CHARTING THE WATERS OF CONSTITUTIONAL CONSTRUCTION: A FUNCTION-BASED FRAMEWORK FOR APPRECIATING OUR CONSTITUTIONAL STATE POLICIES*

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ABSTRACT

All State Policies found in Article II of the 1987 Constitution should be interpreted as self-executing in the sense that they should not be readily dismissed as mere suggestions for the political branches of government. All state policies belong to a general class which I refer to as "third order state policies." They possess a validating function—to be invoked by the state to argue the imprimatur of constitutionality of its acts, aiding the Courts in determining the validity of statutes or acts of the executive. Within this general class exists a second class of policies which I refer to as "second order state policies" that also possess a complementing function—to be invoked by citizens to enhance other rights that have already been provided by the other provisions of the Constitution or by law. Finally, there are privileged policies which I refer to as "first order state policies." Beyond their validating and complementing functions, they confer on the public readily enforceable rights which have a nullifying function—in themselves, these policies grant the public a right of action to nullify state acts which violate said readily enforceable rights.

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I. INTRODUCTION

The Constitution's Declaration of State Policies, embodied in Article II, is a hodgepodge of ideas and aspirational goals which often receive little attention, scantly deserving a second look in a freshman law school classroom. For the longest time, its provisions have been easily dismissed by the doctrine that these provisions were never intended to be "self-executing." This is understandably so because of how its provisions have been treated dating back to its predecessor in the 1935 Constitution.

However, a strange thing has happened since the ratification of the 1987 Constitution. Most notably starting with the case of *Oposa v. Factoran,* various "self-executing" state policies have sprouted from the many aspirational provisions of our Constitution's not-so-terse text. By now, at least six of the state policies found in Article II have either been expressly declared as self-executing or have been treated as self-executing by the Supreme Court. And although some scholars and members of the Court have criticized these cases as acts of judicial activism, as scholars, students, and future practitioners of the law we must confront the reality that these cases have ripened into doctrine through *stare decisis.* Indeed, one needs to sift through jurisprudence to find which provisions have been exceptionally found by the Court to be self-executing. What makes this task at times more confusing is the fact that, in some cases, the Court makes little explanation as to why those provisions are treated as such.

Adding to our confusion are declarations by the Supreme Court that modern constitutions—which we certainly perceive our 1987 Constitution to be—are generally self-executing.

Also problematic, unresolved, and yet uncertain is the effect when a state policy has been found to be self-executing. What does "self-executing" even mean?

From the standpoint of legal method, we also confront the problem of predictability. Is it fair to assume that the Supreme Court merely arbitrarily selects state policies to activate to justify their preferred interpretation of the Constitution?

I think not.

This paper attempts to develop a guide to charting these waters. It seeks to situate our understanding of our Declaration of State Policies after nearly three decades from the Constitution's ratification to harmonize

jurisprudence and to devise a framework that addresses the question of predictability. The second part traces the history of Article II and provides a comprehensive survey of the jurisprudence affecting our constitutional state policies. The third part of this paper harmonizes jurisprudence to uncover the theories and problems we must address in appreciating our state policies. The fourth part begins by proposing to abandon the trend of readily dismissing Article II provisions as merely "not self-executing." Instead, it asks that we return to the original intent for such provisions which recognizes that these provisions may be invoked by the State for a "validating function." The framework also uncovers the fact that certain provisions embedded in Article II possess a textually demonstrable nullifying function which creates a public right that may be vindicated by ordinary citizens in case of breach. Moreover, it notes that there is also a complementing function that may be found in some provisions which may be invoked by injured parties together with other Constitutional provisions. Finally, this paper illustrates how a function-based approach to these provisions may be validly invoked in prospective cases.

II. THE DECLARATION OF PRINCIPLES AND STATE POLICIES

A. Historical Antecedents

The current Declaration of Principles and State Policies embodied in Article II of the 1987 Constitution traces its roots to Article II of the 1935 Constitution.[1] Then merely designated as "Declaration of Principles," Article II comprised only five sections covering the principles of republicanism,[2] the government duty to defend the state,[3] the renunciation of war and the adoption of generally accepted principles of international law,[4] the natural

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[1] Its counterpart in the 1935 Constitution was Article II (Declaration of Principles).

