DEBUNKING THE NOTION OF A LIVING CONSTITUTION

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"The Athenian admits that a government thus limited by law may not be ideally the best; if a man could be found without the limitations of human ignorance and self-interest, it would be wrong to subject him to law, for no law has higher authority than knowledge. But the possibility of finding such a ruler is not great; he is to be found, if at all, only in the proverbial age of Kronos, when men are said to have been ruled by semidivine beings higher than themselves. Hence we must exclude the sovereignty of men from our city; the best we can do in the present age is to imitate the ordered life of that legendary era and make law our sovereign."
-Glenn R. Morrow, *Plato's Cretan City*[1]

I. INTRODUCTION

One question the Judicial and Bar Council (JBC) often asks those vying for the position of Supreme Court Associate Justice is whether the candidate, if

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[1] GLENN R. MORROW, PLATO'S CRETAN CITY: A HISTORICAL INTERPRETATION OF THE LAWS 544-545 (Princeton University Press: Princeton, N.J., 1960).

appointed, would exercise judicial activism or judicial restraint.[2] During the June 2019 JBC interviews, then Chief Justice Lucas Bersamin would ask candidates for their understanding of the terms judicial activism and judicial restraint and ask if they consider themselves a textualist. Associate Justice Noel Tijam, on the other hand, would ask the candidates for their understanding of the phrase "the living constitution."

In the United States, the Senate Judiciary Committee asks a similar line of questions during confirmation hearings of nominees to the U.S. Supreme Court. The Committee would ask nominees if they believe in the notion of a "living constitution". The late U.S. Supreme Court Justice William Rehnquist explains why choosing the "living constitution" (over originalism) is prudent in this situation:

> At least one of the more than half-dozen persons nominated during the past decade to be an Associate Justice of the Supreme Court of the United States has been asked by the Senate Judiciary Committee at his confirmation hearings whether he believed in a living Constitution. **It is not an easy question to answer; the phrase "living Constitution" has about it a teasing imprecision that makes it a coat of many colors.**
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> **One's first reaction tends to be along the lines of public relations or ideological sex appeal, I suppose. At first blush it seems certain that a living Constitution is better than what must be its counterpart, a dead Constitution. It would seem that only a necrophile could disagree.** If we could get one of the major public opinion research firms in the country to sample public opinion concerning whether the United States Constitution should be living or dead, the overwhelming majority of the responses doubtless would favor a living Constitution.[3] (Emphasis supplied)

It certainly seems that one who does not adhere to the notion of a living constitution would prefer a 'dead' constitution. Yet, as pointed out by Justice Rehnquist, this term deserves to be analyzed in more than just the public relations context, as a judge's perception of the Constitution will necessarily affect his opinion on issues of constitutionality.

The notion of a living constitution originated in the United States and has sparked debates between originalists and evolutionists. As defined by the late U.S. Supreme Court Justice Antonin Scalia, quoting *Trop v. Dulles*, the "living constitution" is the notion that a written constitution changes from decade to decade to comport with "the evolving standards of decency that mark the

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[2] Lian Buan, "Recent JBC Interviews Had Less Tough Questions on SC Decisions." Rappler, 2 Oct. 2018, www.rappler.com/newsbreak/in-depth/jbc-interviews-fewer-tough-questions-supreme-court.

[3] William H. Rehnquist, *The Notion of a Living Constitution*, 54 Texas L. Rev. 693 (1976), reprinted in 29 Harvard J.L. & Pub. Pol'y, 401, (2006).

progress of a maturing society."[4] Thus, for the evolutionist, the constitution "grows and changes from age to age, in order to meet the needs of a changing society."[5]

Not much has been said about the notion of a living constitution in the context of Philippine democracy. However, several Supreme Court Justices have occasionally alluded to this notion.

In a keynote address delivered during a Fellowship Luncheon of the Philippine Bar Association in 2014, the former Chief Justice Artemio V. Panganiban said that there are at least two ways of interpreting the Constitution: textualism/originalism and what is called "the living constitution". He says:

> [T]here are at least two ways of interpreting or construing constitutions and laws. **The textualists or originalists interpret according to the original intent of the framers, regardless of the dire consequences on current and future events. They rely on "dura lex sed lex."** Their self-imposed duty is "to apply laws faithfully and desist from engaging in socio-economic or political experimentations," which they denounce as "judicial legislation."
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> **On the other hand, the liberals or progressives believe in a living Constitution; one that grows with time, solves the vagaries of the present and anticipates the needs of the future.** I belong to this latter group who believe that jurists are not mere social technicians and legal automatons. Rather, they are social engineers who courageously fix their gaze on the underlying principles and overarching aspirations of the Constitution to nurture a free and prosperous nation.[6] (Emphasis supplied)

Unfortunately, this explanation oversimplifies the philosophy underlying the originalist and textualist schools of thought. It also suggests that originalists and textualists are "legal automatons" who ignore the actual consequences of giving the Constitution its straightforward meaning.

This article will focus on the "Great Debate" in Constitutional Law between originalism/textualism[7] and the notion of a living constitution. This article will explain why the notion of a living constitution is in many respects

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[4] *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981), quoting from *Trop v. Dulles*, 356 U.S. 86, 101 (1958)

[5] Antonin Scalia, "Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws" In A Matter of Interpretation edited by Amy Gutmann, 3-48, 38. Princeton: Princeton University Press, 2018. https://doi.org/10.1515/9781400882953-004. (last accessed: July 9, 2021).

[6] Artemio V. Panganiban, *Safeguard Liberty: Conquer Poverty, Share Prosperity (Part Two – For the Legal Profession)*, 62 UST Law Review 173, 178-179 (2018).

[7] Originalism and textualism are not synonymous as explained in Chapter V of this article. However, they are sometimes used interchangeably, especially when contrasted against the notion of a living constitution.

problematic and untenable in a modern/representative democracy, and why it runs afoul of basic legal principles such as the rule of majority, checks and balances, and the political question doctrine.

II. WHAT IS A CONSTITUTION?

In *Manila Prince Hotel v. GSIS* (1997), the Philippine Supreme Court defined a constitution as a "system of fundamental laws for the governance and administration of a nation." Thus, it prescribes the permanent framework of government, assigns to the different departments their respective powers and duties, and establishes certain fixed principles on which government is founded.[8] In *Marbury v. Madison*, the U.S. Supreme Court defined it as "the fundamental and paramount law of the nation."[9]

However, the Supreme Court has also clarified that the Constitution is not primarily a lawyer's document.[10] More than that, it is an expression of the people's sovereign will – a statement of the core principles and aspirations of a nation and its identity as a body politic.

Thus, a constitution ought to be more or less permanent in character. It should not invariably change as it is intended "to serve the country for generations to come".[11]

Notwithstanding its permanent character, the 1987 Philippine Constitution is not inflexible. Article 17 of the Constitution provides that that Constitution can be changed either by amendment or by revision. However, this provision has been criticized as too rigid and strict. This inherent difficulty of introducing changes into the Constitution is the main reason why many find it convenient to assert that the Constitution is a living document that changes and evolves through time. However, the Constitution exists precisely for that purpose. As Justice Scalia intimated:

> **It certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.** A society that adopts a bill

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[8] *Manila Prince Hotel v. GSIS*, G.R. No. 122156 (1997).
[9] *Marbury v. Madison*, 5 U.S. 137 (1803).
[10] *J.M. Tuason & Co., Inc. v. Land Administration*, G.R. No. L-21064 (1970).
[11] HECTOR DE LEON, TEXTBOOK ON THE PHILIPPINE CONSTITUTION 40 (Quezon City: Rex Book Store, Inc., 2008).

