JUDICIAL FLIP-FLOPPING AND THE PHILIPPINE SUPREME COURT: THE MYTH OF JUDICIAL INFALLIBILITY AND ITS ROLE IN PRESERVING THE RULE OF LAW*

*Darwin P. Angeles***

ABSTRACT

In the last decade alone, the Supreme Court, in at least seven cases, has reversed or modified its decisions that have already become final and executory. Relying on the Court's equity jurisdiction and the En Banc's constitutional powers, judgments which have been entered as final and executory were reopened and reversed despite settled jurisprudence that these can no longer be modified or reversed even by the highest court of the land. No standard other than the invocation of the nebulous concept of the "interests of justice" has been advanced to justify the Supreme Court's sudden turnabout in deciding cases ostensibly settled with finality.

The Supreme Court's infallibility is a cornerstone of the rule of law in the Philippines. However, this concept of infallibility is but a myth conjured by the finality of the Court's pronouncements. This myth—and the bedrock of the High Court's moral ascendancy—is unwittingly eroded by judicial flip-flopping because it implies that the High Court's decision-making process is prone to error and that an outcome of the adjudication process can be reversed at any time. The erosion of the myth of infallibility depletes public trust in the Supreme Court as the final arbiter of disputes which if left unchecked leads to the undoing of the rule of law in the Philippines.

---

* *Cite as* Darwin P. Angeles, *Judicial Flip-flopping and the Philippine Supreme Court: The Myth of Judicial Infallibility and Its Role in Preserving the Rule of Law*, 90 PHIL. L.J. 556, (page cited) (2017).

An earlier version of this paper was awarded the Irene Cortes Prize for Best Paper in Constitutional Law in 2013.

** Law Reform Specialist, Institute of Government and Law Reform, University of the Philippines Law Center.

The author expresses his sincerest gratitude to Judge Raul C. Pangalangan and Prof. Alfredo B. Molo III whose insights were invaluable to the drafting of this paper. The author also acknowledges Messrs. Ryan Malit and Aaron Sanchez for their superb assistance in editing and proofreading this work. All errors are the author's alone.

"We are not final because we are infallible, but we are infallible only because we are final."

— Robert H. Jackson, *J.*[1]

INTRODUCTION

We are all familiar with Aesop's fable of the boy who cried wolf. A shepherd-boy, bored with tending his flock, played a prank on his fellow villagers by crying "Wolf! Wolf! The Wolf is chasing the sheep!" The villagers came running up the hill to help him but when they arrived, they found no wolf. The boy laughed at the sight of their angry faces. Week after week thence, whenever he got bored, the shepherd-boy yelled "Wolf! Wolf!" Again the villagers came and saw no wolf, finding only the boy laughing at them. It then came to pass that a real wolf came and preyed on the shepherd-boy's flock. Horrified, the boy cried for help but none of the villagers paid heed to his cries nor rendered any assistance thinking the boy was just trying to fool them yet again. With nothing to stop it, the wolf killed half the flock and chased the rest away.

At sunset, everyone wondered why the shepherd boy had not returned to the village with their sheep. They went up the hill to find the boy. They found him weeping. "There really was a wolf here! The flock has scattered! I cried out, 'Wolf!' Why didn't you come?" An old man tried to comfort the boy as they walked back to the village saying "We'll help you look for the lost sheep in the morning. Nobody believes a liar... even when he is telling the truth!"

Amusing and simple the fable may be, the basic tenet it teaches is one that is well to recall in this day and age to protect one of the pillars of our Government from potentially dangerous conduct that undermines its integrity and credibility.

The Supreme Court was constituted as the court of last resort. It has the final say as to what the law and the Constitution is as applied to an actual case or controversy.[2] With such power it has emerged as the sanctuary of the innocent and the protector of the oppressed. Through its pronouncements, the words and principles of both the Constitution and the law are given flesh and find meaning. Through the judicial process, the cherished ideals we have aspired for as a People are recognized and upheld. With its judgment, the

---

[1] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, *J.*, *concurring*).

[2] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

might of the State is brought to bear, and through it Society, hopefully, moves toward a direction that harkens to our better selves.

More than two and a half decades since the ratification of the 1987 Constitution, Philippine society bears witness to a new form of imbalance in our system of Government. By asserting its "solemn duty under the Constitution," the past decade saw a Supreme Court that wielded an unprecedented form of judicial might. The Court was given newfound authority to suspend at will the constitutional limits to its power. The steady and constant reliance of the People on the Supreme Court has tolerated the cumulative watering down of the inherent powers of its coordinate branches of government.

Since 2008, several controversies of varying degrees of significance have been elevated to the Supreme Court for its final judgment and resolution. The cases run the gamut of cases the Supreme Court is constitutionally empowered to adjudge pursuant to its inherent appellate jurisdiction.[3] These cases include:

1. A case for the determination of just compensation for the acquisition of more than 1,400 hectares of agricultural land under the Government's agrarian reform program;

2. A case by airline pilots and stewardesses against an airline for illegal dismissal and enforcement of a collective bargaining agreement;

3. A criminal case for graft and corruption filed against a crony of a previous regime who fled the jurisdiction possibly to avoid prosecution;

4. A protracted litigation among family members for control of a family corporation;

5. A case assailing the constitutionality of a statute converting 16 municipalities into cities;

6. A case assailing the constitutionality of a statute mandating the creation of a province; and

[3] CONST. art. VIII, §5.

7. A case filed by an insurance company against a shipyard company for the recovery of damages it had paid following the destruction of a ship which was being kept at the drydock for repairs.

Apart from the immense pecuniary amount or interesting personalities involved in these cases, the Supreme Court's unpredictable practice of "flip-flopping" in the resolution of crucial questions cuts across them. The Court set aside recognized limits on its jurisdiction and, in the process, dismissed decades worth of jurisprudence and pronouncements of public policy as mere "procedural technicalities" that must give way to the interests of "higher justice." More importantly, however, the promulgation of these judgments has resulted in the collateral destabilization of the rule of law in the Philippines under the guise of delivering justice.

While these "flip-flopping" justices bear the veneer that justice has been served, an unintended consequence is the creeping depletion of the political capital[4] of the Supreme Court. While these decisions embody some form of triumph for the prevailing party, they also mean the denial of the hard-earned fruits of litigation to the party aggrieved by the sudden reversal.

The spate of consecutive reversals of its own judgment rendered in a single case, even after the said judgment had long lapsed into finality, hews at the myth of the infallibility of the Supreme Court which is the bedrock of its moral ascendancy. It is this unspoken element of judicial power that grants the Supreme Court with the requisite capacity to fulfill its duty of resolving disputes as the court of last resort and, more importantly, as the final guardian of constitutional rights and the check on the excesses of limited government. It is this myth of infallibility that allows the other two great branches of government to submit themselves to the pronouncements of the Supreme Court, especially when the constitutionality of their respective actions are put into question.

If left unchecked, the continuing dissipation of the Supreme Court's credibility and reputation may inevitably result in the loss of its decisions' legitimacy. Such loss will effectively prevent the Court from discharging its constitutionally mandated functions by encouraging systemic apathy towards it from the other branches of Government or deadening the People's

[4] As used in this work, political capital shall refer to the institutional integrity of the Supreme Court which is dependent, in large part, on the public's perception of its duty to effectively discharge its mandate and duties under the Constitution. It includes the capacity of the Supreme Court to effectively administer justice and at the same time effectively resolve disputes of rights and obligations of contending parties under the law.

responsiveness to its judgments. The resulting imbalance will ultimately lead to the collapse of democratic government.

I. THE THEORY OF JUDICIAL FLIP-FLOPPING

A. Origins of Judicial Flip-flopping: The Equity Jurisdiction of the Philippine Supreme Court

Each of the cases of judicial flip-flopping involve the recall of an Entry of Judgment of a previously decided case to further the interests of substantial or higher justice. At its essence, therefore, the phenomenon of judicial flip-flopping emanates from the equity jurisdiction of the Philippine Supreme Court.[5] Equity jurisdiction is also wielded by the Supreme Court of the United States as an incident of the rulemaking power given to it by the United States Judiciary Act of 1789.[6]

The merger of legal and equity jurisdiction in the Philippine Supreme Court may be implied from the words of the Constitution itself which mandates that judicial power "includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable."[7] Equity jurisdiction aims to do complete justice in cases where a court of law is unable to adapt its judgments to the special circumstances of a case because of the inflexibility of its statutory or legal jurisdiction.[8] Equity is a pliable concept which allows its wielder wide discretion in applying it to achieve just results. As one author said, "the Supreme Court's power to administer justice is not simply the power to apply the law to the facts of a case, but also the power to achieve equitable results under the law[.]"[9] The

---

[5] "Under the system of procedure which obtains in the Philippine Islands, both legal and equitable relief is dispensed in the same tribunal. We have no courts of law in England and the United States. All cases (law and equity) are presented and tried in the same manner, including their final disposition in the Supreme Court." United States v. Tamporong, 31 Phil. 321, 327 (1915). *See also* Hodges v. Yulo, 81 Phil. 622 (1948) (Tuason, *J.*, *dissenting*).

[6] Rosemary Krimbel, *Rehearing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI.-KENT L. REV. 919, 928 (1989).

[7] CONST. art. VIII, §1.

[8] Darwin Angeles & Anne Jaycelle Sacramento, *A Dead Limb on the Quasi-Judicial Tree: The Necessity of Recognizing the Remedy of Annulment of Judgment Against Fraud and Collusion in the Exercise of Quasi-Judicial Power*, 86 PHIL. L.J. 643, 687 (2012), *citing* 27 Am. Jur. 2d §2.

In LCK Industries Inc. v. Planters Development Bank, G.R. No. 170606, 538 SCRA 634, 652, Nov. 23, 2007, *citing* Tamio v. Tieson, G.R. No. 154895, 443 SCRA 44, 55, Nov. 18, 2004, the Supreme Court held: "[e]quity regards the spirit and not the letter, the intent and not the form, the substance rather than the circumstance[.]"

[9] Krimbel, *supra* note 6, at 927.

general trend is to give courts wide latitude when exercising equity jurisdiction to prevent a clear case of injustice.[10]

However, it is precisely the pliability and flexibility of equity jurisdiction that renders it prone to misuse. The exercise of the Supreme Court's rule-making power has been the subject of criticism. In instances referred to as "extra-decisional judicial activism,"[11] the exercise of such power had been criticized as a means to bypass the constitutional proscription that rules promulgated by the Court shall not "diminish, increase, or modify substantive rights."[12]

Organizational structures are essential to constrain the possibility of the misuse of equity jurisdiction within the context of a limited government.[13] In our system of law, the very rules of procedure of the Supreme Court provide for this limiting structure. The Constitution vests the Court with the power to "promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts"[14] provided that such rules do not "diminish, increase, or modify substantive rights."[15]

Pursuant to its rule-making power, the Supreme Court promulgated the Internal Rules of the Supreme Court.[16] Rule 15, Section 3 thereof effectively institutionalized judicial flip-flopping as one of the Supreme Court's powers, in effect distilling previous jurisprudence on the matter. It states:

> Section 3. *Second motion for reconsideration.* – The Court shall not entertain a second motion for reconsideration, and any exception to this rule can only be granted in the higher interest of justice by the Court *en banc* upon a vote of at least two-thirds of its actual membership. There is reconsideration "in the higher interest of justice" when the assailed decision is not only legally erroneous, but is likewise patently unjust and potentially capable of causing unwarranted and irremediable injury or damage to the parties. A second motion for reconsideration can only be entertained before

---

[10] Angeles & Sacramento, *supra* note 8, at 687.

[11] Bryan Dennis Tiojanco & Leandro Angelo Y. Aguirre, *The Scope, Justifications and Limitations of Extradecisional Judicial Activism and Governance in the Philippines*, 84 PHIL. L.J. 73, 74 (2009).

[12] *See id.* at 126-9.

[13] Krimbel, *supra* note 6, at 928, *citing* J.K. GALBRAITH, THE ANATOMY OF POWER 54 (1983).

[14] CONST. art. VIII, § 5(5).

[15] Art. VIII, §5(5).

[16] A.M. No. 10-4-20-SC, May 4, 2010. Internal Rules of the Supreme Court.

> the ruling sought to be reconsidered becomes final by operation of law or by the Court's declaration.
>
> In the Division, a vote of three Members shall be required to elevate a second motion for reconsideration to the Court *En Banc*.[17]

B. Defining Judicial Flip-Flopping

As used in this paper, judicial flip-flopping is the sudden or abrupt reversal of a prior and final judgment on the merits rendered by the Supreme Court *in a single case*. This distinguishes judicial flip-flopping from various legal doctrines that are closely analogous but significantly distinct from it.

1. "Sudden and Abrupt Reversal" and "Single Case": Overruling of Precedents and Stare Decisis

Judicial flip-flopping should not be confused with the judicial overruling or abandonment of established precedents. Otherwise known as *stare decisis*, the doctrine of adherence to precedents is claimed "to be the glue that binds the court's past, present and future."[18] According to Justice Benjamin N. Cardozo, "[a]dherence to precedent then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts."[19] Haphazard reversals of doctrine prejudices the stability and effective administration of justice embodied by the maxim "to stand by things decided, and not to disturb settled points."[20]

Nonetheless, the abandonment of precedents, unlike judicial flip-flopping, is permissible and, in fact, necessary to the development of any legal system. Even under common law, adherence to precedents has slowly given way. In 1966, the House of Lords of the United Kingdom declared that it was not strictly bound by precedents.[21] In its 200-year history, the U.S. Supreme

---

[17] Rule 15, § 3.

[18] Theodore Te, *Stare (In)Decisis: Some Reflections on* Stare Decisis *in the Wake of the Judicial Flip-Flopping in* League of Cities v. COMELEC *and* Navarro v. Ermita, 85 PHIL. L.J. 785, 785 (2011).

[19] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 34 (1921).

[20] BLACK'S LAW DICTIONARY 1537 (9th Ed., 2009).

[21] Practice Statement (Judicial Precedent) dated Jul. 26 1966, 1 W.L.R. 1234 (1966). *See also* Cassell & Co. Ltd. v. Broome, 2 W.L.R. 645 (1972).

Court has occasionally refused to follow the *stare decisis* rule and reversed its decisions in 192 cases.[22]

Thus, while adherence to precedents is preferred for both convenience and stability, it is by no means absolute. Our Constitution expressly vests the Supreme Court En Banc with the power to modify or reverse any doctrine or principle of law laid down by a division of the Supreme Court or the En Banc.[23] Even Justice Cardozo conceded that the "rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law—the courts of justice."[24] After all, the foundations of precedents are "the basic juridical conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which those conceptions had their origin, and which, by a process of interaction, they have modified in turn."[25] Justice Cardozo concludes thus, "[e]very new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered."[26]

Even then, however, such reversals did not come immediately or abruptly nor were they rendered in the very same case where the rule or doctrine was enunciated. Thus, an important distinguishing feature between judicial flip-flopping and abandonment of precedents is that, in the latter, the reversal comes at later point in time, and in another case involving analogous, if not substantially identical, facts.

2. "Judgment on the Merits": Equitable Remedies against Final Judgments

Neither should the problem of judicial flip-flopping be confused with the remedies of annulment or declaration of nullity of judgments. The latter

---

[22] Ting v. Velez-Ting, G.R. No. 166562, 582 SCRA 694, Mar. 31, 2009, *citing* Lambino v. Commission on Elections, G.R. No. 174153, 505 SCRA 160, Oct. 25, 2006 (Puno, *J., dissenting*). *See* Albert Blaustein & Andrew Field, *Overruling Opinions in the Supreme Court*, 57 MICH. L. REV. 151 (1958).

[23] CONST. art. VIII, §4(3).

[24] CARDOZO, *supra* note 19, at 23 (1921), *citing* MUNROE SMITH, JURISPRUDENCE 21 (1909).

[25] *Id.* at 19, *citing* Saleilles, DE LA PERSONNALITÉ JURIDIQUE 45; EHRLICH, GRUNDLEGUNG DER SOZIOLOGIE DES RECHTS, 34-5; ROSCOE POUND, PROCEEDINGS OF AMERICAN BAR ASS'N 455 (1919).

[26] *Id.* at 23.

remedies are based on well-defined equitable or jurisdictional grounds.[27] On the other hand, judicial flip-flopping presupposes that the Court takes a final and definitive stand through an opinion that constitutes a judgment on the merits. It is based only on a change in the interpretation of the law by the Supreme Court. In turn, this amounts to *nothing more than a change in the minds of the Justices that comprise the Court.*[28]

The essence of judicial flip-flopping is precisely the "sudden and abrupt reversal" of the Supreme Court's judgment on the merits in the same case. In this regard, the sober analysis of Justice Antonio T. Carpio in his dissent in the April 12, 2011 Resolution in the *League of Cities Cases* fully illustrates the species of cases that fall within the ambit of the term judicial flip-flopping, thus:

> On 18 November 2008, the Court rendered a decision declaring *unconstitutional* the 16 Cityhood Laws. The decision became *final* after the denial of two motions for reconsideration filed by the 16 municipalities. An *Entry of Judgment* was made on 21 May 2009. The decision was *executed* (1) when the Department of Budget and Management issued LBM (Local Budget Memorandum) No. 61 on 30 June 2009, providing for the final Internal Revenue Allotment for 2009 due to the reversion of 16 newly created cities to municipalities; and (2) when the Commission on Elections issued Resolution No. 8670 on 22 September 2009, directing that voters in the 16 municipalities shall vote not as cities but as municipalities in the 10 May 2010 elections. In addition, fourteen Congressmen, having jurisdiction over the 16 respondent municipalities, filed House Bill 6303 seeking to amend Section 450 of the Local Government Code, as amended by Republic Act No. 9009. The proposed amendment was intended to correct the infirmities in the Cityhood Laws as cited by this Court in its 18 November 2008 Decision.
>
> Subsequently, the Court rendered three more decisions: (1) 21 December 2009, declaring the Cityhood Laws *constitutional*; (2) 24 August 2010, declaring the Cityhood Laws *unconstitutional*; and (3) 15

---

[27] *See* Arcelona v. Ct. of Appeals, G.R. No. 102900, 280 SCRA 20, Oct. 2, 1997; Barco v. Ct. of Appeals, G.R. No. 120587, 420 SCRA 173, 181, Jan. 20, 2004; Peña v. Gov't Service Insurance System, G.R. No. 159520, 502 SCRA 383, 404, Sept. 19, 2006. *See also* Angeles & Sacramento, *supra* note 8, at 667-674.

[28] League of Cities of the Phil. v. Commission on Elections, G.R. No. 176951, 648 SCRA 198, 393-9, Apr. 12, 2011, (Abad, *J., concurring*). *See also* Navarro v. Ermita, G.R. No. 180050, 648 SCRA 400, 528-31, Apr. 12, 2011 (Abad, *J., concurring*).

