FACING THE FACTS: CONFRONTING LEGISLATIVE FACTS IN SUPREME COURT ADJUDICATION*

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ABSTRACT

The Supreme Court is not a trier of facts; it rejects petitions for review attended by factual questions. However, not all factual assertions are necessarily the subject of trial. Adjudicative facts—the material incidents of a case—are contingent on evidence. Parties' conflicting claims on what transpired must be weighed during trial. The same is not true of legislative facts—more generalized facts about the world that transcend a particular dispute. Rather than impair, descriptive knowledge on such matters as science, history, economics, culture, or psychology can facilitate the resolution of questions of law by weighing law's contents and considerations, ultimately enabling a determination of what the law is or how it ought to be interpreted. Instead of a sweeping rejection of cases that deal with questions of a factual sort, this Article invites recognition: first, of the distinction between adjudicative facts and legislative facts; and second, of the utility of considering legislative facts in the Supreme Court's discharge of its functions. This is especially true in the context of the Court's extraordinary capacities enabled by the 1987 Constitution's expansion of judicial power. This Article further considers challenges and pitfalls, along with responses and techniques to confronting legislative facts, particularly in an environment of information saturation and post-truth discourse.

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"Every law is an imagined future."
—Justice Marvic M.V.F. Leonen[1]

"The final cause of law is the welfare of society."
— Justice Benjamin Cardozo[2]

I. INTRODUCTION

In countless instances, the Supreme Court has declined to entertain cases, disavowing competence to try questions of fact. The tendency to be selective and to balk at review seems inclined to escalate as the Court remains mired in a gridlock, unable to surmount its staggering docket even when disposing of cases at an unprecedented rate. This logistical difficulty has prompted it to make doctrinal declarations emphasizing the application of procedural filters. However, the pragmatic drive to diminish its docket by resisting factual matters risks being overzealous.

A factual assertion pertains to any "descriptive statement that can (at least theoretically) be falsified."[3] Within this general category of assertions belongs *adjudicative facts* and *legislative facts*. Adjudicative facts are the "facts of the case[,]"[4] as traditionally understood. They are the what, who, when, where, how, and why of a case.[5] Ascertaining adjudicative facts is contingent on evidence of what actually transpired; thus, they are necessarily the subject of trial. In contrast, legislative facts are "more generalized facts about the world"[6] that "transcend the particular dispute[.]"[7] Though not concerned with what happened in a case, they are vital in informing a court about other attendant considerations, allowing it "to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take."[8] In short, they aid a court in "say[ing] what the law is"[9] and facilitate

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[1] Associate Justice Marvic M.V.F. Leonen, Interpellation during the Oral Arguments on Calleja v. Exec. Sec'y, G.R. No. 252578, Feb. 2, 2021, *available at* https://www.youtube.com/watch?v=dwPdzdVkkEA&t=9517s.

[2] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 28 (1921).

[3] Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1264 (2012), *citing* Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 150 (2010).

[4] *Id.* at 1256.

[5] Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955).

[6] Larsen, *supra* note 3, at 1255.

[7] David L. Faigman, *Normative Constitutional Fact-Finding: Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 552 (1991).

[8] Davis, *supra* note 5.

[9] Marbury v. Madison, 5 U.S. 137, 177 (1803).

the resolution of questions of law. As they "deal with the general,"[10] they are not beholden to trial. Accordingly, their consideration by the Supreme Court does not run afoul of its and trial courts' relative competencies.

Many of the Court's rulings have been informed by such matters as history, culture, science, economics, and psychology. Its future determinations will need to continue to draw from such knowledge base. A sweeping resistance to reckoning descriptive knowledge can mean the Court's consigning itself to pedantic, but ultimately futile, legalism that is unable to make sense of the larger reality in which it both operates and which it binds by its determinations. Its rulings may be well-founded in legal formulations, operating like clockwork, but ultimately debilitated from serving the social ends for which laws have been adopted.

This Article is foremost an invitation to come to terms with the conceptual distinction between adjudicative facts and legislative facts. The Constitution impels the Supreme Court to delve into concerns traditionally reserved for other branches of government. It also codifies normative and policy objectives that the Judiciary must carry into effect. The constitutional design of judicial power urges recognition of how integrative knowledge beyond what is strictly legal is an ineluctable dimension of the Court's duties and a proper instrument of its functions.

This Article begins by examining the seeming tension between the pragmatic aims of judicial economy and the normative demands of the Constitution's broadening of judicial duty and accompanying innovations. Confronting legislative facts at the level of the Supreme Court is not incompatible with its general avoidance of matters reserved for trial. The Article proceeds to examine paradigms on legislative facts, their nature and utility, how they differ from adjudicative facts, as well as the means used to establish them. The ripened understanding of and robust discourse on legislative facts in the United States—where the notion of legislative facts was birthed—along with the contemporary challenges of post-truth discourse in a technologically-saturated environment bring to light aspersions concerning prevailing practices. These misgivings shall be considered in view of the realities and imperatives of judicial function in general, and adjudication at the level of the Supreme Court in particular. The Constitution's expansion of judicial power urges deliberate reflection on what legislative fact consideration in Supreme Court litigation and adjudication entails. In the interest of effective operationalization, responses to the challenges of legislative fact consideration

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[10] Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-record Factfinding*, 61 Duke L.J. 1, 39 (2011), *citing* Faigman, *supra* note 7.

shall be explored. Likewise, a possible framework for strategically appraising the Supreme Court's consideration of legislative facts and enhancing democratic accountability shall be traced.

II. TENSION: PRAGMATIC AIMS AND ORDAINED IDEALS

The Supreme Court, in the 2019 case of *Gios-Samar, Inc. v. Department of Transportation and Communications*,[11] frames the doctrine of hierarchy of courts in absolute terms: "[D]irect recourse to this Court is allowed only to resolve questions of law, notwithstanding the invocation of paramount or transcendental importance of the action."[12] It adds, "when a question before the Court involves determination of a factual issue indispensable to the resolution of the legal issue, the Court will refuse to resolve the question regardless of the allegation or invocation of compelling reasons, such as the transcendental or paramount importance of the case."[13]

Gios-Samar makes no secret of how it serves the pragmatic interest of judicial economy. Noting how the Court is overwhelmed with "staggering numbers"[14]—as thousands of cases are filed before it on an annual basis, even when it produces a sizeable number of decisions and resolutions[15]—it mused about the "sort of cases [that] deserves the Court's attention and time."[16] Thus, it extolled the doctrine of hierarchy of courts as a "filtering mechanism"[17] grounded on due process[18] and constitutional design.[19]

Justice Francis Jardeleza's *ponencia* was a welcome development for current and past members of the Court. By the end of 2019, *Gios-Samar* had

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[11] [Hereinafter "*Gios-Samar*"], G.R. No. 217158, 896 SCRA 213, Mar. 12, 2019.

[12] *Id.* at 227.

[13] *Id.* at 224.

[14] *Id.* at 290-91. "Strict adherence to the doctrine of hierarchy of courts is an effective mechanism to filter the cases which reach the Court. As of December 31, 2016, 6,526 new cases were filed to the Court. Together with the reinstated/revived/reopened cases, the Court has a total of 14,491 cases in its docket. Of the new cases, 300 are raffled to the Court En Banc and 6,226 to the three Divisions of the Court. The Court En Banc disposed of 105 cases by decision or signed resolution, while the Divisions of the Court disposed of a total of 923 by decision or signed resolution."

[15] *Id.*

[16] *Id.* at 291.

[17] *Id.* at 290.

[18] *Id.* at 288-89.

[19] *Id.* at 284-88.

been favorably referenced in at least 13 Supreme Court decisions,[20] resolutions,[21] and separate opinions.[22] In a speech delivered two months after its promulgation, former Chief Justice Lucas Bersamin lauded the decision as key to judicial reform. He noted that it was adopted "with the intention of further managing the growing volume of cases directly filed in the Supreme Court"[23] as it will enable the Court to "filter out the unworthy or frivolous cases."[24] Retired Justice Arturo Brion further recognized that "better overall numbers can be achieved if the inflow of cases can also be seriously considered and limited to the extent allowed by law."[25] He exhorted obedience to *Gios-Samar*, saying that "both the public and the court itself must toe this line to achieve the prompt disposition of cases that the public seeks."[26] Former Chief Justice Artemio V. Panganiban acknowledged the frustration animating the Court's recognition of its staggering caseload.[27] He expressed hope that reforms adopted in keeping with *Gios-Samar*'s aims "will finally solve the perennial problem of 'justice delayed is justice denied.'"[28]

Gios-Samar is not alone in its advocacy of judicial restraint. Other rulings were likewise promulgated by the Court around the same period, as

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[20] Alyansa para sa Bagong Pilipinas, Inc. v. ERC, G.R. No. 227670, May 3, 2019; Inmates of the New Bilibid Prison v. De Lima, G.R. No. 212719, June 25, 2019; Falcis v. Civ. Registrar Gen. [hereinafter "*Falcis*"], G.R. No. 217910, Sept. 3, 2019; Acosta v. Ochoa, G.R. No. 211559, Oct. 15, 2019; Local Gov't of Sta. Cruz, Davao Del Sur v. Provincial Office of the DAR, Digos City, Davao Del Sur, G.R. No. 204232, Oct. 16, 2019; Servo v. Phil. Deposit Ins. Corp., G.R. No. 234401, Dec. 5, 2019.

[21] Guinyaoan v. Sabado, G.R. No. 244452 (Notice), July 10, 2019; Sacolles v. Aquino, G.R. No. 236219 (Notice), July 22, 2019; Reyes v. Phil. Health Ins. Corp., G.R. No. 241062 (Notice), July 30, 2019; Unciano v. Guanlao, G.R. No. 249336 (Notice), Dec. 5, 2019.

[22] Nicolas-Lewis v. COMELEC, G.R. No. 223705, Aug. 14, 2019 (Jardeleza, *J.*, *concurring*) ; Abogado v. DENR, G.R. No. 246209, Sept. 3, 2019 (Jardeleza, *J.*, *separate opinion*); Pimentel v. Legal Educ. Bd., G.R. No. 230642, Sept. 10, 2019 (Jardeleza, *J.*, *concurring and dissenting*).

[23] Chief Justice Lucas P. Bersamin, Judicial Reform for a Competitive Future, Speech delivered at the Management Association of the Philippines (MAP)-Judicial Reform Initiative (JRI) Joint General Membership Meeting, Makati Shangri-La, at 6 (May 21, 2019), *available at* http://map.org.ph/wp-content/uploads/2019/05/BERSAMIN-CJ-LUCAS-21May2019-Judicial-Reform.pdf (last visited Dec. 22, 2020).

[24] *Id.*

[25] Arturo D. Brion, *The Legal Front: Hear ye, hear ye: the Bersamin Court approach in Supreme Court litigation*, MANILA BULLETIN, Mar. 27, 2019, ¶ 4, *available at* https://mb.com.ph/2019/03/27/hear-ye-hear-ye-the-bersamin-court-approach-in-supreme-court-litigation/ (last visited Dec. 22, 2020).

[26] *Id.* at ¶ 18.

[27] Artemio V. Panganiban, *With Due Respect: Solving the SC's heavy caseload*, INQUIRER.NET, Aug. 23, 2020, ¶ 2, *at* https://opinion.inquirer.net/132930/solving-the-scs-heavy-caseload (last visited Dec. 22, 2020).

[28] *Id.* at ¶ 11.

testament to its commitment to procedural standards as a means of sieving through cases.

In 2018, *Provincial Bus Operators Ass'n of the Philippines v. Department of Labor and Employment*[29] maintained that the Court is not a forum for deciding policy questions.

In 2019, the Court was particular with the requirements of justiciability in *Falcis v. Civil Registrar General.* Building on extant standards, *Falcis* added that "[t]he need to demonstrate an actual case or controversy is even more compelling in cases concerning minority groups."[30] It proceeded to determine that the LGBTQI+ community has suffered a "history of erasure, discrimination, and marginalization[,]"[31] thus "impel[ling] th[e] Court to make careful pronouncements — lest it cheapen the resistance, or worse, thrust the whole struggle for equality back to the long shadow of oppression and exclusion."[32]

In 2020, *Kumar v. People*[33] facilitated the outright denial of petitions for review on certiorari which "fail [ ] to readily demonstrate 'special and important reasons[.]'"[34] It notes that such petitions "may be denied due course, and disposed without further action by th[e] Court."[35]

Similarly in 2020, the Court in *De Leon v. Duterte*[36] and *Taguiwalo v. Duque*[37] refused to entertain petitions concerning information on President Rodrigo Duterte's state of health and seeking to facilitate mass testing for COVID-19, respectively. These denials were made without comments even being filed by the public respondents and in the face of how some of the Court's own members have underscored that the petitions have "a significant impact on the social, political and economic life of the nation."[38]

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[29] G.R. No. 202275, July 17, 2018.

[30] *Falcis,* at 33. This pinpoint citation refers to the copy of the decision uploaded on the Supreme Court website.

[31] *Id.* at 46.

[32] *Id.*

[33] [Hereinafter "*Kumar*"], G.R. No. 247661, June 15, 2020.

[34] *Id.* at 1. This pinpoint citation refers to the copy of the decision uploaded on the Supreme Court website.

[35] *Id.*

[36] G.R. No. 252118, May 8, 2020.

[37] G.R. No. 252556, Sept. 1, 2020.

[38] *Id.* at 4 (Leonen, *J., dissenting*). This pinpoint citation refers to the copy of the decision uploaded on the Supreme Court website.