> of rights is skeptical that "evolving standards of decency" always "mark progress," and that societies always "mature," as opposed to rot. Neither the text of such a document nor the intent of its framers (whichever you choose) can possibly lead to the conclusion that its only effect is to take the power of changing rights away from the legislature and give it to the courts.[12] (Emphasis supplied)

Aside from this relative permanence, the Constitution must also be brief and couched in general terms, lest it loses its essence as a statement of our fundamental beliefs. In *McCulloch v. Maryland,* Justice John Marshall expressed this sentiment:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.[13]

For Dr. Bernardo M. Villegas, a member of the 1986 Constitutional Commission, a big defect of the 1987 Philippine Constitution is that it contained copious details that should have been left out of a written constitution (and should have instead been enacted through legislation) such as the economic provisions.[14]

Dr. Villegas explained that "there was a great sentiment, especially among the members of the 1986 Constitutional Commission, that the 1973 Constitution was completely crafted by Marcos to enable him to remain indefinitely as head of state." Wary of the "Ghost of Marcos", the framers included in the draft of the 1987 Constitution provisions that were the opposite of what Marcos adopted. Thus, it would seem that all that Marcos adopted is reprehensible and should be proscribed in the Constitution, or so the framers thought.[15]

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[12] SCALIA, supra note 5, at 40.

[13] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[14] This was said during an interview with Prof. Jeremy I. Gatdula. See "Naturang Batas, Likas na Tama: Amending the Constitution (pt.1)" https://www.youtube.com/watch?v=UckGFrplgvk, (last accessed Jan. 30, 2021).

[15] Dr. Villegas illustrates: "For example, since President Marcos was very liberal in his view towards FDIs, the majority of the commissioners voted to incorporate provisions in the new Constitution that would be opposite to the martial law policies." See "The Wisdom of Amending the Constitution." 2021. Manila Bulletin. February 11, 2021. https://mb.com.ph/2021/02/12/the-wisdom-of-amending-the-constitution/.

Dr. Villegas also pointed out that some provisions of the 1987 Constitution were by the byproduct of "you give me this, and I will give you that" negotiations from among the members of the Commission.

Justice Isagani Cruz expressed a similar sentiment on the verbosity of the 1987 Constitution:

> What has made the present Constitution excessively long is the inclusion therein of provisions that should have been embodied only in implementing statutes to be enacted by the legislature pursuant to the basic constitutional principles. The most notable flaw of the new charter is its verbosity and consequent prolixity that have dampened popular interest in what should be the common concern of the whole nation. The sheer length of the document has deterred people from reading it, much less trying to understand its contents and motivations. It would seem that every one of the members of the Constitution Commission wanted to put in his two centavos worth and unfortunately succeeded, thereby ballooning the Constitution to unseemly dimensions.
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> Thus, in some portions thereof, the new Constitution sounds like a political speech rather than a formal document stating only basic precepts. It is full of platitudes. This is true of the policies on social justice and the national economy, which could have been worded with less loquacity to give the legislature more leeway in their implementation. It is believed that such policies could have been expressed briefly without loss of substance if the framers had more expertise in the art of constitution-making and less personal vainglory, let alone distrust of the legislature.[16]

III. HOW TO INTERPRET THE CONSTITUTION

In *Francisco v. House of Representatives* (2003), the Supreme Court laid down the procedure for interpreting the Constitution.[17]

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[16] ISAGANI A. CRUZ & CARLO A. CRUZ, PHILIPPINE POLITICAL LAW 806-807 (Quezon City: Central Book Supply, Inc, 2014),

[17] Interpretation, it should be noted, has both a general sense and a specific sense. Interpretation in the general sense covers interpretation in the specific sense and construction. Earl T. Crawford in his book *The Construction of Statutes* (1940) distinguished interpretation from construction in this wise: "Strictly speaking, construction and interpretation are not the same although the two terms are often used interchangeably. Construction, however, to be technically correct, is the drawing of conclusions with respect to subjects that are beyond the direct expression of the text from elements known and given in the text, while interpretation is the process of discovering the true meaning of the language used." See NOLI C. DIAZ, STATUTORY CONSTRUCTION 2 (Quezon City: Central Bookstore, 2016), citing EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES 241 (Thomas Law Book Company, 1940).

The **first rule of interpretation** is *verba legis* (plain meaning rule): the words of the Constitution must be given their ordinary meaning except where technical terms are employed.[18] Citing *J.M. Tuason & Co., Inc. v. Land Administration* (1970), the Court explained:

> **As the Constitution is not primarily a lawyer's document, it being essential for the rule of law to obtain that it should ever be present in the people's consciousness, its language as much as possible should be understood in the sense they have in common use.** What it says according to the text of the provision to be construed compels acceptance and negates the power of the courts to alter it, based on the postulate that the framers and the people mean what they say. Thus, these are the cases where the need for construction is reduced to a minimum.[19] (Emphasis supplied)

The reason is simple. Words should mean what they mean. The Written Constitution "says what it says and doesn't say what it doesn't say." This ruling in *J.M. Tuason* is iterated in *Pimentel v. Legal Education Board* (2019), where the Court held that:

> **As much as possible, the words of the Constitution are understood in the sense they have in common use.** What it says according to the text of the provision to be construed compels acceptance and negates the power of the courts to alter it, based on the postulate that the framers and the people mean what they say.[20] (Emphasis supplied)

The Constitution should be primarily understood in the context of political theory as the expression of our 'general will' – our fundamental beliefs, principles, and aspirations. And its definition as the fundamental law of the land (the lawyer's sense of the term) should only come in second, particularly for the purpose of determining whether laws enacted by Congress conform to the 'general will' of the people.

When the meaning of a constitutional text is not clear, and a plain reading thereof falls short of a reasonable interpretation, we go to **the second rule, that is, *ratio legis est anima***. Translated as "the reason of the law is its soul", this rule tells us to look into the reason why the framers of the Constitution included a particular provision. The words of the Constitution should be interpreted according to the intent of its framers. Citing *Civil Liberties Union v. Executive Secretary* (1991), the Court explained in this wise:

> A foolproof yardstick in constitutional construction is the intention underlying the provision under consideration. Thus, it has been held that the Court in construing a Constitution, should bear in mind the object

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[18] *Francisco v. House of Representatives*, G.R. No. 160261 (2003).
[19] *J.M. Tuason & Co., Inc. v. Land Administration*, G.R. No. L-21064 (1970).
[20] *Pimentel v. Legal Education Board* G.R. Nos. 230642 & 242954 (2019).

> sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied**. A doubtful provision will be examined in the light of the history of the times, and the condition and circumstances under which the Constitution was framed. The object is to ascertain the reason which induced the framers of the Constitution to enact the particular provision and the purpose sought to be accomplished thereby, in order to construe the whole as to make the words consonant to that reason and calculated to effect that purpose**.[21] (Emphasis supplied)

Legal scholars refer to this methodology as "old originalism or original intent originalism", as opposed to "new originalism or original meaning originalism". New originalism focuses instead on the 'original public meaning' of the Constitution or how the people understood the text which they forged into a Constitution.