> February 2011 declaring the Cityhood Laws *constitutional*. Clearly, there were three reversals or flip-flops in this case.[29]

C. Judicial Flip-Flopping and the Philippine Supreme Court

In the last decade, the Supreme Court had begun to venture into uncharted jurisprudential territory by choosing to suddenly or abruptly reverse several of its judgments in the same case. In all these judgments, all procedural remedies of the aggrieved parties under the Rules of Court had been exhausted and corresponding entries had been made in the Court's Book of Judgments. Not only were these judgments final and executory, but the fact these judgment lapsed into finality meant there were also vested rights in favor of the prevailing party by operation of law. In such reversals, the Supreme Court cited nothing more than the interests of higher justice. In these cases, the Court had not laid down the justifications comprising these "high interests of justice." As will be discussed below, such reversals were made on the basis of nothing more than the Supreme Court simply changing its mind in the interpretation of a statute and therein, lies hidden the danger behind judicial flip-flopping.

The phenomenon of judicial flip-flopping has occurred in no less than seven cases. The alarming trend is that the decisions in which the Supreme Court has flip-flopped were all decisions of fairly recent vintage.

These cases have provided the bedrock of a new strain of jurisprudence justifying the Supreme Court's purported and unlimited jurisdiction over all cases brought to it, even long after these cases have been resolved by final judgment on the merits. Moreover, the *ratio decidendi* justifying the reversals had been condensed into a rule of procedure modifying the hornbook doctrine of law prohibiting second motions for reconsideration.[30] However, the theoretical underpinnings of this rule are supported by cases with extraordinary or peculiar facts. It is in this regard that the eminent Justice Oliver Wendell Holmes says it best when he said that great cases make bad law:

> For great cases are called great not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what was previously clear seem

---

[29] G.R. No. 176951, 648 SCRA 198, 380-81, Apr. 12, 2011 (Carpio, *J.*, *dissenting*). (Emphasis in the original.)

[30] Internal Rules of the Supreme Court, Rule 15, §3.

> doubtful, and before which even well-settled principles of law will bend.[31]

Cases of judicial flip-flopping provide a good illustration of the extent to which well-settled principles will bend when hydraulic pressure is applied arising from various "immediate interests". The doctrine of finality and immutability of judgment is among those principles that can seemingly be swept aside with ease when its non-application is sought by the "proper" party or circumstances. These considerations are discussed at length in Part IV of this work.

To fully understand the context behind and the inherent dangers of judicial flip-flopping, we must carefully scrutinize the facts of the case and how "final" dispositions were reached. It is upon a critical examination of these "radical" cases that we can extricate the strands of jurisprudence that form the basis for this emerging rule of law granting the Supreme Court with almost unbridled discretion over any dispute brought before it.

For the purpose of brevity, the paper will focus on cases of flip-flopping, other than the well-known *Dinagat Islands*[32] and *League of Cities Cases*,[33] that have not been given due attention in legal literature. There are other cases of judicial flip-flopping that illustrate how pervasive and well-entrenched the tradition of judicial flip-flopping is in our jurisprudence.

D. A Theoretical Basis for Judicial Flip-flopping

The case of *Apo Fruits Corporation v. Court of Appeals*[34] is among the earlier examples of judicial flip-flopping by our Supreme Court. In this case, after the Entry of Judgment had been made, the petitioners still filed the

---

[31] Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, *J.*, *dissenting*).

[32] Navarro v. Executive Secretary, G.R. No. 180050, 612 SCRA 131, Feb. 10, 2010; G.R. No. 180050, 648 SCRA 400, Apr. 12, 2011; G.R. No. 180050, Sept. 11, 2012.

[33] League of Cities in the Philippines, Inc. v. Commission on Elections, G.R. No. 176951, 571 SCRA 263, Nov. 18, 2008; G.R. No. 176951, 608 SCRA 636, Dec. 21, 2009; G.R. No. 176951, 628 SCRA 819, Aug. 24, 2010; G.R. No. 176951, 643 SCRA 149, Feb. 11, 2011; G.R. No. 176951, 648 SCRA 344, Apr. 12, 2011.

[34] G.R. No. 164195, 514 SCRA 537, Feb. 6, 2007 [hereinafter "First Apo Fruits Decision"]; G.R. No. 164195, 541 SCRA 117, Dec. 19, 2007 [hereinafter "First Apo Fruits Resolution"]; G.R. No. 164195, 607 SCRA 200, Apr. 30, 2008 [hereinafter "Second Apo Fruits Resolution"]; G.R. No. 164195, 541 SCRA 117, Dec. 4, 2009 [hereinafter "Third Apo Fruits Resolution"]; G.R. No. 164195, 632 SCRA 727, Oct. 12, 2010 [hereinafter "Fourth Apo Fruits Resolution"]; G.R. No. 164195, 647 SCRA 207, Apr. 5, 2011 [hereinafter "Fifth Apo Fruits Resolution"].

following motions assailing the Court's Resolution that denied their Motion for Reconsideration:

i. Motion for leave to file and admit second motion for reconsideration;

ii. Second motion for reconsideration (with respect to the denial of the award of legal interest and attorney's fees); and

iii. Motion to refer the second motion for reconsideration to the Honorable Court en banc.[35]

Despite the Entry of Judgment, the Second Motion for Reconsideration was still admitted and forwarded to the Court En Banc. Nonetheless, the Supreme Court En Banc, by a vote of 8-6,[36] maintained its stand and denied the second motion for reconsideration, citing the doctrine of immutability of judgments.[37] The Court En Banc also reviewed the facts of the case and made determinations on the merits.[38] It ended with an admonition on the improvident resort to a second motion for reconsideration in an attempt to circumvent the finality of the judgment:

> *Lastly, approving the* second motion for reconsideration *will surely produce more harm than good.* In addition to the costly sacrifice of the long-standing doctrine of immutability, we will thereby be sending the wrong impression that a private claim had primacy over public interest. There are many other landowners who already paid their just compensation by virtue of final judgments, but who may believe themselves still entitled also to claim interest based on the supposed difference between the desired valuations of their properties and the amounts of just compensation already paid to them. *To reopen their final judgments will definitely open the floodgates to petitions for the resurrection of litigations long ago settled. This Court cannot allow such scenario to happen.*[39]

However, the Supreme Court En Banc, on October 12, 2010, would reverse itself later on the very same issue it has already decided; *First*, through its Third Division, and *second*, through the En Banc, which affirmed the Third Division.

---

[35] *Third Apo Fruits Resolution*, 607 SCRA 200.
[36] *Id.* at 223.
[37] *Id.* at 212-3.
[38] *Id.* at 220-21.
[39] *Id.* at 222-3. (Emphasis supplied.)

In its Resolution where it confronted the doctrine of immutability of judgments, the Third Division cited a long line of decisions which purportedly sanctioned exceptions to the rule by allowing the Court to reverse "judgments and [recall] their entries in the interest of substantial justice and where special and compelling reasons called for such actions."[40] These jurisprudential pronouncements were painstakingly enumerated to justify the reversal, as follows:

> Notably, in *San Miguel Corporation v. National Labor Relations Commission*, *Galman v. Sandiganbayan*, *Philippine Consumers Foundation v. National Telecommunications Commission*, and *Republic v. de los Angeles*, we reversed our judgment on the *second* motion for reconsideration, while in *Yir-Jen Shipping and Marine Services v. National Labor Relations Commission*, we did so on a *third* motion for reconsideration. In *Cathay Pacific v. Romillo* and *Cosio v. de Rama*, we modified or amended our ruling on the second motion for reconsideration. More recently, in the cases of *Munoz v. Court of Appeals*, *Tan Tiac Chiong v. Hon. Cosico*, *Manotok IV v. Barque*, and *Barnes v. Padilla*, we recalled entries of judgment after finding that doing so was in the interest of substantial justice.[41]

In justifying the reversal of what had been settled before by the Third Division and the En Banc, the Court placed great reliance on *Barnes v. Padilla*[42] which recognized, among others, that the "merits of the case"[43] are sufficient to warrant the overturning of a final and executory judgment since "rules of procedure should be viewed as mere tools designed to facilitate the attainment of justice" and the application of the rule of finality of judgments if rigidly applied results in "technicalities that tend to frustrate rather than promote substantial justice, must always be eschewed."[44]

The subsequent Resolution of the Court En Banc also directly dealt with the doctrine of immutability of judgments and multiple motions for reconsideration. The Court En Banc declared that these matters depend on the collegial will of the Supreme Court En Banc, which, in turn, is determined by the majority vote upon deliberation of the case. Thus, the Court En Banc explained that the power of the Supreme Court to reverse a final and executory judgment finds constitutional basis in Article VIII, Section 4(2) of the 1987 Constitution:

---

[40] *Fourth Apo Fruits Resolution*, 632 SCRA at 760.

[41] *Id.* at 760-61. (Emphasis in the original; citations omitted.)

[42] 482 Phil. 903 (2004).

[43] *Id.* at 915.

[44] *Fourth Apo Fruits Resolution*, 632 SCRA at 762-3.

The basic rule governing 2nd motions for reconsideration is Section 2, Rule 52 (which applies to original actions in the Supreme Court pursuant to Section 2, Rule 56) of the Rules of Court. This Rule expressly provides:

> Sec. 2. Second Motion for Reconsideration. No second motion for reconsideration of a judgment or final resolution by the same party shall be entertained.

The absolute terms of this Rule is tempered by Section 3, Rule 15 of the Internal Rules of the Supreme Court that provides:

* * *

Separately from these rules is Article VIII, Section 4 (2) of the 1987 Constitution which governs the decision-making by the Court *en banc* of any matter before it, including a motion for the reconsideration of a previous decision. This provision states:

* * *

> (2) All cases involving the constitutionality of a treaty, international or executive agreement, or law, which shall be heard by the Supreme Court *en banc*, and *all other cases which under the Rules of Court are required to be heard en banc*, including those involving the constitutionality, application, or operation of presidential decrees, proclamations, orders, instructions, ordinances, and other regulations, *shall be decided with the concurrence of a majority of the Members who actually took part in the deliberations* on the issues in the case and voted thereon.

Thus, while the Constitution grants the Supreme Court the power to promulgate rules concerning the practice and procedure in all courts (and allows the Court to regulate the consideration of 2nd motions for reconsideration, including the vote that the Court shall require), these procedural rules must be consistent with the standards set by the Constitution itself. Among these constitutional standards is the above quoted Section 4 which applies to "*all other cases which under the Rules of Court are required to be heard en banc*," and *does not make any distinction as to the type of cases or rulings it applies to*, *i.e*, whether these cases are originally filed with the Supreme Court, or cases on appeal, or rulings *on the merits* of motions before the Court. Thus, rulings on the merits by the Court *en banc* on 2nd motions for reconsideration, if

> allowed by the Court to be entertained under its Internal Rules, must be decided with the concurrence of a majority of the Members who actually took part in the deliberations.
>
> When the Court ruled on October 12, 2010 on the petitioners' motion for reconsideration by a vote of 12 Members (8 for the grant of the motion and 4 against), the Court ruled on the merits of the petitioners' motion. This ruling complied in all respects with the Constitution requirement for the votes that should support a ruling of the Court.
>
> Admittedly, the Court did not make any *express* prior ruling accepting or disallowing the petitioners' motion as required by Section 3, Rule 15 of the Internal Rules. The Court, however, did not thereby contravene its own rule on 2nd motions for reconsideration; *since 12 Members of the Court opted to entertain the motion by voting for and against it, the Court simply did not register an express vote, but instead demonstrated its compliance with the rule through the participation by no less than 12 of its 15 Members.* Viewed in this light, the Court cannot even be claimed to have suspended the effectiveness of its rule on 2nd motions for reconsideration; it simply complied with this rule *in a form other than by express and separate voting.*
>
> Based on these considerations, arrived at after a lengthy deliberation, the Court thus rejected Mr. Justice Abad's observations, and proceeded to vote on the question of whether to entertain the respondents' present 2nd motion for reconsideration. *The vote was 9 to 2, with 9 Members voting not to entertain the LBP's 2nd motion for reconsideration.* By this vote, the ruling sought to be reconsidered for the second time was unequivocally upheld; its finality–already declared by the Court in its Resolution of November 23, 2010–was reiterated.
>
> * * *
>
> Thus, this Court mandated a clear, unequivocal, final and emphatic *finis* to the present case.[45]

From the volume of legal verbiage arises three-pronged reasoning that constitutes the theoretical basis to validate cases of judicial flip-flopping by the Supreme Court. To distill its elements, this three-pronged theory may be expressed as follows:

---

[45] *Fifth Apo Fruits Resolution*, 647 SCRA at 214-7. (Emphases in the original.)

(1) Any decision rendered by a Supreme Court Division that has lapsed into finality may be re-opened and retried so long as it is referred to the Supreme Court En Banc, owing to its inherent power to define what kinds of cases it can hear and try En Banc;

(2) That majority of the Supreme Court En Banc is obtained to reopen and reverse a final and executory judgment; and

(3) Reopening of a case and its subsequent reversal is justified so long as the Court is convinced of the merits of the case.

A survey of other cases would show that these are the same theoretical elements relied upon by the Court En Banc to pierce the seal of finality of judgments.

1. The Lu Ym Case: The Unconstitutional Supreme Court Decision

Lu v. Lu Ym[46] involved an intra-corporate dispute within Ludo and Luym Development Corporation ("LLDC"), a family corporation owned by the parties. The case was essentially a derivative suit seeking the declaration of nullity of the issuance of shares of LLDC which were issued for consideration less than their real value, and to place the corporation under receivership as well as its dissolution.[47] What is peculiar here is that in order to justify its turnabout of judgment, the Court En Banc, went to the extent of declaring as unconstitutional the Resolution promulgated by one of its Divisions.[48]

Despite the myriad of issues raised in this case, it was the non-payment of docket fees in which the Supreme Court flip-flopped.[49]

Initially, the trial court rendered judgment annulling the issuance of 600,000 shares of stock of LLDC and ordered its dissolution and liquidation of assets.[50] All issues pertaining to the controversy, both procedural and on its merits, found their way to the Supreme Court and were consolidated therein.

---

[46] G.R. No. 153690, 563 SCRA 254, Aug. 26, 2008 [hereinafter "Lu Ym Decision"]; G.R. No. 153690, 595 SCRA 79, Aug. 4, 2009 [hereinafter "First Lu Ym Resolution"]; G.R. No. 153690, 643 SCRA 23, Feb. 11, 2011[hereinafter "Second Lu Ym Resolution"].

[47] *Lu Ym Decision*, 563 SCRA at 259.

[48] *Second Lu Ym Resolution*, 643 SCRA at 40-41.

[49] *Lu Ym Decision*, 563 SCRA at 263.

[50] *Id.*

In its first Decision dated August 26, 2008, the Supreme Court Third Division held that there was proper payment of docket fees and accordingly, the trial court acquired jurisdiction over the case. The Court held that the nature of the action filed, involving as it did the nullification of the issuance of shares of stock of LLDC, the placement of LLDC under receivership, and LLDC's dissolution were all matters incapable of pecuniary estimation; therefore, the docket fee paid by the David Lu, et al. was proper.[51] Even assuming that the case was capable of pecuniary estimation, the Court held that the non-payment was not tainted with bad faith and an intent to defraud the Government which would have justified the dismissal of the action.[52]

Upon a duly filed Motion for Reconsideration by John Lu Ym, LLDC, et al., however, the Supreme Court Third Division reversed its prior Decision and held that the actions filed with the trial court were capable of pecuniary estimation. Moreover, the Court went further and held that there was bad faith and intent to defraud the Government which justified the dismissal of the complaint in accordance with the *Manchester* doctrine.[53] The Court premised this ruling on the fact that the complainants requested for the annotation of notices of *lis pendens* on properties owned by LLDC, which meant that they were aware that the action filed was a real action, which called for the computation of docket fees based on the value of the property involved in the action.[54] Thus, the Supreme Court Third Division ordered the dismissal of the complaint.

This, however, did not spell the end of the controversy. Aggrieved by the First Lu Ym Resolution, David Lu, et al. filed a Motion for Reconsideration and Motion to Refer Resolution to the Court En Banc, which was denied by the Supreme Court Third Division in a Resolution dated September 23, 2009.[55] Undeterred, David Lu filed a Second Motion for Reconsideration and Motion to Refer Resolution to the Court En Banc. He also filed a "Supplement to Second Motion for Reconsideration with Motion to Dismiss" dated January 6, 2010.[56] On the other hand, John Lu Ym and LLDC filed their Motion for the Issuance of an Entry of Judgment. Various pleadings and incidents were likewise filed by other parties who had joined the action.[57] Instead of denying these prohibited pleadings and issuing an Entry of Judgment in the case, these

---

[51] *Id.* at 276.

[52] *Id.* at 276-9.

[53] *First Lu Ym Resolution*, 595 SCRA at 88-9, *citing* Manchester Development Corp. v. Ct. of Appeals, G.R. No. L-75919, 149 SCRA 562, May 7, 1987.

[54] *Id.* at 90-92.

[55] *Second Lu Ym Resolution*, 643 SCRA at 35.

[56] *Id.*

[57] *Id.*

were all referred to the Court En Banc by a Resolution of the Third Division dated October 20, 2010.[58]

In its Resolution dated February 15, 2011, the Supreme Court En Banc not only took cognizance of all incidents, but proceeded to render judgment on the merits. In justifying this drastic measure, the Court ratiocinated that it was necessary "to resolve all doubts on the validity of the challenged resolutions as they appear to modify or reverse doctrines or principles of law."[59] But what is more extraordinary is the ratiocination of the Court En Banc in holding that the First Lu Ym Resolution had not lapsed into finality because *such Resolution was null and void for being unconstitutional*:

> It is argued that the assailed Resolutions in the present cases have already become final, since a *second* motion for reconsideration is prohibited except for extraordinarily persuasive reasons and only upon express leave first obtained; and that once a judgment attains finality, it thereby becomes immutable and unalterable, however unjust the result of error may appear.
>
> The contention, however, misses an important point. The doctrine of *immutability of decisions* applies only to *final and executory decisions*. Since the present cases may involve a modification or reversal of a Court-ordained doctrine or principle, the judgment rendered by the Special Third Division may be considered unconstitutional, hence, it can never become final. It finds mooring in the deliberations of the framers of the Constitution:
>
> > On proposed Section 3(4), Commissioner Natividad asked what the effect would be of a decision that violates the proviso that "no doctrine or principle of law laid down by the court in a decision rendered *en banc* or in division may be modified or reversed except by the court en banc." The answer given was that *such a decision would be invalid*. Following up, Father Bernas asked *whether the decision, if not challenged, could become final and binding at least on the parties*. Romulo answered that, *since such a decision would be in excess of jurisdiction, the decision on the case could be reopened anytime*. (emphasis and underscoring supplied)

---

[58] *Id.*

[59] *Id.* at 39.