The numbers and burden confronting the Court speak for themselves. The Judiciary's 2018 Annual Report indicates that there were 8,786 pending cases in the Court by the end of 2017. Throughout 2018, the Court disposed of 6,487 cases, exceeding its target of 6,000 cases by more than 8%. However, as 6,543 new cases were filed, by year's end, the Court's total docket increased to 8,852 cases.[39] The Judiciary's 2019 Annual Report further indicates that the Court disposed of 5,792 cases in 2019. However, because 6,014 cases were filed, the year-end total docket increased to 8,972 cases.[40]

The Court's practical intentions are laudable, and its measures are imperative and timely. However, such a consummate framing of refusal to entertain "determination[s] of [ ] factual issue[s,]"[41] spurred by a sharp yearning to overcome a staggering burden, risks overzealousness in practice. Thus, albeit concurring in *Gios-Samar*, Associate Justice Marvic M.V.F. Leonen underscored that the Constitution is typified by innovations—"encod[ing] the concepts of social justice, acknowledg[ing] social and human rights, and expand[ing] the provisions in our Bill of Rights"[42]—of which the Court must not lose sight. Though urging the "further tam[ing of] the concept that a case's 'transcendental importance' creates exceptions to justiciability[,]"[43] he also cautioned, "[w]e should always be careful that in our desire to achieve judicial efficiency, we do not filter cases that bring out these values."[44] Retired Senior Associate Justice Antonio Carpio was more forthright, stating "[w]e do not abandon here the doctrine of transcendental importance."[45]

The doctrine of hierarchy of courts seeks to prevent the Supreme Court's being reduced to a surrogate trial court, inordinately burdened with "inferring the facts from the evidence as these are physically presented."[46] It is meant "to ensure that every level of the judiciary performs its designated roles in an effective and efficient manner[,]"[47] acting within its unique competency. Chief Justice Querube Makalintal's seminal assertion in *Chemplex*

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[39] Jud. Ann. Rpt. 2018, Supreme Ct. of the Phil., 8 (2019), *available at* https://sc.judiciary.gov.ph/files/annual-reports/SC_Annual_18.pdf

[40] Jud. Ann. Rpt. 2019, Supreme Ct. of the Phil., 8 (2020), *available at* https://sc.judiciary.gov.ph/files/annual-reports/JAR-2019.pdf.

[41] *Gios-Samar*, 896 SCRA 213, 248.

[42] *Id.* at 306 (Leonen, *J., concurring*).

[43] *Id.* at 304.

[44] *Id.* at 306.

[45] *Id.* at 296 (Jardeleza, *J.*)

[46] Diocese of Bacolod v. COMELEC, G.R. No. 205728, 747 SCRA 1, 43, Jan. 21, 2015.

[47] *Id.*

(Philippines), Inc. v. Pamatian[48] that the Court is not a trier of facts hearkens to the distinct competencies of trial courts and the Supreme Court: "This Court is not a trier of facts, and it is beyond its function to make its own findings of certain vital facts different from those of the trial court, especially on the basis of the conflicting claims of the parties and without the evidence being properly before it."[49] It is in keeping with this that questions of law are distinguished from questions of fact:

> As distinguished from a question of law which exists "when the doubt or difference arises as to what the law is on [a] certain state of facts" — "there is a question of fact when the doubt or difference arises as to the truth or the falsehood of alleged facts;" or when the "query necessarily invites calibration of the whole evidence considering mainly the credibility of witnesses, existence and relevancy of specific surrounding circumstances, their relation to each other and to the whole and the probabilities of the situation."[50]

Consciousness of the proper and fundamental purpose of the doctrine of hierarchy of courts requires an examination of which matters the Court must rightly avoid. Such matters must be distinguished from those determinations which, though tinged with considerations of a factual sort, are not inexorably the subject of trial because they do not relate to the "calibration of the whole evidence considering [...] the probabilities of the situation."[51] A factual assertion can mean any "descriptive statement that can (at least theoretically) be falsified."[52] Not all factual assertions are concerned with what happened between the parties to a case as revealed by the evidence. Descriptive statements that do not delve into a case's material incidents are not, in the strict sense, the sort of questions of fact that jurisprudence distinguishes from questions of law.

It is in this regard that a distinction already extensively explored in the United States, but hardly considered in Philippine jurisprudence, should be helpful.

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[48] G.R. No. 37427, 57 SCRA 408, June 25, 1974.

[49] *Id.* at 412 (Makalintal, *C.J., concurring*).

[50] Bernardo v. Ct. of Appeals, G.R. No. 101680, 216 SCRA 224, 232, Dec. 7, 1992.

[51] *Id.*

[52] Larsen, *supra* note 3, at 1264.

Some facts are concerned with "who did what, where, when, how, and with what motive or intent[.]"[53] They "deal with the particular,"[54] relating to "what the parties did, what the circumstances were, what the background conditions were[.]"[55] These are the facts "to which the law is applied in the process of adjudication"[56] and thus, "are conveniently called *adjudicative facts*."[57]

Other facts "deal with the general, providing descriptive, and sometimes predictive, information about the larger world."[58] Although "not particularly within the knowledge of the parties with standing to appear before the court[,]"[59] they nevertheless remain vital because they facilitate a more complete understanding of what are involved in a case. These facts "can take various forms; they might help the court understand the history of a given practice, identify current realities, or make predictions about the potential effects of legal rules that the court is considering adopting."[60]

A widened perspective better informs a court on how to proceed. It facilitates sound and well-founded interpretations that may be relied upon not only as a resolution of a conflict, but also as enduring precedent. Thus, when a court decides a case, "it must attempt to decide not only the case before it but also a great many similar 'cases' not in court [...] [its] legislative function requires it to be informed on matters far beyond the particular case."[61] It is in view of this that matters of general integrative knowledge "which inform the tribunal's legislative judgment are called legislative facts."[62]

The Constitution's normative and policy innovations and broadened judicial power impels the judiciary to be receptive to learning about the greater reality in which it operates and which is bound by how it rules. Thus, courts must necessarily be capable of engaging in various disciplines. Acknowledging the distinction between adjudicative facts and legislative facts calibrates

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[53] Davis, *supra* note 5, at 952.

[54] Gorod, *supra* note 10, at 39.

[55] Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942).

[56] Davis, *supra* note 5, at 952.

[57] *Id.* (Emphasis supplied.)

[58] Gorod, *supra* note 10, at 39, *citing* Faigman, *supra* note 7.

[59] *Id.* at 10, *citing* Faigman, *supra* note 7.

[60] *Id.* at 40, *citing* Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2790–99 (2008); Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504, 2512 (2009); Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2549–50 (2009) (Kennedy, *J., dissenting*)

[61] Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 77.

[62] Davis, *supra* note 5, at 952.

understanding of the Constitution's broadening of judicial duty, revealing that integrative knowledge beyond what is strictly legal is an essential mechanism for informed functioning. This should likewise enable a calibrated operation of the doctrine of hierarchy of courts. The doctrine can then remain true to its purpose of enabling courts at varying levels to act within their competencies, without risking either the inoperability of the Constitution's reforms, or the Supreme Court's abdication of its own, constitutionally-enhanced capacities.

III. PARADIGMS ON LEGISLATIVE FACTS

A. Underlying and Pronounced Reasoning Through Descriptive Knowledge

A court must operate with an understanding of how the world works. Its basic function of appraising acceptable conduct is ultimately grounded in descriptive conceptions of a perceived order. Thus, a determination of what is lawful—though enforcing rights and duties articulated in law, regulation, or precedent—is fundamentally an effort to resolve affairs in conformity with perceived order in human behavior or discoverable phenomenon. The conscious normative exercise is built upon and serves the avowedly factual. While "a good legal rule is one that causes a desirable social end[,]"[63] the desiring of social ends is anchored on and proceeds from an understanding of the human condition.

The rootedness of legal interpretation in descriptive knowledge manifests in declared presumptions and the conclusions they are thought to validly engender. For example, that flight indicates guilt;[64] that "narrations that are contrary to common experience, human nature and the natural course of things" deserve no credence and cannot be the basis for conviction in criminal proceedings;[65] that acting suspiciously engenders probable cause;[66] or that a

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[63] Ann Woolhandler, *Rethinking the Judicial Reception of Legislative Facts*, 41 VAND. L. REV. 111, 115 (1988), *citing* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 952, 958 (1987); Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907).

[64] People v. Molleda, G.R. No. 34248, 86 SCRA 667, 706-07, Nov. 21, 1978.

[65] People v. Buenaflor, G.R. No. 140001, 359 SCRA 783, 790, June 27, 2001.

[66] Terry v. Ohio, 392 U.S. 1, 30-31 (1968)

'young *barrio* lass' would not be so imprudent as to fabricate a tale of physical despoliation, thereby warranting credulity.[67]

Even as they are themselves expressed, declared presumptions are laden with theoretical understanding. Ann Woolhandler notes:

> When statutes and the common law incorporate background assumptions about causation into formal rules for the reception of evidence, we call them presumptions. Writers on evidence routinely recognize that presumptions may reflect judicially accepted views of probability (i.e., causation) as well as policies about who should bear the risks of uncertainty (i.e., choices of desirable effects).[68]

The antecedent understanding that informs declared presumptions is not limited to causes and ends. They encompass a myriad of functions. The example concerning a young barrio lass is built upon an elaborate, yet unstated, subjective map of developmental and cognitive psychology, gender relations, family systems, economics, ethics, history, culture, and even domestic religiosity. It subconsciously—though not to say correctly—invokes the intersectionality of youth, sex, ethnicity, and status, judging its implications on individual reasoning and decision-making, and positing conclusions about disenfranchisement in Philippine rural communities. A singular invocation of these enmeshed myriad of notions then, opportunely disengages obstacles to prosecution and facilitates criminal conviction.

For the most part, descriptive roots are neither categorical nor acknowledged; they are pervasive, but implicit. For instance, a court's choice of words, while mindful of denotation or connotation, is simultaneously an implied invocation of the history that underlies how meaning has evolved and the larger culture in which meaning is immersed.[69] Often, it is only when meaning is itself controversial that it is methodically explored.

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[67] People v. Esguerra, G.R. No. 117482, 256 SCRA 657, 664, May 8, 1996. *But see* People v. Amarela, G.R. No. 225642, 852 SCRA 54, Jan. 17, 2018, wherein the Court criticized what has since been known as the 'Maria Clara doctrine' as bordering on *non sequitur* and loaded with "gender bias or cultural misconception[.]" Nevertheless, it continued to place a premium on testimonies that are "consistent with human nature and the normal course of things."

[68] Woolhandler, *supra* note 63, at 120, *citing* EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 343, at 968-69 (3rd ed. 1984).

[69] Davis, *supra* note 5, at 975. "When the judge or officer looks at the testimony of the first witness, he uses extra-record information about the meaning of words in the English language, and this is so whether or not he consults the dictionary, and whether or not the meaning of a word is at issue between the parties. His knowledge of the meaning of the word 'the' comes from beyond the record. He assumes that a man is not thirty feet tall, that trains

The deliberate exploration of meaning as key to resolving a controversy was demonstrated in how the Court once determined that the remark "*putang ina mo*" did not amount to oral defamation.[70] The conclusions derived from this exploration have since been echoed in subsequent jurisprudence, with the Court describing the expression as "a common enough utterance in the dialect that is often employed, [only] to express anger or displeasure[,] [...] just an expletive that punctuates one's expression of profanity[, and not] seriously insulting[.]"[71] Thus, what was once an incipient assertion has become part of settled judicial wisdom.[72]

The deliberate exploration of meaning that reflects evolved understanding is also demonstrated in how our courts have, over time, variably read ascriptions of sexual orientation other than being heterosexual: *first*, as implying certain unflattering traits[73] or amounting to distasteful associations,[74] *second*, as "vulgar and insulting"[75] "argumentum ad hominem"[76] in the general sense; *third*, as specifically gender-insensitive language;[77] and *fourth*, as ambivalently and innocuously "descriptive[.]"[78] The

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run on rails, that automobiles are not flying machines, that France is outside the United States, and that coal is a fuel. He assumes the existence of human beings, of organized government, of a legal system, of courts, of businesses, of corporations. Every simple case involves the assumption of hundreds of facts that have not been proved."

[70] Reyes v. People, G.R. No. 21528, 27 SCRA 686, 693, Mar. 28, 1969. "*[P]utang ina mo* [...] is a common enough expression in the dialect that is often employed, not really to slander but rather to express anger or displeasure. It is seldom, if ever, taken in its literal sense by the hearer, that is, as a reflection on the virtues of a mother."

[71] Pader v. People, G.R. No. 139157, 325 SCRA 117, 121, Feb. 8, 2000.

[72] *See also* Adamson Univ. Faculty and Employees Union v. Adamson Univ., G.R. No. 227070, Mar. 9, 2020, at 10, wherein the Court ruled: "'*Anak ng puta*' is similar to '*putang ina*' in that it is an expletive sometimes used as a casual expression of displeasure, rather than a personal attack or insult."

[73] People v. Taruc, G.R. No. 69337, 171 SCRA 75, 81, Mar. 8, 1989. "[A]s a homosexual, Sanchez would have been deterred by his timid nature from testifying against the two accused-appellants, who were notorious 'toughs,' unless he was telling the truth."

[74] People v. Joaquin, G.R. No. 98007, 225 SCRA 179, 187, Aug. 5, 1993. "Lesbianism is a malicious accusation that should not be made without proof."

[75] *In re* Gedorio, A.M. No. RTJ-05-1955, 523 SCRA 175, 182, May 25, 2007.

[76] Sy v. Fineza, A.M. No. RTJ-03-1808, 413 SCRA 374, 382, Oct. 15, 2003.