One must bear in mind that in the latter portion of *Civil Liberties Union*, the Supreme Court clarified that we ascertain the framers' intent only as a means to an end, that is, to discover the *original public meaning* of the Constitution. The assumption is that the intent of the framers reflects the understanding of the people who ratified the Constitution. This paradigm shift from *framers' intent* to *electorate's comprehension* acknowledges that the voting electorate is the true author of the Constitution and not the framers. The Court held:

> While it is permissible in this jurisdiction to consult the debates and proceedings of the constitutional convention in order to arrive at the reason and purpose of the resulting Constitution, resort thereto may be had only when other guides fail as said proceedings are powerless to vary the terms of the Constitution when the meaning is clear. Debates in the constitutional convention "are of value as showing the views of the individual members, and as indicating the reasons for their votes, but they give us no light as to the views of the large majority who did not talk, much less of the mass of our fellow citizens whose votes at the polls gave that instrument the force of fundamental law. **We think it safer to construe the constitution from what appears upon its face." The proper interpretation therefore depends more on how it was understood by the people adopting it than in the framers's understanding thereof.**[22] (Emphasis Supplied)

Using the intent of the framers as a device to ascertain the original public meaning of the Constitution is explained in the earlier case of *Nitafan v. Commissioner of Internal Revenue* (1987). In *Nitafan*, the Court said that "It may also be safely assumed that the people in ratifying the Constitution were guided mainly by the explanation offered by the framers."[23]

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[21] *Civil Liberties Union v. Executive Secretary*, G.R. No. 83896 (1991).

[22] *Id.*

[23] The rationale behind this approach was explained by Justice Antonin Scalia when he said: "I will consult the writings of some men who happened to be delegates of the Constitutional Convention—

The third rule is *ut magis valeat quam pereat*—the Constitution is to be read as a whole. As explained in *Civil Liberties Union*:

> It is a well-established rule in constitutional construction that no one provision of the Constitution is to be separated from all the others, to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. Sections bearing on a particular subject should be considered and interpreted together as to effectuate the whole purpose of the Constitution and one section is not to be allowed to defeat another, if by any reasonable construction, the two can be made to stand together.
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> In other words, the court must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make the words idle and nugatory.[24]

This rule tells us to read in context, especially if reading provisions in isolation will lead to unreasonable or absurd interpretations, or conflict with other provisions of the Constitution.

The Court in *Francisco* laid down the canonical rules for interpreting the 1987 Philippine Constitution. To explain the reasoning behind these rules, the next section provides a brief overview of the history of the Philippine legal system.

IV. THE PHILIPPINE LEGAL SYSTEM

The Philippines practices a mixed legal system due to its Spanish and American influences. Its legal system comprises primarily of the civil law tradition from Spain, supplemented by common law principles from the United States.[25]

Civil law systems that originated from Continental Europe are characterized by their legal codes, often enacted by the State legislature or

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Hamilton's and Madison's writings in *The Federalist*, for example. I do so, however, not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood." See SCALIA, supra note 5, at 38.

[24] *Civil Liberties Union v. Executive Secretary*, G.R. No. 83896 (1991).

[25] Since the Philippines was under Spanish Rule for over three hundred years and only half a century under American Rule, it is understandable why the Philippine legal system is predominantly based on the civil law tradition. *See Almonte v. People*, G.R. No. 252117 (2020).

Congress. On the other hand, the common law systems consist principally of judge-made laws or *case law*.

In *Almonte v. People* (2020), Supreme Court Associate Justice Edgardo L. Delos Santos explains the foundation of the Philippine legal system:

> The civil law aspect of the Philippine legal system derives its foundations from: (a) the presently defunct Act No. 2127 which mandates that the language of the text of the law shall prevail in the interpretation of laws; (b) the judicially-institutionalized maxims of *verba legis non est recedendum* (from the words of a statute there should be no departure) and *noscitur a sociis* (where a particular word or phrase is ambiguous in itself or is equally susceptible of various meanings, its correct construction may be made clear and specific by considering the company of words in which it is founded or with which it is associated); (c) Articles 7 and 10 of the Civil Code where "[l]aws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse, or custom or practice to the contrary" and "[i]n case of doubt in the interpretation or application of laws, it is presumed that the lawmaking body intended right and justice to prevail"; and (d) the constitutional power of this Court "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" and assess whether or not there is failure to act in contemplation of law.
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> Concomitantly, the common law aspect of the Philippine legal system traces its roots from: (a) Articles 8 and 9 of the Civil Code where "[j]udicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines" and "[n]o judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws"; and (b) the long-standing judicial adage that "equity follows the law."[26]

Justice Delos Santos explains why the adoption by the Philippines of the civil law tradition—where laws are made by the legislature and not by the courts—conforms with the democratic principle of checks and balances and separation of powers.

> By the well-known distribution of the powers of government among the executive, legislative, and judicial departments by the Constitution, there was provided that marvelous scheme of check and balances which has been the wonder and admiration of the statesmen, diplomats, and jurists in every part of the civilized world. In this system, the Legislative makes the law, the Executive implements the law, and the Judiciary applies and/or interprets the law. This tripartite distribution of powers is inherent in democratic governments where no single branch may dominate another.

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[26] *Id.*

> Stated differently, the principle of checks-and-balances is inherently woven into the fabric of democracy.[27]

The notion of a living constitution, it would seem, is irreconcilable with a predominantly civil law system. As pointed out by David A. Strauss, a law professor at the University of Chicago, **a living constitution is a common law constitution**. Professor Strauss speaks of the legal system of the United States:

> **The common law is a system built not on an authoritative, foundational, quasi-sacred text like the Constitution. Rather, the common law is built out of precedents and traditions that accumulate over time.** Those precedents allow room for adaptation and change, but only within certain limits and only in ways that are rooted in the past. Our constitutional system has become a common law system, one in which precedent and past practices are, in their own way, as important as the written Constitution itself. A common law Constitution is a "living" Constitution, but it is also one that can protect fundamental principles against transient public opinion, and it is not one that judges (or anyone else) can simply manipulate to fit their own ideas.[28] (Emphasis supplied)

However, this common law approach to interpretation—whereby the Constitution morphs according to the circumstances—frustrates the whole purpose of having a written constitution. Justice Scalia criticizes this persistence of the common law tradition in a civil law system as it opens the door to judicial improvisation or judicial legislation. He calls it the "uncomfortable relationship between common-law lawmaking to democracy."[29] Speaking of the common law tradition of the United States, he explains:

> Ours is a common-law tradition in which judicial improvisation has abounded. Statutes were a comparatively infrequent source of English law through the mid-19th century. Where statutes did not exist, the law was the product of judicial invention, at least in those many areas where there was no accepted common law for courts to "discover." It is unsurprising that the judges who used to be the lawgivers took some liberties with the statutes that began to supplant their handiwork — adopting, for example, a rule that statutes in derogation of the common law (judge-made law) were to be narrowly construed and rules for filling judicially perceived "gaps" in statutes that had less to do with perceived meaning than with the judges' notions of public policy. Such distortion of texts that have been adopted by the people's elected representatives is undemocratic. **In an age when democratically prescribed texts (such as statutes, ordinances, and**

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[27] *Id.*
[28] David A. Strauss, *Do We Have a Living Constitution?*, 59 Drake L. Rev. 973-984, 977 (2011).
[29] SCALIA, supra note 5, at 10.