> A decision rendered by a Division of this Court in violation of this constitutional provision would be in excess of jurisdiction and, therefore, invalid. Any entry of judgment may thus be said to be "inefficacious" since the decision is void for being unconstitutional.[60]

More than declaring the Resolutions of a Division of the Supreme Court as unconstitutional, the En Banc went further to assert its broad authority which not only covers the correction of a patent injustice but even "seeming conflict" in the law:

> The law allows a determination at first impression that a doctrine or principle laid down by the court *en banc* or in division *may be* modified or reversed in a case which would warrant a referral to the Court *En Banc*. The use of the word "may" instead of "shall" connotes probability, not certainty, of modification or reversal of a doctrine, as may be deemed by the Court. Ultimately, it is the entire Court which shall decide on the acceptance of the referral and, if so, "to reconcile *any seeming* conflict, to reverse or modify an earlier decision, and to declare the Court's doctrine."
>
> The Court has the power and prerogative to suspend its own rules and to exempt a case from their operation if and when justice requires it, as in the present circumstance where movant filed a motion for leave after the prompt submission of a second motion for reconsideration but, nonetheless, *still within* 15 days from receipt of the last assailed resolution.[61]

These pronouncements of the Court have a tendency to expand rather than limit its prerogative in entertaining motions for reconsideration of final and executory judgments. As will be discussed later on in Part IV, there is an inherent danger when such practice is not only tolerated by the Supreme Court but is actually encouraged by it.

2. The Romualdez Case: Judicial Flip-flopping in Criminal Cases

One of the lesser known cases of judicial flip-flopping is the case of *People v. Romualdez*.[62] It involved the criminal prosecution of Benjamin "Kokoy" Romualdez for a violation of Section 3(e) of the Anti-Graft and Corrupt

---

[60] *Id.* at 40-41. (Emphases in the original.)

[61] *Id.* at 42-3. (Emphases in the original.)

[62] G.R. No. 166510, 559 SCRA 492, July 23, 2008 [hereinafter "Romualdez Decision"]; G.R. No. 166510, 587 SCRA 123, Apr. 29, 2009 [hereinafter "Romualdez Resolution"].

Practices Act.[63] The indictment, which was filed with the Sandiganbayan only on November 5, 2001, charged Romualdez of graft and corruption by securing for himself an appointment as Ambassador while he was concurrently holding the position of Governor of Leyte during the Martial Law Regime of former President Marcos, particularly from 1976 to 1986.[64]

Romualdez moved to quash the indictment claiming that the allegations as pleaded in the information do not constitute an offense. He also argued that criminal liability, if any, had been extinguished by prescription.[65] Under Section 11 of the Anti-Graft Corrupt Practices Act, criminal liability for graft and corruption offenses prescribe after 15 years.[66]His theory was that since he was initially investigated and a complaint had been filed against him before the Presidential Commission on Good Government ("PCGG") in 1987, the prescriptive period began to run as of such date. By the time the indictment was filed with the Sandiganbayan in late 2001, the prescriptive period had already lapsed.[67]

The Sandiganbayan disagreed with the prescription argument, but quashed the information on the ground that the allegations in the information did not constitute an offense for which the accused may be charged.[68] Aggrieved, the Government appealed to the Supreme Court arguing the sufficiency of the indictment against Romualdez.[69] The issue of prescription was not elevated to the Supreme Court.

In its first Decision, the Supreme Court granted the Government's appeal and reinstated the indictment against Romualdez. The Court found that the indictment had sufficiently alleged the elements comprising a charge of graft and corruption under Section 3(e) of the Anti-Graft and Corrupt Practices Act.[70]

---

[63] Rep. Act No. 3019 (1960), § 3 (e) punishes the act of "|c|ausing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of offices or government corporations charged with the grant of licenses or permits or other concessions."

[64] *Romualdez Decision*, 559 SCRA at 496-7.

[65] *Id.* at 497.

[66] § 11.

[67] *Romualdez Decision*, 559 SCRA at 498.

[68] *Id.* at 499-500.

[69] *Id.* at 502.

[70] *Id.* at 513-8.

Aggrieved by the Decision, Romualdez filed a Motion for Reconsideration which was denied in a Minute Resolution dated September 9, 2008.[71] Undaunted, Romualdez filed a second motion for reconsideration which was eventually granted by the Court in its Resolution dated April 29, 2009.[72]

In dismissing the indictment against Romualdez, the Court brought to the fore the issue of prescription, which was not raised in appeal by certiorari to the Supreme Court, and explicitly rejected in the Minute Resolution dated September 9, 2008.[73] In this new Resolution, the Court adopted *in toto* the argument of Romualdez that since the preliminary investigation undertaken and the complaints filed by the PCGG were declared null and void, there was nothing that tolled the prescription period for the offense.[74] Considering that the ground for dismissal was premised on prescription, the Resolution dated April 29, 2009 amounted to an acquittal of Romualdez of the crime charged and foreclosed any future possible criminal prosecution by the Government against him.

The Court's reversal drew stinging criticism from the Court's minority led by Justice Antonio T. Carpio and Justice Arturo D. Brion who submitted individual dissenting opinions. Justice Carpio disagreed that there was substantial basis for concluding that prescription had set in. He opined that the delay in the filing of the indictment was attributable to a voluntary act on the part of Romualdez since he was outside the Philippines from 1986 to April 2000.[75] Thus, Justice Carpio concluded that the majority's judgment gravely hampered the State's effort to effectively prosecute criminal offenses; effectively, all that a person accused of an offense punished by a special law needs to do is to leave the Philippines and wait out the prescriptive period.[76]

Justice Brion's dissent hammered on the procedural aspect of the Court's decision. Apart from castigating the Court in granting relief that is improper in certiorari proceedings,[77] he emphasized the inherent danger to the rule of law of allowing improvident reversals of judgment by the Supreme Court which is only bound by its sense of self-restraint:

---

[71] *Romualdez Resolution*, 587 SCRA at 132.
[72] *Id.* at 137.
[73] *Id.* at 132.
[74] *Id.* at 133-4.
[75] *Id.* at 138 (Carpio, *J.*, *dissenting*).
[76] *Id.* at 144.
[77] *Id.* at 146-53 (Brion, *J.*, *dissenting*).

A glaring feature of the majority's ruling that cannot simply be dismissed is that the majority ruled in favor of an exception to a prohibition against a Second Motion for Reconsideration. The prohibition is an *express rule* in the Rules of Court, not one that has been derived from another rule by implication. *Basic fairness* alone demands that exceptions from the prohibition should likewise be express, not merely implied. Any exception that is merely implied and without the benefit of any specific standard is tantamount to an *exception at will that is prone to abuse and even to an attack on substantive due process grounds. This case and its short-cut in ruling on the prescription issue is the best example of the application of an exception at will. To repeat a statement already made above, the majority ruling does not clearly show how and why the exception to the prohibition against second motions for reconsideration was allowed.*

A separate problematic area in the suspension of the rules is the Court's approach of suspending the prohibition against a second motion for reconsideration on a case-to-case basis – a potential ground for a substantive due process objection by the party aggrieved by the suspension of the rules. Given what we discussed above about the lack of clear standards and the resulting *exception at will* situation, the litigating public may ask: *is the Court's declaration of the suspension of the rules an infallible ex cathedra determination that a litigant has to live with simply because the Highest Court in the land said so?* Without doubt, it cannot be debatable that the due process that the Constitution guarantees can be invoked even against this Court; we cannot also be immune from the grave abuse of discretion that Section 1, Article VIII speaks of, despite being named as the entity with the power to inquire into the existence of this abuse.

In light of the plain terms of Rule 52, Section 2, of the Rules of Court, the litigating public can legitimately rephrase its question and ask: *what is to control the discretion of the Supreme Court when it decides to act contrary to the plain terms of the prohibition against second motions for reconsideration?* If we in this Court are the guardians of the Constitution with the power to inquire into grave abuse of discretion in Government, the litigating public may ask as a follow-up question: are the guardians also subject to the rules on grave abuse of discretion that they are empowered to inquire into; if so, *who will guard the guardians?*

The *ideal* short and quick answer is: *the rule of law*. But for now, in the absence of any clearcut exception to the prohibition against a second motion for reconsideration, the guardians can only police themselves and tell the litigating public: *trust us*. In this sense, the burden is on this Court to ensure that any action in derogation of the express prohibition against a second motion for reconsideration is a legitimate and completely defensible action that will not lessen

> the litigating public's trust in this Court and the whole judiciary as guardians of the Constitution. *Have we discharged this burden in the present case?* After our previous unanimous rulings and under the terms of the present majority's ruling, I sadly conclude that we have not.[78]

It can be readily gleaned that the Supreme Court has well-nigh unbridled authority in so choosing to entertain and re-open a final and immutable judgment. In this regard, the impact of cases involving judicial flip-flopping on the rule of law is essential and will be treated at length later on at Part IV of this work.

3. The Keppel Cebu Shipyard, Inc. Case: The Future of Judicial Flip-flopping

The case of *Keppel Cebu Shipyard, Inc. v. Pioneer Insurance and Surety Corp.*,[79] is one of the more recent examples of judicial flip-flopping. This case involved a claim by an insurance company for compensation upon subrogation following the loss of a ship while it was being repaired in the drydock of Keppel Cebu Shipyard, Inc. ("KCSI"). The ship, known as M/V Superferry 3, was owned by WG&A Jebsens Shipmanagement, Inc. ("WG&A"). On January 26, 2000, WG&A and KCSI entered into a Shiprepair Agreement in which KCSI undertook to renovate and reconstruct M/V Superferry 3 to comply with safety and security rules and regulations. However, on February 8, 2000, the M/V Superferry 3 was gutted by fire.[80] The ship was by Pioneer Insurance and Surety Corp. ("Pioneer") for the amount $8,472,581.78. Declaring a total constructive loss, WG&A filed an insurance claim with Pioneer which it paid on June 16, 2000.

Seeking to recover the amount it paid to WG&A, Pioneer initiated arbitration proceedings against KCSI with the Construction Industry Arbitration Commission ("CIAC") on August 7, 2000 after demands for payment were ignored by the latter. During the arbitration proceedings, an amicable settlement was forged between KCSI and WG&A. Pioneer, thus,

---

[78] *Id.* at 156-9. (Emphases in the original.)

[79] Keppel Cebu Shipyard, Inc. v. Pioneer Insurance Corp., G.R. No. 180881, 601 SCRA 96, Sept. 29, 2009, [hereinafter "Keppel Decision"]; June 7, 2011 (unreported), *available at* http://sc.judiciary.gov.ph/jurisprudence/resolutions/2011/june2011/180880-81.pdf (last accessed Apr. 26, 2017) [hereinafter "First Keppel Resolution"]; Sept. 18, 2012, 681 SCRA 44, *available at* http://sc.judiciary.gov.ph/jurisprudence/2012/september2012/180880-81.pdf (last accessed Apr. 26, 2017) [hereinafter "Second Keppel Resolution"].

[80] *Keppel Decision*, 601 SCRA at 103-105.

stayed on as the remaining claimant.[81] On October 28, 2002, the CIAC rendered a Decision finding both WG&A and KCSI guilty of negligence which resulted in the loss of M/V Superferry 3 by fire. However, the CIAC ruled that, in view of a limited liability clause in the Shiprepair Agreement, the total amount of liability was limited only to 50 million pesos. Therefore, KCSI was ordered to pay Pioneer 25 million pesos with annual interest of 6% from the time of the filing of the case up to the time the decision was promulgated, and 12% interest per annum added to the award, or any balance thereof, after it would become final and executory.[82]

Both Pioneer and KCSI filed an appeal to the Court of Appeals. Initially, the Court of Appeals, in a Decision dated December 17, 2004, absolved KCSI of all liability and ordered the dismissal Pioneer's claims.[83] However, on reconsideration, the Court of Appeals reinstated the CIAC award but deleted the payment of legal interest to Pioneer.[84]

This set the stage for the appeal to the Supreme Court. In a Decision dated September 25, 2009, the Supreme Court Third Division, speaking through Justice Nachura, found that KCSI was *solely* liable for the loss of the vessel.[85] More importantly, the Court declared the limited liability clause in favor of KCSI as null and void for being unfair, inequitable, and contrary to public policy.[86] Accordingly, the Court ordered KCSI to pay Pioneer the total amount claimed of 360 million pesos less the salvage recovery value of the vessel amounting to 30,252,648.09 pesos for a total of 329,747,351.91 pesos with legal interest.[87]

Initially, KCSI filed a motion for reconsideration with a request that the case be set for oral arguments. This was, however, denied in a Resolution dated June 21, 2010. Unfazed, KCSI filed its Second Motion for Reconsideration to Refer to the Court En Banc and for Oral Arguments coupled with a letter dated July 30, 2010.[88] These were all denied in a Resolution dated October 20, 2010. Accordingly, the Court issued an order for Entry of Judgment on November 4, 2010, stating that the decision in these cases had become final and executory.[89]

---

[81] *Id.* at 108.
[82] *Id.* at 118-9.
[83] *Id.* at 119.
[84] *Id.* at 120.
[85] *Id.* at 127-136
[86] *Id.* at 142-4.
[87] *Id.* at 145.
[88] *First Keppel Resolution*, at 1.
[89] *Second Keppel Resolution*, at 7.

Despite these developments, KCSI, on November 23, 2010, would effectively file its third motion for reconsideration in this case which was captioned as "Motion to Re-Open Proceedings and Motion to Refer to the Court En Banc." Essentially, the motion argued that KCSI was denied due process as it was adjudged to be negligent when, in fact, the records of the case had not been elevated from the CIAC. More importantly, KCSI invoked Rule 2, Section 3(n) of the Internal Rules of the Supreme Court allowing the Court En Banc "to act on matters and cases including those 'cases that the Court En Banc deems of sufficient importance to merit its attention.'"[90] KCSI, however, did not merely stop there. On December 13, 2010, it filed a Supplemental Motion (to the Motion to Re-Open Proceedings and the Motion to Refer to the Court En Banc) this time assailing the Supreme Court Third Division's ruling nullifying the limited liability clause.[91] All in all, the pending motions filed by KCSI requested for the complete re-opening of the case.

Despite the fact that all said motions were all barred by the rule on finality and immutability of judgments as well as the lack of a compelling public interest issue, the Supreme Court Third Division granted the referral of the case to the En Banc. Then came the Resolution dated June 11, 2011 by the Court En Banc, where the Court gave due course to the recall of the Entry of Judgment and the re-opening of the issues of the case as requested by KCSI. In a blasé Resolution, the Court En Banc granted an extraordinary remedy in favor of a private party, thus:

> There are serious allegations in the petition that if the decision of the Court is not vacated, there is a far-reaching effect on similar cases already decided by the Court. Thus, by a vote of 4 to 1 in the Second Division that rendered the decision, the case was elevated to the *En Banc* for acceptance, in accordance with the Internal Rules of the Supreme Court, particularly Section 3 (n), Rule 25 thereof which states that the Court *en banc* can act on matters and cases that it deems of sufficient importance to merit its attention. In regard to this matter, ten (10) members, or two-thirds of the Court *en banc,* voted to grant KCSI's Motion to Refer to the Court *En Banc* its Motion to Re-Open Proceedings, while three (3) members dissented and two (2) members did not take part.[92]

Thereafter on September 18, 2012, the Supreme Court En Banc issued a Resolution modifying its earlier but final judgment in this case. While maintaining that KCSI was negligent in its actions, it reduced the award from

---

[90] *First Keppel Resolution*, at 2-3.

[91] *Id.* at 3-4.

[92] *Id.* at 4-5.

329,747,351.91 pesos to 50 million pesos by upholding the limited liability clause of the Shiprepair agreement.[93]

What is most interesting in this case is that despite the fact that the Supreme Court had twice denied reconsideration of its original decision, the recall of the Entry of Judgment was premised solely on "serious allegations in the petition that if the decision of the Court is not vacated, there is a far-reaching effect on similar cases already decided by the Court."[94] The "serious allegation" referred only to the provision on limited liability in the Ship Repair Agreement between KCSI and Pioneer where KCSI's liability for damages arising from the contract was limited only to 50 million pesos. This provision was declared void and ineffectual by the Supreme Court in its Decision dated September 25, 2009 for being contrary to public policy. The issue, however, being one of *stare decisis*, was one that was not barred by reversal in a proper case elevated to the Court in the near future.

Moreover, the case was peculiar as it had the Court En Banc go at lengths to explain its actions and indirectly appeal to the trust of the public to sanction the reversal. Thus, the Court went on to say:

> It bears mentioning, however, that when the Court *En Banc* entertains a case for its resolution and disposition, it does so without implying that the Division of origin is incapable of rendering objective and fair justice. The action of the Court simply means that the nature of the cases calls for *en banc* attention and consideration. Neither can it be concluded that the Court has taken undue advantage of sheer voting strength. It is merely guided by the well-studied finding and sustainable opinion of the majority of its actual membership that, indeed, the subject case is of sufficient importance meriting the action and decision of the whole Court. It is, of course, beyond cavil that all the members of the Highest Court of the land are always imbued with the noblest of intentions in interpreting and applying the germane provisions of law, jurisprudence, rules and resolutions of the Court to the end that public interest be duly safeguarded and the rule of law be observed.[95]

---

[93] *Second Keppel Resolution*, at 18-23. *See also First Keppel Resolution*, at 5-14.

[94] *First Keppel Resolution*, at 4.

[95] *Second Keppel Resolution*, at 11-12.

This dictum is in contrast to the scathing dissents of Justice Brion[96] against the Resolutions dated June 7, 2011 and September 18, 2012 in which he wrote:

> In acting as it did, the Court violated the most basic principle underlying the legal system – the immutability of final judgments – thereby acting without authority and outside of its jurisdiction. It grossly glossed over the violation of technical rules in its haste to override its own final and executory ruling.[97]

This case, however, is ultimately disconcerting for not only does it tolerate but it promotes the line of jurisprudence of judicial flip-flopping as a binding tradition that legitimates this practice by the Court. In sidestepping the argument of immutability of judgments, the Supreme Court cited the cases of *Apo Fruits, League of Cities of the Philippines*, and the *Dinagat Island* case. In effect, the Court not only lengthened the litany of cases earlier cited in *Apo Fruits* but sanctioned the frequent reliance on such precedents to further flip-flop on cases pending before its docket.

The continuing reliance on these cases will not only encourage the spawning of future incidents of judicial flip-flopping but will also strain and weaken the principle of finality and immutability of judgments. Beyond being a mere procedural rule or technicality, it is asserted that the finality and immutability of judgments is the bedrock upon which the judicial resolution of disputes rest. As will be explained later, to allow the Supreme Court to erode the basis of its authority has dire ramifications not only on itself as an institution of Philippine democracy, but our Government in general.

