



**Statutory Deconstruction:
Against Oracular Constitutionalism**

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Philippine Humanities Review

Volume 15 Number 2, 2013, pp. 3-24

ISSN-0031-7802

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STATUTORY DECONSTRUCTION: AGAINST ORACULAR CONSTITUTIONALISM

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This is a critique of the Supreme Court's decision in the case of *De Castro v. Judicial and Bar Council*, which cleared the way for then President Gloria Macapagal-Arroyo to appoint the now impeached Renato Corona as Chief Justice of the Philippines during the election period in 2010. It analyzes and criticizes the Court's interpretive method in construing the ambiguous and contradictory provisions of the 1987 Constitution. This mode of reading used in *De Castro* is described as oracular constitutionalism because of its reliance on the living voice of the constitutional commissioners to confirm a particular interpretation of the foundational text of the Philippine Republic. Using a deconstructive reading, I argue that oracular constitutionalism is an interpretation that problematically fixes the meaning of a text through the conjuring of a present author, thereby privileging the voice of an individual as if a single author had written the Constitution. This metaphysics of presence is politically undemocratic because it excludes other sources of meanings and suppresses the dissemination of textual interpretations. Nonetheless, oracular constitutionalism's attempt to fix meaning through the construction of an author/god—the one source of meaning—fails because all judicial interpretations, in the final analysis, are mere supplements; they are temporary substitutes that can be replaced with a new supplement by future readers of the law.

Keywords:

Statutory deconstruction, Oracular constitutionalism, law and literature, constructed purposivism, judicial decision as supplement

“Power, not reason, is the new currency of this Court's decision-making.”

Justice Thurgood Marshall in *Payne v. Tennessee*
“Ad hoc interpretations or the random taking up

of convenient interpretive techniques fundamentally undermines the constitutional order.”

William F. Harris II, *The Interpretable Constitution*

The impeachment of a Chief Justice by the Senate of the Philippine Republic captured the attention of the Filipino public in 2012. But hidden by the dramatic climax of the event was the judicial decision that started the soap opera: *De Castro v. Judicial and Bar Council* (2010) (from hereon, *De Castro*).¹ This decision, which allowed then Pres. Gloria Macapagal-Arroyo to appoint a Chief Justice in the middle of the election campaign, reversed a long-standing interpretation of the Supreme Court and practically abolished any sense of binding precedent. Instead of affirming stability, the Court favored a re-reading of the Constitution based on controversial grounds, thus revealing the contingency of any particular interpretation.

Indeed, *De Castro* is one of those decisions that show the limits of the canons of statutory construction or rules of interpretation in providing a stable answer to law's inherent indeterminacy. It confirms the view that law as a linguistic construct cannot avoid, following Jacques Derrida, a “dissemination” of its “significations” which complicates the determination of its meaning.

This essay therefore reevaluates and analyzes the interpretive strategy used by the Court in *De Castro* from the view point of literary theory, particularly deconstruction. Deconstruction is understood here as an “anti-structuralist gesture” which aims to undo, de-compose, and de-sediment structures of thought, language, and interpretation (Derrida 1999, 284). This gesture should not be taken in its negative sense of destruction but in the positive sense of setting meanings free. The word comes not from the English “to destroy” but from the French *se deconstruire* which means “to lose its construction” or to “disarrange(ing) the construction of words in a sentence” (Derrida 1999, 283).

This article is primarily a critique of *De Castro*. It questions in particular how the rule of *ratio legis* (intent of the law) was used by the Supreme Court in construing the Constitution in the said case.² It is argued that the search for the intent of the Constitution through the application of the *ratio legis*, specifically in *De Castro*, became a form of an “oracular constitutionalism” in the hands of our justices.³ This strategy attempts to fix the meaning of the text through a hermeneutic process based on the testimony of original and

living “authors.” By calling on the living and present constitutional commission members to clarify the meaning of a provision, the Court ties the text to a living “author,” thereby privileging the “present author” over other possible sources of “intent” such as the text itself, the records, and even the popular understanding of the Constitution. This strategy of oracular constitutionalism, as the essay would argue, is the worst tool in ascertaining the ratio legis because of its metaphysics of presence and undemocratic nature.⁴ Despite its attempt to fix meaning, this oracular style remains to be a temporary aid in suppressing the indeterminacy of textual meanings. The rule of *stare decisis* (or following precedents) stays precarious and can be conveniently ignored by a new majority in the pursuit of a different interpretation.

This essay attempts to fill a gap within legal and literary scholarships which have practically ignored the subject of statutory interpretation. As one author notes, “[s]tatutory interpretation is the Cinderella of legal scholarship. Once scorned and neglected, confined to the kitchen, it now dances in the ballroom” (Eskridge 1994, 1). Indeed, this present work may be said to take its cue from William Eskridge Jr.’s *Dynamic Statutory Interpretation* (1994), which rejected the original intent and plain meaning rhetoric in American statutory interpretation. However, I do not subscribe to Eskridge’s brand of Gadamerian pragmatism because I find the political critiques done by the critical legal studies (legal deconstructionists) more interesting and iconoclastic when applied to the Philippine legal context.

Law and Literature

The application of literary theory to law is not new in the field of legal scholarship. There is now a growing field of law and literature in the United States which has received important contributions ranging from legal luminaries such as Judge Richard Posner and Sanford Levinson to literary critic Stanley Fish. These academic developments led Duke University, in an unprecedented move, to give Fish a joint appointment at the Duke Law School and the English Department in spite of the obvious fact that the literary critic was bereft of a law degree and traditional credentials (Schlag et al. 1996, 21).

