lawrence Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 897-98 (1990).

[441] This was, in fact, the position taken by Senator Aquilino Pimentel, who filed a comment in *Francisco*. Nov. 3, 2003, *at* http://www.nenepimentel.org/speeches/20031103_Comment.asp.

[442] Vik Amar, *supra* note 247, at 1114-15.

[443] G.R. No. 141489, 393 SCRA 227, Nov. 29, 2002.

could well be criticized by setting it against Thayer's philosophy and Justice Isagani Cruz's early pronouncement:

> [The expanded *certiorari* jurisdiction] should not be construed as a license for us to reverse the other departments simply because their views may not coincide with ours.[444]

With respect to the national canvass, the Court could have left Congress to make a permissible interpretation as to the ministerial or discretionary nature of its tasks, aside from dismissing the opposition petitions. In fact, the Canvass Resolutions repeatedly cited Congress's power to make its own rules and *Arroyo v. De Venecia*,[445] but it is submitted that the better outcome was to treat Congress' actions as constitutive of constitutional norms, especially when they pointed to Congress' long standing canvass practices. There is no abdication of duty as impliedly proscribed by the 1987 Constitution, yet neither does the Court venture close to the legislative power through interpretation, as Thayer cautioned.

A review of political question decisions shows that the initial bravado surrounding the Court's descriptions of its expanded jurisdiction have at times degenerated into strained sounding decisions, such as *Cayetano v. Monsod*, *IBP v. Zamora*, and *Estrada v. Desierto*. To avoid being ensnared in textual traps canny petitioners and jurisprudence force onto the Court, one also sees a recent curtailment of liberal standing rules, particularly the standing and actual controversy ruling in *Lacson v. Perez*. Again, this author humbly submits that Justice Puno's coordinacy doctrine may achieve the same results less awkwardly and with more intellectuall fulfillment than dismissals due to lack of standing. There may even be more interpretative material from the political branches than apparent, though academically invisible[446] due to the increased emphasis on judicial supremacy today.

CONCLUSION

The Bard wrote:

> Not all the water in the rough rude sea
> Can wash the balm from an anointed king;
> The breath of worldly men cannot depose
> The deputy elected by the Lord.[447]

Likewise, our government is structured such that the boisterous sea of liberty[448] is fed by a tripartite tributary system, and none of the three great branches

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[444] Ass'n of Small Landowners of the Philippines, Inc. v. Sec. of Agrarian Reform, G.R. No. 78742, 175 SCRA 343, 377, Jul. 14, 1989 (Cruz, J.).

[445] G.R. No. 127255, 277 SCRA 268, Aug. 14, 1997.

[446] Vik Amar, *supra* note 247, at 1112. *See* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 375 (2000).

[447] William Shakespeare, The Tragedy of King Richard II, Act III, Scene 2, Lines 56-59 *in* SHAKESPEARE 417.

[448] Thomas Jefferson, Letter to Philip Mazzei, Apr. 24, 1796, *available at* http://www.wccusd.k12.ca.us/elcerrito/history/jefferson.htm.

may be cleansed of its responsibility to the sovereign people. Our democracy has the inherent tension of possessing both majoritarian and counter-majoritarian aspects, and likewise majoritarian and counter-majoritarian powers and institutions. In the general sense, Congress is its supreme majoritarian institution, while the Supreme Court is the often counter-majoritarian body.[449] Armed with this nature and a broad mandate from the electorate, it falls to Congress to canvass the votes for the presidential elections, that it may act as the ultimate arbiter and legitimizing body in the political exercise.

Setting aside the lesser questions raised in the 2004 canvass, one asks the central question: Should the committee have gone beyond the CoCs? Framed legally, was a ministerial or a discretionary task lain on Congress's shoulders?

Both are plausible conclusions. The weight of precedent, statute, framers' deliberations, and even foreign jurisprudence argue for a relatively mechanical count, with a premium placed on speed. On the other hand, one can claim an exception to the general rule that canvass proceedings are ministerial, and a co-equal branch with broad powers may justify further investigation to ascertain the true will of the electorate, from whom government's authority emanates. The premium here is placed on certitude.