> **regulations) are the rule, the judge's principal function is to give those texts their fair meaning.**
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> **Some judges, however, refuse to yield the ancient judicial prerogative of making the law, improvising on the text to produce what they deem socially desirable results — usually at the behest of an advocate for one party to a dispute. The judges are also prodded by interpretive theorists who avow that courts are "better able to discern and articulate basic national ideals than are the people's politically responsible representatives." On this view, judges are to improvise "basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution."**
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> **To the extent that people give this view any credence, the notion that judges may (even should) improvise on constitutional and statutory text enfeebles the democratic polity. As Justice John Marshall Harlan warned in the 1960s, an invitation to judicial lawmaking results inevitably in "a lessening, on the one hand, of judicial independence and, on the other, of legislative responsibility, thus polluting the bloodstream of our system of government."** Why these alarming outcomes? First, when judges fashion law rather than fairly derive it from governing texts, they subject themselves to intensified political pressures — in the appointment process, in their retention, and in the arguments made to them. Second, every time a court constitutionalizes a new sliver of law — as by finding a "new constitutional right" to do this, that, or the other — that sliver becomes henceforth untouchable by the political branches. In the American system, a legislature has no power to abridge a right that has been authoritatively held to be part of the Constitution — even if that newfound right does not appear in the text. Over the past 50 years especially, we have seen the judiciary incrementally take control of larger and larger swaths of territory that ought to be settled legislatively.
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> It used to be said that judges do not "make" law — they simply apply it. In the 20th century, the legal realists convinced everyone that judges do indeed make law. To the extent that this was true, it was knowledge that the wise already possessed and the foolish could not be trusted with. **It was true, that is, that judges did not really "find" the common law but invented it over time. Yet this notion has been stretched into a belief that judges "make" law through judicial interpretation of democratically enacted statutes.**[30] (Emphasis Supplied)

One must also distinguish between the liberal construction of laws on the one hand and the act of engrafting upon the law something that has been omitted which someone believes ought to have been embraced. As Justice Delos Santos explains:

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[30] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (Thomson/West, 2012).

> [T]he former is a legitimate exercise of judicial power while the latter is judicial legislation forbidden by the tripartite division of powers among the three departments of government. It presupposes that any perceived "gap" or legal vacuum should be within the parameters set by law for courts have no authority to short-circuit the democratic process of legislation and determine for themselves thru interpretation the best policy that should have been clearly enunciated by such statutes. As such, courts should always be mindful that, in establishing doctrines, it does not tread on the powers of Legislature—whose members are duly elected by the People as their representatives and as their instruments of enacting their Sovereign Will. This judicial paradigm **ensures that the possibility of grave abuse of discretion is mitigated and that decisions are tethered to the law.** Accordingly, it may be said that the primary duty of adhering to the text of the law is in recognition of the inherent nature of the democratic process wherein the people elect their representatives who in turn, choose and pursue the appropriate policies on the former's behalf.[31]

There is, however, a misconception that the distinction between these approaches to legal interpretation is more academic than real. To attain conceptual clarity, the next chapter will discuss the different judicial philosophies.

V. JUDICIAL PHILOSOPHIES

A. Textualism

Textualism is the formalist theory of interpreting a legal text based on its ordinary meaning, without considering non-textual sources such as the intent of the framers, the purpose for the enactment of the law, or the problems it sought to address.[32] Textualism centers text as "the most obviously authentic embodiment of constitutional truth," such that anything flatly contrary to it cannot stand.[33]

Justice Scalia, one of the leading proponents of textualism, describes the textualist approach in this fashion: "**[a] text should not be construed strictly, and it should not be construed leniently; it should be construed**

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[31] *Almonte v. People*, G.R. No. 252117 (2020).

[32] KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (Lawrence: University Press of Kansas, 2001).

[33] Laurence Tribe, *Approaches to Constitutional Analysis*, in AMERICAN CONSTITUTIONAL LAW (1988), *reprinted in* IT IS A CONSTITUTION WE ARE EXPOUNDING: COLLECTED WRITINGS ON INTERPRETING OUR FOUNDING DOCUMENT at 21 (2009).

reasonably, to contain all that it fairly means."[34] Thus, the role of a judge is to enforce the Constitution and the laws and not to change or rewrite them.

While the term 'textualism' is hardly mentioned in Philippine jurisprudence, it is, in truth, the canonical rule of interpretation. Textualism translates to the plain meaning rule or *verba legis*, laid down in *Francisco v. House of Representatives*.

A textualist will endeavor to give a legal text its plain ordinary meaning. But when faced with vague legal provisions, a textualist is not precluded from resorting to extrinsic aids. As explained by Justice Clint Bolick of the Arizona Supreme Court:

> A textualist endeavors to give effect to the words of the Constitution and statutes. If the meaning of the words is clear, the judge goes no further. If they are ambiguous, the judge attempts to discern their meaning using well developed rules of construction.[35]

This is what the Supreme Court in *Francisco* prescribes. First, apply *verba legis*. Second, when the law is not clear, apply the second rule: look for guidance from the reason behind the law (*ratio legis*). And we do this by determining the original public meaning of the text.

Textualism is not a rejection of the different canons of construction. When faced with vague provisions of the Constitution, a textualist can (and should) resort to extrinsic aids, such as the intent of the framers or to the original public meaning of the Constitution.

There is no conflict of legal theory here. As explained by Professor Earl T. Crawford in his seminal work *The Construction of Statutes* (1940), and later expounded by Professor Lawrence Solum in his article *The Interpretation-Construction Distinction*, interpretation and construction are two different stages or moments in explicating legal texts. Interpretation does not foreclose construction but precedes it.

Crawford distinguished interpretation from construction in this wise:

> **Strictly speaking, construction and interpretation are not the same although the two terms are often used interchangeably. Construction, however, to be technically correct, is the drawing of conclusions with respect to subjects that are beyond the direct expression of the text from elements known and given in the text, while interpretation is the process of discovering the true meaning of the language used.** Thus, the court will resort to interpretation when it

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[34] SCALIA, supra note 5, at 23.

[35] Clint Bolick, "The Case for Legal Textualism." Hoover Institution. 27 Feb. 2018. https://www.hoover.org/research/case-legal-textualism.

> endeavors to ascertain the meaning of a word found in a statute, which when considered with the other words in the statute, may reveal a meaning different from that apparent when the word is considered with the other words in the statute, may reveal a meaning different from that apparent when the word is considered abstractly or when given its usual meaning. But when the court goes beyond the language of the statute and seeks the assistance of extrinsic aids in order to determine whether a given case falls within the statute, it resorts to construction…
>
> It will thus be seen that there is a substantial difference between interpretation and construction as methods for the exegesis of written laws. **In strictness, interpretation is limited to exploring the written text, while construction goes beyond and may call in the aid of extrinsic considerations.** "Interpretation," says Dr. Lieber, "differs from construction in that the former is the art of finding out the true sense of any form of words, that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey. **Construction, on the other hand, is the drawing of conclusions, respecting subjects that lie beyond the direct expressions of the text, from the elements known from and given in the text; conclusions which are in the spirit, though not within the letter, of the text."**[36] (Emphasis supplied)

Thus, interpretation differs from construction in two ways. First, interpretation is the act of identifying the semantic meaning of a text, while construction is applying the text to a particular factual circumstance.[37] Second, in terms of scope, interpretation is limited to the words of the legal text concerned, while in construction, there is a resort to extrinsic factors.

B. Strict Constructionism

Most criticisms directed against textualism arise from the confusion between textualism and its distant cousin, strict constructionism.

Strict constructionism is hyperliteralism. It is interpreting a text in its most literal sense. It is "[a]n interpretation according to the literal meaning of the words, as contrasted with what the words denote in context according to a fair reading."[38] This is obviously not a valid mode of interpreting the Constitution as this more often than not leads to absurd and irrational results.

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[36] DIAZ, supra note 17.

[37] Randy Barnett, *Interpretation and Construction* in 34 Harvard J.L. & Pub. Pol'y 65-72 (2011).

[38] Cooke, Chris. 2018. "Textualism Is Not Strict Constructionism Is Not Originalism." Least Dangerous Blog. Least Dangerous Blog. July 8, 2018. https://leastdangerousblog.com/2018/07/08/textualism-is-not-strict-constructionism-is-not-originalism/.

There is no need to belabor the point, as very few identify themselves as strict constructionists. Justice Scalia, who is sometimes erroneously labeled a strict constructionist, clarifies:

> Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be—though better, I suppose, than a nontextualist.[39]

C. Originalism

Originalism is the theory that a legal text, such as a constitution, should be interpreted "through the historical ascertainment of the meaning that it would have conveyed to a fully informed observer at the time when the text first took effect."[40] Thus, the provisions of the Constitution are to be given the meaning they had at the time the Constitution was adopted or ratified.