The relationship between literature and law has long been established since the publication of Levinson’s seminal article “Law as Literature.” “The disputes currently raging through literary criticism,” argued Levinson, “precisely mirror some of the central problems facing anyone who would take law

seriously; the basis of this parallelism is the centrality to law of textual analysis.” He added, “[i]f we consider law as literature, then we might better understand the malaise that afflicts all contemporary legal analysis, nowhere more severely than in constitutional theory” (Levinson 1994, 129-130). The article mainly analyzed the opposition between what Levinson called weak textualists best represented by John Hart Ely and strong textualists like Fish. The former group “claims to have gotten the secret of the text” through a science of criticism, while the latter group proposes that “meaning is created rather than discovered” (Levinson 1994, 132).

Full length books have also appeared since then. Most worthy of note is Robin West’s *Narrative, Authority, and Law* (1994) which argued that “narrative is inherent in all legal reasoning because almost any vision of society or justificatory ideology can find its place in Northrop Frye’s typology of narrative myth” (Bender and Weisberg 2000, 283). A judge answered this thesis with a critique in *Law and Literature* (2009), a book that explicitly argued the need to abandon efforts to apply principles of literary interpretation to statutes and constitutions (Posner 2009, 550).

The most important survey of the field of law and literature came in with the publication of Guyora Binder and Robert Weisberg’s *Literary Criticisms of Law* (2000).⁵ In this unparalleled work, the authors argued that the literary criticisms of law examined in their book should be seen as “a larger development within literary studies” (Binder and Weisberg 2000, ix). This in turn makes the literary criticism of law “central to the new conception of literary studies as cultural studies, and part of any contemporary education in literature” (Binder and Weisberg 2000, ix). But one distinctive feature of the survey was a single chapter treatment of deconstructive criticism of law, thereby admitting that deconstruction has been the most influential form of literary theory to deluge legal scholarship (Binder and Weisberg 2000, 378). The authors then mentioned four major reasons why this sort of literary imperialism happened in law schools. First, the interpretation debates in the United States raised the “salience of literary theory in the legal academy.” Second, structuralism broke into law reviews via the theoretical work of the critical legal studies such as Duncan Kennedy and Mark Tushnet. Third, the translation of Jacques Derrida’s *De la Grammatologie* made post-structuralism influential in American Universities. Finally, the economic decline of the humanities led to an exodus of aspiring academics into law schools, many of them have just been trained under post-structuralist professors in college and graduate courses. All these trends have

“resulted in a genre of critical scholarship that treats law as language and views all language use as a figurative or literary practice or signification” (Binder and Weisberg 2000, 378).

Oracles

Traditional statutory construction preaches that when the words of the law are not clear, one must try to know the *ratio legis*. *Ratio legis est anima*. The reason of the law is its soul (Agpalo 2003, 474). The textbook tells us that “the spirit or intention of a statute prevails over the letter thereof, and what is within the spirit of a statute is within the statute although it is not within the letter thereof, while that which is within the letter but not within the spirit of the statute is not within the statute” (cited in Agpalo 2003, 132). The most important authority on statutory interpretation in the United States doubted the plain-meaning rule, but not the intent of the law. The intent of the law is the “objective footprints left on the trail of legislative enactment.” It cannot “be speculated about; but it can be discovered only by factual inquiry into the history of the enactment of the statute” (Sutherland 1943, 322).

These statements from traditional textbooks tell us that when the courts refuse to apply the “plain-meaning rule,” they generally search for the “intent” of the law. The decision is therefore formulated on the basis of a “discovered” intent of the law. The intent is supposed to be waving to the reader from the “language of the document” itself; however, when it plays hide and seek with the reader, the latter is advised to look for “the intent of the framers” with the help of extrinsic aids (Sutherland 1943, 322; *Francisco v. NMMP*, 415 SCRA 126). These extrinsic aids include the background circumstances, the reports of the proponents of the law, the statements made during the deliberation, the course of the enactment (Sutherland 1943, 322).

It can be deduced that when traditional statutory construction speaks of intent, it generally refers to the intent of the framers. The Philippine Supreme Court is fond of doing what Eskridge (1994) calls an “archaeological” search for the intent of the law as shown in the cases of *Francisco v. The House of Representatives* (2003) and *Penera v. Comelec* (2009). In the first case, the Court enthusiastically adopted the “intent” of the Constitution as discovered by Constitutional Commissioners Florenz Regalado and Joaquin Bernas (415 SCRA 169). In the *Penera* case, Justice Antonio Carpio went to the records of

the deliberations of the Bicameral Conference Committee to show that Section 13 of the election law adopted the ruling of the Court in *Lanot v. Comelec* (605 SCRA 585). In other words, the Supreme Court is by tradition and habit a practitioner of a particular form of intentionalism.

The concept of original intent has been controversial in the United States. The most eloquent and polemical theoreticians of this form of interpretation are defeated Supreme Court nominee Robert Bork and Justice Antonin Scalia. Bork's originalism can be familiar, because our own jurisprudence echoes it:

The search is not for subjective intention...When lawmakers use words, the law that results is what those words ordinarily mean...They said 'sale,' and 'sale' it is...All that counts is how the words used in the Constitution would have been understood at the time. The original understanding is thus manifested in the words used and in secondary materials.... (Bork 1994, 559)

For Bork, this is the only way for any judge to be "neutral" when deciding a case. A decision that is based on neutral principles is more legitimate than any non-originalist interpretation.