E. Judicial Flip-flopping in the United States Supreme Court

In this day and age, even a practice as peculiar as judicial flip-flopping finds basis in precedents.[98] There are decisions promulgated by the Supreme Court of the United States which are useful for a comprehensive understanding

---

[96] Coincidentally, Justice Brion was the ponente for the Supreme Court En Banc in the earlier cases of judicial flip-flopping, namely *Apo Fruits* and *In re* Letters of Atty. Estelito P. Mendoza.

[97] *Second Keppel Resolution*, at 3.

[98] The earliest instance of judicial flip-flopping by the Philippine Supreme Court was Republic v. De los Angeles, G.R. No. L-26112, 41 SCRA 422, Oct. 4, 1971, in which the Supreme Court reversed on second motion for reconsideration its prior decision dated May 31, 1965. The case involved a dispute over the ownership of certain fishponds which was being claimed by Ayala y Cia and Alfonso Zobel.

of judicial flip-flopping and its consequences in jurisprudence. A study of these cases show that jurisprudential anomalies spring forth from miniscule excesses made in the name of justice which acquiescence and tolerance cloak with a facade of legitimacy.

1. Motion for Recall of Entry of Judgment: The Case of Cahill v. New York, New Haven & Hartford Railroad Co.

The first case in which the United States Supreme Court overturned its own judgment even after the issuance of an Entry of Judgment is the 1956 case of *Cahill v. New York, N. H. & H. R. Co.*[99] This case was extraordinary for not only was the reversal occasioned by a remedy that is neither sanctioned nor recognized by the rules of procedure of the Court, it was justified by nothing more than a perceived error in the final judgment.[100]

The case involved an action filed by Cahill for injuries sustained while working as a railroad brakeman for the railroad company. After trial, the jury returned a verdict for Cahill. It found the railroad company negligent in sending him to work in a dangerous place without warning him of prior accidents. The Court of Appeals reversed on the ground that the evidence was insufficient to support the verdict.[101] Initially, the Supreme Court granted certiorari and reversed the Court of Appeals.[102] The railroad company then filed a petition for rehearing premised on the erroneous admission of evidence by the district court, an issue not passed upon by the Court of Appeals. The Supreme Court denied the petition for rehearing[103] after which the district court ordered the execution of the judgment. The railroad company paid Cahill, but it nevertheless notified him of its intent to pursue remedies. The railroad company then filed a motion to recall and amend the judgment raising again its arguments in the petition for rehearing.[104]

Despite the earlier rejection of such contention, the United States Supreme Court, by a vote of 5-4,[105] granted the motion to recall the judgment. In so doing, the Court merely stated that "[w]e deem our original order

---

[99] 351 U.S. 183 (1956) [hereinafter "Third Cahill Decision"].

[100] *Id.* at 184.

[101] *Id.* at 184-5.

[102] Cahill v. New York, N. H. & H. R. Co. [hereinafter "First Cahill Decision"], 350 U.S. 898 (1956).

[103] Cahill v. New York, N. H. & H. R. Co. [hereinafter "Second Cahill Decision"], 350 U.S. 943 (1956).

[104] *Third Cahill Decision*, 351 U.S. at 183.

[105] *Id.* Justice Black filed a dissenting opinion. He was joined by Chief Justice Warren and Justices Douglas and Clark.

erroneous and recall it in the interest of fairness"[106] as reason for the reversal. Despite the fact that the judgment had been satisfied, the United States Supreme Court ruled that the grant of relief was proper by "remanding the cause to the Court of Appeals for the Second Circuit for further proceedings."[107]

The Supreme Court's straightforward disregard of its own rules was met by the lucid dissent of Justice Hugo Black. He pointed out that the motion to recall judgment, which had been given special treatment, was nothing more than a rehash of the petition for rehearing earlier rejected:

> The railroad's present 'motion to recall' presents precisely the same contention which was raised in its petition for rehearing. We are asked once more to remand the case to the Court of Appeals for the Second Circuit for that court to determine whether there was error in admitting the evidence of prior accidents. Thus the 'motion to recall' turns out to be a petition for rehearing of a former petition for rehearing. Or, in somewhat plainer language, the motion to recall turns out to be a second petition for rehearing. [...] What is in fact a second petition for rehearing should not be received simply because it is labeled a 'motion to recall.'
>
> * * *
>
> Thus, assuming that the point raised here was overlooked originally, it was correctly raised in the first petition for rehearing and that should end the matter if this Court's Rule 58(4) is to be followed.[108]

Rehearing was a common remedy in the English courts of chancery. It was devised to cure the need for review of the decisions of a court of chancery where no appeal can be made to a higher court since there was no higher body to hear appeals when the Chancellor erred.[109] In rehearing, the litigant does not need to show any kind of error in the judgment; he needs only to show that rehearing must be resorted to in order to achieve the "most 'just' justice

---

[106] *Id.* at 184.

[107] *Id.* at 183.

[108] *Id.* at 185-6.

[109] Ronan Degnan & David Louisell, *Rehearing in American Appellate Courts*, 34 CAN. B. REV. 898, 903-904 (1956). *See also* 9 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 372-3 (1926).

possible."[110] The availability of rehearing in American courts was a necessary consequence of the United States' adoption of the common-law tradition.[111]

Rehearing is the only remedy available to litigants from a wrong judgment of the United States Supreme Court. As a court of last resort, rehearing is the "means by which [the Supreme Court] can admit and correct its misjudgment." [112] Rehearing works within the jurisdictional and the procedural framework which recognizes the role of the Court as both of law and equity. The rule on rehearing is, therefore, subject to the rule on finality of judgments. The Court may only reconsider a decision, and correct and revise a previously expressed opinion before finality of judgment had set in.[113] In this context, the remedy of rehearing is closely akin to a motion for reconsideration allowed under our Rules of Court.[114]

As pointed out by Justice Black, it was precisely the function of rehearing to correct any remaining errors in the judgment of the Court, whether patent or latent.[115] But even more, the dissent hints at one of the inherent evils behind judicial flip-flopping—the purported plenary power of the Supreme Court to disregard its own rules. For while the law or even the Constitution grants the Supreme Court the power to promulgate its own rules of procedure, the existence of rules acts as a restraint such that any act falling beyond the purview of said rules is considered *ultra vires*.[116] It is, therefore, ineffectual for being beyond the power of the Court to act upon much less resolve, and any action by the Court thereon is void.

2. Rehearing Sua Sponte: The Case of United States v. Ohio Power Co.

One of the most well-documented cases of judicial flip-flopping is that of *United States v. Ohio Power Co.*[117] In that case, the United States Supreme Court granted rehearing *sua sponte* even after it had already rendered final judgment resolving the case on its merits. After rehearing, the Supreme Court rendered judgment reversing its prior denial of certiorari as well as the final

---

[110] Krimbel, *supra* note 6, at 930.

[111] *Id.* at 929.

[112] *Id.* at 930.

[113] *Id.* at 929, 932-3. *See also* Brown v. Apsden, 55 U.S. (14 How.) 25, 28 (1852); Bronson v. Schulten, 104 U.S. 410, 416 (1881).

[114] Rules of Court, Rule 54 (1997). *See also* Internal Rules of the Supreme Court, Rule 15, §2 (2010).

[115] *Third Cahill Decision*, 351 U.S. at 186.

[116] *Id.* at 186-8.

[117] 353 U.S. 98 (1957) [hereinafter "Ohio Power"].

judgment of the lower court.[118] The case has been criticized as "an extreme in the Court's exercise of its inherent power over its judgments" as the "Court's purpose was not to clarify or correct a previous order or to expedite a continuing litigation but to reconsider the case on the merits."[119] The swirl of controversy revolved around the rehearing taken at the initiative of the Supreme Court not simply after rendition of judgment, but more than a year since promulgation of judgment on the merits. Moreover, the reversal came after the United States Supreme Court had denied the Government's two petitions for rehearing.[120]

Nevertheless, the United States Supreme Court eventually vacated its own order at its own initiative. The case was reinstated to the Court's calendar and decided on April 1, 1957 with the United States Supreme Court overturning its judgment against the Government. The basis for the sudden reversal was the discordance of the Court of Claims' judgment in at least two cases[121]previously decided upon by the United States Supreme Court involving the same question of law.[122] In so ruling, the Court declared that "interest in finality of litigation must yield when the interests of justice would make unfair the strict application of the Rules of this Court."[123]

Despite the lofty reference to upholding the interests of justice as against procedural and technical niceties, the grant of rehearing *sua sponte* and the eventual reversal of the prior matter adjudged had been the subject of much criticism. Justice Harlan wrote a brief but emphatic dissent. He characterized the "overturning (of) the judgment of the Court of Claims in this case, nearly a year and a half after we denied certiorari, and despite the subsequent denial of two successive petitions for rehearing" as "so disturbing a departure from what I conceive to be sound procedure that I am constrained to dissent."[124] Harlan further admonished the Court for the manner by which the resolution of the case was reached as it constituted a precedent that would render "finality of adjudication in this Court ultimately [depend] on the Court's self-restraint."[125] If that is the case, therefore, there are few if any strictly legal

---

[118] *Id.*

[119] *Judgment Reopened Six Months After Supreme Court Barred Rehearing on Denial of Certiorari*, 58 COLUM. L. REV. 265, 267 (1958).

[120] *See* United States v. Ohio Power Co., 350 U.S. 919 (1955) and United States v. Ohio Power Co., 351 U.S. 958 (1956).

[121] *United States v. Allen-Bradley Co.*, 352 U.S. 306 (1957) and *National Lead Co. v. Commissioner*, 352 U.S. 313 (1957).

[122] *Ohio Power*, 353 U.S. at 98-9.

[123] *Id.* at 99.

[124] *Id.*

[125] *Id.* at 104.

limits on the Supreme Court's power to reopen cases that have been resolved for years.[126]

3. Successive Petitions for Rehearing: The Case of Gondeck v. Pan American World Airways, Inc.

As noted earlier, the problem with even a single instance of judicial flip-flopping is that it becomes a precedent which can then provide the necessary impetus for a snow-balling effect that justifies subsequent flip-flops. This was exactly what happened in what has been termed as the most famous case of judicial flip-flopping by the United States Supreme Court.[127] In *Gondeck v. Pan Am. World Airways*,[128] the Court granted a petition for rehearing after certiorari[129] and a prior petition for rehearing[130] had been denied by the Court. More importantly, the grant of rehearing *de novo* came more than three years from the denial of certiorari.

The case was a claim under the Longshoremen's and Harbor Workers' Compensation Act which provided for death benefits to workmen who were required to be on call even when off duty in cases of emergencies. The petitioner's husband was killed in an accident just outside a United States defense base in San Salvador. The victim, together with his companions, was killed while on his way back to the base from a nearby town. The United States Department of Labor initially granted the claim for death benefits but was reversed by the Federal District Court on review. The Court of Appeals for the Fifth Circuit affirmed the reversal thus, prompting the recourse to the Supreme Court.[131]

Initially, the United States Supreme Court denied certiorari. A subsequent petition for rehearing was likewise denied. Meanwhile, the grant of death benefits to the survivors of other employees who died in the same accident was sustained by the Court of Appeals for the Fourth Circuit and the United States Supreme Court.[132] This prompted the United States Supreme Court to reverse itself in resolving the second petition for rehearing filed in the case. The Court held that notwithstanding the prohibition against consecutive

---

[126] Aaron-Andrew P. Bruhl, *When is Finality… Final? Rehearing and Resurrection in the Supreme Court*, 12 J. APP. PRAC. & PROCESS 1, 5-6 (2011). *See also Judgment reopened six months after Supreme Court barred rehearing on denial of certiorari*, 58 COLUM. L. REV. 265, 267 (1958).

[127] Bruhl, *supra* note 126, at 10.

[128] 382 U.S. 25 (1965) [hereinafter "Gondeck"].

[129] Gondeck v. Pan Am. World Airways, 370 U.S. 918 (1962).

[130] Gondeck v. Pan Am. World Airways, 371 U.S. 856 (1962).

[131] *Gondeck*, 382 U.S. at 26.

[132] *Id.*

petitions for rehearing, "the interests of justice would make unfair the strict application of our rules."[133] The Court then, by a vote of 7-1-1, disposed of the matter by allowing the grant of death benefits to the petitioner.[134]

While the equities in this case were clearly stronger, the grant of rehearing relied heavily on *Cahill* and *Ohio Power*. Justice Harlan again filed a dissent premised on the lack of a compelling reason to justify the reversal of a final denial of certiorari more than three years after denial.[135] More importantly, it was the very fact that the grant of rehearing relied on *Cahill* and *Ohio* as precedents that impelled Justice Harlan to characterize the decision as holding "seeds of mischief for the future orderly administration of justice."[136]

4. The Present and Future of Judicial Flip-flopping in the United States

Apart from the abovementioned cases, no other incidents of judicial flip-flopping had been observed.[137] If at all, the lack of subsequent instances of judicial flip-flopping is attributable to no other than the Court's own self-restraint. The United States Supreme Court's exercise of self-restraint appears to have been attributable, by and large, to the immense threat posed by repeated use of such power on the legitimacy of the Court as an institution of Government. As Justice Harlan put it, judicial flip-flopping indeed holds the "seeds of mischief for the future orderly administration of justice."[138] This matter deserves a lengthier discussion at a later portion of this work.

II. THE SUPREME COURT AS AN INSTITUTION

In the critique of cases of judicial flip-flopping, it is necessary to backtrack a bit and re-examine the legal framework in which the subjects play a distinct role. In this matter, a deeper understanding of the Supreme Court is necessary to fully grasp the juridical consequences of a flip-flopping judiciary.

---

[133] *Id.* at 27.

[134] *Id.* at 28.

[135] *Id.* at 30 (Harlan, *J.*, *dissenting*).

[136] *Id.* at 31.

[137] In April 2011, the Court granted a stay of execution and simultaneously granted leave to file an untimely petition for rehearing in *Foster v. Texas*, 131 S. Ct. 1848 (2011), but the petition for rehearing thus filed was dismissed barely a month later in 131 S. Ct. 2951 (2011).

[138] *Gondeck*, 382 U.S. at 31 (Harlan, *J.*, *dissenting*).

A. As the Third Branch of Government

Upon securing liberty from the British Crown, the people of the thirteen colonies that would later become the United States of America sought the establishment of a Government that prevents the concentration of sovereign powers to a person or group of persons. Such government is to exist under the regime of the rule of law that abhors the emergence of absolute power through the union of all powers of government.

The Supreme Court has been envisioned as a total and independent branch of government equal to Congress and the Executive. By ordaining the Constitution and the power structure it embodies, it is the coalesced sovereign will of the People that a Supreme Court and judiciary be established. It was to be instrumental in building a just and humane society and secure the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace.[139]

Likewise tasked as the head of the judiciary, the Philippine Supreme Court sits at the apex of the judicial hierarchy and, as such, reigns supreme. All courts, tribunals and administrative bodies exercising quasi-judicial functions are obliged to conform to its pronouncements. In the words of Justice J.B.L. Reyes, "[t]here is only one Supreme Court from whose decisions all other courts should take their bearings."[140]

B. Herald of the Final Word on Questions of Law and the Constitution

The Supreme Court of the United States was envisioned as an entity of last resort to produce uniformity in ascertaining the true meaning of laws as well as their operation.[141] Thus, Oliver Wendell Holmes once wrote that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law."[142] Chief Justice Hughes takes it farther when he says "we are under a Constitution, but the Constitution is what judges say it is[.]"[143]

---

[139] CONST. prmb., art. VIII. *See also* CONST. (1935), prmb.; ROBERT JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 10 (1955).

[140] Albert v. Ct. of First Instance of Manila, G.R. No. L-26364, 23 SCRA 948, 961, May 29, 1968.

[141] Alexander Hamilton, The Federalist No. 22 (Dec. 14, 1787), *available at* http://thomas.loc.gov/home/histdox/fed_22.html (last accessed Apr. 26, 2017).

[142] OLIVER WENDELL HOLMES, JR., THE PATH OF THE LAW 461.

[143] CHARLES HUGHES, ADDRESSES 139 (1908), *cited in* William Rehnquist, *The Notion of a Living Constitution*, 29 HARV. J.L. & PUB. POL'Y 401.

Uniformity of judgments is a vital consideration in the establishment of one Supreme Court, particularly in a federal state like the United States. Thus, Alexander Hamilton expounded on the dangers of confusion that may arise from contradictory decisions:

> And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are both indispensable. If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts but the judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.[144]

The role of the Philippine Supreme Court is identical to that of the United States Supreme Court. In the same way that the United States Supreme Court is important simply because it has the disposition of the last possible appeal, wherever the question may originally have arisen,[145] the Philippine Supreme Court enjoys the same mandate.[146]

C. The Mystic Function of the Supreme Court

Professor Charles L. Black, Jr. advanced the theory that the Supreme Court performs the essential function of legitimating the actions of government. This function is performed largely through the exercise of the power of judicial review. However, it can be argued that this function is not limited solely to the latter but extends to the exercise of judicial power in general. Professor Alexander Bickel calls this the "mystic function" which is among the fundamental justifications advanced for judicial review.

In building his theory, Professor Black argues that the existence of government is premised on a feeling of legitimacy from its citizenry.[147] This is

---

[144] Hamilton, *supra* note 141.

[145] CHARLES BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 11 (1960).

[146] CIVIL CODE, art. 8. *See also* Kilosbayan, Inc. v. Manuel Morato, G.R. No. 118910, 246 SCRA 540, 613, July 17, 1995, *citing* Caltex (Philippines), Inc. v. Palomar, G.R. No. L-19650, 18 SCRA 247, Sept. 29, 1966.

[147] BLACK, JR., *supra* note 145, at 37.

the "heart of the democratic faith [which] is government by the consent of the governed."[148] Thus, legitimacy is measured through the stability of a good government over time and is the fruit of consent to specific actions or to the authority to act; the consent to the exercise of authority, whether or not approved in each instance, of a present majority.[149]

Problems that confront the government of limited powers are intricate and perplexing, as it faces the task of maintaining among its citizens an adequately strong feeling of the legitimacy of its measures. It is important to ensure their authentic governmental character as distinguished from their debatable policy and wisdom[150] for it is inherent in government that it must continually generate discontent. Its business, in all its branches, is to mediate and judge conflicting claims.[151] In this case, there must be a body that can be relied upon to settle such conflicting claims both consistently and reliably to ensure that the government is granted legitimacy, or at the very least a perception of legitimacy by its people.

It is in this context that the Supreme Court's role has paramount importance. The Court, throughout its history, has acted as the legitimator of the government. Indeed, the Government of the United States is based on the opinions of the Supreme Court.[152] For the Philippines, this legitimating function is exercised by our Supreme Court and is expressed along the lines of judicial supremacy as declared in *Angara v. Electoral Commission*[153] in which Justice Jose Laurel drew in broad strokes the Philippine Supreme Court's own mystic function.[154]

The foregoing clearly establishes the important role of the Supreme Court in the Philippine legal system. It is not simply a court of law tasked with the resolution of disputes. In the development of Philippine jurisprudence, it

---

[148] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 27 (2nd Ed.).