[2] 1935 CONST. art. II, § 1. This was wholly adopted in 1973 CONST. art. II, § 1, and modified in 1987 CONST. art. II, § 1 by adding the word "democratic." For ease of comparison, *see* CARMELO SISON, THE 1987, 1973, AND 1935 PHILIPPINE CONSTITUTIONS: A COMPARATIVE TABLE, 1999, 2-9.

[3] 1935 CONST. art. II, § 2. This was wholly adopted in 1973 CONST. art. II, § 2, and modified in 1987 CONST. art. II, § 4 by shifting the focus of government duty from "the defense of the State" to "serve and protect the people."

[4] 1935 CONST. art. II, § 3. This was modified in 1973 CONST. art. II, § 3 by adding an adherence "to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations." This modification was wholly adopted in 1987 CONST. art. II, § 2.

right and duty of the parents in the rearing of the youth,[5] and the principle of social justice.[6]

From its inception, this portion of the Constitution had been considered "the basic political creed of the nation [which] lays down the policies that the government is bound to observe."[7] In appreciating the provisions in Article II, it has been widely accepted that these were not intended to be readily enforceable before the Courts—that is, that they were not self-executing.[8] The rationale is clarified by Dean Vicente Sinco's analysis. He found that the burden to fulfill these state objectives fell on the executive and the legislature as the political branches of government. The remedy for their failure to comply with these constitutional directives was necessarily also political—by the ballot.[9]

In 1973, the Marcos-era Constitution expanded Article II to 10 sections and modified its title to "Declaration of Principles and State Policies." Included in the 1973 principles and state policies are the following: the vital role of the youth in nation-building,[10] the policy on social services,[11] the

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[5] 1935 CONST. art. II, § 4. This was substantially modified in 1973 CONST. art. II, § 4 which recognized the family as "a basic social institution." It was further substantially modified in 1987 CONST. art. II, § 12 which also added that "[the State] shall equally protect the life of the mother and the life of the unborn from conception."

[6] 1935 CONST. art. II, § 5. This was substantially modified in 1973 CONST. art. II, § 6 which added that "the State shall regulate the acquisition, ownership, use, enjoyment, and disposition of private property and equitably diffuse property ownership and profits." It was again modified in 1987 CONST. art. II, § 10, deleting the portion on the regulation of property rights which was moved to art. XIII, § 1.

[7] VICENTE SINCO, PHILIPPINE POLITICAL LAW: PRINCIPLES AND CONCEPTS 116 (1962).

[8] JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 36 (2009).

[9] *Id.*

[10] 1973 CONST. art. II, § 5. This was modified in 1987 CONST. art. II, § 13 by adding the duty to "protect" the youth's physical, moral, spiritual, intellectual and social well-being. It further added that the state "shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs."

[11] 1973 CONST. art. II, § 7. This was substantially modified in 1987 CONST. art. II, § 9.

principle of civilian supremacy,[12] the state policy on the protection of labor,[13] and the policy on the autonomy of local government units.[14]

Despite the change in name, it "did not effect an intent different from the Declaration of Principles in the 1935 Constitution."[15] In fact, in a paper by Dean Froilan Bacungan discussing the social and economic policies embodied in the 1973 Constitution, he found that social and economic rights which include some of the policies enunciated in Article II were "at best declarations of an aspiration or a policy. Implementing legislation is necessary in order that they may be realized for all[.]"[16]

In the 1987 Constitution, an attempt was made to distinguish principles[17] from state policies.[18] From 10 sections in the 1973 Constitution, the present article is now composed of 28 sections under the 1987 Constitution. The 18 new provisions include: the principle on general welfare,[19] the principle of separation of Church and State,[20] the policy to pursue an independent foreign policy,[21] the policy of freedom from nuclear weapons,[22] the policy of full respect for human rights,[23] the policy ensuring fundamental equality of men and women,[24] the policy on the people's right to health,[25] the policy on the right to a balanced and healthful ecology,[26] the policy on education and human development,[27] the policy on developing an independent national economy,[28] the policy on the indispensable role of the

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[12] 1973 CONST. art. II, § 8. This was adopted in 1987 CONST. art. II, § 3, to which was included the role of the Armed Forces of the Philippines.

[13] 1973 CONST. art. II, § 9. This section was a modification of the policy established in 1935 CONST. art. XIV, § 6. This was substantially modified in 1987 CONST. art. II, § 18, with some of the policies adopted in art. XIII, § 3.