[77] Dojillo v. Ching, A.M. No. P-06-2245, 594 SCRA 530, 541, July 31, 2009. "In the case of Judge Dojillo, he should be admonished to be more circumspect in his choice of words and use of gender-fair language. There was no reason for him to emphatically describe Concepcion as a 'lesbian[.]'"

[78] Canete v. Puti [hereinafter "*Canete*"], A.C. No. 10949, Aug. 14, 2019, at 6-7. "To be sure, the term 'bakla' (gay) itself is not derogatory [...] [nor] a source of offense as it is merely descriptive. However, when 'bakla' is used in a pejorative and deprecating manner, then

first assumed associations that affirm injurious and myopic attitudes. In the second, the Court recognized that references were made with intent to disparage, but was disinterested in gender sensitivity and indifferent to queer perspective. Its recognition of offense may have even been motivated by antecedent heterosexism (i.e. that the ascription of being "*bakla*" is insulting because it attributes a disorder), and if so, was fundamentally discriminatory.[79] The third abandoned institutional heterosexism as it specifically enjoined gender-fairness and operationalized an ethical canon on equality, diversity, and inclusivity.[80] The fourth is free of antecedent heterosexism while still aware of capacity to harm as it nuanced a vernacular term's meaning in recognizing that "*bakla*" can pertain and translate to the neutral "gay," merely "describ[ing] a male person who is attracted to [another of] the same sex[,]"[81] or that it can be uttered as a slur, translating to the contemptuous "faggot."

Though inhering and implicit in judicial function, the explicit invocation of factual knowledge is, at times, made as an adjunct to another argument (i.e. "rhetorically"[82]), or as an actual point on which a ruling or legal conclusion may turn (i.e. "dispositive to a case's outcome"[83]).

Both rhetorical and dispositive invocation of descriptive knowledge is demonstrated in *Social Weather Stations, Inc. v. COMELEC*.[84] Here, the Court ruled that the Fair Election Act's[85] requirement for persons publishing an election survey to disclose the identity of those who commissioned or paid for a survey encompasses subscribers. Among the Court's initial considerations was the Fair Election Act's objectives. The Court first cited the law's own declaration of principles and proceeded to note a constitutional provision whose language the law echoes and effects:

> Republic Act No. 9006 was adopted with the end in mind of "guarantee[ing] or ensur[ing] equal opportunity for public service"

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it becomes derogatory. Such offensive language finds no place in the courtroom or in any other place for that matter." This pinpoint citation refers to the copy of the decision uploaded on the Supreme Court website.

[79] *See* Luis Jose F. Geronimo, *Rising Above Contempt: SOGIESC Equality and LGBTQI+ Rights in Philippine Law through the Lens of Falcis v. Civil Registrar General*, 64 ATENEO L.J. 1341, 1402-03 n. 308 (2020).

[80] CODE OF JUD. CONDUCT, Canon 5.

[81] *Canete*, at 6.

[82] Larsen, *supra* note 3, at 1277.

[83] *Id.* at 1281.

[84] [Hereinafter "*Social Weather Stations, Inc.*"] G.R. No. 208062, 755 SCRA 124, Apr. 7, 2015.

[85] Rep. Act No. 9006 (2001), § 5.1-5.3.

> and to this end, stipulates mechanisms for the "supervis[ion] or regulat[ion of] the enjoyment or utilization of all franchises or permits for the operation of media of communication or information[.]" Hence, its short title: *Fair Election Act.*
>
> Situated within the constitutional order, the Fair Election Act provides means to realize the policy articulated in Article II, Section 26 of the 1987 Constitution to "guarantee equal access to opportunities for public service[.]" Article II, Section 26 models an understanding of Philippine political and electoral reality. It is not merely hortatory or a statement of value. Among others, it sums up an aversion to the perpetuation of political power through electoral contests skewed in favor of those with resources to dominate the deliberative space in any media.[86]

The quoted paragraphs and accompanying discussions on how the different provisions of the Fair Election Act serve the interest of "guarantee[ing] equal access to opportunities for public service[,]"[87] could have sufficed as authoritative textual reading. However, not limiting itself and further strengthening the point already made, the Court highlighted the urgency of facilitating equal access to elective public office by citing findings on the pathologies of Philippine politics, including rent-seeking, patron-client relationships, elitism, and the "celebritification" of political office.[88]

In ultimately ruling for the inclusion of subscribers among those whose identity must be disclosed, the Court reasoned that election surveys, like election propaganda, can "shape the preference of voters, inform the strategy of campaign machineries, and ultimately, affect the outcome of elections."[89] Thus, when they are published, they partake of the nature of "declarative speech in the context of an electoral campaign properly subject to regulation."[90] Such regulation includes the identification of those who, in paying for them—whether they pay for a specific survey, or in aggregate (as through a subscription)—may be doing so out of interest in the partisan utility of their contents.[91] The assertion on surveys' capacity to affect the outcome of elections needed to be substantiated. To this end, the Court cited scientific

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[86] *Social Weather Stations, Inc.*, 755 SCRA 124, 139-40, *citing* Rep. Act No. 9006 (2001), § 2.

[87] *Id.* at 137

[88] *Id.* at 155, *citing* SHIELA S. CORONEL ET AL., THE RULEMAKERS: HOW THE WEALTHY AND WELL-BORN DOMINATE CONGRESS 24, 33-34, 51 (2007); AN ANARCHY OF FAMILIES: STATE AND FAMILY IN THE PHILIPPINES 10-11 (Alfred W. McCoy ed., 1994).

[89] *Id.* at 149.

[90] *Id.* at 163.

[91] *Id.* at 162-65.

findings on the dynamics of public-opinion polling. These included official findings contained in a paper prepared by the Parliamentary Research Branch of the Canadian Library of Parliament,[92] as well as documented results of an "an experiment on a diverse national sample in which [persons were] randomly assigned [ ] to receive information about different levels of support for three public policies."[93]

People v. Nuñez[94] is another example wherein the invocation of descriptive knowledge was pivotal to the disposition of a case. This case turned on what the Court found to be the prosecution witnesses' faulty recollection of the identity of the persons who robbed a gasoline station and killed three individuals. The Court emphasized that, "[t]o convict an accused, it is not sufficient for the prosecution to present a positive identification by a witness during trial *due to the frailty of human memory.*"[95]

The evidence was otherwise settled; witnesses had testified and positively identified the accused. But the Court challenged the value which it had historically attached to positive identification. *Nuñez* asserted that "[t]he frailty of human memory is a *scientific fact*"[96] which manifests in eyewitness testimonies. In support of this, it referred to several studies, including "an expansive examination of 250 cases of wrongful convictions where convicts were subsequently exonerated by DNA testing [and which] noted that as much as 190 or 76% of these wrongful convictions were occasioned by flawed eyewitness identifications."[97]

Notably, only after establishing a "scientific fact" did *Nuñez* proceed to embark on conventional legal analysis and examine other legal pronouncements. After presenting studies, it stated that "[l]egal traditions in various jurisdictions have been responsive to the *scientific reality* of the frailty of eyewitness identification."[98] Only thereafter did it look into

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[92] *Id.* at 150, *citing* Canada Library of Parliament, *Public Opinion Polling in Canada*, *available at* http://www.publications.gc.ca/Collection-R/LoPBdP/BP/bp371-e.htm (last visited Jan. 28, 2021).

[93] David Rothschild & Neil Malhotra, *Are public opinion polls self-fulfilling prophecies?*, RES. & POL. 1, 1 (2014), *available at* https://journals.sagepub.com/doi/pdf/10.1177/2053168014547667.

[94] [Hereinafter "*Nuñez*"] G.R. No. 209342, 842 SCRA 97, Oct. 4, 2017.

[95] *Id.* at 100. (Emphasis supplied.)

[96] *Id.* at 107. (Emphasis supplied.)

[97] *Id.* at 108, *citing* Deborah Davis & Elizabeth F. Loftus, *The Dangers of Eyewitnesses for the Innocent: Learning from the Past and Projecting into the Age of Social Media*, 46 NEW ENG. L. REV. 769 (2012).

[98] *Id.* at 111. (Emphasis supplied.)

pronouncements made in American and Philippine cases, as well as British standards.[99]

The invocation of general descriptive knowledge in a manner that is both critical to disposing of a case and supplementary to a point otherwise already made is further demonstrated in how constitutional cases use tests to appraise the validity of government actions.

Under established jurisprudence, a valid exercise of police power "must have a lawful subject or objective and a lawful method of accomplishing the goal."[100] In view of this, *Lim v. Pacquing*[101] sustained the validity of Presidential Decree No. 771's express revocation of gambling franchises and permits given by local governments. The Court's ruling drew upon what was supposedly established knowledge of how:

> Gambling is essentially antagonistic to the objectives of national productivity and self-reliance. It breeds indolence and erodes the value of good, honest and hard work. It is, as very aptly stated by PD No. 771, a vice and a social ill which government must minimize (if not eradicate) in pursuit of social and economic development.[102]

In *Philippine Ass'n of Service Exporters v. Drilon*,[103] the Court was confronted with the equal protection issue of whether a valid classification was made concerning female Philippine nationals working as domestics abroad. It explicitly declared that it was proceeding on the basis of judicial notice. Moreover, the Court expressly invoked its duty as "the caretaker of Constitutional rights,"[104] as follows:

> As a matter of judicial notice, the Court is well aware of the unhappy plight that has befallen our female labor force abroad, especially domestic servants, amid exploitative working conditions marked by, in not a few cases, physical and personal abuse. The sordid tales of maltreatment suffered by migrant Filipina workers, even rape and various forms of torture, confirmed by testimonies of returning workers, are compelling motives for urgent

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[99] *Id.* at 111-16. (Citations omitted.)

[100] Manila Mem'l Park, Inc. v. Sec'y of Soc. Welf. and Dev., G.R. No. 175356, 711 SCRA 302, 350, Dec. 3, 2013, *citing* Ass'n of Small Landowners in the Phils., Inc. v. Sec'y of Agrarian Reform, G.R. No. 78742, 175 SCRA 343, 375, July 14, 1989.

[101] Lim v. Pacquing, G.R. No. 115044, 240 SCRA 649, Jan. 27, 1995.

[102] *Id.* at 677.

[103] G.R. No. 81958, 16 SCRA 386, June 30, 1988.

[104] *Id.* at 392.

> Government action. As precisely the caretaker of Constitutional rights, the Court is called upon to protect victims of exploitation. In fulfilling that duty, the Court sustains the Government's efforts.[105]

Having already made its point, the Court nevertheless proceeded to discuss the comparative situation of male workers. It further made a normative declaration concerning equality between men and women:

> The same, however, cannot be said of our male workers. In the first place, there is no evidence that, except perhaps for isolated instances, our men abroad have been afflicted with an identical predicament. The petitioner has proffered no argument that the Government should act similarly with respect to male workers. The Court, of course, is not impressing some male chauvinistic notion that men are superior to women. What the Court is saying is that it was largely a matter of evidence (that women domestic workers are being ill-treated abroad in massive instances) and not upon some fanciful or arbitrary yardstick that the Government acted in this case. It is evidence capable indeed of unquestionable demonstration and evidence this Court accepts. The Court cannot, however, say the same thing as far as men are concerned. There is simply no evidence to justify such an inference. Suffice it to state, then, that insofar as classifications are concerned, this Court is content that distinctions are borne by the evidence. Discrimination in this case is justified.[106]

In addition to these, *People v. Cayat*[107] is a notorious equal protection case which declared that "[i]t has been the sad experience of the past, [...] that the free use of highly intoxicating liquors by the non-Christian tribes have often resulted in lawlessness and crimes[.]"[108] It drew authority from a prior, equally notorious ruling, *Rubi v. Provincial Board of Mindoro*,[109] wherein the Court justified reference to indigenous peoples as "non-Christian tribes" by taking unflattering notice of their "low grade of civilization,"[110] and how they "usually liv[ed] in tribal relationship apart from settled communities."[111]

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[105] *Id.* at 392-93.
[106] *Id.* at 393.
[107] 68 Phil. 12 (1939).
[108] *Id.* at 19.
[109] 39 Phil. 660 (1919).
[110] *Id.* at 693.
[111] *Id.*

B. Disputability and Proof: The Necessity and Utility of Distinguishing Legislative Facts from Adjudicative Facts

The dispositive or rhetorical invocation of descriptive knowledge proceeds from a persuasive purpose. That such invocation is done because a point needs to be made or supported invites appraisals of veracity, accuracy, or disputability. Ultimately, this compels a consideration of proof. Asserting an idea as fact entails surmounting the challenge of its being controverted.

In the example of *Social Weather Stations, Inc.*, there was contention on whether published election surveys should be treated as akin to election propaganda and therefore subject to regulation. The Court maintained that they should be because they affect the outcome of elections. The assertion was disputable, thus, the Court cited studies by way of empirical proof.

In the example of *Nuñez*, there was contention on whether identifications made by eyewitnesses should be believed. The Court approached their recollections with reasonable doubt, ultimately finding that they could not be given credence. The Court's incredulity was susceptible to dispute, especially given that lower courts ruled differently, opting to convict. Thus, to prove its point, the Court cited studies demonstrating the frailty of eyewitness recollections. Having settled the overarching scientific fact, the Court then proceeded to detail the fatal flaws in the eyewitnesses' testimonies.[112] Those flaws revealed how imperceptive reliance on their claims could have resulted in a wrongful conviction, just as it was with many other eyewitnesses whose identification were shown to have been mistaken.