Scalia, on the other hand, describes himself as "a faint-hearted originalist" (2002, 557). He prefers this mode of interpretation because its defects are less problematic compared with those of non-originalist readers. The difficulty of "plumbing" the Constitution is preferable to the absence of a stable meaning which is the consequence of non-originalism.

The critics of originalism are not few. The liberal democrat Edward Kennedy, who led the assault on Bork's nomination, accused Bork of a form of barbaric constitutionalism. "Robert Bork's America," he said, "is a land in which women would be forced into back alley abortions, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution" (cited in Crapanzano 2000, 200). For the originalists, the equal protection clause could not be applied to women, gays, lesbians, because at the time of its enactment, Congress meant to protect the African-Americans only (Sunstein 2005, 56). Thus, originalism "idealizes and idolizes a moment in time and surrenders himself (and us) to the values and structures, the laws, produced in that moment" (Crapanzano 2000, 267). "We must reject," according to another philosopher, "the suggestion that the legitimacy of a well-entrenched

law or political structure depends on the mental processes of long-dead persons” (Sher 1997, 24). But what if the members of the constitutional convention are alive and actively telling our Court what the Constitution means?

This is the anomalous situation that we find in Philippine constitutionalism. The Philippine Supreme Court practices a different form of originalism which springs from the recentness of the 1987 Constitution. While the US Constitution is more than two hundred years old, our constitution is barely a youth in his twenties. Justices Scalia and Clarence Thomas cannot summon Hamilton and Madison; Our Supreme Court, on the other hand, may call on Florenz Regalado and Joaquin Bernas. Indeed, the justices usually call on the constitutional commissioners to elucidate and clarify the meaning of the text and often adopt the views of these “carriers” of original intent. I call this oracular constitutionalism. An oracle is a “place where people could go to ask the gods for advice or information about the future” or “the priest or priestess through whom the gods were thought to give their message” (*Oxford Advanced Learners’ Dictionary* 2000, 1037-38). Oracular constitutionalism is a method of constitutional interpretation that depends on the views of the living members of the Convention. This is a form of originalism with the differentia that the living voice of the Author is used to confirm a particular reading of the records. Hence, the Justices do not just go on an archaeological expedition; they consult the living commissioners like some Greek oracles. The words of the constitutional commissioners are presented as the authentic meaning of the text. Like some pre-modern subjects of an ancient Asiatic kingdom, we are supposed to be satisfied with what the oracles tell our justices and what the latter in turn tells us.

No case⁶ vividly illustrates this kind of constitutionalism other than *De Castro v. Judicial and Bar Council* (615 SCRA 667).⁷ The decision in this case has been the most controversial among the recent constitutional disputes: it allowed the President to appoint a new Chief Justice within the election period and before the retirement of the incumbent Chief Justice. Not mincing words, the *Philippine Daily Inquirer* labeled the Supreme Court a “political court” for “upending existing jurisprudence” and privileging “the view of one member of the Constitutional Commission” (*Philippine Daily Inquirer* 2010a). It also called the appointment of a Chief Justice during the election period “shameful” and the Court’s interpretation a “deliberate misreading of the Constitution”—upending “traditional rules of statutory construction” (*Philippine Daily Inquirer* 2010b). The Court cannot insist, the editorial added, “that its interpretation of

two key provisions must be favored over the actual, demonstrated intent of the Constitution's framers."

It may be observed that while the editorial criticizes the decision for accepting Regalado's word, it in turn appeals to the "actual, demonstrated intent of the Constitution's framers." What happens is a battle of intents; an originalism against originalism. I believe this is not the road that constitutional interpretation should tread on.

The question of whether the President under the 1987 Constitution may appoint judges during the election period was first raised in the election year of 1998. Pres. Fidel Ramos signed the appointments of Mateo Valenzuela and Placido Villarta on 30 March 1998, less than two months before the May elections. He also requested the Judicial and Bar Council through the Chief Justice to submit a list of nominees for the vacant judicial positions. When the Chief Justice declined, it appeared that the Justice Secretary and some regular members of the Judicial and Bar Council "met at some undisclosed place" and wrote a resolution to the Chief Justice requesting the latter to convene the Council and submit the list of nominations. The members threatened the Chief Justice: "Should the Chief Justice be not disposed to call for the meeting aforesaid, the undersigned members constituting the majority will be constrained to convene the Council for the purpose of complying with its Constitutional Mandate." The President wrote the Chief Justice that the prohibition under Article VII only pertains to appointments in the executive branch and so it is the duty of the Council to submit the list. With the President insisting on his power to appoint and the members of the JBC threatening a coup, the Chief Justice submitted the issue to the Supreme Court en Banc and the result was the *In Re: Hon. Mateo A. Valenzuela and Hon. Placido B. Vallarta* (1998) (298 SCRA 408).

The Supreme Court gave its reading of the contradictory provisions of the 1987 Constitution:

Section 15, Article VII

Two months immediately before the next presidential elections and up to the end of his term, a President or Acting President **shall not make appointments**, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety.