[14] 1973 CONST. art. II, § 10. This was modified in 1987 CONST. art. II, § 25.

[15] BERNAS, *supra* note 8, at 36.

[16] Froilan Bacungan, *The Social and Economic Policies Embodied in the New Constitution*, 48 PHIL. L.J. 476, 477 (1973).

[17] CONST. art. II, §§ 1-6.

[18] Art. II, §§ 7-28.

[19] Art. II, § 5.

[20] Art. II, § 6. This provision was adopted from 1973 CONST. art. XV, § 15.

[21] Art. II, § 7.

[22] Art. II, § 8.

[23] Art. II, § 11.

[24] Art. II, § 14.

[25] Art. II, § 15.

[26] Art. II, § 16.

[27] Art. II, § 17.

[28] Art. II, § 19.

private sector,[29] the policy on rural development,[30] the policy on the rights of indigenous communities,[31] the policy on non-governmental, community-based, or sectoral organizations,[32] the policy on the vital role of communication and information in nation building,[33] the policy on equal access to opportunities for public service,[34] the policy on the integrity of the public service,[35] and the policy on full public disclosure.[36]

Is this shopping list of aspirations needlessly long for a list of provisions not intended to be self-executing? You would not be the first to think so. In fact, one commentary goes so far as to say that many of these provisions "appear to be but meaningless platitudes on subjects considered significant, perhaps, only by those who insisted on their inclusion."[37]

As noted by Fr. Joaquin Bernas, the framers of the 1987 Constitution sought to distinguish between "principles," which were binding rules that must be observed in the conduct of government, as opposed to "state policies," which are mere guidelines for the orientation of the state.[38] Unfortunately, this distinction has not been upheld by the courts since jurisprudence has maintained that not all six principles are self-executing, while certain state policies already anchor justiciable rights.[39]

As jurisprudence developed, various cases have generally treated the provisions of Article II as mere "guidelines for legislative or executive action."[40] *Kilosbayan v. Morato* (hereinafter, "*Kilosbayan*"), for instance, announced that "[t]hese principles in Article II are not intended to be self-executing principles ready for enforcement through the Courts."[41] Thus, our contemporary understanding of the provisions in Article II is that they merely lay down the rules underlying our system of government, with the purpose of

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[29] Art. II, § 20.

[30] Art. II, § 21. This is a modification of 1973 CONST. art. XIV, § 12.

[31] Art. II, § 22. This is a modification of 1973 CONST. art. XV, § 11.

[32] Art. II, § 23.

[33] Art. II, § 24.

[34] Art. II, § 26.

[35] Art. II, § 27.

[36] Art. II, § 28. This policy is derived from the right to information in the Bill of Rights of the 1973 Constitution found in 1973 CONST. art. IV, § 6.

[37] ISAGANI CRUZ & CARLO CRUZ, PHILIPPINE POLITICAL LAW 81 (2014).

[38] BERNAS *supra* note 8, at 37.

[39] *Id.*

[40] Tañada v. Angara, G.R. No. 118295, 272 SCRA 18, 20, May 2, 1997; Espina v. Zamora, G.R. No. 143855, 631 SCRA 17, 26, Sept. 21, 2010.

[41] Kilosbayan, Inc. v. Morato, G.R. No. 118910, 250 SCRA 130, 138, Nov. 16, 1995.

emphasizing and articulating the objectives and limitations of governmental action in pursuit of goals announced in the preamble.[42]

Given how these provisions have been treated, some commentaries have made criticisms on how many have needlessly contributed to the excessive length and verbosity of the Constitution.[43] The same commentary likewise makes the criticism that some portions of the Constitution sound more "like a political speech rather than a formal document stating only basic precepts,"[44] arguing that the constitution has no place for words such as the "rhythm and harmony of nature."[45]

However, that Article II, Section 16 has been found by the Court to be complete and enforceable in the landmark case of *Oposa v. Factoran*—and that such a view has not been reversed by jurisprudence to date—shows that the other provisions of Article II cannot be dismissed as merely hortatory. Rather, they deserve a closer look. In fact, nearly three decades from the ratification of the 1987 Constitution, jurisprudence has declared other provisions of our constitutional state policies as not only self-executing, but also as provisions which confer rights on the citizens of the Republic.