While textualism is a theory of interpretation, originalism is a theory of construction. Construction, as herein defined, is giving legal effect to a text by resorting to extrinsic aids. For originalism, the extrinsic aid may be the intent of the framers or the understanding of the electorate (the latter identified by the term 'original public meaning'). Several variations of originalism may be categorized either as 'old originalism' or 'new originalism'.

Old originalism (also known as 'original intent' originalism) is the species of originalism that looks specifically into the intent of the framers of the Constitution. On the other hand, new originalism (also known as 'original meaning' originalism) looks instead at how the public, who voted to ratify the Constitution, understood its text.

The Court in *Francisco* held that the words of the Constitution should be interpreted according to the intent of the framers. But this statement in *Francisco* is quite misleading. *Francisco* cited *Civil Liberties Union*, which made it very clear that **"[t]he proper interpretation therefore depends more on how it was understood by the people adopting it than in the framers' understanding thereof**."[41] As explained in *Nitafan*: "[it] may also be safely assumed that the people in ratifying the Constitution were guided mainly by the explanation offered by the framers."

It is not difficult to discern the wisdom behind this rule. As held in *J.M. Tuason & Co. Inc*, the Constitution is not primarily a lawyer's document. Hence

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[39] SCALIA, supra note 5, at 23.
[40] SCALIA AND GARNER, supra note 30.
[41] *Civil Liberties Union v. Executive Secretary*, G.R. No. 83896 (1991).

its language, as much as possible, should be understood in the sense they have in common use.

Following *Francisco*, *Civil Liberties*, and *Nitafan*, it is safe to conclude that the Philippine Supreme Court has adopted 'new originalism' as its primary theory of constitutional construction.

In a nutshell, the Supreme Court's judicial philosophy as laid down in *Francisco* and later cases is first to interpret textually (textualism); and second, to construe vague provisions based on the 'original public meaning' of the Constitution or how it was understood by the people who ratified it (new originalism).

D. Living Constitution

As the name suggests, the 'living constitution' is the notion that a constitution "evolves, changes over time, and adapts to new circumstances without being formally amended."[42] Proponents of the living constitution argue that a constitution must evolve to cater to new phenomena which the framers could not have foreseen. Thus, they interpret the provisions of the Constitution to conform to the changing needs of the times or the moral values of contemporary society.[43]

The phrase 'living constitution' originates from a book published in 1927 entitled *The Living Constitution*. But the notion of a living constitution has been etched in American Jurisprudence earlier through *Missouri v. Holland* (1920) penned by Justice Oliver Wendell Holmes. Justice Holmes wrote:

> With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[44]

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[42] "The Living Constitution | University of Chicago Law School." 2010. Uchicago.edu. September 27, 2010. https://www.law.uchicago.edu/news/living-constitution.
[43] *Almonte v. People*, G.R. No. 252117 (2020).
[44] *Missouri v. Holland*, 252 U.S. 416 (1920).

The main argument supporting the living constitution is a pragmatic one: "Such an evolutionary approach is necessary in order to provide the 'flexibility' that a changing society requires."[45]

Pragmatist approaches of interpretation often involve the Court weighing the practical consequences of one interpretation against other interpretations.[46] The Court determines which interpretation would better serve the parties involved or society in general. This ties the living constitution with judicial activism—the view that courts can depart from the applicable law to consider the societal impact of its decisions or to serve the dictates of social justice.

Since the U.S. Supreme Court resolves many significant social and political issues in the United States, it comes as no surprise why the debate between the originalists and the living constitutionalists extends beyond the legal academe. This translates to the debate based on political ideology—between conservatives and liberals. As intimated by Justice Bolick: "That is why judicial nominations are so important—and often so contentious. The judiciary's method of interpreting the Constitution and statutes will play a large role in determining the relationship between individuals and their government on a wide range of issues that intimately touch the lives of all Americans."[47]

I humbly submit that the 'living constitution' is not a highly contested topic of legal discourse in the Philippines (unlike in the United States). Nonetheless, we hear the phrase 'living constitution thrown around (rather senselessly) in lectures, law books and journals, and court decisions. This, coupled with the fact that the JBC often asks would-be Justices of the Supreme Court about the "living constitution", begs the question: Is our Constitution a living document? The next section will attempt to provide the answer by surveying Supreme Court decisions quoting or alluding to 'the living constitution'.

VI. DO WE HAVE A LIVING CONSTITUTION?

A. Survey of Philippine Jurisprudence

Since the 1987 Philippine Constitution is silent on the matter of constitutional interpretation, we perforce rely on Philippine jurisprudence for

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[45] SCALIA, supra note 5, at 41.

[46] Murrill, Brandon. 2018. "Modes of Constitutional Interpretation." https://fas.org/sgp/crs/misc/R45129.pdf, (last accessed July 9, 2021).

[47] BOLICK, supra note 35.

guidance, especially since "[j]udicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines."

The first time the phrase 'living constitution' appeared in Philippine jurisprudence was in *Angara v. Electoral Commission* (1936), considered the equivalent of *Marbury v. Madison* (as it dwells on the Supreme Court's power of judicial review). The decision was penned by Justice Jose P. Laurel. Speaking of the 1935 Constitution, he wrote:

> As any human production, our Constitution is of course lacking perfection and perfectibility, but as much as it was within the power of our people, acting through their delegates to so provide, that instrument which is the expression of their sovereignty however limited, has established a republican government intended to operate and function as a harmonious whole, under a system of checks and balances, and subject to specific limitations and restrictions provided in the said instrument. The Constitution sets forth in no uncertain language the restrictions and limitations upon governmental powers and agencies. If these restrictions and limitations are transcended it would be inconceivable if the Constitution had not provided for a mechanism by which to direct the course of government along constitutional channels, for then the distribution of powers would be mere verbiage, the bill of rights mere expressions of sentiment, and the principles of good government mere political apothegms. **Certainly, the limitations and restrictions embodied in our Constitution are real as they should be in any living constitution.** In the United States where no express constitutional grant is found in their constitution, the possession of this moderating power of the courts, not to speak of its historical origin and development there, has been set at rest by popular acquiescence for a period of more than one and a half centuries. In our case, this moderating power is granted, if not expressly, by clear implication from section 2 of article VIII of our Constitution.[48] (Emphasis supplied)

Apart from *Angara* and subsequent cases citing it, the only Supreme Court case mentioning the 'living constitution' in the majority opinion is *People v. Bandula* (1994). Justice Josue N. Bellosillo concludes *Bandula* in this fashion:

> Indeed, it is unfortunate that the investigators who are sworn to do justice to all appear to have toyed with the fundamental rights of the accused. Men in uniform do not have blanket authority to arrest anybody they take fancy on, rough him up and put words into his mouth. **There is a living Constitution which safeguards the rights of an accused**, a penal law which punishes maltreatment of prisoners and a statute which penalizes the failure to inform and accord the accused his constitutional rights.[49] (Emphasis supplied)

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[48] *Angara v. Electoral Commission*, G.R. No. L-45081 (1936).
[49] *People v. Bandula*, G.R. No. 89223 (1994).

There are, however, a few other cases mentioning 'living constitution' in the separate opinions.