[149] *Id.* at 30.

[150] BLACK, JR., *supra* note 145, at 42.

[151] *Id.*

[152] *Id.* at 52.

[153] 63 Phil. 139 (1936).

[154] "The Constitution is a definition of the powers of government. Who is to determine the nature, scope and extent of such powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way. And when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but *only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them.*" *Id.* (Emphasis supplied.)

has assumed the role of legitimator of governmental actions by mediating between the Government and the governed and determining constitutional and legal boundaries as well breaches or violations thereof. This role has manifested itself time and time again in times of political or social disquietude in which the Supreme Court has proven itself instrumental in balancing order and the welfare of society on one hand and the rule of law in the other. This matter deserves an extended discussion later.

III. THE MYTH OF INFALLIBILITY OF THE SUPREME COURT

Litigants file complaints or petitions before municipal or regional trial courts. They then experience the rigors of trial by attending hearings and securing court documents and transcripts. When the judgment of the trial court is rendered, reference is made to a cryptic ruling by the Supreme Court which is decisive of the case. When the case is elevated to the appellate court, there is little, if at all, participation by litigants as pleadings and briefs are usually filed by their respective attorneys. Finally, when the case reaches the Supreme Court, a final adjudication is reached through the final pronouncement laid down by the Court, whether by Division or the En Banc. At that point, can it be said the decision was final because it was correct or it was correct simply because it was final?

A. The Scorer's Discretion and Saying What the Law Is

The ideal of the administration of justice requires the realization of the former scenario, that a final resolution of a controversy or dispute is achieved because of a just and correct adjudication thereof. In this regard, the conceptualization of the Philippine Supreme Court is the real-life counterpart of the H.L.A. Hart's theory of a scorer with the ultimate scorer's discretion.

Following Hart's theory, the Supreme Court is and ought to be a "supreme tribunal [that] has the last word in saying what the law is and, when it has said it, the statement that the court was 'wrong' has no consequences within the system[.]" [155] For Hart's system of an instituted scorer, "the institution of a scorer whose rulings are final, brings into the system a new kind of internal statement; for unlike the players' statements as to the score, the scorer's determinations are given, by secondary rules, a status which renders

[155] H.L.A. HART, THE CONCEPT OF LAW 141 (3rd Ed., 1994).

them unchallengeable."[156] It is in this sense that for the purposes of the game, the score is what the scorer says it is.[157]

Hart's perspective is particularly useful in examining the judiciary. The power to apply the law and to direct its consequences subject only to one's conscience is an indicia of pure infallibility for no other authority may be invoked in order to protest a disagreement with a certain ruling. If the game were to be used as a metaphor for a democratic form of government, it is easily seen that the persona of the scorer refers to the judiciary as the branch of government tasked with the resolution of disputes. As the game progresses, disputes may arise between the players, whether unsportsmanlike conduct or whether a score was indeed made and must be registered for one of the teams/players.

As against leaving the business of resolving disputes to the disputants themselves, it is apparent that instituting a third and neutral person that mediates or adjudicates conflicting claims is better than allowing the disputants to argue the merits of their respective positions *ad infinitum*. But Hart is correct in saying that the advantages of instituting a scorer to facilitate the quick and final settlement of disputes comes at a price. The scorer may, or to be more precise, *will* make honest mistakes. This is a fact in all sports whereby games are won or lost by a wrong call by the referee. This is simply because the scorer, being human, has the incapacity or lack of skill to make perfect calls or applications of the rule.[158] Worse, corruption may taint his judgment. The scorer, finding a lack of an overruling authority on the exercise of his discretion, may wantonly violate his duty to apply the scoring rule fairly and to the best of his ability.[159]

B. The Nature of the Myth of Infallibility

This seeming infallibility of the Supreme Court, however, is nothing more than a myth, a "popular belief or tradition that has grown up around something or someone."[160] The use of the term "myth", as a matter of nomenclature, is important. The mythical character of the Supreme Court's infallibility distinguishes it from fiction or falsehood. Fictions are known to be untrue, disconnected from reality, and are known and utilized as such. Lies and

---

[156] *Id.* at 142.
[157] *Id.*
[158] *Id.* at 142-3.
[159] *Id.*
[160] MERRIAM-WEBSTER DICTIONARY.

falsehoods are knowingly used for some improper purpose.[161] On the other hand, a myth is a belief not in consonance with reality, but is not known as such. Myths are believed by the people to be true because the belief in the myth serves some deep human need or beneficial end.[162] It is with this in mind that the preservation of the myth of infallibility acquires significance as shall be expounded at length later on.

Arthur S. Miller has identified several pervasive myths unique to the Supreme Court which include the usurpation of power, its undemocratic character, its neutrality on the matters of politics, and others.[163] By no means was his enumeration exclusive. His discussion was open-ended thereby implying that more myths may be discovered, masked by the mundane events of everyday life for citizens, the rigors of litigation for legal practitioners, and the duties imposed by law for those in the Government. Even Miller recognized that one of the most pervasive myths surrounding the Supreme Court is the "Myth that the Court Is All-Powerful."[164] Other scholars have termed it the "fiction of judicial infallibility."[165]

Much of the myth is painted by the traditional reverence enjoyed by the Supreme Court. Homage is paid to it by the legal profession, which in turn is passed on to litigants who count on the courts for the vindication of their rights. Advocates approach the courts with reverence to gain favor in the final determination of a controversy or dispute. The structural hierarchy of the courts contribute to further the mythical character of the Supreme Court. As the apex of the judicial hierarchy, laymen only obtain personal experience of the Supreme Court once a case in which they have a personal stake in is subjected to the judicial processes of trial and appeals with the Municipal and Regional Trial Courts and the Court of Appeals. Even then, the pronouncements of the Supreme Court are applied by lower courts as though they were Delphic commands or sermons from the Mount. The combination of the Court's detachment from the people and the reverence extended to it by the legal profession and lower courts establish a deep shroud of mystique and mystery as to its processes.

Moreover, the discipline and necessary attributes and skills of judges intensify the mystique surrounding the magistrates. Their insulation gives

---

[161] ARTHUR MILLER, THE SUPREME COURT: MYTH AND REALITY 11 (1978).

[162] *Id.* at 12, 14.

[163] MILLER, *supra* note 161, at 14.

[164] *Id.* at 43.

[165] Albert Blaustein & Andrew Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 163 (1958).

courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry.[166] Courts have the opportunity for the sober second thought.[167] This mystique is magnified exponentially with respect to Justices of the Supreme Court. As reflected by the words of Dean Rostow, Justices of the Supreme Court are inevitably teachers in a vital national seminar and no other branch in a Republican form of government is nearly so well equipped to conduct one.[168]

While recently, audio recordings of oral arguments held by the Supreme Court in high-profile cases are broadcast live and made available for download in the Supreme Court's own website. This brings another layer of mystique as the public is exposed to the Court's solemn deliberative processes in an unprecedented manner which provides for the full exposition of all sides in a controversy for consumption by the public. This full presentation of the merits of all sides to a dispute impresses on the People the numerous complex issues submitted to the Court's resolution which in effect creates a compelling need for the Court to make a final pronouncement and a convincing discussion of why a particular interpretation of the merits of the case should be made to prevail over an alternative yet reasonable interpretation of the merits of the case.

C. Infallibility because of Finality

It is a rule so basic and so fundamental taught every student of the law that "[i]t is to the interest of the public that there should be an end to litigation between the same parties and their privies over a subject fully and fairly adjudicated."[169] Therefore, it is the essence of judicial function that at some point, litigation must end. So compelling is this public policy that even if erroneous, a final judgment is considered binding on the whole world.[170]

Even in the earliest days of the Supreme Court, the prospect of judicial flip-flopping had been eschewed and rejected. Even as a possibility, it is anathema to the very essence of the administration of justice. In the words of the eminent Justice George A. Malcolm, "[t]he very object for which the courts

---

[166] BICKEL, *supra* note 148, at 26.

[167] H.F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936).

[168] BICKEL, *supra* note 148, at 26, *citing* Eugene Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. R., 193, 195 (1952).

[169] Manila Electric Co., v. Phil. Consumers Foundation, Inc., G.R. No. 101783, 374 SCRA 262, 262, Jan. 23, 2002.

[170] *Id.*

were instituted is to put an end to controversies."[171] In the 1911 case of *Arnedo v. Llorente*,[172] speaking through Justice Carson, the Supreme Court explained at length the underlying public policy behind according finality and immutability to judgments rendered by courts:

> It is true that it is the purpose and intention of the law that courts should decide all questions submitted to them "as truth and justice require," and that it is greatly to be desired that all judgments should be so decided; but controlling and irresistible reasons of public policy and of sound practice in the courts demand that at the risk of occasional error, judgments of courts determining controversies submitted to them should become final at some definite time fixed by law, or by a rule of practice recognized by law, so as to be thereafter beyond the control even of the court which rendered them for the purpose of correcting errors of fact or of law, into which , in the opinion of the court it may have fallen. The very purpose for which the courts are organized is to put an end to controversy, to decide the questions submitted to the litigants, and to determine the respective rights of the parties. With the full knowledge that courts are not infallible, the litigants submit their respective claims for judgment, and they have a right at some time or other to have final judgment on which they can rely as a final disposition of the issue submitted, and to know that there is an end to the litigation. "If a vacillating, irresolute judge were allowed to thus keep causes ever within his power, to determine and redetermine them term after term, to bandy his judgments about from one party to the other, and to change his conclusions as freely and as capriciously as a chameleon may change its hues, then litigation might become more intolerable than the wrongs it is intended to redress." And no words would be sufficient to portray the disastrous consequences which would follow the recognition of unbridled power in a court which has the misfortune to be presided over by a venal and corrupt judge, to vacate and amend, in matters of substance, final judgments already entered.[173]

So fundamental is this rule that it is considered as "a general rule common to all civilized systems of jurisprudence" and a "fundamental concept

---

[171] Dy Cay v. Crossfield & O'Brien, 38 Phil. 521, 526, Aug. 30, 1918; *See* Layda v. Legaspi, 39 Phil. 83, 88, Nov. 12, 1919; Albert v. Ct. of First Instance of Manila, G.R. No. L-26364, 23 SCRA 948, 949, May 29, 1968; *See also* Lim v. Jabalde, G.R. No. L-36786, 172 SCRA 211, 224, Apr. 17, 1989; Banogon v. Serna, G.R. No. L-35469, 154 SCRA 593, 597, Oct. 9, 1987.

[172] Arnedo v. Llorente, 18 Phil. 257 (1911).

[173] *Id.* at 263.

in the organization of every jural society."[174] In the jurisprudential tradition of our Supreme Court prior to the cases of judicial flip-flopping, even compelling grounds of equity in favor of a particular litigant were held to be inadequate when weighed against the "overmastering need" of society to rely on the finality of matters decided by judges:

> "We have to subordinate the equity of a particular situation to the overmastering need" of certainty and immutability of judicial pronouncements. The loss to the litigants in particular and to society in general "would in the long run be greater than the gain if judges were clothed with power to revise" their decisions at will.[175]

Apart from the possibility that judges may be corrupted, the policy of the law is to terminate litigation at some time to ensure the enjoyment of rights guaranteed under the law. For unless any judgment should at some point become final, the rights of parties remain suspended in endless confusion or indefinite limbo. Worse, the lack of finality of judgments would strip courts of their fundamental powers reducing them to mere advisory bodies, and thus the most important function of government—that of ascertaining and enforcing rights—would go unfulfilled.[176]

Ultimately, the reason for the rule of immutability is that if on the application of one party, the court could change its judgment to the prejudice of the other, the court could on application of the latter, again change the judgment and continue this practice indefinitely.[177] As long as there are different perspectives on a certain reality, justice will forever remain an amorphous concept. In a complicated world riddled with paradox, mystery, and uncertainty, the concept of justice is as varied as the unbounded limits of human reasoning will allow. Thus, parties will craft arguments in various degrees of eloquence and reason unbounded by the seemingly infinite scope of human imagination. Therefore, the essence of litigation and the judicial process is the final adjudication of the controversy.

---

[174] Quasha Ancheta Peña & Nolasco Law Office v. Special Sixth Division of the Ct. of Appeals, G.R. No. 182013, 607 SCRA 712, 723, Dec. 4, 2009; *See* Seven Brothers Shipping Corp. v. Oriental Assurance Corp., G.R. No. 140613, 391 SCRA 67, 74, Oct. 15, 2002; Legarda v. Savellano, G.R. No. L-38892, 158 SCRA 194, 200, Feb. 26, 1988; Okol v. Tayug Rural Bank, G.R. No. L-28115, 35 SCRA 619, Oct. 30, 1970; Zambales Academy, Inc. v. Villanueva, G.R. No. L-19884, 28 SCRA 1, 10, May 8, 1969; Ponce v. Macadaeg, 91 Phil. 410 (1956); Peñalosa v. Tuason, 22 Phil. 303, 310 (1912). *See also* 2 Moran, Comments on the Rules of Court, 360-1 (1970).

[175] Gabaya v. Mendoza, G.R. No. L-53560, 113 SCRA 405, 406, Mar. 30, 1982.

[176] Peñalosa v. Tuason, 22 Phil. at 310, *citing* Black on Judgments, ¶500.

[177] Spouses Rabat v. Philippine National Bank, G.R. No. 158755, 673 SCRA 371, June 18, 2012, *citing* Kline v. Murray, 257 P. 465, 79 Mont. 530.

In speaking of the competency of the United States Supreme Court in resolving legal issues, Justice Robert H. Jackson said that "[w]e are not final because we are infallible, but we are infallible only because we are final."[178] In so saying he hinted that the foundation of the power of the Supreme Court is in its decisiveness and finality. In fact, from a theoretical perspective, the reversal by an appellate court of a lower court's judgment is not an accurate measure of justice being done, as explained by Justice Jackson:

> Conflict with state courts is the inevitable result of giving the convict a virtual new trial before a federal court sitting without a jury. Whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts. *However, reversal by a higher court is not proof that justice is thereby better done. There is no doubt that, if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed.*[179]

Thus, the infallible character of the Supreme Court is premised on its unique and important role in our legal system. As the final tribunal, having the last say on any matter of law allows it to wield the supreme power of the Law-giver that Bishop Hoadley had foretold King George I, that is: "Nay, whoever hath an absolute authority to interpret any written or spoken laws it is he who is truly the Law Giver to all intents and purposes, and not the persons who first spoke and wrote them."[180] Professor John Gray put it more succinctly yet more emphatically, thus: "*A fortiori*, whoever hath an absolute authority not only to interpret the Law, but to say what the law is, is truly the Law-giver."[181]

In the end, it is the finality of judgments that ensures the legitimacy of the judicial system *per se*. By recognizing the apparently infallible authority of a tribunal of last resort, Society is assured of the stability achieved by the final resolution of disputes. In his dissent in *Romualdez*, Justice Brion summarizes the considerations underpinning the necessity of according finality and immutability to judicial decisions, especially of the Supreme Court as the tribunal of last resort:

> The judiciary contributes to the harmony and well-being of society by sitting in judgment over all controversies, and by rendering rulings that the whole society – by law, practice and convention – accepts as

---

[178] Brown v. Allen, 344 U.S. at 540 (Jackson, *J.*, *concurring*).

[179] *Id.* (Emphases supplied.)

[180] BENJAMIN HOADLY, SERMON PREACHED BEFORE THE KING 12 (1717), *cited in* JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* 125 (2d ed., 1921).

[181] JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* 125 (2d Ed., 1921).

> the final word settling a disputed matter. The Rules of Court express and reinforce this arrangement by ensuring that at some point all litigation must cease: a party is given *one and only one chance* to ask for a reconsideration; thereafter, the decision becomes final, unchangeable and must be enforced.[182]

D. Acquiescence by the People and Political Branches of Government

The importance of the Supreme Court's myth of infallibility does not simply find moorings in its role as the tribunal of last resort in private disputes. It is also the Court's foray in public and political issues in which vital questions of law and the Constitution have played the decisive role in determining how the Filipino people moves as a Nation and a Society.

Our own Nation's political history is rife with instances where the judgment of the Supreme Court was crucial in charting the destiny of the Nation. It is reverence for the Supreme Court's moral authority that has been the basis for the acquiescence of the other political branches of Government and the People to the Court's exercise of political powers and its disposition of constitutional issues.

One merely need recall the Supreme Court's pronouncement in the much-reviled *Javellana v. Executive Secretary*,[183] which led to the ratification of the 1973 Constitution, sealing the Nation's fate until the 1986 EDSA Revolution. In holding that "there is therefore no further judicial obstacle to the New Constitution being considered in full force and effect," the Court ushered in the Martial Law Regime that followed.

In the case of *In re Saturnino Bermudez*,[184] the Supreme Court, in saying that "the legitimacy of the Aquino government is not a justiciable matter" and "the people have made the judgment" effectively declared Corazon C. Aquino and Salvador H. Laurel as the duly elected President and Vice-President in the 1986 Snap Elections and upheld their exercise of powers as such as well as the revolutionary government reconstituted in 1986 after the EDSA Revolution.

The Supreme Court continued to exercise broad political power in the case of *Estrada v. Desierto*.[185] In that case, the Court resolved the question of

---

[182] *Romualdez Resolution*, 587 SCRA at 159 (Brion, *J., dissenting*). (Emphases in the original.)

[183] G.R. No. L-36142, 50 SCRA 30, Mar. 31, 1973.

[184] G.R. No. 76180, 145 *SCRA* 160, Oct. 24, 1986.

[185] Estrada v. Desierto, G.R. No. 146710, 353 SCRA 452, 490, Mar. 2, 2001.

whether former President Joseph E. Estrada could have been considered resigned in view of the events that transpired in the EDSA II Revolution.

One need only recall the dramatic episode involved in *Francisco v. House of Representatives*,[186] in which Congress, through the House of Representatives Committee of Justice, submitted the propriety of its exercise of discretion to proceed with the impeachment of then Chief Justice Hilario P. Davide, Jr., to the Court's exercise of judicial review. More importantly, the decision of the Court to declare the unconstitutionality of the impeachment proceedings undertaken was subsequently ratified by the People.

It is that level of institutional integrity that enables public acquiescence to the issuance by the Supreme Court of Temporary Restraining Orders ("TROs") that restrain the implementation of acts of Congress, a co-equal branch of Government. Even political acts that have for their consequence the determination of the destiny of Muslim Mindanao and its people are first tested in the Supreme Court as to whether they meet constitutional muster.[187]

All these instances exhibit the vast political power held by the Philippine Supreme Court and how it has been wielded by it to chart the destiny of the Nation. Political power, in this context, refers to "the ability or capacity to make decisions affecting the values of the [People]."[188] That this power is assumed to be held and exercised by the Supreme Court is without argument, and the question that remains is how much of that power is enjoyed by it and in which instances may it be exercised.[189]

The myth of infallibility directly supports this deep and profound respect for the Court's pronouncements. Without the perception of correctness

---

[186] Francisco v. House of Representatives, G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003.