Section 4 (1), Article VIII

The Supreme Court shall be composed of a Chief Justice and fourteen Associate Justices. It may sit en banc or, in its discretion, in divisions of three, five or seven Members. Any **vacancy shall be filled within ninety days from the occurrence thereof.**

Section 9, Article VIII

The Members of the Supreme Court and judges in lower courts shall be appointed by the President from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy. Such appointments need no confirmation.

For the lower courts, the President shall issue appointments within ninety days from the submission of the list.

A unanimous Court concluded that the prohibition under Article VII shall prevail over the duty under Article VIII for the former is “couched in stronger negative language” (423).⁸ It construed Section 15 of Article VII to prohibit “midnight” appointments in line with *Aytona v. Castillo* which declared the 350 appointments made by President Carlos Garcia a few hours before the inauguration of President Diosdado Macapagal void (425). The Court saw the prohibition under the 1987 Constitution to be broader thus it includes not only “midnight appointments” but also “appointments presumed made for the purpose of influencing the outcome of the Presidential election” (426).

The Court said that the exceptions under Section 15 only apply to “temporary appointments to executive positions” when continued vacancies will prejudice public service. Balancing between the time frame to make appointments and a restriction on the President’s power of appointment, the Court decided that “the former shall yield to the latter” (426). It implicitly suggested that the rule on the period of appointment was proposed primarily to prevent the Court from having a decapitating vacancy because at the time it was proposed the fifteen-member Court was yet unforeseen (423). The rule, the Court seems to say, has less weight now that a fifteen-member Court was approved. The original intent of the rule was weakened by the increase of the Court’s membership. Most importantly, the Court ignored “the view expressed” by retired Associate Justice Regalado that the prohibition “had no application

to appointments to the Court of Appeals” (413). The Court refused to seriously consider the interpretation because no research or discussion was done to support it.

This interpretation stood as the meaning of these provisions for the next twelve years. Numerous law students were taught that the power to appoint within ninety days applies only during the period not covered by Section 15 (Bernas 2003, 83). The meaning seemed settled until the Arroyo regime, made confident by its numerous appointments to the Supreme Court since 2001, launched a renewed constitutional attack on the meaning of the provisions. This was particularly made timely by the impending retirement of Chief Justice Reynato Puno by 17 May 2010. Hence, petitions were filed in behalf of the regime asking the Court to compel the Judicial and Bar Council to submit a list of nominees for Chief Justice even before the vacancy occurs. A divided Supreme Court reversed the previous decision in *In Re: Valenzuela* and ruled that the President can appoint the Chief Justice during the election period. Justices Bersamin, Mendoza, Villarama, Abad, Del Castillo, Brion, and Peralta voted in favor of Presidential appointment, with the latter four limiting the power to appointments to the highest court. Justices Nachura and Velasco voted for dismissal on procedural grounds. Justice Conchita Carpio-Morales wrote a lone but scathing dissent. Chief Justice Puno and Justices Carpio and Corona inhibited themselves (615 SCRA 755).

The Supreme Court submitted seven reasons to defend its against-the-grain interpretation; each of these reasons was, in my view, successfully rebutted by the dissenting opinion. Therefore, allow me to focus on the more controversial rules of interpretation followed by the Court: the structural and oracular interpretations. The first is an appeal to the structure of the Constitution. The *ponencia* written by Justice Lucas Bersamin explains that the framers wrote the Constitution following certain stylistic divisions. Each major branch of the government is defined under a particular article which enumerates the powers and the limitation of such powers. Hence, Articles VI, VII, and VIII belong to the Legislative, Executive and Judiciary respectively. Section 15 belongs to the Executive, while Section 4 belongs to the judiciary. This division suggests that these sections are limited and applicable only to the branch given power under the particular article. Since Section 15 is found in Article VII, the prohibition extends only to appointments made in the Executive branch (742). On the other hand, Section 4 of Article VIII applies to the judiciary and therefore obligatory whenever there is a vacancy (738).

This stylistic interpretation expresses the principle of the separation of powers where each branch is superior in its own turf (Amar 2005, 60). “The arrangement,” the decision says, “was a true recognition of the principle of separation of powers that underlies the political structure” of the government (733). But the decision forgets that this reasoning is too functional an approach to the Constitution and leaves out the twin brother of the separation principle: the principle of checks and balances. The style does not propose an absolute separate application of each Article, because the Constitution puts certain powers of one branch even under the Article devoted to another branch. For instance, the veto is no doubt an executive power and yet it is found under Article VI: The Legislative Department (Sec. 27). The Congress has the power to define the jurisdiction of the Courts and yet this provision falls under Article VIII (Sec. 2). Hence, the structure of separation of power is balanced by its twin principle of checks and balances. One cannot therefore make the formal style mean an absolute separation, because such principle is called divorce and not merely separation.

This focus on the stylistic features of the Constitution seems to assume that the writing of the text was perfectly done. The Court emphasized the fact that “the framers devoted time to meticulously drafting, styling, and arranging the Constitution” (733). What is suggested and implied by the decision is familiar in literary studies: the text of a perfect author. The Supreme Court is saying that the Constitution is a perfect text written by a perfect author. But this author cannot and does not exist. As one poet said, even Homer blinks. The masterpieces of world literature show signs that their authors have committed not a few errors. Indeed, the first edition of *Don Quixote* contains an oversight either by Cervantes or the printer (Rutherford 2003, xxviii). The Chinese classic *The Story of the Stone* (*hung lou meng*) also contains inconsistencies (Hawkes 1973, 42). This is even worse in the case of a constitution which is a product of various hands (cited in Sutherland 1943, 321). On several occasions, be it in his finely written textbook *Political Law* or in his *ponencia*, Justice Isagani Cruz criticized the Constitutional Commission for the charter’s verbosity, platitudes and lack of clarity (Cruz 1997, 17). Such an observation by the most accomplished writer to have ever sat on the bench makes the claim of a perfect text suspect. Overreliance on the style of the Constitution is indeed, as Justice Carpio-Morales puts it, “the weakest aid in arriving at a constitutional construction” (757).