In the context of litigation, disputability and proof are thought of as concerns that ought to be universally addressed by the rules of evidence. However, rules of evidence in an adversarial setting are designed to facilitate proof only of a particular sort of facts.[113] It is in view of this that Kenneth Culp Davis first differentiated between adjudicative facts and legislative facts.[114] Adjudicative facts are what are properly referred to as the "facts of the case."[115] They "deal with the particular"[116] material incidents of a case and establish the truth of what actually transpired. Legislative facts "transcend the

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[112] *Nuñez*, 842 SCRA 97, 128-33.
[113] Gorod, *supra* note 10, at 9-10.
[114] Davis, *supra* note 55, at 402-03.
[115] Larsen, *supra* note 3, at 1256.
[116] Gorod, *supra* note 10, at 39.

particular dispute[.]"[117] They are more concerned with provid[ing] descriptive information about the world which [is then] use[d] as foundational 'building blocks' to form and apply legal rules."[118]

In many cases, a legal controversy merely calls for the application of settled law. Thus, "the legislative element is either absent, unimportant, or interstitial."[119] However, in those instances when interpretation is impelled by novel questions, latent areas of law, or appropriate challenges to erstwhile settled wisdom, "[l]egislative facts [...] help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take."[120]

The manner of not only proving, but also of adducing, adjudicative and legislative facts are necessarily different. Davis noted that "[t]he rules of evidence for finding facts which form the basis for creation of law and determination of policy should differ from the rules for finding facts which concern only the parties to a particular case."[121] Because adjudicative facts are particular to a case, knowing them must rely on evidence obtained from those involved in the conflict. Due process dictates that they be the subject of trial, where their presentation simultaneously subjects them to dispute and testing by an adverse party who avers differently. Legislative facts, because they are "more generalized facts about the world[,]"[122] "are not particularly within the knowledge of the parties with standing to appear before the court."[123] Thus, even as they may be vital to a court's enlightened disposal of the present conflict, they are not beholden to the technical capacities uniquely enabled by trial.

Proceeding from how courts in the United States have considered social and economic data in constitutional cases, Davis conceded that legislative facts "may come into a case through the evidence along with adjudicative facts[.]"[124] He added however, that in the majority of cases, they come into consideration either though independent judicial research or

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[117] Faigman, *supra* note 7.

[118] Larsen, *supra* note 3, at 1256-57, *citing* Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1, 11 (1988); Suzanna Sherry, *Foundational Facts and Doctrinal Change*, 2011 U. ILL. L. REV. 145, 146 (2011).

[119] Davis, *supra* note 5, at 952.

[120] *Id.*

[121] Davis, *supra* note 55, at 402.

[122] Larsen, *supra* note 3, at 1255.

[123] Gorod, *supra* note 10, at 10.

[124] Davis, *supra* note 55, at 403.

through discussions in counsels' briefs. The classic example of the latter is the celebrated 'Brandeis Brief' of Justice Louis Brandeis in *Muller v. Oregon*:[125]

> When an agency finds facts concerning immediate parties—what the parties did, what the circumstances were, what the background conditions were—the agency is performing an adjudicative function, and the facts may conveniently be called adjudicative facts. When an agency wrestles with a question of law or policy, it is acting legislatively, just as judges have created the common law through judicial legislation, and the facts which inform its legislative judgment may conveniently be denominated legislative facts. *The distinction is important; the traditional rules of evidence are designed for adjudicative facts, and unnecessary confusion results from attempting to apply the traditional rules to legislative facts.*
>
> The courts have generally treated legislative facts differently from adjudicative facts, even though the distinction has not been clearly articulated and explanations have been beclouded by an erroneous use of the concept of judicial notice. The distinction between legislative and adjudicative facts apparently has been clearly recognized only in constitutional cases, in which a category of "constitutional facts" has emerged. Often referred to as "social and economic data," constitutional facts are those which assist a court in forming a judgment on a question of constitutional law. They may come into a case through the evidence along with adjudicative facts; a notable example is *Borden's Farm Products, Inc. v. Baldwin. But more frequently[,] they come to the court's attention through researches of a judge or briefs of counsel.* In *Muller v. Oregon*, for example, the Court considered factual information contained in a brief filed by Mr. Louis D. Brandeis, including "extracts from over ninety reports of committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, both in this country and in Europe[.]" After Brandeis became a Justice he continued his extensive factual studies and wrote many opinions saturated with facts brought to light through his own researches. In his celebrated opinion in *Jay Burns Baking Co. v. Bryan* he went outside the record to acquaint himself with "the art of breadmaking and the usages of the trade; with the devices by which buyers of bread are imposed upon and honest bakers subjected by their dishonest fellows to unfair competition; with the problems which have confronted public officials charged with the enforcement of the laws prohibiting short weights, and with their experience in administering those laws." The opinion contains dozens of references to books, articles, reports of committees, testimony

[125] 208 U.S. 412 (1908).

> before congressional committees, reports of state and municipal officers and agencies, federal administrative regulations, regulations adopted by the Conference on Weights and Measures, a 1917 letter from Herbert Hoover to President Wilson, results of an investigation by the Bureau of Chemistry, and many other similar references, with frequent quotations of statements, opinions, beliefs, and points of view—all in utter disregard of any rules of evidence that would control adjudicative facts.[126]

Davis added that the difficulty of relying on rules of evidence in the United States was compounded by prohibitive standards on judicial notice. He observed that, at the time of his writing, such standards demanded notoriety and "indisputable accuracy[.]"[127] These requirements are apropos for adjudicative facts—because judgment ensues from the application of law to a definite, ascertained occurrence—but not so for legislative facts. Knowledge of the world is borne by ceaseless discovery. It builds upon hypotheses, is gradually confirmed, and is subject to constant testing. Nevertheless, in a critique of the formal limits of judicial notice written 13 years after his seminal examination of legislative facts, Davis noted that "[n]ot only do courts constantly take notice of disputable facts which are not determinable from sources of indisputable accuracy, but *they should do so*."[128] Charles T. McCormick recognized the practical utility of this, stating, "the usual resort [...] for ascertainment of legislative facts is not through formal proof by sworn witnesses and authenticated documents but by the process of judicial notice."[129]

Drawing from McCormick's, James Bradley Thayer's, and John Henry Wigmore's[130] discourses on evidence, Davis urged courts to shun cognitive isolationism and, instead, "go beyond the record for facts bearing upon law and policy[.]"[131] Judicial notice concerning "the method of research into the professionally authoritative books and reports in [...] particular field[s]"[132] was seen as a cure to what would otherwise be "the needless failures of justice that are caused by the artificial impotence of judicial proceedings."[133] He asserted that "[j]udicial notice [...] should extend to facts

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[126] Davis, *supra* note 55, at 402-04. (Emphasis supplied, citations omitted.)

[127] *Id.* at 405-06. (Citations omitted.)

[128] Davis, *supra* note 5, at 951. (Emphasis supplied.)

[129] *Id.* at 958, *quoting* CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 705 (1954).

[130] *Id.* at 951.

[131] *Id.* at 946.

[132] *Id.* at 951, *quoting* MCCORMICK, *supra* note 129, at 712.

[133] *Id.* (Citations omitted.)

and sources that are disputable"[134] considering that the effectiveness of "research into the professionally authoritative books and reports[,]"[135] even when appropriate, will be "destroyed if the research is limited to the indisputable or if the facts discovered are never mixed with uncertain judgment."[136]

Davis' observations and seminal analysis had already noted that, early in the 20th Century, "the business of the Supreme Court has as never before involved problems that may be solved only through more and more reliance upon social and economic facts and less and less dependence upon abstract legal doctrine."[137] However, it is not difficult to see how, what Davis subsequently referred to as inquiry into *extra-record facts* or what Alisson Orr Larsen has referred to as *in-house research*, has accelerated and been facilitated by contemporary technological advances. Larsen writes:

> Many of the Supreme Court's most significant decisions turn on questions of fact. These facts are not of the "whodunit" variety concerning what happened between the parties. They are instead more generalized facts about the world: Is a partial-birth abortion ever medically necessary? Can one effectively discharge a locked gun in self-defense? Are African American children stigmatized by segregated schools?
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> * * *
>
> So where do the Justices find information that enables them to decide factual questions about the world? *The typical answer involves trust in the adversarial system. The basic idea is that 'the adversary system is [. . .] quite practiced at finding facts.'* If a fact is important to a case's resolution, then the parties (and their amici) can provide the Court with enough information to address it through testimony (at the trial level) and briefing (on appeal). And if one party presents unreliable or flawed evidence to support his factual claim, then we can count on the other party to point this out.
>
> *The idea, however, that courts depend only on the adversary system to inform their decisions — even for fact finding — is 'more myth than reality.'* As others have recently observed, judges 'reach beyond the four corners of the parties' briefing' when they think the parties have not done enough. With respect to questions of legislative fact, this

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[134] *Id.* at 952.

[135] *Id.* at 951, *quoting* MCCORMICK, *supra* note 129, at 712.

[136] *Id.*

[137] Davis, *supra* note 55, at 407.

> happens because the importance of the fact did not become apparent until after the case was pending on appeal, or perhaps because the parties do not brief it in enough detail to convince a judge or Justice that he knows all he needs (or wants) to know.
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> * * *
>
> Independent judicial research of legislative facts is certainly not a new phenomenon. We have all heard the stories of Justice [Harry] Blackmun holed up in the medical library at the Mayo Clinic during the summer of 1972 studying abortion procedures. But since that time the world has undergone a massive change in the way it obtains information. *The digital revolution provides a new tool for members of the judiciary to address legislative facts.*[138]

C. Problems in Confronting Legislative Facts

The greater ease with which technology enables in-house research on extra-record facts gives rise to certain challenges. Larsen identifies these challenges as systematic introduction of bias, the possibility of mistake, and questions of fairness and legitimacy. Systematic introduction of bias means that "studies and statistics purporting to answer them can be slanted depending on the identity of the researcher or the goal of the research."[139] Research can then "get trapped in a 'filter bubble' [where individuals] are only exposed to information that confirms [their] world view."[140] Unbridled in-house research can also lead to a situation wherein research simply "gets the facts wrong."[141] Moreover, independent judicial inquiry raises questions about 'short-term fairness,' that is, a ruling's fairness and legitimacy with respect to the parties who are directly bound by it; as well as 'long-term fairness,' that is, with respect to the larger community that is bound by it by way of precedent.[142]

The risks attendant to the customary and ubiquitous practice of in-house research has similarly raised questions about the soundness of the adversarial system itself, along with its premise that "adversarial testing is the surest route to truth."[143] Lamenting the lack of standardized mechanisms,

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[138] Larsen, *supra* note 3, at 1255-58, 1260. (Citations omitted.)

[139] *Id.* at 1291.

[140] *Id.* at 1294, *citing* ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU 15 (2011).

[141] *Id.* at 1295.

[142] *Id.* at 1301.

[143] Gorod, *supra* note 10, at 3, *citing* United States v. Beechum, 582 F.2d 898, 908 (5th Cir. 1978).

Brianne Gorod notes that resort to ad hoc methods and "failure to meaningfully test the facts underlying judicial decisions undermines both the legitimacy of the judicial process and the results of that process."[144]

Though concededly magnified by contemporary advances, Larsen's and Gorod's observations and reservations are not new. Kenneth Karst in 1960,[145] Arthur Miller and Jerome Barron in 1975,[146] and Peggy Davis in 1987[147] have previously advocated reforms in how courts receive legislative facts. Woolhandler summarizes their analyses and recommendations, as follows:

> Professors Davis, Karst, Miller, and Barron see a problem in the haphazard way in which courts receive legislative facts. They believe courts should embrace more openly their legislative functions by adopting procedures better suited to making general, prospective rules. These reformists claim that lawyers fail to understand the importance of presenting general data to assist courts in fashioning legal rules, and that courts are insensitive to the need to seek out facts about the general effects of the legal rules they create, rather than relying on unsupported assumptions or one-sided presentations. Their suggested remedies range from such unexceptionable proposals as increased sophistication on the part of lawyers and judges, and judicial requests for further presentations by parties and amici, to more ambitious goals such as adoption of formal rules of evidence, and appointment of independent experts and scientific panels.[148]

Larsen considers two divergent approaches in dealing with legislative facts: *minimalist* and *maximalist*. The minimalist approach is to restrict in-house research and to adhere to the strict limits of the adversarial system.[149] Minimalist options include remanding cases, ascribing to avoidance, and outright desistance from queries and considerations that lean into legislative facts.[150] In contrast, a maximalist approach will "open[ ] up the adversary system so that information flows more freely and openly."[151] Maximalist measures include adopting structural changes for capacity-building (such as

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[144] *Id.* at 6.

[145] Karst, *supra* note 61.

[146] Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975).

[147] Peggy C. Davis, *"There is a Book Out. . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1603-04 (1987).

[148] Woolhandler, *supra* note 63, at 113. (Citations omitted.)

[149] Larsen, *supra* note 3, at 1305.

[150] *Id.* at 1307-08.

[151] *Id.* at 1305.

the creation of a judicial research service), enabling the greater participation of amici curiae, and adopting processes akin to administrative fact-finding.[152]

D. In Philippine Jurisprudence

Philippine Supreme Court decisions have never truly explored the concept of legislative facts and distinguished them from adjudicative facts.