With respect to the canvass, the Court spurned its suitors, and left individual Justices to write opinions that offered glimpses into its frame of mind. Following the coordinacy theory given newfound emphasis by Justice Puno in *Francisco*, however, all branches have a duty to interpret the Constitution upon which they exist. Such judicial deference is based on the importance of majoritarian consensus in the political branches, among other factors, and it is ultimately the electorate who are the final interpreters of the fundamental law because they have the power to amend it. As Ackerman wrote:

> When the Court tests some recent congressional initiative against its interpretation of past constitutional solutions, it is not engaged in an anti-democratic form of ancestor worship... It is signaling to the mass of private citizens... that their would-be representatives are attempting to legislate in ways that few political movements in American history have done with credibility; and that the moment has come, once again, to determine whether our generation will respond by making the political effort required to redefine, as private citizens, our collective identity....
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> [O]nce a movement has succeeded in enacting a constitutional amendment, it will no longer be obliged to call so extravagantly upon the political energies of the American people.[450]

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[449] Michael Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 492-93 (1997).

[450] Ackerman, *supra* note 360, at 1050. "As the people are the only legitimate fountains of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived..." *The Federalist No. 49*, *supra* note 154, at 151. However, Yale professor Owen Fiss opines

Certainly, constructing a Constitutional tradition is not easy:

> To interpret the document, or the doctrine for that matter, is to engage in an act of construction; the interpreter tries to weave together a coherent account from tangled data. Further wrinkles arise when the faithful interpreter tries to apply the document's precepts to a world that is in many respects different from the world that generated the constitutional texts in question... even interpreters who fundamentally agree (in step one) about the dictates of the document as written and amended may disagree (in step two) about how best to apply those dictates to a changed world.[451]

Thus, beyond textbook discussions of the separation of powers, it is important for this endeavor to harness the political branches' institutional competencies, and the collective judgment of the sovereign people. Given this, it is not as important whether Congress has a ministerial or a discretionary task as much as it is for Congress to interpret its own role as final, legitimizing arbiter. The canvass remains part of the most political of democratic exercises, and the judiciary should keep its distance lest it become embroiled in another Hayes-Tilden or Bush-Gore controversy. Again, both answers are plausible and emphasize different policies, leaving Congress to determine its own course within James Bradley Thayer's range of Constitutionally permissible options. This kind of interpretation respects the values embraced by the majority as well as the accountability of its chosen representatives, yet does not result in the dereliction of judicial duty the framers of the 1987 Constitution feared.

Such a conclusion impacts on other powers textually committed to the political branches. *Francisco* recognized that impeachment is predominantly political, and it is submitted that Congress should have been allowed to come to its own final decision regarding the submission and trial of the impeachment complaint in question. While the Court's decision did in fact resolve the tensions that arose, the counter-majoritarian blow arguably sapped some democratic vigor in the long run and abruptly ended the frenetic debate. Such actions also open the door for those who cannot triumph in the political arenas to try their luck in the courtrooms,[452] precisely the damning criticism leveled against *Bush v. Gore*.

Many other powers beyond canvass and impeachment are textually committed to the political branches, and the fullness of each is realized if the wielder itself is empowered to hazard an interpretation, beyond the mere talk of internal rules and enumerations of years seen in the Canvass Resolutions. Justice Roberto Regala once enumerated the Rule of Law's components: 1) separation of powers; 2) degree of objectivity in human relations; 3) limited government; 4) basic

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that legislatures are "not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people—what they want and what they believe should be done." *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1979).

[451] Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 53 (2000).

[452] MALCOLM JEWELL & SAMUEL PATTERSON, THE LEGISLATIVE PROCESS IN THE UNITED STATES 475 (1977); BORK, *supra* note 148, at 70; Fisher, *Constitutional Interpretation*, *supra* note 221, at 730-31.

fairness, and 5) independent judiciary.[453] Although society strives towards a rule of laws and not of men, one can never set aside the majoritarian aspect of republicanism, and laws are themselves an expression of majority rule. While the West may see law as restraint, it is more Oriental to see it as stable foundation, and from here, the consensus of men may take their place in the Rule of Law beside neutral principles. Not only is such consensus important in mapping the metes and bounds of the political branches' powers, it is also crucial in interpreting the 1987 Constitution's many policy statements, especially those not deemed self-executing.