However, the assumption of having a perfect author of the Constitution is consistent with the Court's oracular constitutionalism. It is only by creating a perfect author that the intent of the text becomes clear and unambiguous to the reader. The interpretative strategy of the Court in *De Castro v. JBC* begins with the construction of the perfect author whose text is a product of conscious drafting, careful choice of diction and structure, and thorough editing. The result is a text that clearly expresses the intent of the author and one only needs to confirm it from the real author as represented by a member of the Constitutional Commission. As the decision states, "[m]uch of the unfounded doubt about the President's power to appoint during the period of prohibition...could have been dispelled...had (the Court) properly acknowledged and relied on the confirmation of a distinguished member of the Constitutional Commission like Justice Regalado" (744). What happens then is that a connection is established between the imaginary perfect author, the source of the theological intent, and the real/living author in the person of a constitutional commissioner. The flow of the original intent from the imaginary to the living author is clear by now. Indeed, the decision is saying that had the fifteen Justices of the Narvasa Court consulted the oracle, they would not have been wrong! The enlightened advice came too late.

The fault of the fifteen Justices, including three future Chief Justices, was that they "accorded no weight and due consideration to the confirmation of Justice Regalado" (744). The word "confirmation" is important; it is the most significant portion of oracular constitutionalism. If the reader thinks he has just discovered the intent of the text, let him ask the author for confirmation. In this particular case, the Court transformed a member of the Constitutional Commission not only into an author but the author of the Constitution. The newly-transmogrified author is now treated as an oracle which is the source of meaning and life of the Constitution (supposedly) authored by the people. Through the oracle, all doubts are swept away by the Author-God and the Justices are finally enlightened on the Constitution's theological meaning (Barthes 2001, 1468). The meaning of the holy constitution is discovered and the faithful are inspired.

If this is how the charter is read, we might as well replace the preamble's "we the people" with "the distinguished member of the Constitutional Commission." The dissent of Justice Carpio-Morales expressed it so well: "The line of reasoning is specious. If that is the case and for accuracy's sake, we

might as well reconvene all ConCom members and put the matter to a vote among them” (766). My suggestion is that they do a *pompiang*.⁹

Some may find oracular constitutionalism as an aberration of a court whose membership is subservient to the notorious Arroyo. I doubt it. I myself would not insinuate that the members of the Court voted to expand the President’s power of appointment as an accommodation to someone who had earlier benefitted them. From the viewpoint of theory, I see oracular constitutionalism as a logical conclusion of originalism in the context of interpreting a twenty-year-old text. Our readers of the Constitution usually examine the records of the Convention. When things get tough, they now call on the real authors to comment on what the text means. Like oracles, the Commissioners, who appear before the Court as *amici* or friends, give their words and these words become the meaning of the text. Thus, the structure of the interpretative process of the Philippine version of originalism is simple: From the examination of records (archeological work), the Court proceeds to the confirmation by the gods (oracular work). This is exemplified by the *ponencia* in De Castro which tried to prove Valenzuela wrong by quoting an excerpt from the Record of Proceedings (supposedly showing “a mandate to fill a vacancy”) and then proceeded to oracular work through a confirmation from the Author/God/Oracle/Commissioner (737, 743).¹⁰

The excerpts showing a “mandate to fill a vacancy,” Justice Carpio-Morales notes, “only support the view that the number of Justices should not be reduced for any appreciable time” (768). The record merely reveals that the “intent was not to strictly impose an inflexible timeframe” for appointing judges (768). The dissent theorized that the mandate is not an absolute duty that overwhelms the dangers of midnight appointments, for this reason the mandate to appoint should be suspended during the ban (769).¹¹ More importantly, the excerpt did not categorically state that the President may sign midnight appointments and thus the majority decision merely stood on the oracular words of Justice Regalado.¹² These two different readings of the same excerpts underscore the fact that convention records by themselves do not tell us the intent of the framers. Justices must read these documents and interpret them like any text that does not explicitly reveal what it means. Most often “the relevant historical materials (sometimes) render plausible more than one conclusion” (Perry 1994, 63). If language renders law indeterminate, language does the same thing to historical materials.

There are various reasons why oracular constitutionalism must be opposed. These criticisms arise from literary, philosophical, and political theory. From the viewpoint of literary theory, this form of originalism is fallacious for treating the Commissioners as the source of meaning. This is simply the “intentional fallacy” in constitutional law. To paraphrase the famous article of W.K. Wimsatt Jr. and Monroe Beardsley, the Constitution is not the Commissioner’s own. The text is “detached from the author at birth and goes about the world beyond his power to intend about it and control it.” The Constitution belongs to the public and what is said about it must be subjected to the “same scrutiny as any statement in linguistics” (Wimsatt and Beardsley 1989, 45). For Roland Barthes, the text is “a multi-dimensional space in which a variety of writings, none of them original, blend and clash.” This multi-dimensional space is merely limited by assigning the text an author. But once the author is decentered, the claim to discover the meaning of a text becomes hopeless. Hence, “to give a text an Author is to impose a limit on that text, to furnish it with a final signified, to close the writing” (Barthes 2001, 1468-1469). In order to free interpretation from the claws of authors, whether imaginary or real, “it is necessary to overthrow the myth: the birth of the reader must be at the cost of the death of the author” (Barthes 2001, 1470). In the context of constitutional interpretation, the privileging of the author is a mode of transferring power to a very special individual while depriving other stakeholders in a constitutional dispute the opportunity to make their visions of the Constitution form part of the law.