In 1972, *People v. Ferrer*[153] resolved the matter of whether the Anti-Subversion Act was a bill of attainder. It determined that Section 2 of the Anti-Subversion Act's "declaration [...] that the Communist Party of the Philippines is an organized conspiracy for the overthrow of the Government is intended not to provide the basis for a legislative finding of guilt of the members of the Party but rather to justify the proscription spelled out in section 4."[154] In explaining that the legislative declaration did not amount to an encroachment on judicial prerogative to determine guilt for a crime, the Court stated:

> In saying that by means of the Act Congress has assumed judicial magistracy, the trial court failed to take proper account of the distinction between legislative fact and adjudicative fact. Professor Paul Freund elucidates the crucial distinction, thus:
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> > "A law forbidding the sale of beverages containing more than 3.2 per cent of alcohol would raise a question of legislative fact, i.e., whether this standard has a reasonable relation to public health, morals, and the enforcement problem. A law forbidding the sale of intoxicating beverages (assuming it is not so vague as to require supplementation by rule-making) would raise a question of adjudicative fact, i.e., whether this or that beverage is intoxicating within the meaning of the statute and the limits on governmental action imposed by the Constitution. Of course[,] what we mean by fact in each case is itself an ultimate conclusion founded on underlying facts and on criteria of judgment for weighing them.
> >
> > "A conventional formulation is that legislative facts — those facts which are relevant to the legislative judgment — will not be canvassed save to determine whether there is a rational basis for believing that they

[152] *Id.* at 1310-11.
[153] G.R. No. 32613, 48 SCRA 382, Dec. 27, 1972.
[154] *Id.* at 408.

> exist, while adjudicative facts — those which tie the legislative enactment to the litigant — are to be demonstrated and found according to the ordinary standards prevailing for judicial trials."[155]

Following *Ferrer*, Justice Jose Vitug's separate concurring opinion in *People v. Purazo*[156] referenced a speech delivered by Fr. Joaquin Bernas which distinguished legislative facts from "judicial facts." However, it is apparent from Justice Vitug's discussion that the distinction made in his opinion is different from that which this Article—drawing from the seminal discussions of Davis—explores. He wrote:

> Bernas advances that legislative facts are different from judicial facts, the former being of a more limited scope since the legislature, in considering all facts relevant to enacting a piece of legislation, cannot be expected to take full account of all possible situations. In contrast, a trial judge must point to judicial facts which establish a link between the offense committed and the reality which the penal law envisions to be deserving of the supreme penalty.[157]

The term "legislative fact/s" is used in three more cases where it is evident that its usage is not in the manner that this Article contemplates.

Central Bank Employees Ass'n, Inc. v. Banko Sentral ng Pilipinas[158] considered 'legislative facts' in relation to choices made by the legislature. According to then-Justice Reynato Puno:

> Whether it would have been a better policy to make a more comprehensive classification 'is not our province to decide.' The absence of *legislative facts* supporting a classification chosen has no significance in the rational basis test. In fact, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."[159]

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[155] *Id.* at 409, *citing* Paul Freund, *Review of Facts in Constitutional Cases, in* SUPREME COURT AND SUPREME LAW 47-48 (Cahn ed., 1954).

[156] G.R. No. 133189, 402 SCRA 541, May 5, 2003. (Vitug, *J.*, *concurring*).

[157] *Id.* at 564, *citing* Joaquin G. Bernas, S.J., *Constitutionalism and the Narvasa Court*, 43 ATENEO L.J. 325 (1998).

[158] [Hereinafter "*Cent. Bank Employees Ass'n*"], G.R. No. 148208, 446 SCRA 299, Dec. 15, 2004.

[159] *Id.* at 433. (Emphasis supplied, citations omitted.)

Justice Roberto Abad's concurring opinion in *Spouses Imbong v. Ochoa*[160] quoted a statement from the Office of the Solicitor General which spoke of "legislative fact[s]" in connection with Congress' prerogatives:

> The issue of whether or not hormonal contraceptives and IUDs are safe and non-abortifacient is so central to the aims of the RH Law that the OSG has as a matter of fact been quick to defend the authority of Congress to convert such factual finding into law. The OSG insists that everyone, including the Court, has to defer to this finding considering that the legislature is better equipped to make it. Specifically, the OSG said:
>
> > The Congress, employing its vast fact-finding and investigative resources, received voluminous testimony and evidence on whether contraceptives and contraceptive devices are abortifacients. It thereafter made a finding that the used of current reproductive devices is not abortifacient. Such finding of legislative fact, which became the basis for the enactment of the RH Law, should be entitled to great weight and cannot be equated with grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the Congress.[161]

Most recently, Justice Amy Lazaro-Javier referenced "social and legislative facts" in her concurring and dissenting opinion in *Pimentel v. Legal Education Board*:[162]

> The indubitable social and legislative facts prove that a screening mechanism like PhiLSAT is necessary. If we are again going the way of making such screening mechanism an optional device for law school admission, as the Decision does, then the Court is not just overhauling the undeniable social and legislative facts upon which Subsection 7 (e) of RA 7662 was based, the Decision is also turning its back to the problems that have long beset our legal education.[163]

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[160] G.R. No. 204819, 721 SCRA 146, Apr. 8, 2014.
[161] *Id.* at 649 (Abad, *J. concurring*).
[162] G.R. No. 230642, Sept. 10, 2019 (Lazaro-Javier, *J., concurring and dissenting*).
[163] *Id.* at 29.

IV. JUDICIAL RECKONING: REALITIES AND IMPERATIVES

A. The Judicial Task and its Demands

The preceding review of paradigms reveals how a consideration of judicial reception of legislative facts must eventually contend with fundamental notions on the role of the judiciary. Larsen's drawing of recommendations along minimalist and maximalist lines demonstrates how even mere openness to the concept of legislative facts and willingness to consider them can turn on one's view of how judges should resolve cases. Interestingly, Larsen's minimalist options—remanding to compel trial within strict adversarial confines, avoidance, and skepticism towards inquiry as a slippery slope—if carried at their utmost at the level of the Supreme Court, are less of real solutions, than are oblique ways of altogether resisting the task of reckoning legislative facts.

The denomination of such options as "minimalist" suggests that the very idea of legislative facts and engaging them are fundamentally incongruous with the formalist and minimalist schools. The formalist bifurcation of law and society compels adjudication that is divorced from social interests.[164] The minimalist ethos constrains adjudication to narrow interpretation. Apprehensive with inherent limitations, it deliberately avoids the far-reaching consequences of precedent.[165] Conversely, it is not difficult to see how engaging legislative facts hews to realism's integrative view of legal formulations, social interests, and public policy, and its rejection of formalism's mechanical tendencies. In Woolhandler's account, "Louis Brandeis began presenting general facts, which Davis later renamed 'legislative facts' because the Realists frankly recognized the courts' lawmaking function."[166]

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[164] Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?* 16 LEGAL THEORY 111 (2010). "'Formalist' theories claim that [...] adjudication is [...] 'autonomous' from other kinds of reasoning, that is, the judge can reach the required decision without recourse to non-legal normative considerations of morality or political philosophy."

[165] CASS R. SUSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix-x (1999). "A minimalist court settles the case before it, but it leaves many things undecided. It is alert to the existence of reasonable disagreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions."

[166] Woolhandler, *supra* note 63, at 115, *citing* Laurens Walker & John Monahan, Social Frameworks: *A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987); WILLIAM MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW: CASES, READINGS, COMMENTARY 434-83 (1987).

Justice Benjamin Cardozo's treatise, THE NATURE OF THE JUDICIAL PROCESS, explored the question of how judges should decide cases and recognized that judicial interpretation is an endless exercise of "becoming."[167] Law will inevitably have gaps and, in the words of Justice Oliver Wendell Holmes, "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[168] Cardozo detailed this modality of judges legislating, astutely noting that, at times, even the legislature never thought of which meaning to imbue in law:

> Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey [...] *[But t]here are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided.* Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute. "The fact is," says Gray in his lectures on the "Nature and Sources of the Law," "that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what, it would have intended on a point not present to its mind, if the point had been present." [...] You may call this process legislation, if you will. In any event, no system of *jus scriptum* has been able to escape the need of it [...] The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision "*libre recherché scientifique.*" [...] *Courts are to "search for light among the social elements of every kind that are the living force behind the facts they deal with."*[169]

Cardozo added that the task is particularly pressing in constitutional law:

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[167] CARDOZO, *supra* note 2.

[168] S. Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, *J., dissenting*).

[169] CARDOZO, *supra* note 2, at 14-16. (Emphasis supplied, citations omitted.)

> Above all in the field of constitutional law, the method of free decision has become, I think, the dominant one today. The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared. It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law.[170]

As jurisprudence is constantly evolving, the problem confronting a judge is two-fold: "first[, to] extract from the precedent the underlying principle, the *ratio decidendi*, [...] [second, to] determine the path or the direction along which the principle is to move or develop, if it is not to wither and die."[171] Once the first is resolved, "[t]he problem remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path[.]"[172] Thus, Cardozo recognized four methods of analysis:

> The directive force of principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the line of justice, morals and social welfare, the mores of the day; and this I will call the method of sociology.[173]

Cardozo recognized that the first has primacy; "adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts."[174] But confinement to notions already postulated can only go so far. He explained:

> We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first, we have no trouble with the paths; they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading

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[170] *Id.* at 17
[171] *Id.* at 28.
[172] *Id.* at 30.
[173] *Id.* at 30-31.
[174] *Id.* at 34

> spirit of our law, must come to the rescue of the anxious judge, and tell him where to go.[175]

Ultimately, a judge must come to terms with how "[t]he final cause of law is the welfare of society."[176] The method of sociology then, which is cognizant of and through which is expressed in social justice, dominates. In his discussion, Cardozo eventually turned to formalism, not mincing words as he did so, given formalism's restrictive assumption that law operates with neat, scientific symmetry, and its rejection of law as necessarily underpinned by value considerations and accommodating human exigency:

> From history and philosophy and custom, we pass, therefore, to the force which in our day and generation is becoming the greatest of them all, the power of social justice which finds its outlet and expression in the method of sociology.
>
> The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. "Ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live." Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all. There is an old legend that on one occasion God prayed, and his prayer was "Be it my will that my justice be ruled by my mercy." That is a prayer which we all need to utter at times when the demon of formalism tempts the intellect with the lure of scientific order.[177]

For that matter, the method of sociology, "[e]ven when it does not seem to dominate [...] is always in reserve."[178] It pervades all methods, "determining in the last analysis the choice of each, weighing their competing claims, setting bounds to their pretensions, balancing and moderating and harmonizing them all."[179] It is here that legislative facts prove their utility. To go back to Holmes, "[a]s the judge is bound to declare the law[,] he must know or discover the facts that establish the law."[180]

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[175] *Id.* at 43.
[176] *Id.* at 66.
[177] *Id.* at 65-66. (Citation omitted.)
[178] *Id.* at 98.
[179] *Id.*
[180] Prentis v. Atl. Coast Line Co., 211 U.S. 210, 227 (1908).

Accordingly, it ought to be a virtue naturally occurring in and reasonably expected of a judge to be well-read and to be acquainted with and capable of engaging the many disciplines arising from the great expanse of human capacity and experience. This does not mean that judges must be experts in all things. Rather, it is merely to say that, as officers before whom conflicts in the vast spectrum of human affairs shall be brought for resolution with the authority of law, they must be able to competently grapple with knowledge as established and cultivated in the diverse disciplines engaging the many points of that spectrum.

Integrative knowledge beyond strictly legal formulations is a proper subject and instrument of judicial power. Judicial function grinds to a halt when divorced from an understanding of the world and the human condition. Davis exposes the absurdity and futility of legal reasoning bereft of such knowledge and understanding as follows:

> When the judge or officer looks at the testimony of the first witness, he uses extra-record information about the meaning of words in the English language, and this is so whether or not he consults the dictionary, and whether or not the meaning of a word is at issue between the parties. His knowledge of the meaning of the word "the" comes from beyond the record. He assumes that a man is not thirty feet tall, that trains run on rails, that automobiles are not flying machines, that France is outside the United States, and that coal is a fuel. He assumes the existence of human beings, of organized government, of a legal system, of courts, of businesses, of corporations. Every simple case involves the assumption of hundreds of facts that have not been proved.[181]

Jurisprudence itself is a repository of human knowledge. The collective, enduring, and evolving wisdom contained in it is the product of consistent dialectic between normative articulations in law and their descriptive underpinnings, progressively renewed by lived experience. "'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated."[182]

The accumulation of judicial wisdom lends itself to the mounting articulation of descriptive suppositions on what is customary or rational, and of judgment on what is licit or valid. Jurisprudence, too, is constant self-validation of judicially-made law. When it fails to acknowledge its factual

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[181] Davis, *supra* note 5, at 975.

[182] Nat'l Lab. Rel. Bd. v. Seven-Up Bottling Co., 344 U.S. 344, 349 (1953).

underpinnings, the reasoning that builds judgment can become arbitrary. A theorem of human behavior is believed and constantly upheld for no other reason than the court's mere declaration. Subliminal prejudices can be entrenched and legitimated. Recall the repugnant characterization of indigenous peoples in *Rubi* and *Cayat*, and the heterosexism that, until recently, pervaded jurisprudence.

In keeping with *stare decisis*, "[c]itations function something like the currency of the legal system. An opinion's references to authoritative legal materials, *most often the Court's own prior decisions*, form the fundamental justification for a judicial decision."[183] Judicial decisions' reliance on themselves as authority may do well in a vacuum. But it is naive to assume that the law operates in such manner. Coming to terms with the need for courts to engage multiple disciplines is far more preferable to relying on a judge's idiosyncratic perception of empirical phenomena, regardless of whether that perception has been timelessly canonized in court decisions.

B. The 1987 Constitution's Exceptional Imperatives

Regardless, whatever one's philosophical inclination may be, the 1987 Constitution has palpably chosen to be realist. It codifies normative choices. Most tellingly, it adds a distinct article devoted to social justice and human rights.[184] Likewise, it expands on the 1973 Constitution's declaration of principles and state policies by adding 18 new provisions on, among others, "the role of women in nation-building[ ] and [...] the fundamental equality before the law of women and men[,]"[185] the right to health,[186] "the right of the people to a balanced and healthful ecology[,]"[187] "comprehensive rural development and agrarian reform[,]"[188] "the rights of indigenous cultural communities[,]"[189] the role of civil society,[190] "equal access to opportunities for public service[ ] and prohibit[ing] political dynasties[,]"[191] and "maintain[ing] honesty and integrity in the public service[.]"[192]

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[183] Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of their Use and Significance*, 2010 U. ILL. L. REV. 489, 490. (Emphasis supplied.)