In *Manila Prince Hotel v. GSIS* (1997), Justice (later Chief Justice) Reynato S. Puno, in his dissenting opinion, wrote:

> The fourth issue demands that we look at the content of the phrase "qualified Filipinos" and their "preferential right." **The Constitution desisted from defining their contents. This is as it ought to be for a Constitution only lays down flexible policies and principles which can be bent to meet today's manifest needs and tomorrow's unmanifested demands. Only a constitution strung with elasticity can grow as a living constitution.**[50] (Emphasis supplied)

Justice Puno appears to argue that we have a living Constitution because some provisions of the Constitution used general terms (which in this case is 'qualified Filipinos'). But leaving to Congress the task of enacting an implementing legislation (to define the term 'qualified Filipinos') is not the same as giving the Court the latitude to change the meaning of the Constitution as originally intended.

In *Francisco v. House of Representatives* (2003), Justice Adolfo S. Azcuna, speaking of the power of judicial review, remarks:

> **This function of the Court is a necessary element not only of the system of checks and balances, but also of a workable and living Constitution.** For absent an agency or organ that can rule, with finality, as to what the terms of the Constitution mean, there will be uncertainty if not chaos in governance, i.e., no governance at all. This is what the noted writer on legal systems, Prof. H.L.A. Hart, calls the need for a Rule of Recognition in any legal system, without which that system cannot survive and dies.[51] (Emphasis supplied)

In *Poe-Llamanzares v. Comelec*, then Chief Justice Maria Lourdes Sereno, in her concurring opinion, argued that both the originalist and living constitutionalist interpretations of the Section 2 of Article VII of the Constitution leads to the same conclusion—that Grace Poe is a natural-born citizen. She explains:

> **I emphasize that this Court has utilized different approaches to interpreting the Constitution. It is not mandated to take only an originalist view of the fundamental law. On the contrary: the Court, through Justice Jose P. Laurel, considered the 1935 Constitution to be a "living constitution."** This concept is said to have originated from *Missouri v. Holland* penned by Justice Oliver Wendell Holmes:

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[50] *Manila Prince Hotel v. GSIS*, G.R. No. 122156 (1997).
[51] *Francisco v. House of Representatives*, G.R. No. 160261 (2003).

> When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.

It bears mentioning however that Chief Justice William H. Rehnquist, in his Notion of Living Constitution, ventured to say that the framers purposely couched the United States Constitution in general terms:

> The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live. Those who framed, adopted, and ratified the Civil War amendments to the Constitution likewise used what have been aptly described as "majestic generalities" in composing the fourteenth amendment. **Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct. Where the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.**

> **Theorists utilizing the functionalist approach have likened Constitutions to animate beings that can evolve to the extent that they become hardly recognizable by their framers. In other words, they believe that the Constitution may be interpreted in a manner that goes beyond the original intent of the persons who crafted the text.**

> In this case, the use of both the originalist and the functionalist approaches leads to the same result — that petitioner had sufficient reason to believe that she is a natural-born citizen despite the admitted fact that she was a foundling.[52] (Emphasis supplied)

Interestingly, in arguing for the validity of the living constitution, Sereno quoted Justice Rehnquist, a known critic of the notion of a living constitution. Thus, she killed her own argument when she quoted Justice Rehnquist saying:

> Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct. Where the framers of the Constitution have used general language,

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[52] Maria Lourdes Sereno's separate opinion in *Poe-Llamanzares v. Comelec*, G.R. No. 221697 (2016).

> they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.[53]

Precisely, as Justice Rehnquist argues, the framers of the U.S. Constitution wrote in general terms to make it applicable to new phenomena and to avert the need to amend the Constitution so often.

In *Almonte v. People* (2020), Justice Edgardo Delos Santos wrote a concurring opinion (which was integrated and made part of the majority opinion)[54] arguing against the notion of a living constitution. He explains:

> **The "liberal" justices of the US Supreme Court posit that they are constitutionally-empowered and authorized to recognize these "certain rights" which are "implied" by their Constitution. They are mostly known to be advocates of the "Living Constitution" doctrine where it is ideal to "interpret" the provisions in such a way as they "adapt to the times" and "as understood and intended by the people of the present."** The "conservative" justices, on the other hand, argue that it should be Congress — being the people's representatives — who are constitutionally-authorized to determine these "implied certain rights." They believe that it is "undemocratic" to have the unelected judges craft or select policies to meet the exigent needs of the times. Understandably, the terms "certain rights" in the Ninth Amendment makes Justice Scalia's conservative and highly-textualist statements controversial in the arena of US Constitutional law discussions.
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> **In the context of Philippine Constitutional law discussions, such "conservative-versus-liberal" debates have little bearing or relevance to jurisprudence. The present Philippine Constitution, although it draws most of its significant provisions from the US Constitution, does not have a provision similar or related to the "unenumerated rights clause" of the Ninth Amendment which suggests either the existence of implied rights or that the legal system or tradition should predominantly adhere or be based on common law instead of civil law.** The Declaration of Principles and State Policies in Article II as well as the Bill of Rights in Article III contain no such "unenumerated rights" provision. Neither does Article VIII nor all the other articles in the Constitution have the effect of giving the Judiciary the power to "determine" any right which may have been "implied" in the Constitution. In fact, the opposite seems to be the case as it is explicitly shown in Section 1, Article VIII of the Constitution which states:
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> > Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

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[53] *Id.*

[54] The Court did not distinguish whose separate opinions were made integral parts of the majority opinion. It merely stated that the remainder of the issues in *Almonte* are threshed out in the separate opinions.

> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and 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.

There is nothing in the aforementioned provision that the power "to settle actual controversies" which can be interpreted to mean that the Judiciary may "recognize certain rights" implied in the Constitution thru interpretation or simple application of laws. Even the word "includes," when used in the context of the whole second paragraph clearly appears to merely enumerate or state the scope of "judicial power" which includes both the duty to — (a) settle actual controversies; and (b) 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. Moreover, it cannot be reasonably implied that the term "justice" in the phrase "courts of justice" gives magistrates an unfettered prerogative of straying away from legislative enactments. On the contrary, the phrase "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction" strongly suggests that even judicial functions should be within the parameters of the law. Such principle is shown by rulings explaining that the writ of certiorari's purpose is supervisory to keep inferior courts within the parameters of their respective jurisdictions. Since jurisdiction is "the power and authority of a court to hear, try, and decide a case" "conferred only by the Constitution or by statute," it is inevitable to assume that explicit provisions define the limits of judicial power only to those matters within the confines of the law.

Besides, the adjudicative approach of primarily resorting or deferring to the text of the law is not without cogent reasons. It greatly minimizes, if not removes, any personal and subconscious bias that an unelected magistrate may inadvertently factor in weighing the rights or interests and obligations of conflicting parties. This is the reason why a judge must always maintain cold neutrality and impartiality for he or she is a magistrate, not an advocate. Moreover, such approach is also in recognition of the idea that, in a democratic and republican system of government, laws are borne out of the general consensus of the people's directly chosen representatives. It ensures that magistrates do not wander far away into their own subjective preferences. As such, what it says according to the text of the provision to be construed compels acceptance and negates the power of the courts to alter it, based on the postulate that the framers and the people mean what they say.

Accordingly, those claiming that the resort to common law is "progressive" fail to realize that even such legal tradition is as ancient as the civil law tradition relative to the modern times. The idea is not novel or revolutionary such as to create a messianic realization that our Judiciary, all on its own, should suddenly discard the civil law aspect of its legal tradition and wholly replace it with common law.