It becomes clear therefore that oracular constitutionalism is essentially theocratic and anti-democratic. It is theocratic because we raise the Commissioners to the position of high priests through whom the gods speak. It is anti-democratic because the word of one man is law. From a certain perspective, it is really a form of dictatorship sanctioned and legitimized by the courts, a brand of dictatorship which is not new in the Philippines. The Marcos dictatorship, declared the Marcos Supreme Court, was “constitutional” (Bernas 2003, 878).

The de-privileging of an individual in the interpretation of the Constitution is imperative for any democratic government. The deconstruction of this center of meaning frees the text from the control of a single individual or faction of society and brings the text to the agora of public life where a variety of interpretations proliferate.

Finally, oracular constitutionalism is a form of suppression of writing identified by Jacques Derrida as “phonocentrism” which requires the “presence” or “absolute proximity of voice and being” (Derrida 2001, 1146). We as readers refuse to provide a meaning of a text because we deem writing as “mediation of mediation” and as “a fall into the exteriority of meaning” (Derrida 2001, 1147). The Court prizes highly the “presence” of a Commissioner at the moment of constitutional writing and demands that such “presence” be present at the moment of interpretation. Commanding presence at these two moments of constitutionalism is counter-democratic and ties everyone to a mythical moment. Rather than open ourselves to the future, we close the text and ourselves in the prison-house of myth.

In other words, oracular constitutionalism as a brand of philosophical phonocentrism deprives us the confidence and courage to read the words of the Constitution according to the necessities of our time. A political community cannot survive the intricacies and contradictions of political life as crystallized in a constitutional dispute by merely anchoring its choice on the idiosyncratic memories of a few Commissioners. Constitutional choices are political choices and we as citizens cannot simply allow a few privileged beings to make those choices for us. To allow such is to practice a form of political tutelage which would revert our politics to pre-enlightenment paternalism. For this reason, we must learn to read our Constitution independent of tutors however distinguished they might be.

Thus, a better alternative to the oracular strategy is for the Court to read the intent from the words of the law guided by history. A textual and historical reading of the Constitution should be preferable. First, it should be textual because law is in the final analysis, at least in this country, something to be read. And no better way to interpret law other than to begin with the words of the law. This textual reading should, of course, reject the claim that meanings are in plain view. A textualism which is unafraid to admit that application is always interpretation and that words, sentences, and paragraphs contain all the possibilities of meaning. Second, as viewed by constitutional scholar John Hart Ely, it should be historical because a clause-bound interpretivism is impossible. History here does not mean in the archeological or originalist sense, that is, a history that freezes meaning. It is a history that provides or, to be more precise, reconstructs a purpose.¹³ In other words, we only look back in order to move forward. This reconstructed purpose turns the vision of interpretation not to the past but to the future. Thus, this textualist and historicist strategy is but a

constructed purposivism, progressive but conscious of its own constructedness and supplementarity, that provides us with a hermeneutic that avoids the pitfall of giving an imaginary author so much power of interpretation as if his word is meaning itself.

Dangerous Supplements

As we know by now, a word acquires its meaning only from its difference with another word but the chain of differentiation could go on and on that the meanings produced by the process proliferate. Being made up of words, the law is a terrain where advocates of various and sometimes opposing significations clash. The solution to this indeterminacy has always been the attempt to fix a meaning through the suppression of other significations. The players must “struggle to maintain coherence of its world view in the face of the proliferation of rival values, the multiplicity of meaning” (Clayton 1993, 13). Hence, there is a tendency for the legal order to be imperial, an order that must both “restrict the proliferation of meaning and itself be meaningful” (Clayton 1993, 14). In pursuing this tendency, the readers of imperial law use oracular constitutionalism to stabilize the meaning in the most “objective” manner and make their particular choice be meaningful.¹⁴ However, what this strategy produces is merely what Derrida calls supplement, a substitute that can be replaced through “an infinite chain” of significations where supplementary meanings are produced and replaced (Derrida 1997, 157). These two strategies have provided us with nothing but supplements. In the words of Derrida: “there have never been anything but supplements, substitutive significations which could only come forth in a chain of differential references” (Derrida 1997, 159).