[187] *See* Province of North Cotabato v. The Philippines Peace Panel on Ancestral Domain, G.R. No. 183591, 568 SCRA 402, Oct. 14, 2008. In this case, the constitutionality of a peace agreement calling for the creation of a Bangsamoro Juridical Entity (BJE) was questioned before the Supreme Court. The creation of the BJE was among the conditions for peace required by the rebel forces known as the Moro Islamic Liberation Force (MILF). With the Court's declaration of constitutionality, the civil war between the MILF and the Government of the Philippines continued until a complete ceasefire was brokered by Presidential Adviser on the Peace Process (and now Justice of the Supreme Court) Marvic Leonen through the signing of the Framework Agreement on the Bangsamoro on October 15, 2012. *See* The 2012 Framework Agreement on the Bangsamoro, Official Gazette, *available at* http://www.gov.ph/bangsamoro2/the-2012-framework-agreement-on-the-bangsamoro (last accessed Apr. 26, 2017).

[188] MILLER, *supra* note 161, at 136.

[189] *Id.*

and moral ascendancy, there is no reason as to why the elected representatives of the sovereign People in the Executive and Legislative branches of Government would even deign to submit themselves to the ruminations of a branch of Government composed of persons who do not enjoy a direct vote of confidence by the People. This myth clothes mere mortals, who are simply elevated to the position of the High Bench, with the impression that they are fit to pass judgment and in doing so cannot and do not make mistakes in the interpretation of the law and the Constitution. This allows the Supreme Court to perform its most essential functions: mediating constitutional boundaries, determining conflicting claims of authority, or establishing between parties in an actual controversy their rights and obligations under the law.[190]

But recent events show that the institutional integrity of the Supreme Court may not always rest on solid ground. In the Impeachment Trial of Chief Justice Renato Corona,[191] the fringes of the constitutional provisions pertaining to impeachment were put to the test when the House of Representatives Prosecution Panel requested a subpoena *ad testificandum et duces tecum* from the Senate Impeachment Court against the Branch Manager of Philippine Savings Bank ("PSB"). The subpoena sought to compel the PSB Branch Manager to testify before the Senate Impeachment Court and produce documents regarding the Dollar accounts being maintained by the former Chief Justice with unlawfully acquired funds. Fears of a constitutional crisis arose when the Supreme Court responded by issuing a TRO to the Senate Impeachment Court's issuance of the subpoena requested.[192] Reflective of the Senate's healthy respect for the power of the Supreme Court, the Senate Impeachment Court, by a 13-10 vote of its members, resolved to comply with the TRO.[193] Thus, the Senate Impeachment Court restrained itself from inquiring further into the Dollar deposit accounts maintained by the Chief Justice with the said Bank. However, the narrow vote margin suggests that even in cases where the Court has chosen to partake in the controversy, the political branches of Government have the discretion of whether or not to submit themselves to the Court's authority and to comply with its judgment.

---

[190] Angara v. Electoral Commission, 63 Phil. 139, 158 (1936).

[191] *In re* Impeachment Trial of Honorable Chief Justice Renato C. Corona, Impeachment Case No. 002-2011.

[192] Philippine Savings Bank v. Senate Impeachment Court, G.R. No. 200238, Resolution dated Feb. 9, 2012, *available at* http://sc.judiciary.gov.ph/jurisprudence/2012/february2012/200238-TRO.pdf (last accessed on Apr. 26, 2017). The TRO was issued upon urgent petition filed by the PSB alleging grave abuse of discretion.

[193] Abigail Kwok & Karl John Reyes, *Senate won't defy SC TRO on Corona's dollar deposits*, INTERAKSYON.COM, Feb. 13, 2012, *available at* http://www.interaksyon.com/article/24403/senate-wont-defy-sc-tro-on-coronas-dollar-deposits (last accessed Mar. 19, 2013).

As a myth, the Supreme Court's infallibility relies solely on perception and lacks "any solid factual base."[194] There is no provision of the Constitution that says or even hints at the infallibility of the Supreme Court. Being a myth that rests on perceptions, it is therefore necessary that perception of infallibility be preserved so that the Court may continue to enjoy legitimacy which in turn leads to the acceptance of its judgments by the other branches of Government and, more importantly, by the People.

At the conception of republican democracy, Alexander Hamilton had the temerity to call the judiciary the "least dangerous branch."[195] This inherent weakness of the Court becomes apparent when one accepts that inasmuch as the judgments of the Supreme Court have been successfully recognized as the driving force or catalyst for social or political change, its judgments are prone to be disregarded by the coordinate branches of Government. Thus, any judgment of the Supreme Court is susceptible to two outcomes: widespread adherence or systematic disobedience.[196]

On this matter, Miller cites the widely disparate reception of *Brown v. Board of Education*[197] when compared to that of *Baker v. Carr*.[198] In *Brown*, the Southern states affected by the decision made little, if any, effort to comply with the United States Supreme Court's condemnation of racial segregation while on the other hand, the reapportionment principle in *Baker* was implemented without need of further judicial decree.[199]

This is precisely because the Supreme Court's pronouncements from the mount are dependent on the will of others for its recognition and efficacy. They rely on the good will and the determination of the political branches to take action to see to it that judicial norms are applied. While the Supreme Court lets loose bolts of lightning from Mount Olympus, and purportedly makes mere mortals quail, the hard truth is that the Court must act through delegated commands or admonitions.[200] This reality was eloquently summarized by Justice Perfecto thus:

> Among the three powers of governments, the judiciary is in the material sense the weakest. Although its function in society is as

---

[194] MILLER, *supra* note 161, at 44.

[195] Alexander Hamilton, The Federalist No. 78, *available at* http://thomas.loc.gov/home/histdox/fed_78.html (last accessed Apr. 26, 2017).

[196] MILLER, *supra* note 161, at 44.

[197] 347 U.S. 483 (1954).

[198] 369 U.S. 186 (1962).

[199] MILLER, *supra* note 161, at 44.

[200] *Id.* at 45.

> noble and important as the ones entrusted to the legislative and executive powers, and there is none loftier that our mind may conceive or to which the most ambitious heart may aspire, it needs the active and positive help of other agencies to make it effective. Congress must provide for the adequate budget, and the executive power the necessary force to make effective the orders and decisions of tribunals.
>
> To compensate for the comparative physical weakness of the judicial power, it is necessary that judges and courts should acquire the unbounded moral force which springs from the general faith and confidence of government and people alike. That moral force, although intangible, immeasurable and imponderable, is as effective as any cosmic force, if not more. We hold as an axiom that spiritual energy is stronger than atomic energy, the mighty basic force of material universe. But to obtain and retain public faith and confidence, it is necessary that courts and judges should show by their acts that they are actually entitled to such faith and confidence.[201]

There is a famous yet fictitious account of President Jackson's reaction to the United States Supreme Court judgment in *Worcester v. Georgia*[202] where the President was said to have remarked, "[w]ell, John Marshall has made his decision; now let him enforce it!"[203] Even others quote James Madison echoing President Jackson's sentiment with sarcasm: "[w]ith what army will the Chief Justice enforce his Decision?"[204] Indeed, like "the Pope, the Supreme Court has no battalions, tanks or guns to enforce its decisions."[205] Ultimately, the Supreme Court relies on the cooperation of the coordinate branches and other instrumentalities of the Government and on the sheer moral force and truth of

---

[201] Teehankee v. Director of Prisons, 76 Phil. 630 (1946) (Perfecto, *J.*, *concurring*).

[202] 31 U.S. 515 (1832).

[203] The attribution to President Jackson was reported by Horace Greeley. PAUL HICKS, JOSEPH HENRY LUMPKIN: GEORGIA'S FIRST CHIEF JUSTICE 88 (2002), but it has been subsequently repudiated as fictional. The more accurate quote, as contained in President Jackson's letter to John Coffee, was more tempered and less emotional yet loses little of its persuasive implications on the Supreme Court's lack of coercive power: "The decision of the supreme court has fell still born, and they find that it coerce Georgia to yield to its mandate." PAUL BOLLER, JR. & JOHN GEORGE, THEY NEVER SAID IT: A BOOK OF FAKE QUOTES, MISQUOTES, AND MISLEADING STATEMENTS 53 (1989).

[204] Sanlakas v. Executive Secretary, G.R. No. 159085, 421 SCRA 656, 686–698, Feb. 3, 2004 (Ynares-Santiago, *J.*, *separate opinion*).

[205] *In re* Ilagan, G.R. No. 70748, 139 SCRA 349, 405, Oct. 21, 1985 (Teehankee, *J.*, *dissenting*).

its judgments in accordance with the faith and confidence reposed in it by the People.[206]

IV. THE PROBLEM OF A FLIP-FLOPPING SUPREME COURT

Many actions of government have two aspects: their immediate, necessarily intended practical effects, and perhaps more importantly, the unintended or unappreciated bearing on the values we hold to be permanent.[207] In this regard, it cannot be denied that while judicial flip-flopping may serve practical concerns and the "higher interests of justice" in the short-term, it has the pernicious effect of dissipating the credibility of the Supreme Court in the long-term. It is the dissipation of the Supreme Court's institutional integrity in the long-term that poses the greatest danger not only to the Court itself, but to limited government altogether.

A. Exhaustible Political Capital of the Supreme Court

The individual members of a society of any size must necessarily yield to an individual or a small group of people the function of establishing the framework of society, and of laying down general rules to direct the future actions of persons within it so as to maintain that same framework.[208] The Supreme Court is among the primary pillars of such framework.

While the People are thus governed, it must be remembered that their reverence and tolerance is not infinite, and that the Court's public prestige and political capital is exhaustible. In the words of Professor Choper, "the fortress of judicial review stands or falls with public opinion and the Court's symbolic image is not forever indestructible."[209] The legitimacy of the Court's decisions rests upon the authority of the group rendering such judgment, and can rest on nothing else.[210] The authority of the Supreme Court is moral in nature; it depends on the continuing acquiescence of the people it is meant to judge. Professor Owen Fiss further expounds on this matter, thus:

> [One] sense of authoritativeness, suggested by the works of [...] positivists, namely Herbert Hart and Hans Kelsen, stresses not the

---

[206] *Id.*

[207] BICKEL, *supra* note 148, at 24.

[208] Luke Cooperrider, *The Rule of Law and the Judicial Process*, 59 MICH. L. REV. 501, 504 (1960).

[209] JESSE N. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 139-140 (1983).

[210] Cooperrider, *supra* note 208, at, 503.

> use of state power, but an ethical claim to obedience—a claim that an individual has a moral duty to obey a judicial interpretation, not because of its particular intellectual authority (i.e., because it is a correct interpretation), but because the judge is part of an authority structure that is good to preserve. This version of the claim of authoritativeness speaks to the individual's conscience and derives from institutional virtue, rather than institutional power. It is the most important version of the claim of authoritativeness, because no society can heavily depend on force to secure compliance; it is also the most tenuous one. It vitally depends on a recognition of the value of judicial interpretation. Denying the worth of the Constitution, the place of constitutional values in the American system, or the judiciary's capacity to interpret the Constitution dissolves this particular claim to authoritativeness.[211]

The legitimacy of the Court is especially at stake when confronting an "intensely divisive controversy" over which attention is great and stakes are high, where a prior decision in this controversial area should be overruled only for "the most compelling reason."[212] This necessity was explained by Professor Sullivan, thus:

> Why stand faster in such a case? Like Ulysses tying himself to the mast in anticipation of the sirens' song, the Court makes a "promise of constancy" in anticipation of coming "under fire." Why? To preserve the Court's legitimacy. People will not give the Court "credit for principle" if it abandons an intensely divisive decision; they will regard it instead as a "surrender to political pressure".[213]

Jesse Choper explains that one of the consistent attacks against the exercise of judicial review by the Supreme Court is that the continued anti-majoritarian rulings will tip the balance of credibility and drive public sentiment to the inescapable reality that the Court has but a gossamer claim to legitimacy in a democratic society.[214] This sentiment fuels the movement seeking popular disregard of the Court's decisions or inspiring political forces that aim to bring it to heel, or both.[215] This rationale can equally apply well to flip-flopping rulings for such goes into the heart of the Supreme Court's function in our democratic system of Government.

---

[211] Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 756 (1982).

[212] *Id* at 709.

[213] Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 73 (1992)

[214] CHOPER, *supra* note 209, at 139.

[215] *Id.* at 139-140.

One of the most important weaknesses of the Supreme Court lies inherently in its counter-majoritarian nature. Unlike the other branches of government that enjoy renewals of trust and confidence directly from the People themselves, the Supreme Court is composed of magistrates who are thrust upon the people until their retirement, supervening incapacity, or removal for cause through impeachment. Thus, the Court's prestige and authority is of a broad and institutional nature. When the Court expends its store of capital it tends to do so in a cumulative fashion.[216] Negative judgments of the court spark a markedly hostile reaction which goes beyond the case from which it arose. Public antagonism, resistance, and retribution appear to have a spill-over effect by increasing the likelihood that its subsequent judgments will be rejected regardless of their actual merit.[217]

This is further compounded by the fact that the Supreme Court is seen as acting in a continuum.[218] It is perceived by the legal community as such through the doctrine of *stare decisis*, which give its rulings a semblance of cumulative continuity regardless of the Court's composition.[219] The perception of the homogenous character of the Supreme Court is likewise carried over to the public who, for the lack of a direct role in determining the Court's membership, only experience it through its various pronouncements. Even the Court's own jurisprudence echoes this—it has consistently held that "[t]here is only one Supreme Court from whose decisions other courts should take their bearings."[220]

Choper cites the impact of the *Dred Scott* case[221] to the institutional integrity of the United States Supreme Court which, in his words, "enfeebled the Court for years to come."[222] Edward Corwin noted that the post-*Dred Scott* period "marked the nadir of judicial power and influence."[223] In Philippine legal history, the closest equivalent we have to *Dred Scott* is the case of *Javellana*

---

[216] *Id.* at 156.

[217] *Id.*

[218] BICKEL, *supra* note 148, at 31.

[219] The Supreme Court continuously cites previous decisions, some spanning decades past, in resolving present disputes with an apparent reference of identity of the previous court and the prior court that decided the precedent being cited. *See* Sales v. People, G.R. No. 191023, Feb. 6, 2013.

The homogeneity of the identity of the Supreme Court is still maintained even when it chooses to overrule prior precedents. *See* De Castro v. Judicial and Bar Council, G.R. No. 191002, 615 SCRA 666, Mar. 17, 2010.

[220] Albert v. Ct. of First Instance of Manila, G.R. No. L-26364, 23 SCRA 948, 961, May 29, 1968.

[221] Dredd Scott v. Sandford, 60 U.S. 393 (1857).

[222] CHOPER, *supra* note 209, at 156.

[223] R. MCCLOSKEY, THE AMERICAN SUPREME COURT 100 (1960).

v. Executive Secretary,[224] which is perhaps the worst exercise of the Court's power by not doing anything. At any rate, regardless of what the individual members of the Court did or failed to do in *Javellana*, the legacy of their pronouncement drained the Supreme Court of all of its political capital until it was restored by revolution in 1986 and promulgation of a new Constitution in 1987.

The political capital expended by the Supreme Court to justify the overreach of its powers is difficult to reclaim.[225] "Like the character of an individual, the legitimacy of the Court must be earned over time."[226] The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.[227]

In this sense, Bickel says that the Supreme Court is unlike other institutions which are capable of being renewed in a single stroke.[228] As noted in *Planned Parenthood v. Casey*,[229] "unlike the political branches, a weakened Court could not recover its prestige 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."[230] Changes of one or two justices in the Supreme Court, or even the appointment of a new Chief Justice do not enjoy the same replenishment capability as the inaugural of a newly elected President.[231]

In its various decisions that have been hailed as victories for human rights,[232] the rule of law,[233] and public accountability[234] the cumulative loss of

---

[224] G.R. No. L-36142, 50 *SCRA* 30, Mar. 31, 1973.

[225] Paul Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 UCLA L. REV. 76, 90 (1974).

[225] Planned Parenthood of Southeastern Pa. v. Casey [hereinafter "Casey"], 505 U.S. 833 (1992).

[226] *Id.* at 868.

[227] Mistretta v. United States, 488 U. S. 361, 407 (1989).

[228] BICKEL, *supra* note 148, at 31.

[229] 505 U.S. 833 (1992).

[230] *Casey*, 505 U.S. at 868.

[231] BICKEL, *supra* note 148, at 31.

[232] *See* Oposa v. Factoran, G.R. No. 101083, 224 SCRA 792, July 30, 1993; Legaspi v. Civil Service Commission, G.R. No. 72119, 150 SCRA 530, May 29, 1987; Ople v. Torres, G.R. No. 127685, 293 SCRA 141, July 23, 1998; White Light Corp. v. City of Manila, G.R. No. 122846, 576 SCRA 416, Jan. 20, 2009.

[233] *See* Francisco v. House of Representatives, G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003; David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 223, May 3, 2006; Lambino v. Comm'n on Elections, G.R. No. 174153, 505 SCRA 160, Oct. 26, 2006.

[234] *See* Gutierrez v. House of Representatives Committee on Justice, G.R. No. 193459, 643 SCRA 198, Feb. 15, 2011; Neri v. Senate Committee on Accountability of Public Officers

its integrity and prestige is tapered by its contributions to the betterment of Philippine society. When the Supreme Court remains faithful to the trust reposed in it by the People, it acquires immense institutional integrity which in turn translates to political power of the highest order, capable of swaying the other branches of Government to submit to the moral force of its judgments.

Regardless, replenishment requires the accretion of political capital over a span of months, years, or decades depending on the political climate. Once diminished, "legitimacy may be restored, but only slowly."[235] The public belief in the Court's institutional legitimacy enhances public acceptance of controversial Court decisions. But this legitimacy is purchased by "making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[236] Thus, the Supreme Court gains when it casts its decisional lot on the side that resonates with the political will of the People at the relevant point in time.

The prestige of the Supreme Court, and its corresponding political power, is fundamentally dependent on its history and in the collective rulings it has rendered. It is judged by the impact of its rulings on Philippine Society which is not made apparent immediately, as the experience in *Javellana* and later in *Desierto* showed. In these cases, the exercise of the Court's legitimating power has resulted in the rise of publicly-reviled Presidencies resulting in the dissipation of whatever political capital gained and the continued expenditure of political capital as unpopular decisions are subsequently rendered. Since the Supreme Court's well-received decisions in the cases of *Lambino v. COMELEC*[237] and *David v. Macapagal-Arroyo*,[238] the latter part of President Macapagal-Arroyo's term saw a Supreme Court, primarily composed of her appointees, render one questionable decision after another which tend to cumulatively deplete the political capital of the Court.