[184] CONST. art. XIII.

[185] CONST. art. II, § 14.

[186] § 15.

[187] § 16.

[188] § 21.

[189] § 22.

[190] § 23.

[191] § 26.

[192] § 27.

Specifically as to the judiciary, the 1987 Constitution capacitates and mandates courts to engage in matters traditionally reserved for other branches of government. Its expansion of judicial power imposes upon the Supreme Court the duty to review the acts of political branches, compelling it to venture into conflicts attended by more than mere legal abstractions. The reality of its enhanced capacities and broadened duties, along with the Constitution's bolder articulation of norms, impels the Court to come to terms with legislative facts as an integral dimension of its functions.

The 1987 Constitution "textualized a mutant strain of judicial power."[193] Judges have thus been given the license "to enter the political thicket as a matter of *obligation*[.]"[194] According to Skarlit Labastilla:

> Over twenty years ago, the 1987 Constitution textualized a mutant strain of judicial power. Instead of allowing judges to exercise judicial review over policy—political—issues one case at a time, when and as they see fit, as has been done for nearly a century in this jurisdiction, the Constitution tasked them with the "duty… to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government." By giving electorally unaccountable judges license, written in constitutional ink, to enter the political thicket as a matter of obligation, the Constitution, wittingly or not, redefined Philippine constitutional democracy as we know it.[195]

The 1987 Constitution's expansion of judicial power through Article VIII, Section 1's inclusion of the "*duty* […] to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government"[196] itself hearkens to a realist appraisal of the history that preceded and begot it. *Francisco v. House of Representatives*[197] recounted proceedings in the 1986 Constitutional Commission, shedding light on how this added duty "is a (normative) child of martial law."[198]

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[193] Skarlit C. Labastilla, *Dealing with Mutant Judicial Power: The Supreme Court and its Political Jurisdiction*, 84 PHIL. L.J. 2, 2 (2009).

[194] *Id.* (Emphasis in the original.)

[195] *Id.* (Citations omitted.)

[196] CONST. art. VIII, § 1, ¶ 2. (Emphasis supplied.)

[197] [Hereinafter "*Francisco*"] G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003.

[198] Labastilla, *supra* note 193, at 3, *citing* 1 RECORD CONST. COMM'N 434, 435 (July 10, 1986).

The discussion in *Francisco*, which includes a reproduction of former Chief Justice Roberto Concepcion's explanation of the intent that animates Article VIII, Section 1, paragraph 2 is worth quoting at length:

> The frequency with which this Court invoked the political question doctrine to refuse to take jurisdiction over certain cases during the Marcos regime motivated Chief Justice Concepcion, when he became a Constitutional Commissioner, to clarify this Court's power of judicial review and its application on issues involving political questions, *viz*:
>
> * * *
>
> Fellow Members of this Commission, this is actually a product of our experience during martial law. As a matter of fact, it has some antecedents in the past, but the role of the judiciary during the deposed regime was marred considerably by the circumstance that in a number of cases against the government, which then had no legal defense at all, the solicitor general set up the defense of political questions and got away with it. As a consequence, certain principles concerning particularly the writ of habeas corpus, that is, the authority of courts to order the release of political detainees, and other matters related to the operation and effect of martial law failed because the government set up the defense of political question. And the Supreme Court said: "Well, since it is political, we have no authority to pass upon it." The Committee on the Judiciary feels that this was not a proper solution of the questions involved. It did not merely request an encroachment upon the rights of the people, but it, in effect, encouraged further violations thereof during the martial law regime.
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> * * *
>
> The powers of government are generally considered divided into three branches: the Legislative, the Executive and the Judiciary. Each one is supreme within its own sphere and independent of the others. Because of that supremacy power to determine whether a given law is valid or not is vested in courts of justice.
>
> Briefly stated, courts of justice determine the limits of power of the agencies and offices of the government as well as those of its officers. In other words, the judiciary is the final arbiter on the question whether or not a branch of government or any of its

> officials has acted without jurisdiction or in excess of jurisdiction, or so capriciously as to constitute an abuse of discretion amounting to excess of jurisdiction or lack of jurisdiction. This is not only a judicial power but a duty to pass judgment on matters of this nature.
>
> This is the background of paragraph 2 of Section 1, which means that the courts cannot hereafter evade the duty to settle matters of this nature, by claiming that such matters constitute a political question.[199]

Francisco proceeded to distinguish "truly political questions" from those which "are not truly political questions."[200] It set the standard for appraising justiciability in cases attended by ostensible political questions, explaining that, for as long as "there are constitutionally imposed limits on powers or functions conferred upon political bodies [...] then our courts are duty-bound to examine whether the branch or instrumentality of the government properly acted within such limits":[201]

> From the foregoing record of the proceedings of the 1986 Constitutional Commission, it is clear that judicial power is not only a power; it is also a duty, a duty which cannot be abdicated by the mere specter of this creature called the political question doctrine. Chief Justice Concepcion hastened to clarify, however, that Section 1, Article VIII was not intended to do away with "truly political questions." From this clarification it is gathered that there are two species of political questions: (1) "truly political questions" and (2) those which "are not truly political questions."
>
> Truly political questions are thus beyond judicial review, the reason being that respect for the doctrine of separation of powers must be maintained. On the other hand, by virtue of Section 1, Article VIII of the Constitution, courts can review questions which are not truly political in nature.
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> * * *
>
> In our jurisdiction, the determination of a truly political question from a non-justiciable political question lies in the answer to the question of whether there are constitutionally imposed limits on powers or functions conferred upon political bodies. If there are, then our courts are duty-bound to examine whether the branch

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[199] *Francisco*, 415 SCRA at 144-48, *citing* 1 RECORD CONST. COMM'N 434-36 (July 10, 1986).

[200] *Id.* at 149.

[201] *Id.* at 151.

> or instrumentality of the government properly acted within such limits.[202]

Building on *Francisco*, the Court, in *Association of Medical Clinics for Overseas Workers, Inc. v. GCC Approved Medical Centers Ass'n, Inc.*[203] recognized that Article VIII, Section 1's "expan[sion of its] certiorari jurisdiction"[204] enables a distinct remedy for which a novel procedural vehicle is appropriate. Such a vehicle should cater more effectively to the distinct purpose of addressing actions by other branches of government, rather than errors of jurisdiction by bodies or officers exercising judicial or quasi-judicial functions. However, the mechanics of that distinct remedy have yet to be crafted. Thus, in the meantime, petitions invoking expanded certiorari jurisdiction are brought under Rule 65 of the 1997 Rules of Civil Procedure:

> This situation changed after 1987 when the new Constitution "expanded" the scope of judicial power[.]
>
> * * *
>
> In *Francisco v. The House of Representatives*, we recognized that this expanded jurisdiction was meant "to ensure the potency of the power of judicial review to curb grave abuse of discretion by 'any branch or instrumentalities of government.'" Thus, the second paragraph of Article VIII, Section 1 engraves, for the first time in its history, into black letter law the "expanded certiorari jurisdiction" of this Court, whose nature and purpose had been provided in the sponsorship speech of its proponent, former Chief Justice Constitutional Commissioner Roberto Concepcion:
>
> * * *
>
> Meanwhile that no specific procedural rule has been promulgated to enforce this "expanded" constitutional definition of judicial power and because of the commonality of "grave abuse of discretion" as a ground for review under Rule 65 and the courts' expanded jurisdiction, the Supreme Court *based on its power to relax its rules* allowed Rule 65 to be used as the medium for petitions invoking the courts' expanded jurisdiction based on its power to relax its Rules. This is however an ad hoc approach that does not fully consider the accompanying implications, among them, that Rule 65 is an essentially distinct remedy that cannot simply be

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[202] *Id.* at 149-51.

[203] [Hereinafter "*Ass'n of Medical Clinics*"], G.R. No. 207132, 812 SCRA 452, Dec. 6, 2016.

[204] *Id.* at 474.

> bodily lifted for application under the judicial power's expanded mode. The terms of Rule 65, too, are not fully aligned with what the Court's expanded jurisdiction signifies and requires.
>
> On the basis of almost thirty years' experience with the courts' expanded jurisdiction, the Court should now fully recognize the attendant distinctions and should be aware that the continued use of Rule 65 on an ad hoc basis as the operational remedy in implementing its expanded jurisdiction may, in the longer term, result in problems of uneven, misguided, or even incorrect application of the courts' expanded mandate.[205]

Article VIII, Section 1's expansion of certiorari jurisdiction is not a solitary development. Rather, it is part of a "bundle of amendments"[206] that collectively enhances the capacities of the judiciary, in general, and of the Supreme Court, in particular:

> [Article VIII, Section 1, paragraph 2] is part of the bundle of amendments wrought by the 1987 Constitution on the judicial branch including the lowering to simple majority of the vote requirement to decide the constitutionality of laws [§ 4(2)]; transferring the power to nominate members of the judiciary to an independent constitutional body (§ 8); assuring the judiciary of fiscal autonomy (§ 3); and granting to the Supreme Court the power to promulgate rules concerning the protection and enforcement of constitutional rights [§ 5(5)]. Commenting on the significance of the lowered vote requirement (in conjunction with § 1, ¶ 2), Dean Pacifico Agabin had opined early on: "The political implications of this provision are loud and clear: the Supreme Court has been strengthened as a check on the executive and legislative powers by requiring a simple majority vote to declare a law unconstitutional. Our experience under martial law has swung the pendulum of judicial power to the other extreme where the Supreme Court can now sit as "superlegislature" and "superpresident." If there is such a thing as judicial supremacy, this is it."[207]

The net effect of the 1987 Constitution's codification of ground-breaking normative choices and bundle of amendments enhancing judicial capacity has been characterized as the Philippines' "judicializ[ation] [of] its

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[205] *Id.* at 474-80. (Emphasis in the original, citations omitted.)

[206] Labastilla, *supra* note 193, at 2 n.3.

[207] *Id.*, *citing* Pacifico Agabin, *The Politics of Judicial Review over Executive Action: The Supreme Court and Social Change*, in UNCONSTITUTIONAL ESSAYS 193-94 (1996).

governance[.]"[208] This legitimizes a form of judicial activism, which has seen the Court move to extradecisional means of engagement. This is exemplified by how the Puno Court convened the National Consultative Summit on Extrajudicial Killings and Enforced Disappearances, Forum on Increasing Access to Justice for the Poor and the Forum on Environmental Justice, from which ensued the adoption of the rules on the Writs of *Amparo*, *Habeas Data*, and *Kalikasan*, as well as the Rule of Procedure for Small Claims Cases.[209] Bryan Tiojanco and Leandro Aguirre write:

> The Philippines has judicialized its governance as a mode of correcting the deficiencies of democratic processes. By judicialized governance the writers mean the phenomenon where principled courts step into the void left by dysfunctional democratic majorities. Judicial governance in this sense is a form of judicial activism, which refers "to a judge's readiness to use his court…to advance substantive social or political causes."
>
> Traditionally, the modes by which the judiciary, particularly the Supreme Court, has exercised judicial activism and governance were limited to the confines of an actual case and controversy. The 1987 Constitution strengthened this role of the courts through the codification of policy objectives and substantive norms, and the expansion of the judiciary's certiorari jurisdiction. The Supreme Court itself has also expanded the judicial role in these two areas by construing the grand normative statements of the Constitution as directly enforceable by courts, without need of legislative implementation, as well as by relaxing the traditional requirements for standing.
>
> Recently, however, the Supreme Court has forayed into extradecisional modes of judicial governance and activism, most prominent of which are its use of both its expanded rulemaking power and its convening function.[210]

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

[209] *See* PUB. INFO. OFFICE, SUPREME CT. OF THE PHIL., COMPLETING THE CIRCLE OF HUMAN RIGHTS: THE PUNO INITIATIVE (2010), *available at* https://www.ombudsman.gov.ph/UNDP4/completing-the-circle-of-human-rights-the-puno-initiative/index.html.

[210] Tiojanco & Aguirre, *supra* note 208, *citing* Raul Pangalangan, *Chief Justice Hilario G. Davide, Jr.: A Study in Judicial Philosophy, Transformative Politics and Judicial Activism*, 80 PHIL. L.J. 538, 539 (2006).

V. RESPONSES AND STRATEGIES

Larsen and like-minded authors raise valid concerns on how in-house research can mean a court's overstepping its limits. These should not, however, engender the Supreme Court's capitulation and refusal to confront legislative facts altogether. Moreover, proposed reforms, though well-meaning, should be carefully approached. Separation of powers remains imperative. Measures urging the Court to "embrace more openly [its] legislative functions[,]"[211] to open its processes, or to adopt liberal rules akin to those on administrative fact-finding can unwittingly push it beyond legitimate checks and balance and into outright extrajudicial engagement. The more appropriate approach begins with normative orientation; from which, grounded interventions, capacity-building measures, and accountability-enforcing engagement can proceed.