In *Of Grammatology* (1997), Derrida construed Jean Jacques Rousseau’s longing for Therese as a supplement to the absence of Madame de Warrens and the latter in turn as a substitute of a missing and irreplaceable mother. He enthusiastically quoted Rousseau’s admission that “I found in Therese the substitute (supplement) that I needed” (Derrida 1997, 157). For Derrida, reading is also a process of continuous search and replacement of meanings (supplement), a chain without end. As readers of law, our justices are also involved in this unceasing search for substitutes. Like Rousseau’s supplement, all judicial readings only provide us with a temporary substitute that a political faction within the community needs. Suppressed meanings may return with a vengeance. This is clear from Justice Chico-Nazario’s opinion in *Penera v.*

COMELEC where she expressed the thought that while fair elections has been “dealt a fatal blow,” her dissent will not “be viewed as an effort made in vain if in the future,” it will be “revisited and somehow rectified” (605 SCRA 605).¹⁵ A dissent therefore is a suppressed meaning, a hidden supplement reserved for the future. The vindication of a dissent reaffirms the view that what is involved in adjudication is not pure law but “an interplay of law, economics, politics and society generally” (Tushnet 2008, xxiv).

As mere supplements, the decisions of the Supreme Court based on a problematical method of interpretation like oracular constitutionalism stand precariously. When the political outcomes of said decision are unacceptable to the community, then the decision totally loses any form of legitimacy. Without legitimacy, the political cost can only be calculated in the long run. The Supreme Court does not collapse because of a single wrong decision. But when such decisions accumulate, such institution would no doubt follow in the footsteps of the Marcos Court, a court that stinks with the appellation it carries. Hence, *De Castro v. Judicial and Bar Council* was a wrong decision and time may only show its true color with more vividness. The Court’s expansion of presidential power at a time when the community no longer trusts the Arroyo Regime was politically costly (Justice Brion’s Separate Opinion mentions “lack of trust in an appointment to be made by the incumbent”) (618 SCRA 685). The decision can be considered “a dangerous supplement,” dangerous to the Court as an institution and to the construction of a democracy under which the President has limited powers (Derrida 1997, 141).¹⁶

Indeed, the Court is still “struggling to rebuild its tarnished image” up to this moment (Bernas 2010). But the plagiarism issue, the show-cause order to the University of the Philippines Law Faculty, and the recent flip-flopping of court decisions all point not only to *se deconstruire* but to *se detruire*.¹⁷ The Supreme Court seems not only willing to de-construct but to destroy itself.

Notes

- ¹ The impeachment of CJ Renato Corona does not make this article moot. *De Castro v. Judicial and Bar Council* remains a standing decision of the Supreme Court and the oracular interpretation used in the said case may be used again by the Court.
- ² The *verba legis* or plain meaning rule is the more popular strategy used by the Supreme Court. A critique of this canon is the subject of my paper “Problems of the Plain-Meaning Rule in Legal Interpretation.” The most obvious problem is that meanings are not plain and so words cannot be applied without any interpretation. Stanley Fish writes that “a sentence that seems to need no

interpretation is already the product of one” (Is there a text in this class, 1980). Even Antonin Scalia and Bryan A. Garner say: “As we see things, if you seem to meet an utterance which does not have to be interpreted, it is because you have interpreted it already” (Reading Law, 2012). Thus, the canon that says “where the law is clear, there is no room for construction” should be rejected. Courts should just admit that they have interpreted the text and that their interpretation is the most acceptable ordinary meaning of the text and not a plain meaning of the text.

- ³ This oracular form of interpretation is by no means limited to *De Castro v. The House of Representatives* 415 SCRA 45 (2003) also uses this method through the adoption of the position of Commissioners Joaquin Bernas and Florenz Regalado. The word “constitutionalism” is used here in a limited sense as “interpretation” of the Constitution to distinguish it from the interpretation of other texts. In its broader sense, the word “constitutionalism” really refers to the “conjoining” of the linguistic order and the political order, which is called by William F. Harris II as the “constitutional enterprise” (Harris 1993, 1).
- ⁴ In other words, the paper does not necessarily reject the *ratio-legis* method. What it provides is a critique of one method of ascertaining the *ratio-legis*, which is what is called here as “oracular constitutionalism,” a strategy of relying on the living voice of the Constitutional commissioners. The author of the present critique believes that the intent of the law may still be read from the words of the law and the records. Thus, it offers a particular version of constructed purposivism.
- ⁵ As a critic of the law and literature movement, Richard Posner considers the book to be a “minefield” which should be avoided by scholars belonging to the group. He wrote in the third edition of *Law and Literature* (2009, 7): “Binder and Weisberg are fascinated by...an assortment of scholarly literatures that have no significance for law. “ Nonetheless, this paper argues that literary theory can illuminate problems of authorial intent, language, and narratives of law. Posner, in fact, admits that Binder and Weisberg’s book has a first-rate chapter on narrative.
- ⁶ Another case of oracular constitutionalism is *Francisco v. The House of Representatives*. The Court adopted the Bernas and Regalado position that the word “initiate” means the filing and referral of the impeachment complaint and not merely the filing. It also rejected the position that the word means the “transmission” of the impeachment complaint from the House of Representatives to the Senate.
- ⁷ This means volume 615 of the Supreme Court Reports Annotated and page 667.
- ⁸ The following quotation comes from volume 208 of the Supreme Court Reports Annotated (SCRA). The page is indicated and the year is omitted in order to avoid repetition.
- ⁹ *Pompiang* or *pompiyang* is literally a cymbal but it also refers to a game of elimination played by children.
- ¹⁰ *De Castro v. JBC* 615 SCRA 737 (2010): Mr. De Castro. I understand that our justices now in the Supreme Court, together with Chief Justice, are only 11. Mr. Concepcion. Yes. Mr. De Castro. And the second sentence of this subsection reads: “Any vacancy shall be filled within ninety days from the occurrence thereof.” Mr. Concepcion. That is right. Mr. De Castro. Is this now a mandate to the executive to fill the vacancy? Mr. Concepcion. That is right. That is borne out of the fact that in the past 30 years, seldom has the Court had a complete complement.
- ¹¹ Justice Carpio-Morales cites another excerpt from the Records which equivocally suggests the intent to ban midnight appointments: “Mr. Davide: The idea of the proposal is that about the end of the term of the President, he may prolong his rule indirectly by appointing people to these sensitive positions, like the commissions, the Ombudsman, the Judiciary, so he could perpetuate himself in power...”(615 SCRA 760 2010). It is not only the law that is contradictory, but also the historical