For instance, in *De Castro v. Judicial and Bar Council*,[239] the Supreme Court literally carved out an exception to the prohibition against midnight appointments by the executive as ordained by Article VIII, Section 15 of the

---

and Investigations, G.R. No. 180643, 549 SCRA 77, Sept. 4, 2008; Republic v. Sandiganbayan, G.R. No. 152154, 407 SCRA 10, *July 15, 2003*.

[235] 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, 715 (1994).

[236] *Id.*

[237] G.R. No. 174153, 505 SCRA 160, Oct. 26, 2006.

[238] G.R. No. 171396, 489 SCRA 160, May 3, 2006.

[239] G.R. No. 191002, 615 SCRA 666, Mar. 17, 2010.

1987 Constitution.[240] By limiting the provision's applicability to appointments within the Executive Branch of Government, the Supreme Court effectively legitimated President Macapagal-Arroyo's appointment of her former chief-of-staff, Renato C. Corona, as Chief Justice in May 2010.

The Court's political quandary was further highlighted as a new administration took office and the hostility and distrust between the Court and the new administration became apparent. President Benigno S. Aquino III publicly refused to recognize the appointment of Chief Justice Corona and instead took his oath of office before Justice Conchita Carpio-Morales, one of the leading dissenters in *De Castro v. Judicial and Bar Council*.[241]

After several political tussles, the issue came to a head when the House of Representatives voted to impeach Chief Justice Corona in an apparently concerted effort between the Executive and the administration's allies in Congress. Couched as an attempt to check the seeming overreaches of the Supreme Court, the case culminated in the impeachment and removal from office of then Chief Justice Corona. This removal was met with little public uproar from the People, with supporters of the administration lauding the impeachment as a triumph of constitutional processes.

Thus, courts must take caution. Where it is perceived that the powers of the Court, just like any branch of Government, is abused to further a private agenda, political backlash from the coordinate branches of Government and ultimately, the People themselves is only a matter of magnitude and time.

The political capital of the Supreme Court is a precious resource. It is akin to a diamond whose rarity stems from the fact that it is acquired by surviving great pressures of governmental instrumentalities and the temperatures of the crowd's passion. Indeed such kind of pressure is unique to the judicial institution, in contrast to the Executive and the Legislature whose direct accountability to the People occupy most of their time and resources.

---

[240] In this context, midnight appointments shall refer to appointments made by a President or Acting President within two months immediately before the next presidential elections and up to the end of his term. Prior to *De Castro*, the only exception recognized by CONST. art. VII, § 15 were "temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety."

[241] Oscar Tan, *Guarding the Guardians: Addressing the Post-1987 Imbalance of Presidential Power and Judicial Review*, 86 PHIL. L.J. 523, 527 (2012).

B. Loss of Public Trust and Confidence

While the power of the Supreme Court to check the excesses of the other branches of Government has since been accepted, its exercise has been the subject of criticism when it is seen to infringe the domain of the elected representatives of the People. In this regard, public opinion and criticism has emerged as among the most significant checks on the Supreme Court's authority. But public criticism and opinion does not merely extend to the Court's exercise of judicial review but likewise applies with equal force to the exercise of judicial power, for society relies on the judiciary for the orderly resolution of disputes. Professor Paul Kauper explains the reasons for concluding that even the Supreme Court "follows the election returns:"

> An even more important control, however, is reflected in the Court's responsiveness to the forces of public opinion. Since the Court's formal position in the structure of constitutional power is a relatively weak one, its strength and independence depend ultimately on its moral authority as measured by the public trust, respect and confidence generated by the Court's reputation for disinterestedness, integrity, and a sober sense of responsibility in the discharge of its important and delicate tasks. Like any other institution of government, the Court is subject to the corrective process of public judgment. Moreover, public opinion exerts an invisible influence in determining the policy and value norms, or, if you prefer, the prepossessions and predilections, that enter into the substance of the judgment process. Judges, by virtue of their education, training, and the development of their intellectual and emotional processes and responses, cannot divorce themselves from the movement of ideas and events that shape contemporary, political, social and economic developments. It is true in this sense, as Dooley once observed, that the Supreme Court follows the election returns.[242]

Trust and confidence in the Supreme Court, just like any other instrumentality of Government, is measured by how well the Court discharges the duties reposed upon it by the People. Assuring the consistency, evenhandedness, and repose in the settlement of disputes is among the cornerstones of the judicial process. It is in this context that Justice Harlan's reminder acquires particular significance:

> I can think of nothing more unsettling to lawyers and litigants, and more disturbing to their confidence in the evenhandedness of the

---

[242] Paul Kauper, *The Supreme Court and the Rule of Law*, 59 MICH. L. REV. 531, 541-2 (1961).

> Court's processes, than to be left in the kind of uncertainty which today's action engenders, as to when their cases may be considered finally closed in this Court.[243]

Indeed, as was declared by Justice Stevens after the United States Supreme Court voted to grant rehearing in *Patterson*, removing the element of finality in judicial decisions will lead to erosion in faith in the Court's authority:

> To recognize an equality right -- a right that 12 years ago we thought "well established"-- and then to declare unceremoniously that perhaps we were wrong and had better reconsider our prior judgment, is to replace what is ideally a sense of guaranteed right with the uneasiness of unsecured privilege. Time alone will tell whether the erosion in faith is unnecessarily precipitous, but, in the meantime, some of the harm that will flow from today's order may never be completely undone.[244]

In his concurring opinion in *Florida Department of Health v. Florida Nursing Home Association*, [245] Justice Stevens warns that the overruling of precedents and changes in doctrine premised only in the change in personnel of the Supreme Court directly leads to the erosion of the public's confidence on the Court's capacity to discharge its role in a government of limited powers:

> *Of even greater importance, however, is my concern about the potential damage to the legal system that may be caused by frequent or sudden reversals of direction that may appear to have been occasioned by nothing more significant than a change in the identity of this Court's personnel.* Granting that a zigzag is sometimes the best course, I am firmly convinced that *we have a profound obligation to give recently decided cases the strongest presumption of validity.* That presumption is supported by much more than the desire to foster an appearance of certainty and impartiality in the administration of justice, or the interest in facilitating the labors of judges. *The presumption is an essential thread in the mantle of protection that the law affords the individual. Citizens must have confidence that the rules on which they rely in ordering their affairs -- particularly when they are prepared to take issue with those in power in doing so -- are rules of law*, and not merely the opinions of a small group of men who temporarily occupy high office. *It is the unpopular or beleaguered individual -- not the man in power -- who has the greatest stake in the integrity of the law.*[246]

---

[243] *Ohio Power*, 353 U.S. 98, 111 (Harlan, *J., dissenting*).
[244] Patterson v. McLean Credit Union, 485 U.S. 617, 622 (1988).
[245] 450 U.S. 147 (1981).
[246] *Id.* at 153-4. (Emphases supplied.)

The very jurisprudence promulgated by the Supreme Court recognizes the power of the public's perception that the Supreme Court discharges its duty in a uniform and impartial manner. On this basis, magistrates of lower courts and employees of the judiciary have been disciplined or even discharged from the service in the interest of preserving the perception of integrity of the judiciary. In a catena of cases, these words have achieved the status of a hornbook doctrine of law:

> The integrity of the judiciary rests not only upon the fact that it is able to administer justice, but also upon the perception and confidence of the community that the people who run the system have done justice.[247]

Professor Paul Mishkin argues that even in cases where the Supreme Court is caught between the tension to maintain fidelity to principle and the Court's institutional legitimacy, it is suggested that it is better that an unsatisfactory opinion be given rather than risk damage to the Court's prestige:

> If the price of preservation of the Court's effectiveness and prestige is the handing down of such unsatisfactory opinions, then even an institution whose authority is premised upon adherence to principle and to reason may be forgiven in seeing such defective opinion-writing as a reasonable cost to pay. The misleading nature of what is written can be corrected by the Court later, and with relative ease. Damage to the Court's stature, prestige, or credibility is not so easily repaired.[248]

This tension between legitimacy and principle is further expounded by the United States Supreme Court in *Planned Parenthood of Southeastern Pa. v. Casey*,[249] in that the Supreme Court must always take care to speak in ways that allow the people to accept its decisions:

> The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is

---

[247] Panaligan v. Ibay, A.M. No. RTJ-06-1972, 491 SCRA 545, 554-5, June 21, 2006; Spouses Makadaya Sadik v. Casar, A.M. No. MTJ-95-1053, 266 SCRA 1, 14, Jan. 2, 1997. *See also* Talens-Dabon v. Arceo, A.M. No. RTJ-961336, 259 SCRA 354, July 25, 1996.

[248] Paul Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 UCLA L. REV. 76, 90 (1974).

[249] 505 U.S. 833 (1992).

> furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.[250]

The grant of a "second shot for the higher interests of justice," despite its altruistic goal, has the tendency of eroding the public interest in the Court. This is because rehearings or recalls of Entries of Judgment are seen as arbitrary on their face.[251] Reopening cases threatens its own kind of inequality if the Court exercises its power haphazardly, granting rehearing to one lucky litigant but not to others with similar claims.[252] Justice Brion pointed out the inequity wrought by judicial flip-flopping in *People v. Romualdez*. He decried the purported special treatment given by Supreme Court to Benjamin Romualdez:

> Hand in hand with the prohibition on second motion for reconsideration and underlying it, is the bedrock principle of immutability of judgments. The judiciary contributes to the harmony and well-being of society by sitting in judgment over all controversies, and by rendering rulings that the whole society – by law, practice and convention – accepts as the final word settling a disputed matter. The Rules of Court express and reinforce this arrangement by ensuring that at some point all litigation must cease: a party is given *one and only one chance* to ask for a reconsideration; thereafter, the decision becomes final, unchangeable and must be enforced.
>
> The majority's ruling, sad to state, *gnawed* at this sensible and indispensable rule when it lifted the prohibition on second motions for reconsideration without fully explaining its grounding in reason, in jurisprudence and in the law. It rendered uncertain the state of final decisions of this Court if only because *exceptions at will* may now be possible and one has in fact been applied to the present case.

---

[250] *Id.* at 865-6.

[251] Bruhl, *supra* note 126, at 11.

[252] "The facts of this case are even more compelling than those in [Gondeck] [...] All [this litigant] asks is that the Court apply the law in her case that was applied in the one following hers." *Id.*, *citing* Weed v. Bilbrey, 400 U.S. 982, 984 (1970) (Douglas & Black, *JJ.*, *dissenting*). (Emphases in the original.)

> Thus, we cannot blame an adversely affected litigant who asks: *why was Benjamin "Kokoy" Romualdez given an exceptional treatment when I was not?* Lest the issues be enlarged in the public's mind to encompass the very integrity of this Court, we owe it to the litigating public to explain why or why not; the majority did not.[253]

It is precisely decisions like this that call into question the impartiality of the Court, or at the very least, the perception that it still holds a commitment to impartiality. This illustrates Justice Holmes's belief as to why great cases simply make bad law because of that "immediate overwhelming interest which appeals to the feelings and distorts the judgment [that] exercise a kind of hydraulic pressure which makes what was previously clear seem doubtful, and before which even well-settled principles of law will bend."[254]

C. Shattering the Myth of Infallibility

If anything can be gathered from the phenomenon of judicial flip-flopping, it is that the Supreme Court's shroud of moral force and authority stems from nothing more than the myth of its infallibility. Stripped of its trappings of grandeur, the Supreme Court remains to be a collegial body of fallible persons, touted to be the best among the best in the legal world, called upon to resolve disputes of law and the Constitution which creates as much as it destroys.

To be sure, our Supreme Court[255] is far from perfect. After all, it is an undeniable truth that to err is to be human. The Court, being composed of fallible men, may, and surely will, err.[256] Regardless, by virtue of its unique role in Government, its continued survival is essential despite its vulnerability to commit errors.

Under our constitutional scheme the Supreme Court is given the power to say interpret the law or the Constitution.[257] Nevertheless, such power has concomitant limits consistent with the concept of a limited government under the rule of law. Thus, even Hart exhorts that "it is important to see that

---

[253] *Romualdez Resolution*, 587 SCRA at 159.

[254] Northern Securities Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, *J.*, *dissenting*).

[255] Or any Supreme Court or High Tribunal for that matter.

[256] Cooper v. Aaron, 358 U.S. 1, 24 (1958) (Frankfurter, *J.*, *concurring*), *citing United States v. United Mine Workers*, 330 U. S. 258, 8 (1947) (Frankfurter, *J.*, *concurring*).

[257] Lozano v. Nograles, G.R. No. 187883, 589 SCRA 356, June 16, 2009, *citing* Marbury v. Madison, 1 Cranch 137, 2L. Ed. 60 (1803). *See also* Phil. Guardians Brotherhood, Inc. v. Commission on Elections, G.R. No. 190529, 619 SCRA 585, Apr. 29, 2010.

the scoring rule remains what it was before and it is the scorer's duty to apply it as best he can."[258] The system will lose meaning if the tribunal has free rein to apply what rules it chooses to apply as if it possessed a seemingly unbridled discretion.

The scorer operates in the context of a game and is therefore a part of the system. The game can be said to be but a simple metaphor for a democratic form of government, and the institution of the scorer is akin to the creation of a Supreme Court that operates in a democracy. When the scorer begins to enjoy seemingly unbridled discretion, not only in applying the rules but in choosing which rules to apply, there is an illusion of democracy for, in truth, there is totalitarian power. Thus, Hart metaphorically explains:

> '[T]he score is what the scorer says it is' would be false if it meant that there was no rue for scoring save what the scorer in his discretion chose to apply. There might indeed be a game with such a rule, and some amusement might be found in playing it if the scorer's discretion were exercised with some regularity; but it would be a different game. We may call such a game the game of scorer's discretion.[259]

While the rulings of the scorer are in a sense, final and infallible, this conclusion is premised on the fact that there is a rule ensuring that the authority and finality of his application of the scoring rule in a particular case is properly implemented.[260] For even when rulings made by the scorer are plainly wrong, that by itself does not prevent the game from continuing so long as the game being played is the same.[261]

Thus, even in a democracy, the Supreme Court can err, or even make plain and palpable mistakes, because mistakes are simply consistent with the fundamental and inherent limitation of a tribunal composed of human beings who can err. Professor Sullivan explains this with respect to frequent overrulings of precedents which apply with equal force to judicial flip-flopping:

> The general rule about overruling constitutional decisions is: don't. Why not? The Court is the least dangerous branch. It cannot tax, and it has no tanks. So why should people obey it? Because it has "legitimacy, a product of substance and perception." People

---

[258] H.L.A. HART, *supra* note 155, at 143.
[259] *Id.* at 142.
[260] *Id.* at 144.
[261] *Id.*

> "perceive" the Court as making "principled" decisions, not political "compromises."
>
> This does not mean that the Court can never overrule prior decisions; the people can "accept some correction of error without necessarily questioning the legitimacy of the Court." But they can't handle too much.[262]

The commission of mistakes is simply a necessary consequence of one's humanity. And the Supreme Court's "mistakes" can be tolerated so long as the Supreme Court enjoys a perception of infallibility. Hart refers to this as the metaphorical "game." But there is a limit to the extent to which tolerance of incorrect decisions is compatible with the continued existence of the game.[263]

The perception of the Supreme Court's infallibility goes into its capability to resolve disputes. Its frequent overruling of its own judgments in the same case years after a final adjudication had been reached,[264] or even going as far as declaring the unconstitutionality of the decisions of one of its Divisions,[265] strains the public's trust.

Where the Supreme Court makes frequent and palpable mistakes or willingly repudiates the bounds of its authority, there are serious consequences which may result in the warping of democracy and the pursuit of justice into something else. And once the players realize that the rules of the game have changed or are not being implemented anymore, this, in turn, leads to the shattering of the myth of infallibility of the scorer, or in our context, the Supreme Court. Thus, Hart explains:

> [I]f these aberrations are frequent, or if the scorer repudiates the scoring rule, there must come a point when either the players no longer accept the scorer's aberrant rulings or, if they do, the game has changed. It is no longer cricket or baseball but 'scorer's discretion'; for it is a defining feature of these other games that, in general, their results should be assessed in the way demanded by the plain meaning of the rule, whatever latitude its open texture may leave to the scorer. [266]

---

[262] Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 71 (1992).

[263] *Id.* at 144.

[264] *See Third Apo Fruits Resolution*, 632 SCRA 727; *Second Keppel Resolution*, 681 SCRA 44.

[265] *Second Lu Ym Resolution*, 643 SCRA 23.

[266] H.L.A. HART, *supra* note 155, at 144-5.

The effects of frequent overruling were extensively discussed in *Casey* where the United States Supreme Court, confronted with the challenge of reversing its precedent in *Roe v. Wade*, declared that a decision of reversal or overruling implies a mistake on the part of the Court. Such imputation diminishes the public's perception and faith in the Court's capacity to discharge its functions. When done frequently or with regularity, the strain will overtax the People's belief in the Court:

> There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. *The legitimacy of the Court would fade with the frequency of its vacillation.*[267]

Ultimately, the problem posed by judicial flip-flopping is the cumulative dissipation of the Supreme Court's political capital. With every flip-flop, the dissipation gains further momentum until finally political capital is exhausted and shatters the illusion. The piercing of the myth is occasioned by the flagrant disregard of the rule which guarantees its infallibility, that is, the doctrine of immutability of judgments. This is the ultimate meaning behind the enigmatic dictum of Justice Robert Jackson that pronouncements of the Supreme Court "are not final because we are infallible, but we are infallible only because we are final."[268]

D. Decay of the Rule of Law

The legal profession in all countries knows that there are only two real choices of government open to a people. It may be governed by law or it may be governed by the will of one or of a group of men. Law, as the expression of the ultimate will and wisdom of a people, has so far proven the safest guardian of liberty yet devised.[269] History, as well as common sense, suggests that the broader the construction of the grants of power, the construction of these specific limits ought to be broad as well; power that amounts affirmatively to near political omnipotence wants limitation.[270]

Among the primary objectives for the rule of law is the maintenance of an independent judiciary with the final say in disputes between individuals, and

---

[267] *Casey*, 505 U.S. 833, 866 (1992). (Emphases supplied.)

[268] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, *J., concurring*).

[269] ROBERT JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 27 (1955).