> However, the undersigned is not saying that the Philippines cannot change the primary aspect of its legal system or tradition from civil law to common law. Such shift in legal tradition should be done in a constitutionally-permissible manner. Stated differently, there are constitutionally-sanctioned processes or remedies available to change a policy, governmental structure, or legal culture. These processes should not be bypassed for the sake of convenience or disputable exigencies if this government is one "of laws and not of men." All that the undersigned is emphasizing is that a shift in legal tradition would require no less than a constitutional (or legislative for purely statutory rights and obligations) amendment or revision— a process explicitly sanctioned in the Constitution itself. **For now, the Judiciary cannot short-circuit the legislative democratic process and invent a new right in the guise of interpretation.**[55] (Emphasis supplied)

Based on this survey, the phrase 'living constitution is hardly even mentioned in Philippine jurisprudence. And among those cases which do mention it, the Supreme Court has used the term 'living constitution' figuratively to describe the 1987 Constitution as a constitution that is functional, operative, and dynamic, as opposed to one that is dead, dysfunctional, or stale. Thus, I humbly submit that there is no doctrine or theory of the 'living constitution' in Philippine jurisprudence. It exists only as a notion. A notion is defined as "an idea, often vague and sometimes fanciful. A notion is lighter than a theory and embraces a whimsy that a simple idea never could."[56]

The most tenable argument in support of the notion of a living constitution (if there is one) is that the framers used general terms in the Constitution (and thereby intended it to be flexible). But that argument is tenuous. Whatever interpretation is given to any given provision (or whichever direction it is "flexed") shall be circumscribed by the very text of the Constitution. That is precisely the reason the Constitution uses general terms—to make it flexible (that it can also apply to new phenomena) but without reaching its breaking point, that is, without departing from its original meaning. In the words of Justice Rehnquist: "Where the framers of the Constitution have used general language, they have given latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen."[57]

The use of general terms already provides the allowance for a reasonable interpretation. Any interpretation beyond that is a defiance of the will of the

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[55] *Almonte v. People*, G.R. No. 252117 (2020).

[56] "Notion." 2021. Vocabulary.com. 2021. https://www.vocabulary.com/dictionary/notion, (last accessed July 9, 2021).

[57] REHNQUST, supra note 3, at 402.

majority. Again, we must bear in mind that the Supreme Court in *Francisco* had clearly laid down how the Constitution must be read.

One last case worth mentioning is *La Bugal-B'laan Tribal Association, Inc. v Ramos* (2004) where the Supreme Court interpreted the phrase "agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils" in Sec. 2, Art XII. Former Chief Justice Artemio Panganiban, in his separate opinion, called the 1987 Constitution a 'living document'. He wrote:

> Finally, I believe that the Concom did not mean to tie the hands of the President and restrict the latter only to agreements on rigid financial and technical assistance and nothing else. **The commissioners fully realized that their work would have to withstand the test of time; that the Charter, though crafted with the wisdom born of past experiences and lessons painfully learned, would have to be a living document that would answer the needs of the nation well into the future. Thus, the unerring emphasis on flexibility and adaptability.**
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> **Commissioner Joaquin Bernas stressed that he voted in favor of the Article, "because it is flexible enough to allow future legislators to correct whatever mistakes we may have made." Commissioner Felicitas Aquino noted that "unlike the other articles of this Constitution, this article whether we like it or not would have to yield to flexibility and elasticity which inheres in the interpretation of this provision. Why? Precisely because the forces of economics are dynamic and are perpetually in motion."**[58] (Emphasis supplied)

If this is also what other judges, justices, and commentators insinuate by the phrase 'living constitution', then I submit that the 'living constitution' (whenever used to refer to the 1987 Constitution) is only a fanciful term to describe a constitution "whose boundaries are dynamic, congruent with the needs of society as it changes"[59], "a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs".[60] To refer to the 1987 Constitution as a living document, therefore, is to speak of the constitution pompously, magnificently, or in grand terms, and not to elaborate a theory or mode of interpretation.

B. Rebuttals to the Notion of a Living Constitution

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[58] *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, G.R. No. 127882 (2004).
[59] The Use of Administrative Analogies and the Making of the Modern International Organizations, Ejiltalk.org (2019), https://www.ejiltalk.org/the-use-of-administrative-analogies-and-the-making-of-the-modern-international-organizations/ (last visited Feb 6, 2021).
[60] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

Richard Duncan, a professor of law at the University of Nebraska, has argued that the greatest defect of the notion of a Living Constitution is "its total reliance on the subjective moral and philosophical preferences of nine unelected lawyers who serve in the Supreme Court," making it the rule of man, not the rule of law. He explains:

> Proponents of the Living Constitution have no answer to the charge of "judicial personalization of the law." As Judge Bork has said, "The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else." **Even when a judge purports to apply contemporary moral principles or fundamental community values to "discover" constitutional doctrine, the reality is that there are always competing moral systems and values in society, and the judge will always (or almost always) decide cases based upon his or her own moral preferences and values.**[61] (Emphasis supplied)

The essence of a written Constitution is to preserve democratic self-rule—to ensure that our tripartite system of government remains a government of the people and by the people. That is why the Court's power is limited to interpreting and applying the Constitution. No matter how noble its intentions, the Court cannot replace the ideals of the nation with its own, lest the Constitution becomes, "a weapon of ideological war…wielded by legal elites who view constitutional law as the means of imposing their views of the good life on everyone else through no less than the supreme law of the land."

Justice Scalia had a similar opinion expressed no less eloquently:

> Perhaps the most glaring defect of Living Constitutionalism, next to its incompatibility with the whole antievolutionary purpose of a constitution, is that there is no agreement, and no change of agreement, upon what is to be the guiding principle of the evolution. *Panta rei* is not a sufficiently informative principle of constitutional interpretation. What is it that the judge must consult to determine when, and in what direction, evolution has occurred? Is it the will of the majority, discerned from newspapers, radio talk shows, public opinion polls, and chats at the country club? Is it the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle? As soon as the discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful.[62]

Rebutting the argument that the notion of a living constitution provides a practical approach (as it makes a written constitution adaptive to the needs of contemporary society), Justice Scalia argued that it does exactly the opposite. He remarks:

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[61] Richard F. Duncan, *Justice Scalia and the Rule of Law: Originalism vs. The Living Constitution*, 29(1) Regent L. Rev., 9-34, 17 (2016).

[62] SCALIA, supra note 5, at 45.

> [There's] the argument of flexibility and it goes something like this: The Constitution is over 200 years old and societies change. It has to change with society, like a living organism, or it will become brittle and break. But you would have to be an idiot to believe that; the Constitution is not a living organism; it is a legal document. It says something and doesn't say other things.... [Proponents of the living constitution want matters to be decided] not by the people, but by the justices of the Supreme Court .... **They are not looking for legal flexibility, they are looking for rigidity, whether it's the right to abortion or the right to homosexual activity, they want that right to be embedded from coast to coast and to be unchangeable.**[63] (Emphasis supplied)

A written constitution is a limitation to democratic self-rule as it functions as a safeguard against laws which "abandon liberties which they [the framers] considered essential, and so sought to protect those liberties in a Bill of Rights. Justice Scalia explains:

> **…[T]he Constitution is an exception from the fundamental principle of democracy**. The fundamental principle is the majority rules. We debate about things, we put up it to a vote either directly or through our representatives and the majority rules. In liberal democracies, however, the majority does not rule with regard to certain matters; and those matters are set forth in the Constitution, in ours, mostly in the Bill of Rights. And the important point is: Who made those exceptions from democratic self-government? The majority did because that constitution was submitted to the people...[64] (Emphasis supplied)

A Supreme Court that *reads into* the Constitution certain rights which are beyond the contemplation of the voting electorate usurps not only the lawmaking power of Congress, but also the sovereign right of the people to determine for themselves which rights can and cannot be limited by the legislative process. This curtails the right of the people, acting through an elected Congress, to exercise its sovereign right to decide what to allow and what not to. For instance, the Family Code of the Philippines clearly provides that a marriage can only be had between a man and a woman. But a court which, believing in an evolving constitution, reads into the equal-protection clause a right to same-sex marriage, contravenes this clear mandate of the Family Code. This not only encroaches on the lawmaking power of Congress

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[63] The Washington Times https://www.washingtontimes.com. 2006. "Scalia Jeers Fans of 'Living' Charter." The Washington Times. The Washington Times. February 14, 2006. https://www.washingtontimes.com/news/2006/feb/14/20060214-110917-5396r/.