To recall, Larsen identified three risks: systematic introduction of bias, possibility of mistake, and questions of fairness and legitimacy. Of these three, it is only the third which is of some particularity to the judiciary. The first and second, though indeed precarious, are burdens borne by all inquiries that reckon with disputable postulates but nevertheless ascribe to rationality, fairness, and competence. "[A]ll thinking process—whether about finding facts or making law or declaring policy or exercising discretion—necessarily involve reliance upon facts that have not been proved, and the facts that enter into thinking processes are frequently either highly disputable or inseparably fused with questionable or uncertain judgment."[212] These are no more unique problems in a judicial setting than they are in other fields where facts and findings must also be vetted. As other disciplines demonstrate, the fact of these tendencies is not a reason for abandoning the task of discovery. Inquiry proceeds, supplemented by capacity building, and with wayward impulses reined in by normative and qualitative standards.

A. Enhanced Vetting

Specifically concerning judicial office, bias and mistakes are long-realized tendencies that are already sought to be addressed by the basic requirement that its holders be "person[s] of *proven* competence, integrity, probity, and independence."[213] The reference to long-standing, cardinal qualifications is not meant to dismiss the problems of bias and mistakes as esoteric, old foes consigned to irrelevance. Rather, it is to ground those

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[211] Woolhandler, *supra* note 63, at 113.

[212] Davis, *supra* note 5, at 982-83.

[213] CONST. art. VIII, § 7(3). (Emphasis supplied.)

problems in the realization that they are manifestations of deep-seated and systemic pathologies. Root causes must be distinguished from causal factors if effective responses are to be devised.

The inability to shun bias or proclivity for cognitive error even in the face of countervailing truth represents fundamental problems in native ability, or worse, character. They suggest that a judge ought not be a judge at all, let alone a justice of the Supreme Court. Being deep-seated, they will be recurrent problems regardless of whether an inquiry specifically concerns legislative facts. Reining them in entails systemic interventions that emphasize the high ethical and qualitative standards proper to judicial office.

A systemic response traces to a point as early as the vetting process for applicants to judicial office. The Constitution demands "*proven* competence, integrity, probity, and independence."[214] Requisite qualities must be demonstrated, not claimed. The need to exert greater scrutiny at the outset calls for the identification and operationalization of more accurate indicators of, among others, capacity for analysis, critical thinking, identifying and validating sources, and persistence in truth-seeking. These may be supplemental to already customary indicators of qualification such as service records, performance reviews, and sample outputs,[215] or in the form of finer-crafted criteria for evaluating skills. Similarly, applicants must account for demonstrable past instances of such errors as grossly imperceptive analysis, fallacious reasoning, undisciplined research, misrepresentation, and/or manifestly spurious assertions or conclusions. Applicants of disreputable record or ethic may then be weeded out.

B. Capacity-Building and Normative Commitment

The Supreme Court sits atop the entire judicial system. It cultivates institutional culture. It also embodies and reflects that culture: abstractly, as figurehead; and derivatively, through career officials who have risen through the ranks. By the time judges become Supreme Court justices, their stature would have put them in a unique position. In a collective with others who have risen to the peak of the hierarchy, they have been sustained by and will affirm or challenge extant culture. That the Court derives from a larger culture means that the drive to enhance its capacity benefits from addressing that

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[214] § 7(3). (Emphasis supplied.)

[215] *See* Jud. & Bar Council, *Guidelines & List of Documentary Requirements*, JUD. & BAR COUNCIL WEBSITE, *at* http://jbc.judiciary.gov.ph/forms/Guidelines%20Documentary%20Requirements_1-14-21.pdf (last visited Jan. 28, 2021).

culture's tendencies. Thus, it is also opportune to build the capacities of judges through skills training, coupled with emphasis on high standards concerning research and overall quality of work.

Interventions will have to be concerned with general research standards, techniques, issues, and ethics. They cannot merely enhance already existing training on *legal* research. The specific goal is to broaden capacity, balancing it with antecedent competence. It is a given that the instructive exercise beyond traditional legal skills will challenge settled comforts, but care must be taken for it to not be unduly burdensome. It is not its goal for judges to be omniscient, only that they be equipped for learned engagement. The Supreme Court has recognized this delicate balance impelled by interdisciplinary engagement:

> This Court is a court of law. We are equipped with legal expertise, but we are not the final authority in other disciplines. In fields such as politics, sociology, culture, and economics, this Court is guided by the wisdom of recognized authorities, while being steered by our own astute perception of which notions can withstand reasoned and reasonable scrutiny. This enables us to filter unempirical and outmoded, even if sacrosanct, doctrines and biases.
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> This Court exists by an act of the sovereign Filipino people who ratified the Constitution that created it. Its composition at any point is not the result of a popular election reposing its members with authority to decide on matters of policy. This Court cannot make a final pronouncement on the wisdom of policies. Judicial pronouncements based on wrong premises may unwittingly aggravate oppressive conditions.[216]

The challenge is even more acute in an age of disinformation. It should be recalled that Larsen's observations are particularly borne by technological advances that facilitate the delivery—but do not guarantee—the accuracy, veracity, and quality of information. She was prompted by how "new digital fact-gathering methods have changed the calculus and should force us to rethink the procedural vacuum."[217] She further explains:

> Now the Justices (and their clerks and their librarians) are flooded with information literally at their fingertips. Social science studies, raw statistics, and other data are all just a Google search away. If the Justices want more empirical support for a factual

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[216] *Falcis*, at 33.

[217] Larsen, *supra* note 3, at 1263.

> dimension of their argument, they can find it easily and without the help of anyone outside of the Supreme Court building.[218]
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> Now, however, not only are judges still free to look outside the record and the briefs for questions of fact, but their ability to do so is tremendously enhanced. The digital revolution has two palpable relevant effects: it increases the amount of factual information available for review (statistics, social science research, and polling data can now all be posted to the world for free by anyone) and it also makes this information faster to obtain—literally just fingertips and a Google search away.
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> This new research tool is a game changer. Of course[,] there are benefits to letting judges research freely in a new digital age. Like all of us, judges presumably make better decisions when they know more. But there are also troubling effects that accompany a robust practice of in-house judicial fact finding today.[219]

The enduring need to ground adjudication on knowledge beyond legal formulations against the backdrop of overabundant, but faulty information makes it urgent for the judiciary to protect itself. It must be equipped in navigating the increasingly treacherous terrain of post-truth discourse. Thus, interventions on research standards cannot be limited to classical conceptions. They must be up-to-date, informed, and deliberately designed to address evolving challenges.

The inability to shun bias and the tendency to err can arise out of plain partiality or from unwavering adherence to an ideology or intellectual tradition. The latter may not derive from malice *per se*, but it is no less noxious. Ascribing to a school is not itself imprudent. It grounds and prompts discourse. A collegial, deliberative body, such as the Supreme Court, is well-served by diversity of thought and free exchanges between paradigms. "[O]ut of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements."[220] Justices are kindred not because of homogeneity but because of common commitment to reason and the rule of law.

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[218] *Id.* at 1260, *citing* Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 120 (2003).

[219] *Id.* at 1290-91, *citing* Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 167-68 (2008).

[220] CARDOZO, *supra* note 2, at 176-77 (1921), *citing* HENRY ADAMS, THE DEGRADATION OF THE DEMOCRATIC DOGMA 291-92 (1919).

That commitment is key. Rational grounding manifests in the humble readiness to abandon paradigmatic rigidities when faced with countervailing demonstrable truth or when they simply fail to withstand scrutiny. This assumes stark significance in an ecosystem of polarization, partisan disinformation, revisionism, anti-science, and co-opted narratives. Rule of law also does not mean legalism devoid of principle. "[T]he fact[-]finding process is itself value-driven[.]"[221] The rule of that 'law' includes every noble purpose for which each law is enacted. Especially so, it includes the Constitution's organic, normative dictates. A justice takes an oath "to support and defend the Constitution[.]"[222] That oath speaks of a single Constitution, not a bifurcated document where prestations are segregated from the text's principles, policies, and objectives. Interpretation can extrapolate, but within limits and tethered to anchors. The Constitution, as text, is a product that evinces historicity and, through it, reveals its ideals and aims.[223] For instance, that it is the normative child of an experience in dictatorship[224] compels interpretation that sustains and promotes freedoms, and carefully weighs official overreach.

C. Engaging Counsels

Of the other risks noted by Larsen, legitimacy concerns challenges of perception that can be addressed by enhancing competence and credibility, and by effective engagement. Capacity-building interventions and normative commitment address competence and credibility. They are best complemented by counsels' cognition, especially at the level of the Supreme Court, that litigation is not confined to and should not end with the proximate objective of securing reliefs for parties. "[T]he judiciary remains a part of the

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[221] Woolhandler, *supra* note 63, at 119.

[222] *See* Javellana v. Exec. Sec'y, G.R. No. 36142, 50 SCRA 30, 87, Mar. 31, 1973; *Cent. Bank Employees Ass'n*, 446 SCRA 299 390; Republic v. Sereno, G.R. No. 237428, 863 SCRA 1, May 11, 2018.

[223] *Social Weather Stations, Inc.*, 755 SCRA 124, 167. "The more appropriate and more effective approach is, thus, holistic rather than parochial: to consider context and the interplay of the historical, the contemporary, and even the envisioned. Judicial interpretation entails the convergence of social realities and social ideals. The latter are meant to be effected by the legal apparatus, chief of which is the bedrock of the prevailing legal order: the Constitution. Indeed, the word in the vernacular that describes the Constitution—*saligan*—demonstrates this imperative of constitutional primacy." *See also* McCulloch v. Maryland, 17 U.S. 316 (1819).

[224] Labastilla, *supra* note 193, at 3, *citing* 1 RECORD CONST. COMM'N 434, 435 (July 10, 1986).

policy making sphere of government[,]"[225] and is bound to proceed with its larger societal duty.

The Supreme Court affirms its policy-setting role. Its emphasis on procedural filters has been grounded on a desire to see it effectively carry out this function, unburdened by concerns that are ill-served by its faculties. For example, in *Kumar*:

> [T]his Court is better advised to stay its hand and not entertain the appeal when there is no novel legal question involved, or when a case presents no doctrinal or pedagogical value whereby it is opportune for this Court to review and expound on, rectify, modify[,] and / or clarify existing legal policy, or lay out novel principles and delve into unexplored areas of law.
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> This Court may decline to review cases when all that are involved are settled rules for which nothing remains but their application. Also, when there is no manifest or demonstrable departure from legal provisions and/or jurisprudence. So too, when the court whose ruling is assailed has not been shown to have so wantonly deviated from settled procedural norms or otherwise enabled such deviation.
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> Litigants may very well aggrandize their petitions, but it is precisely this Court's task to pierce the veil of what they purport to be questions warranting this Court's sublime consideration. It remains in this Court's exclusive discretion to determine whether a Rule 45 Petition is attended by the requisite important and special reasons.[226]

Counsels share the responsibility and bear the burden of effective policy engagement within the confines of litigation. Davis' seminal analysis never sought to undo the adversarial system and the participation of parties and their counsels. He acknowledged the capacity of traditional procedures on evidence and pleading to facilitate legislative fact-finding.[227] He spoke highly of Justice Brandeis whose example as counsel set the archetype for pleading legislative facts: "Questions of law and policy often yield to comprehensive factual study, as the magnificent leadership of Justice Brandeis in that direction so eloquently testifies."[228] The U.S. Supreme Court, too, at

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[225] Dean Alfange, Jr., *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 638 (1966).

[226] *Kumar*, at 7.

[227] Davis, *supra* note 55, at 403.

[228] Davis, *supra* note 5, at 953.

one point emphasized that taking judicial notice does not dispense with a party's duty and opportunity to dispute and disprove. *Ohio Bell Tel. Co. v. Public Utilities Commission*,[229] penned by Justice Cardozo, states:

> [N]otice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. "It does not mean that the opponent is prevented from disputing the matter by evidence if he [or she] believes it disputable."[230]

Davis maintained that the adversarial system should afford counsels and parties all the opportunity "to meet in the appropriate fashion all facts that influence the disposition of [a] case":[231]

> The fundamental principle is that parties should have opportunity to meet in the appropriate fashion all facts that influence the disposition of the case. What is the appropriate fashion depends upon three main variables—how far the facts are from the center of the controversy between the parties, the extent to which the facts are adjudicative facts about the parties or legislative facts of a general character, and the degree of certainty or doubt about the facts.[232]

Counsels' mere awareness and appreciation of the metamorphic potential of how they litigate can itself spell the difference in whether standing but dubious views will remain entrenched:

> But when lawyers perceive that a particular showing will affect the outcome in a case, they tend to make such a showing, which courts tend to receive. If the court relies on an imbalanced presentation in one case, attorneys with sufficient resources and sophistication are likely to respond in later cases with counter-presentations. Explicit judicial reliance on imbalanced information thus creates its own incentive for correction by showing attorneys what kinds of facts just might make a difference to the court. One cannot necessarily say that these presentations will change the prior legal rule, or that their effect might not have been different if presented before an earlier rule crystallized. But one can say that it is unlikely that over time a contestable scientific or social scientific study that is made the explicit basis of a court decision will remain unchallenged.[233]

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[229] 301 U.S. 292 (1937).

[230] *Id.* at 301-02. (Citations omitted.)

[231] Davis, *supra* note 5, at 983.

[232] *Id.*

[233] Woolhandler, *supra* note 63, at 118, *citing* Davis, *supra* note 147, at 1590.