Previously, part of the restraint that allowed the political branches to present their initial interpretations came from the political question doctrine, but this was radically curtailed by the 1987 Constitution. However, when one sets the stigma of Martial Law aside, its merits remain perfectly valid, and there are times when the political branches should enjoy wide discretion in the textual powers committed to them, powers they are institutionally more competent to wield. Moreover, there are also times when the Court simply must disentangle itself from a case out of prudence. When a selection of the lengthy 1987 Constitution's provisions are invoked in tandem with the expanded *certiorari* jurisdiction, petitioners sometimes force the Court into textual traps, with results as arguably awkward as *Cayetano v. Monsod*, *IBP v. Zamora*, and *Estrada v. Desierto*. Otherwise, the Court is forced to duck the issue through the other Bickelian tools in the standing and actual case and controversy armories. It is proposed that coordinacy theory, with its more positive perspective, better avoids these problems, and enriches the Constitutional tradition by explicitly recognizing the political branches' role in its formation.

Certainly, it cannot be said that the political actors are unconscious of the Constitution. Recently, for example, new Foreign Affairs Secretary Alberto Romulo cited during his turnover rites:

> In the conduct of foreign policy, my guidepost and lodestar is no less than the Constitution with its clear mandate to pursue an independent foreign policy with paramount consideration being national sovereignty, territorial integrity, national interest, and the right to self-determination.[454]

To cite another example, when Budget Secretary Emilia Boncodin presented the Arroyo administration's new fiscal program, Senator Miriam Defensor-Santiago asked for the executive's interpretation of the provision that "no money shall be paid out of the Treasury, except in pursuance of an appropriation made by law,"[455] in the context of automatic budget appropriations. She added that

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[453] Roberto Regala, *Expanding Frontiers of the Rule of Law*, 14 LAW REV. 239, 239 (1964).

[454] TJ Burgonio, *Mending tattered U.S ties Romulo's priority at DFA*, PHIL. DAILY INQUIRER, Aug. 25, 2004, at A2

[455] CONST. art. VI, § 29(1)

former Budget Secretary Benjamin Diokno had proposed that reenactment of a budget only affected current operating expenditures.[456]

Perhaps the last question, then, is what if the Constitutional interpretation put forward is a product of error, and what if time proves Justice Puno preaching from the Bench the wiser all along? The answer is simply that legislatures and majorities alike have a right to be wrong, or certainly more a right than a judge has to be correct on a question he is incompetent to rule on.[457] Yale Professor Akhil Reed Amar argues that a Constitution is seen more significantly from the eyes of the electorate that ratified it amidst trying times and great challenges, and articulates:

> Two heads are often better than one, and multitudes may be far wiser than five or nine . . . The Constitution should be read as collecting the solemn judgments of this Court, inscribing the lived experiences and wisdom – the reason and not merely the will or whim – of a great many people.[458]

Moreover, Dean Agabin cautions:

> Judicial review, like most things in life, is double-edged. In our political life, it can cut both ways. It can protect human rights, but it can also prevent social reforms. With its new found strength and its expanded power, the judiciary is no longer the "least dangerous branch of our government"…. [I]t may yet evolve to be the most dangerous branch.[459]

It is more in keeping with democracy to have to constantly raise one's voice and have a hand in charting one's course, rather than to stand in the shadow of a too-powerful Caesar and a seeming *Pax Romana* that thinly veils decadence and complacency.

One should not forget "it is a Constitution we are expounding,"[460] and that the Constitution is an experiment, as all life is an experiment.[461]

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[456] Michael Lim Ubac & Christine Avendano, *Gov't prescribes higher power rates, new taxes*, PHIL. DAILY INQUIRER, Aug. 31, 2004, at A5.

[457] *See, however*, Alexander & Schauer, *Defending Judicial Supremacy*, *supra* note 28, at 1383. They argue that for every *Dred Scott v. Sandford*, there is a *Brown v. Board of Education*, and the majority of officials at the time believed the latter morally or constitutionally wrong. *See* Lawrence Sager, *The Incorrigible Constitution*, 65 N.Y.U. L. REV. 893, 957 (1990).

[458] Akhil Reed Amar, *Foreword*, *supra* note 451, at 43. Amar quotes Bickel: "Most of us did not fully wake up to the immorality of the war in Vietnam until we were shown pictures of Vietnamese children being scalded by American napalm . . . It is thus no surprise that the case that our 'isolated' judiciary has done a better job of speaking for our better moral selves turns out to be very shaky historically." *Id.* at 44-45.

[459] Agabin, *supra* note 9, at 210.

[460] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.).

[461] Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., *dissenting*).