[64] Antonin Scalia and Stephen Breyer, *A Conversation on the Constitution: Principles of Constitutional and Statutory Interpretation*, Recorded October 26, 2009, video of the lecture 31:58-32:30, Rogers, James E. 2019. "U.S. Supreme Court Justices Antonin Scalia & Stephen Breyer Conversation on the Constitution (2009)." YouTube Video. *YouTube*. https://www.youtube.com/watch?v=jmv5Tz7w5pk, (last accessed July 9, 2021).

but also violates the fundamental tenets of democratic self-rule, the principle of checks and balances, and the political question doctrine.[65]

Taken from this perspective, it is clear that the notion of an evolving constitution, in the guise of creating new rights, only creates restrictions upon a democratic society. At its core, a living constitution is anti-democratic as it replaces the rule of the majority with the rule of fifteen unelected justices of the Supreme Court (or the lesser number constituting a majority of a quorum). "Indeed, when the Court constitutionalizes an issue committed to Congress [or the States] by the Written Constitution, it deprives the people of the most fundamental liberty of all: the liberty to make laws through the cherished right of democratic self-government."[66]

As to the argument that an evolving constitution provides an alternative to the cumbersome process of constitutional amendment or revision laid down in Article XVII of the 1987 Constitution, it bears stressing that having an evolving constitution is antithetical to having a written constitution that is "not likely to be easily tampered with to suit political expediency, personal ambitions, or ill-advised agitation for change."[67] A constitution that evolves and grows with society, whenever the Supreme Court says so, does exactly that: it opens the door for changes that only suit political expediency, personal ambitions, or ill-advised agitation for change. A Court that believes in an evolving constitution can easily become a counter-majoritarian institution, supplanting the views, morals, and aspirations of the Filipino people with its own beliefs and political agendas, whether noble or perverse.[68]

Changing the meaning of the written constitution may provide immediate results that are practical and convenient, but it takes away our most fundamental freedom of self-governance. A Court that reads into the

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[65] The Court in *Tañada v. Cuenco* defines political questions as "those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of government." Thus, if an issue is clearly identified by the text of the Constitution as matters for discretionary action by a particular branch of government or to the people themselves then it is held to be a political question.

[66] DUNCAN, supra note 61, at 25.

[67] CRUZ & CRUZ, supra note 16.

[68] Alexander Bickel, an American legal scholar, coined the term counter-majoritarian difficulty in his 1962 book, *The Least Dangerous Branch*. He used the term to refer to the apparent tension between judicial review and the democratic process, as the court's power of judicial review allows unelected judges to overrule the lawmaking of elected representatives and thus to undermine the will of the majority. The problem stems from the understanding that a democracy's legitimacy arises from the fact that it implements the will of the majority. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73(2) NYU L. Rev., 333-433 (1998).

Constitution a right or a prohibition that does not exist therein eliminates the object of such right or prohibition from "the arena of democratic choice."[69]

VII. CONCLUSION

The 1987 Philippine Constitution is described as conventional or enacted, written, and rigid or inelastic. It is clear and definite and is not easily bent or twisted by the legislature or by the courts to meet the fleeting fancies of the moment. It is stable and free from the dangers of temporary popular passion.[70]

The downside of having a written constitution lies in the difficulty of its amendment, which prevents the immediate introduction of desired changes. This is particularly true with respect to specific provisions of the 1987 Constitution, which should have been left for Congress to legislate, such as the provisions on national economy and patrimony under Article XII.

However, this also holds true to those who wish to introduce contemporary moral values contrary to those clearly enshrined in our Constitution. It is this latter difficulty of introducing changes in a written constitution that inspired the notion that a constitution evolves to comport with "the evolving standards of decency that mark the progress of a maturing society."[71] In the words of Justice Isagani Cruz:

> But the very virtue of permanence may at the same time be a disadvantage where the written constitution is unable to adjust to the genuine need for change brought about by new conditions and circumstances. The difficulty itself of the amending process may be responsible for delay in effecting needed change and thus cause irreparable injury to the public interest.
>
> In a situation like this, the written constitution will become an impediment rather than a spur to progress, a treadmill to the nation seeking to liberate itself from the shackles of obsolete rules no longer conformable to their needs and aspirations. Where this happens, the people may have to resort to a violation of the provisions of the permanent constitution; and if they cannot make a new constitution, they will have to make a revolution.[72]

However, the 1987 Constitution is not inflexible. Article XVII provides that the Constitution may be changed either by amendment or revision.

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[69] DUNCAN, supra note 61, at 25.
[70] DE LEON, supra note 11, at 30.
[71] *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981), quoting from *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
[72] CRUZ & CRUZ, supra note 16.

Proposal to change the Constitution may be made by a direct action from Congress, a Constitutional Convention, or through a People's initiative. Thereafter, the amendment or revision may be ratified by the people through a plebiscite.

The argument that many proponents of the living constitution espouse, that this process of changing the Constitution is cumbersome and difficult, is irrational and absurd. What is a written constitution for then if not to resist the erratic, whimsical, and capricious demands of society or the clamor of powerful and influential lobbyists? As Professor Duncan remarks, speaking of the U.S. Constitution:

> Since the Supremacy Clause makes the Constitution the supreme law of the land, binding Congress and all fifty state legislatures, the requirement of ratification by a supermajority ensures that democratically enacted laws will be invalidated only when there is strong consensus among the states concerning the entrenchment of new national norms. **This supermajority consensus ensures that regional differences about basic values and liberties are settled and compromised before new principles are entrenched in the Constitution.** This process helps citizens "transcend their differences" and may even result in greater and more widespread allegiance to the Constitution and the Court.[73] (Emphasis supplied)

Unfortunately, the notion of a living constitution threatens to upend democracy as it renders illusory the provisions of the 1987 Philippine Constitution on amendment and revision. Indeed, if the framers of the Constitution (or the ratifying majority) intended that the Constitution would change its meaning to adapt to the changing circumstances, they would not have included therein an entire article on amendment and revision. Basic is the rule that a legal text, such as the Constitution, should not be given an interpretation that would make any part thereof inoperative. Courts must lean in favor of a construction that will make every word of the Constitution operative rather than useless.

The 1987 Constitution is the expression of the sovereign will of the Filipino. It is a statement of our core principles and aspirations and our identity as a nation. If we accept the premise that our Constitution changes its meaning through time, we would have achieved nothing and the revered text that is the Constitution would be devoid of meaning.

Indeed, there are specific provisions in the 1987 Constitution that are so particular and time-bound that they deter rather than spur progress (like the nationalist provision on foreign equity limitation).[74] But the real solution to

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[73] DUNCAN, supra note 61, at 15-16.
[74] CONST., art. XII, sec. 2.

this problem is to amend the Constitution. Once taken out of the purview of the fundamental law, as it should be, Congress will be free to legislate according to the changing needs of the nation. Justice Scalia has vigorously pointed out that the solution to many problems lies not in changing the constitution but simply through legislation.

To end, we revert to the question posed by Justice Rehnquist: If our Constitution is not a living document, what do we have? A dead constitution? Justice Scalia answers: "No, I don't say that. ... I call it *the enduring Constitution*."[75]

[75] "Scalia Favors 'Enduring,' Not Living, Constitution." 2012. Princeton University. 2012. https://www.princeton.edu/news/2012/12/11/scalia-favors-enduring-not-living-constitution, (last accessed July 9, 2021).