records. In other words, the Record is also indeterminate and its meaning also depends on construction. The majority noted that the excerpt refers to the discussion on nepotism and not midnight appointments (*De Castro v. JBC II* 618 SCRA 661 2010).

- ¹² It is also interesting to note the section of Justice Carpio-Morales's dissent subtitled "All rules of statutory construction revolt against the interpretation arrived at by the ponencia." The section argues that the Bersamin ponencia virtually violates the following rules: *Ubi lex non distinguit nec nos distinguere debemos*, *Expressio Unius et exclusion alterius*, *Casus omissus pro omissis habendus est*, including *Verba legis non est recedendum*" (615 SCRA 764-767 2010). Indeed, the majority decision may be said to have replaced legal logic with theological logic.
- ¹³ The best example of this method is *Civil Liberties Union v. Executive Secretary* 194 SCRA 317 (1991), which explained the purpose of Sec. 13 of Art. VII of the 1987 Constitution. This decision states: "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 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 "(Citing *Maxwell vs. Dow*, 176 U.S. 581). This reconstruction of purpose is also used in *In re Appointment of Valenzuela*, AM 98-0501, 9 November 1998. Indeed, reconstructing the Constitution's intent has always been done by the Court through the use of historical records. Cases like *Bayan v. Zamora* (2000), *Senate v. Executive Secretary* (2006), and the more recent *Gutierrez v. House of Representatives* (2011) are representative of this method of historical interpretation. This purposivist and historical method of interpretation retains its validity when the reader is confronted with constitutional provisions adopted from the U.S. Constitution. Thus, U.S. jurisprudence (like *Escobedo* and *Miranda*) which was followed in the formulation of Sec. 12 of Article III should be considered in the interpretation of said provision and U.S. jurisprudence limiting or even reversing *Miranda* should be ignored. The same purposivist interpretation should not prevent the Court from adopting decisions like *Texas v. Johnson* (491 U.S. 397) and *Lawrence v. Texas* (539 U.S. 588) (which declared laws prohibiting flag burning and anal sex unconstitutional) in reading the freedom of expression and due process clauses.
- ¹⁴ The illusion of objectivity is perpetuated through the pretense that the judge only applied the law and the intent came not from the reader but from the text's intent as shown by the records and confirmed by the oracle.
- ¹⁵ The majority in *De Castro v. JBC* downplayed the rule of precedent or *stare decisis et non quia movere* (not to unsettle things that are settled). It claimed that the Court is not controlled by precedents, especially when it has a new membership (618 SCRA 658 2010). The statement is double-edged because it weakens the present Court's claim to finality. The argument suggests that future members of the Court may of course reverse its present interpretation.
- ¹⁶ There are few ponencias that are explicitly defensive, but nothing beats the *De Castro v. JBC II* ruling: "It has been insinuated as part of the polemics attendant to the controversy...that because all the members of the present Court were appointed by the incumbent President, a majority of them are now granting to her the authority to appoint the successor of the retiring Chief Justice. The insinuation is misguided and utterly unfair. The Members of the Court vote on the sole basis of their conscience and the merits of the issues. Any claim to the contrary proceeds from malice and condescension" (618 SCRA 662 2010). This statement shows that there was widespread public skepticism about the Court's Constitutional interpretation. (The concept of a dangerous supplement comes from Derrida's of *Grammatology*. It is the title of chapter 2 of Part II *Nature, Culture, Writing*.)

- ¹⁷ Harry Roque accused Justice Mariano Del Castillo of plagiarizing articles from law journals published abroad. The Supreme Court later ruled that there was no plagiarism for lack of intent despite the failure to attribute the numerous statements and notes to the authors (A.M. 10-7-17-SC, Oct. 12, 2010). See the dissenting opinion of Justice Maria Lourdes Sereno. Ironically, she herself was accused of plagiarism by Justice Roberto Abad in a separate opinion released on 8 February 2011. Meanwhile, Marvic Leonen, Dean of the U.P. College of Law (now a justice of the Supreme Court), one of the signatories of the statement accusing Justice Del Castillo of plagiarism, was also accused of plagiarism. Indeed, vindictiveness and resentment seem to have been the answer to an otherwise academic issue. Not to be outdone, the Court also ran after the U.P. law professors who demanded the resignation of Justice Del Castillo and required the latter to show cause why they should not be cited for contempt. Two months later, the Court issued another controversial decision declaring unconstitutional the creation of the Truth Commission set up by President Aquino to investigate the Arroyo administration (G.R. 192935, 7 December 2010). This decision seems to confirm the popular observation that there is an “Arroyo Court.” Of course, the history of the Arroyo Court does not end with the recent impeachment of Corona. One may also add to this litany the *League of Cities v. COMELEC* case which has accumulated four decisions!

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