[270] BLACK, JR., *supra* note 145, at 98.

between individuals and government.[271] Under the rule of law, the state exercises its power on the basis of laws adopted in a constitutional procedure so as to safeguard freedom and justice.[272]

The law also recognizes the need for uniformity as much as it does the need to achieve justice.[273] Uniformity is needed partly to provide certainty and predictability. Where rules of law are fixed and generalized, the citizen can plan his activities with a measure of certainty and predict the legal consequences of his behavior.[274] It also establishes fixed rules that limit the arbitrary fiat of the judge. The preference for a government of laws and not of men is the release of a citizen from the whims of his fellow citizens. The stability and the security derived by the social order when rules of law are uniform, unchanging, and certain is another benefit.[275] Thus, Justice Brandeis expressed that in most matters, "it is more important that the applicable rule of law be settled than that it be settled right."[276]

This necessity is dictated by the goal of achieving an ordered society. Thus, it is a fundamental characteristic of an organized and cohesive society that it possess a "system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner."[277]

One of the problems with the concept of the rule of law is that it is essentially an abstract concept that has been, through the prose of judicial opinions and political commentary, sought to be given a concrete manifestation as though it were an active sentient being. This is hardly the case for the law only exists as a guiding principle that directs the conduct of men.[278] The danger of this misconception is that it easily leads to disillusion, for it is quickly recognized that every event habitually ascribed to the law is actually the product of the mind, the will, and the act of an identifiable human being.[279] While the judicial process suggests that the law is the active subject and the judge merely a passive instrument, that is not the case. The judge is the actor

---

[271] Cooperrider, *supra* note 208, at 503.

[272] Joseph Thesing, *Rule of Law and Democracy – An Introduction*, *in* THE RULE OF LAW: A READER 17 (Joseph Thesing, ed. 1997).

[273] P.J. FITZGERALD, SALMOND ON JURISPRUDENCE 65 (1966).

[274] *Id.*

[275] *Id.*

[276] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, *J., dissenting*).

[277] Boddie v. Connecticut, 401 U.S. 371, 375 (1971).

[278] Cooperrider, *supra* note 208, at 507.

[279] *Id.*

and the law serves as the obligatory force that impels him to choose among a set of options in the disposition of a particular controversy as to which is legal and just.[280]

The point of the discussion is that if the judicial system is to work at all, that feeling of obligation among judges must be preserved. The "Rule of Law" insofar as the judicial process is concerned, depends on the extent to which judges are compelled to remain within the bounds provided by law.[281] Without that obligatory force, there would be, in fact, no external control over the judge's decision.[282] If such were the case, then judicial discretion will be prone to abuse as much as the powers of the executive and legislative branches—an abuse that the judicial branch of government was meant to guard against.

In this regard, the duty of the judiciary is to maintain a jurisprudential climate in which persons are able to rely in good faith that what is perceived to be the law of the present will govern and protect their rights and interests tomorrow. This climate cannot be achieved when every judgment of the Supreme Court is prone to sudden reversal whether tomorrow or a year from its rendition with finality.

Emphasizing respect for the rule of law finds proper context in the case of judicial flip-flopping since the abrupt reversals or immediate overruling of prior decisions of the Court imply prior error in the exercise of its discretion. The cumulative reversals of the Supreme Court's decisions will overtax the People's good faith in the Court because of the cloud of doubt that arises as to whether finality will indeed be reached in the disposition of controversies. Thus, in *Casey,* the Joint Opinion of the majority explained that:

> In two circumstances, however, the Court would almost certainly fail to receive the benefit of the doubt in overruling prior cases. There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. *Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong.*[283]

Every Supreme Court should aim for a reversal of a prior decision not simply justified on the soundness of its ratiocination, but also on the avoidance

---

[280] *Id.* at 508.

[281] *Id.*

[282] *Id.*

[283] *Casey*, 505 U.S. 833, 866. (Emphases supplied.)

of a reasonable perception that such reversal was occasioned by a mere "surrender to political pressure" or an "unjustified repudiation of the principle" originally relied upon by the Court.[284] While there is a "limit to the amount of error that can plausibly be imputed to prior Courts," this does not give the Court free-wheeling authority to repudiate its prior judgments on a whim unless it is willing to gamble away its institutional integrity and legitimacy. As *Casey* warned, if the People's "limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term" and that "[t]he legitimacy of the Court would fade with the frequency of its vacillation."[285]

The reminder often ignored by our Supreme Court is Justice Cardozo's when he said "Justices must not benevolently constitute themselves '*les bons juges*' and do in each case what seems just for it alone."[286] It cannot be denied that the challenge to restrain the hand wielding the sword of justice is immense, especially if the purpose is altruistic. Bickel terms this the Lincolnian tension inherent in a democratic system of government. It is the tension between expediency and principle within which the Supreme Court must play its role. Beyond the function of judicial review to define values and proclaim principles, our Supreme Court has the duty of maintaining the stability of jurisprudence and the administration of justice.[287] A Supreme Court that exercises its power to rule in favor of one today and then backtracks and rules in favor of another tomorrow does not only call its own integrity and impartiality in question, but also tends to short circuit the present orderly system of law and jurisprudence.

The danger is compounded by the lack of recourse against members of the Supreme Court, except perhaps, through the strong medicine of impeachment. It is further compounded by the absence of an effective remedy from a flip-flopped decision.[288] Hamilton's sentiments are echoed by the solemn admonition of our own Justice Antonio Barredo which is most appropriate in explaining the lack of a recourse against judgments made by the Supreme Court in the context of the rule of law:

> The rule of law avoids creating areas of discretionary powers, and the fact that it is the Supreme Court that exercises the discretion does

---

[284] *Id.* at 867.

[285] *Id.* at 866.

[286] CARDOZO, *supra* note 19, at 139.

[287] BICKEL, *supra* note 148, at 68.

[288] Alexander Hamilton, The Federalist No. 81 (June 28, 1788), *available at* http://thomas.loc.gov/home/histdox/fed_81.html (last accessed Apr. 26, 2017).

> not make it tolerable in any degree, for such an eventuality can be worse because no other authority can check Us.[289]

A principle of law laid down by the Supreme Court becomes part of the law interpreted. In constitutional interpretation, the principle enunciated by the Supreme Court is engrafted as an annex of the Constitution itself. In this regard, the principle can be revised or reversed only by the Court itself, unless the other branches of government amend the law or the Constitution.[290]

The continuous and brazen transgressions of the law lead to the decay of the rule of law. The decay refers to the loss of efficacy of the rules precisely because the People have tolerated their breach or violation. Today's non-compliance, if sufficiently and frequently repeated, creates a numbness that deadens the obligatory force of law on Society. It does not matter if there is no provision of law that prohibits its breach or violation for it is the essence of law that it has compelling or obligatory force and, therefore, must be followed. Hart's ruminations on this matter are particularly instructive:

> No rules can be guaranteed against breach or repudiation; for it is never psychologically or physically impossible for human beings to break or repudiate them; and if enough do so for long enough, then the rules will cease to exist. [...] It is logically possible that human beings might break all their promises; at first, perhaps, with the sense that this was the wrong thing to do, and then with no such sense. Then the rule which makes it obligatory to keep promises would cease to exist[.][291]

Ultimately, the zeal to uphold justice, albeit an admirable and desirable trait, must never be allowed to blind judges or justices to the limits of judicial power or to obscure the boundaries set by the law.[292] Otherwise, the magistrates themselves become the very means by which the rule of law, which they have sworn to protect and uphold, is undermined. As Justice Leonardo-De Castro explained: "[f]or the decisions of the Court to have value as precedent, [it] cannot decide cases on the basis of personalities nor on something as fickle and fleeting as public sentiment".[293] In this matter Justice White lucidly explains the danger of a flip-flopping court:

---

[289] Gonzales v. Commission on Elections, G.R. No. 27833, 27 SCRA 835, 915-6, Apr. 18, 1969 (Barredo, *J.*, *concurring and dissenting*).

[290] *See* Cooper v. Aaron, 358 U.S. 1 (1958).

[291] H.L.A. HART, *supra* note 155, at 146.

[292] Alonzo v. Concepcion, A.M. No. RTJ-04-1879, 448 SCRA 329, Jan. 17, 2005.

[293] Biraogo v. Philippine Truth Commission of 2010, G.R. No. 192935, 637 SCRA 78, 306, Dec. 7, 2010 (Leonardo-De Castro, *J.*, *concurring*).

> The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that, on great constitutional questions, this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value, and become a most dangerous instrument to the rights and liberties of the people.[294]

E. Collapse of the Legitimating Arm of Government

This role of the Supreme Court is made even more important from the greater perspective of evaluating the legitimacy of government. A government of limited powers, acting outside its limits, is to that extent not a legitimate government at all.[295]

Judicial power is of the same species of judicial review in that it serves an affirmative function vital to the government of limited powers.[296] Unlike judicial review, however, judicial power does not merely have for its object the enforcement of the limits of governmental powers but also private individuals and their rights and obligations under law and contract. The institution of judicial power serves the rule of law by subordinating private or public interest according to some rule of statute, and through the adjudication of a dispute that the government and the people are ready to obey.

In this regard, Professor Black is correct in always reminding us that what a government of limited powers needs, at the beginning and forever, is some means of assuring the people that it has taken all steps humanly possible to stay within its powers. That is the condition of its legitimacy, and its legitimacy in the long run, is the condition of its life.[297]

The function of legitimating the acts of Government had been entrusted to the Supreme Court as an inherent incident of its judicial power. In such manner, the continued discharge of the Supreme Court of its duties and the public reception of the exercise of its duties as valid is a symbiotic process essential for the government's survival. Thus, the fact that a Supreme Court is dependent on the perception of the People as to its legitimacy for survival

---

[294] *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 652 (1895).
[295] BLACK, JR., *supra* note 145, at 77.
[296] *Id.* at 86.
[297] *Id.* at 52.

acquires immense significance. This was enunciated by the United State Supreme Court in *Casey*, thus:

> The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.[298]

The fate of the Government is interwoven with the Supreme Court. In *Casey*, the United States Supreme Court underscored the need to protect the Court's legitimacy if only to maintain a Nation's "very ability to see itself through its constitutional ideals," thus:

> Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.[299]

The evil inherent in judicial flip-flopping is that it plants the seed for the destruction of the Supreme Court as an institution. The admonition in *Casey*, inasmuch as it is applicable to the Supreme Court of the United States, is very much applicable to our own Supreme Court. As was explained by then Justice (now Chief Justice) Sereno:

> What has been at stake in the flip-flopping cases and now in the puzzling invocation of the Internal Rules of the Court in this case is no less than the risk that the moral force of Supreme Court judgments will be undermined. The Supreme Court's word is final because all the coercive forces of the state apparatus will ensure its

---

[298] *Casey*, 505 U.S. 833, 865 (1992).
[299] *Id.* at 868.

execution, by operation of the Constitution. The Members of the Court must never lose sight of the fact that it owes the authority of its decisions only to the Constitution and, hence, to the people themselves. When the moral force of the decisions of the Supreme Court is lost because the people do not see in them the application of procedural rules in an even manner, then it is conceivable that even the automatic legal force given to its decisions may likewise be lost. That would be a most sad period in its history.[300]

This sentiment is likewise echoed by the ruminations of Justice Brion:

The capacity, capability and potential for imaginative ideas of those engaged in the law, in arguing about the law and citing justifications for their conclusions, have been amply demonstrated over the years and cannot be doubted. In this endeavor, however, lawyers should not forget that certain underlying realities exist that should be beyond debate, and that cannot and should not at all be touched even by lawyers' convincing prowess. They should not forget that their arguments and conclusions do not stand by themselves and do not solely address the dispute at hand; *what they say and conclude create ripple effects on the law and jurisprudence that ultimately become tsunamis enveloping the greater society where the law stands as an instrument aimed at fostering social, political and economic order.*

In the context of the actions of the Supreme Court – the highest court that decides on the interpretation of the law with binding effect for the whole country – it cannot simply disregard fundamental principles (such as the principle of immutability of judgments) in its actions without causing damage to itself and to the society that it serves. *A supreme court exists in a society and is supported by that society as a necessary and desirable institution because it can settle disputes and can do this with finality. Its rulings lay to rest the disputes that can otherwise disrupt the harmony in society.*

This is the role that courts generally serve; specific to the Supreme Court – as the highest court – is the finality, at the highest level, that it can bestow on the resolution of disputes. Without this element of finality, the core essence of courts, and of the Supreme Court in particular, completely vanishes.

This is the reality that must necessarily confront the Court in its present action in reopening its ruling on a case that it has thrice passed upon. After the Court's unsettling action in this case, *society will inevitably conclude that the Court, by its own action, has established that*

---

[300] *Fourth Apo Fruits Resolution*, 647 SCRA 207, 240-41, Apr. 5, 2011.

> *judgments can no longer achieve finality in this country*; an enterprising advocate, who can get a Justice of the Court interested in the reopening of the final judgment in his case, now has an even greater chance of securing a reopening and a possible reversal, even of final rulings, because the Court's judgment never really becomes final. Others in society may think further and simply conclude that this Supreme Court no longer has a reason for its being, as it no longer fulfills the basic aim justifying its existence.[301]

Justice Brion goes further by warning us that the systemic incapacity of the Supreme Court to render judgment with finality results in a monumental imbalance in the legal structure and leads to the downfall of Government, and with it, Society:

> The finality of a judgment is a consequence that directly affects the immediate parties to a case. In a sense, it affects the public as well because the public must respect the finality of the judgment that prevails between the immediate parties. Where a ruling affects the public at large, as in the declaration of the constitutionality or unconstitutionality of a statute, the Court's declaration is binding on the general public.
>
> Under this scheme, it is only right and proper that the Supreme Court itself be bound by the finality of the judgment because: (1) the finality is by reason of the Rules that the Court itself promulgated; and (2) of societal reasons deeper than what the Rules of Court expressly provides. If the rules for the immediate parties and the public were to be one of finality, while the rule for the Court is one of flexibility and non-binding effect because the Court may reopen at will and revisit even final rulings, what results is a *monumental imbalance in the legal structure* that the Constitution and our laws could not have intended. If an imbalance were intended or tolerated, then a serious restudy must perhaps be made – for a society with a heavy tilt towards unregulated power cannot but at some point fall, or, at the very least, suffer from it.[302]

For truly, lack of repose in the law by the institution entrusted with its ultimate protection leads to the undoing of the rule of law. The decay of the rule of law becomes a reality when its very guardian refuses to recognize and be bound by it.

---

[301] *Second Keppel Resolution*, at 4-5, Sept. 18, 2012 (Brion, *J.*, *dissenting*). (Emphases in the original.)

[302] *Id.* at. 7 (Brion, *J.*, *dissenting*). (Emphases in the original.)

The fact that the foregoing are but ruminations of dissenting Justices does not deprive them of their inherent persuasive power. As pointed out by Chief Justice Charles Hughes, "[a] dissent in a Court of last resort is an appeal [...] to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."[303] As Justice Antonin Scalia remarks, dissents of this order "augment rather than diminish the prestige of the Court."[304] He further explained:

> When history demonstrates that one of the Court's decisions has been a truly horrendous mistake, it is comforting ... to look back and realize that at least some of the [J]ustices saw the danger clearly and gave voice, often eloquent voice, to their concern.[305]

V. CONCLUSION: NEITHER FORCE NOR WILL BUT ONLY JUDGMENT

The preservation of the Supreme Court's mystique of infallibility has immense significance when placed in the context of its very reason for existence as an organ of government exercising the delegated power of the people to judge. The continued relevance of its functions is put in serious danger when it has shown itself, through its repeated flip-flopping, as systemically incapable of arriving at the proper interpretation of law and the Constitution.

Indeed it is true that judicial supremacy is not the Supreme Court asserting dominance over a co-equal branch of government; every time it exerts its solemn duty to mediate constitutional boundaries under the Constitution, it places itself on the line. Its reputation and integrity is tried and tested every time it renders judgment, whether in a case involving the interests of private individuals or the excesses of government. If it reaches a point that the content of its institutional integrity fails to sway coordinate branches of government and the people, the system of government collapses. A government cannot attain and hold a satisfactorily definite attribute of legitimacy if its actions as a government are not, by and large, received as authorized.[306]

---

[303] CHARLES HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1936).

[304] Antonin Scalia, *Dissents*, 13 OAH MAG. HISTORY 18, 19 (1998), *cited in* Ruth Ginsberg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 5 (2010).

[305] *Id.*

[306] BLACK, JR., *supra* note 145, at 37.

The author hopes that the Supreme Court realizes the fringes of its own jurisdiction and its role in a system of limited government which eschews the existence of any form of unbridled authority. In the earliest days when the United States Supreme Court was coming to grips with the extent of its powers under the Constitution of the United States, even Chief Justice Marshall declared that:

> Courts are mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always the will of the legislature; or in other words, to the will of the law.[307]

An equally important thing to remember is Bickel's exhortation about the Court's temperance for the exercise of judicial review whose rationale equally applies to judicial power. The essentially important fact, so often missed, is that the Court wields a threefold power. It may strike down actions as inconsistent with principles enunciated by law. It may validate or legitimate actions, whether of government or private persons which are consistent with the law or the Constitution. Or it may do *neither*. Therein lies the secret of its ability to maintain itself in the tension between principle and expediency[308] and thereby, not only maintain but deepen its institutional integrity.

Flip-flopping on its decisions severely expends the Supreme Court's political capital and, in turn, takes a great toll on its institutional integrity. The flip-flopping cases illustrate the great lengths certain parties go to in taking advantage of legal processes and equitable remedies to secure a favorable ruling. Worse, it shows the Supreme Court's willingness to bend over backwards to service a private interest, betraying its lack of impartiality. The façade given by the pursuit of the "interests of higher justice" is easily pierced when private interests are made apparent from a simple reading of the Supreme Court's irresolute and flip-flopping decisions. No amount of appeal to the public's trust or simply wrapping itself in the trappings of impartiality can shield it from an inquisitive and vigilant public.[309] The sole question that remains, therefore, is to what extent the People will tolerate a Court that not only chooses to go beyond the limits imposed on it by the Constitution, but goes as far as to shift the meaning of the words of the Fundamental Law of the Land.

---

[307] Osborn v. Bank of the United States, 9 Wheat. 738, 866 (1824).

[308] BICKEL, *supra* note 148, at 69.

[309] *Romualdez Resolution*, 587 SCRA at 158-160 (Brion, *J.*, *dissenting*).

For in the end, the Supreme Court, despite all its lofty declarations is still the weakest branch of government. The Court's authority—possessed neither of the purse nor the sword—ultimately rests on the sustained public confidence in the truth, justice, integrity, and moral force of its judgments.[310] Hamilton aptly said that the Court has "*neither force nor will*, but merely judgment."[311] Just as in the fable of the boy who cried wolf, we are given a vision of what will become of a Court that refuses to heed these admonitions and when it inevitably loses the moral force of its judgments.

- o0o -

[310] Aquino v. Enrile, G.R. No. L-35546, 59 SCRA 183, Sept. 17, 1974.

[311] Alexander Hamilton, The Federalist No. 78, *available at* http://thomas.loc.gov/home/histdox/fed_78.html (last accessed Apr. 26, 2017).