A recent case serves as an example of how, even when the Court appreciates problematic situations and intuits the value of relief, counsels retain the responsibility of, at the very least, making a sufficient initial showing of supporting facts. Concerning a Petition for Certiorari and Prohibition which sought sweeping policy changes by legalizing same-sex marriage, the Court said:

> All told, petitioner's 29-page initiatory pleading neither cites nor annexes any credible or reputable studies, statistics, affidavits, papers, or statements that would impress upon this Court the gravity of his purported cause. The Petition stays firmly in the realm of the speculative and conjectural, failing to represent the very real and well-documented issues that the LGBTQI+ community face in Philippine society.[234]

D. The Risks of Liberalized Rules

Suggestions for the Supreme Court to "embrace more openly [its] legislative functions[,]"[235] open its processes, and liberalize rules for legislative fact consideration seek to address long-term fairness. By inviting the Court to more openly concede and operationalize its policy-making role, they hope to enhance judicial policy-making's responsiveness in relation to the larger community. "Because courts inevitably make law, the argument goes, courts should use decision[-]making processes that are appropriate for making general, prospective rules[.] [...] Courts need to develop techniques for obtaining the views of, or effects on, the unrepresented or underrepresented."[236]

Woolhandler warns, however, that opening judicial processes with a view to replicating legislative or administrative efficacy is a slippery slope. The drive to enable contemporaneous representation of broad interests by importing extrajudicial techniques can blur the bounds of constitutional separation of powers. Drawing from the example of Karst's effort to exhaustively identify issues that are preferably addressed by legislative fact presentations in a particular constitutional case, Woolhandler cautions against both judicial overreach and self-imposed impotence:

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[234] *Falcis*, at 48.

[235] Woolhandler, *supra* note 63, at 113, *citing* Davis, *supra* note 147, at 1600; Karst, *supra* note 61, at 78-80; Miller & Barron, *supra* note 146, at 1189-90, 1243.

[236] *Id.* at 122, 124.

> [F]ormalizing judicial mechanisms for consideration of all affected interests will accentuate the polycentric and unique qualities of each decision. Professor Karst's litany of questions that he believes would illuminate constitutional decisions bears this out. For example, Professor Karst believes the court's decision as to whether Detroit's enforcement of a criminal antismoke ordinance violated the commerce clause would be illuminated by legislative fact presentations on the following issues:
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> > What is the danger to the inhabitants of Detroit from air pollution? What losses of health and property have resulted, before and after the adoption and enforcement of the ordinance? What dangers would result if Detroit were to exempt from the ordinance those sources of smoke which are impossible to eliminate without adding substantially to the cost of interstate commerce? Is other equipment available which would permit Huron to comply with the ordinance? How much would it cost Huron to comply? How many other federally licensed vessels which operate in Detroit are equipped with the same kind of boiler?
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> Professor Stewart has questioned the ability of an interest representation model to legitimate administrative process. The interest representation model is even less capable of legitimating judicial process because the political branches have a much stronger claim that they can determine the majority's desires. Even if courts can be seen as reweighing the legislative balance to assure representation of underrepresented interests, these interests are likely to receive better protection from principles and precedent rather than ad hoc balancing of the effects of legal rules. If courts simply sought legitimacy through duplication of the legislative process, they ultimately would put themselves out of business.[237]

Even as it is duty-bound to proceed with its larger societal task of policy engagement, the judiciary ought not be beholden to the styles of political branches. It does not have Congress' or the Executive's resources at its disposal. It is not vested with the same mandate, and does not confront the same crises. The Constitution's expanded judicial power concerning grave abuse of discretion by any branch or instrumentality of the government is framed precisely as a dimension of *judicial* power. It still operates in conformity with the basic requirements of justiciability.[238] *Association of Medical Clinics for*

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[237] *Id.* at 125. (Citations omitted.)

[238] Belgica v. Exec. Sec'y, G.R. No. 208566, 710 SCRA 1, 89-90, Nov. 19, 2013. (Citations omitted.)

Overseas Workers, Inc. emphasizes that this expansion must operate with an adequately devised vehicle, and that vehicle remains to be a judicial process.[239] So too, the final products of the Supreme Court's affirmative engagement with its extradecisional capacities have prudently come in the form of judicial writs and procedural rules.[240] Separation of powers compels the judiciary to maintain fidelity with judicial ethos:

> Judicial law making is "undemocratic"; it represents government by a handful of [individuals] [...] sheltered, although not entirely, from the pressures of public demand. It is haphazard and unsystematic, for it is contingent upon the presentation of an appropriate case raising the appropriate questions of constitutional or legal interpretation. It is, in Mr. Justice Holmes' phrase, "confined from molar to molecular motions," by the stubborn fact that, for all the points of convergence, law is not the same as other aspects of politics. Thus[,] a court cannot simply set out to establish justice or to create the good society but rather must heed the peculiarly legal requirements of stability, consistency, adherence to precedent and adherence to the language of the statutes or constitutional provisions that come before it. Nevertheless, despite these limitations and despite the fact that its political functions are distinct from and considerably narrower than those of the executive and legislative branches, the judiciary remains a part of the policy making sphere of government with unique and inescapable responsibilities of its own. Its task is to insure that the legal system is always directed toward coincidence with the society's best conceptions of justice, to legitimate governmental power when the public interest demands the exercise of that power, and to protect constitutional rights against needless incursions by government or, in some cases, individuals.[241]

Engagement and accountability are desirable, but not in a manner that feeds extrajudicial appetite and flirts with institutional distension. Rather than enabling outright intervention in judicial proceedings, it is preferable to enhance accountability through strategic scrutiny.

E. Resisting Authority's Temptations

On the part of the Court, reckoning its own accountability urges it to demur from provisional modes, idiosyncratic styles, impression, and intuition.

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[239] *Ass'n of Medical Clinics*, 812 SCRA 452, 474–80.

[240] *See* PUB. INFO. OFFICE, SUPREME CT. OF THE PHIL., *supra* note 209.

[241] Alfange, *supra* note 225, at 638, *citing* Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, *J.*, *dissenting*).

It must turn to methodical approaches. Legal reasoning's impulse is to advert to authority. "Unlike other disciplines (like math or science), the 'law's practice of using and announcing its authorities [. . .] is part and parcel of law's character.' [...] '[c]itations function something like the currency of the legal system.'"[242] Citations matter, but citation for its own sake can be transcended. Apart from merely referencing ostensibly credible sources, it is helpful to be particular with quality control and peer-review standards, impact factors and citation rankings, underlying methodologies, subsequent conflicting or confirming literature, and the depth and extent of an author's engagement in a given field.[243]

Precedence induces inertia. Quantitative (e.g. frequency of citation) and qualitative (e.g. nature of decisions in which it was cited, such as doctrine-setting cases) factors are likely to affect a source's perceived value and authority. Moreover, once a source is enshrined in a decision, it and its ideas can be reinforced, no longer just by actual reference to it, but by reference to the decision that cited it. In which case, it is no longer a matter of in-house research on extra-record facts, but merely of citing precedent. Davis recognized that "judicial determinations of questions of fact have become precedents, so that questions of fact today are resolved by evidence or judicial notice in yesterday's cases."[244] He added, "[w]hatever the theory about *stare*

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[242] Larsen, *supra* note 3, at 1282, *citing* Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1934-35 (2008); Frank B. Cross et.al., *supra* note 186.

[243] Carolyn Sutherland, *Interdisciplinarity in Judicial Decision-making: Exploring the Role of Social Science in Australian Labour Law Cases*, 42 MELB. U. L. REV. 232, 270-72 (2018), *citing* Kylie Burns, *Judges, 'Common Sense and Judicial Cognition*, 25 GRIFFITH L. REV. 319, 324, 339-45 (2016). Sutherland further notes:

> When judges explicitly rely on intuition in labour law cases, this may be expressed as an understanding of 'obvious' or 'notorious' workplace norms or of 'common sense' and 'modern business arrangements'. Alternatively, the judge's background knowledge may be a 'silent lens' that is not cited but is nevertheless influential on the decision-making process. In either case, the reliance on intuition means that judges are unlikely to challenge their own biases about the way the world works. This is particularly problematic when it comes to deciding cases under laws that are designed to challenge systemic bias in workplace rules. Social science may therefore have a role to play in assisting judges to see beyond their own intuitive understanding of the way that workers and workplace operate.
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> A second, important step is for labour law scholars to escalate their level of engagement with social science disciplines, either by adopting methods and perspectives from those disciplines or by drawing on relevant studies from the social sciences when addressing research questions in labour law.

[244] Davis, *supra* note 5, at 966.

decisis may be, the tendency of the courts to apply that principle to findings of fact is a rather substantial one."[245] Even when viewed as *obiter dicta*, legal propositions derived from jurisprudential determinations of factual matters will still hold significant value. "[L]ower courts will, as a practical matter, often reflexively follow a statement by a higher court, *even if the statement is only dictum* or a factual finding that perhaps ought not be binding."[246]

It is essential that jurisprudence be self-critical and, if necessary, overcome its own inertia. As mentioned, judicial decisions' reliance on nothing but themselves as authority can be injudicious when dealing with matters beyond law's technical expertise. Abiding reliance on prior information wrongly assumes that knowledge in other disciplines is static. Quite the contrary, discovery's constant progress requires jurisprudence to be dynamic. As with the examples of the distasteful views on indigenous peoples in *Rubi* and *Cayat*, as well as the heterosexism entrenched in jurisprudence, the Court is challenged to abandon regressive postulates.

F. Scrutiny and Democratic Accountability

Beyond the Court, the challenge also bears on the legal community, professional circles, and the academe to facilitate democratic accountability. They can systematically appraise jurisprudence's treatment of its sources and the conclusions derived from them.

Reference to sources can be strategically weighed in relation to the purposes for which they were cited. In this regard, insights drawn from an endeavor to create a taxonomy—ranging from "perfunctory" to "substantive"—of legal scholarship's qualitative uses in the decisional lawmaking process[247] are instructive. The taxonomy evokes similar considerations as the drawing of distinctions between rhetorical and dispositive invocation of legislative facts.

Thus, when a citation is made merely to "highlight additional sources of information about topics [a decision] mentions, but does not address," then it is perfunctory.[248] Another perfunctory citation is one that only "acknowledge[s] that there are different views about an issue."[249] Citations that supply a persuasive background are "less perfunctory and more

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[245] Davis, *supra* note 5, at 970.

[246] Gorod, *supra* note 10, at 64. (Emphasis supplied.)

[247] *See* Derek Simpson & Lee Petherbridge, *An Empirical Study of the Use of Legal Scholarship in Supreme Court Trademark Jurisprudence*, 35 CARDOZO L. REV. 931 (2014).

[248] *Id.* at 954.

[249] *Id.* at 956.

connected to the substance of an analysis."[250] These "provide more understanding about a point of reasoning [a decision] is actually making," by invoking "a scholarly argument to add explanatory detail[.]"[251] Highest quality, substantive references are those that are used "to reveal what the relevant law or policy should be in a particular instance" and make "a normative suggestion about the development of the law[.]"[252] A category of citations that can variably be perfunctory or highly substantive, depending on the nuances of actual use, is one that "emphasizes the use of scholarship to support claims to empirical historical facts."[253] These include citations "to support factual claims undergirding a descriptive historical narrative that appears important to the [decision's] analysis[,]"[254] and "to establish a historical timeline of how the real world was."[255]

Further, the field to which a case belongs bears heavily on the quality of sources that may be invoked and the soundness of dispositions. For example, literature on psychiatry and psychology command much respect in the resolution of family law cases, forensic science in relation to criminal cases, and economics in cases involving trade practices.[256] Specialists, practitioners, and scholars are then especially capacitated to promote, elevate, and ground accompanying discourse. They can challenge, evolve, and refine the Court's determinations. Discussion in the public sphere can transcend common punditry or traditional legal commentary, and involve heightened discernment on sociological or scientific dimensions. At the same time, they can improve popular understanding and demystify intimidating legalese. This can encourage educated evaluation by the public and enhance the qualitative premises for democratic accountability.

VI. CONCLUSION

Law is a means to social ends. A factual understanding of the world and its workings informs law's purposes and how it operates. Judicial interpretation serves the law's determination of what is good and just, of what is acceptable and proper, of the social goods law seeks to secure. Judicial interpretation's systemic purpose demands that it proceed with knowledge of greater realities. Decisional lawmaking means that society is as much its

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[250] *Id.* at 962.
[251] *Id.*
[252] *Id.* at 964.
[253] *Id.* at 966.
[254] *Id.* at 967.
[255] *Id.*
[256] *See* Sutherland, *supra* note 243, at 240-42. (Citations omitted.)

subject as are the parties to a case, even if indirectly. This manner of engagement is not only native to general judicial function. It is also a duty expressly ordained by the Constitution.

The practicalities and unremittingly staggering demands of the present make it an acute need for the Supreme Court to be scrupulous in admitting cases. It is right to desist from engaging cases whose factual dimensions mislead it into simulating trial, a task reserved for other courts. However, critical discernment reveals that the facts necessarily subject of trial—adjudicative facts—are distinct from facts that merely educate it about the larger context in which it operates and which even facilitate its capacity to resolve questions of law. The manner of knowing legislative facts is not beholden to the techniques of trial and does not run afoul of the Court's competencies. More importantly, legislative facts equip the Court rather than constrain it. They facilitate learned and responsive decision-making. Conversely, denied the illumination that legislative facts afford, the Court runs the risk of impotence. Carried to the extreme, such denial reduces the Court to an automaton governed by ostensibly neat and orderly formulas, dependable in its swiftness, but ultimately oblivious.

Confronting legislative facts carries risks. Adjudication's ensuing encounter with other disciplines urges the Court to be in keeping with its best qualities. Planted in its normative roots, this involves moving with technique and enabling accountability. Along with the Court, counsels must be minded and equipped for engagement. The same is true of "broader concerned publics."[257] As the Court proceeds with its duty of decisional lawmaking, democratic accountability is imperative. This can be facilitated by engagement that strategically considers the nonlegal wisdom from which the Court draws and through which it arrives at its conclusions.

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[257] Howard E. Dean, *Judicial Policymaking*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1043 (Leonard W. Levy, et al. eds., 1986).