The succeeding section reviews the development of jurisprudence under the 1987 Constitution to examine the doctrines which discuss provisions in Article II.

B. Jurisprudential Developments

To begin our journey into how the provisions of the Declaration of Principles and State Policies have been appreciated by the Supreme Court in our contemporary legal framework, we trace the development of jurisprudence from the moment of the ratification of the 1987 Constitution. In doing so, it is prudent to consider not only the majority opinions, but also the separate, concurring and dissenting opinions of the Court.

Separate opinions give us a glimpse into the debates that were considered by the Supreme Court in coming up with the doctrinal portions of its decisions. They play an important role in maintaining the Constitution's public acceptability through the "agonistic process of mobilizations and

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[42] CRUZ & CRUZ, *supra* note 37, at 81.
[43] *Id.* at 13-15, 81-83.
[44] *Id.* at 14.
[45] *Id.* at 15.

counter-mobilizations."[46] At times, they serve to enrich the theoretical discussions on how the law is properly interpreted. Further, dissents, as well as concurring opinions, are addressed to future similar cases in the hope that the Court will resolve the same issues in a different way.[47] It is with these in mind that the first subsection provides a chronological discussion of the decisions and different opinions that discuss Article II in a way which supports the view that it does not contain self-executing provisions. The second subsection then individually discusses exceptional state policies which have been found by the Court to be self-executing.

1. Not Self-Executing

In 1991, various state policies were invoked in an effort to declare the nullity of the Marcos-era charter of the Philippine Amusements and Gaming Corporation (PAGCOR). In *Basco v. PAGCOR* (hereinafter "*Basco*"), petitioners sought the annulment of PAGCOR's charter,[48] claiming that the charter's "gambling objective" is contrary to the "declared national policy of the 'new restored democracy' and the people's will as expressed by the 1987 Constitution."[49] Petitioners invoked the state policies on human rights (Section 11), the family (Section 12), and the youth (Section 13). Petitioners also invoked the provisions on social justice (Article XIII, Section 1) and educational values (Article XIII, Section 2). The Court ultimately upheld the constitutionality of the PAGCOR charter, ruling that the provisions cited are "merely statements of principles and policies. As such, they are basically not self-executing, meaning a law should be passed by Congress to clearly define and effectuate such principles."[50] Citing Fr. Joaquin Bernas, the Court maintained that Article II of the 1987 Constitution was of the same nature as Article II of the 1935 Constitution, such that:

> [Its] provisions were not intended to be self-executing principles ready for enforcement through the Courts. They were rather directives addressed to the executive and the legislature. If the executive and the legislature failed to heed the directives of the articles the available remedy was not judicial or [sic] political. The electorate could express their displeasure with the failure of the executive and the legislature through the language of the ballot.[51]

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[46] Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 609-11 (2009).

[47] DANTE GATMAYTAN, LEGAL METHOD ESSENTIALS (2012).

[48] Pres. Dec. No. 1869.

[49] Basco v. Phil. Amusements and Gaming Corp., G.R. No. 91649, 197 SCRA 52, 57, May 14, 1991.

[50] *Id.* at 68.

[51] *Id.*

This case has since emerged as one of the leading authorities in arguing that the provisions of Article II are not self-executing.

In 1993, the Court's majority in *Oposa v. Factoran* (hereinafter, "*Oposa*") found exceptions in Sections 15 and 16 of Article II. The majority found these provisions as belonging to a category of rights distinct from the civil and political rights enumerated in Article III (Bill of Rights).[52] These rights were deemed by the majority to have existed from the inception of humankind and need not even be written in the constitution. As a practical consequence of this declaration, the Court found that petitioners had sufficiently established a *prima facie* case against the government for violating their right to a balanced and healthful ecology because of the granting of various Timber License Agreements (TLAs).

In his concurring opinion, Justice Feliciano cautioned the Court on treating the "right to a balanced and healthful ecology" as a self-executing provision. He found that, although the right was fundamental in character, the language of the provision was so comprehensive in scope and generalized in character that the provision "could not be characterized as 'specific' without doing excessive violence to language."[53] Thus, the right to a balanced and healthful ecology could not be considered as a specific and fundamental right upon which petitioners' cause of action rests. To illustrate his concerns, Justice Feliciano listed the various types of particular claims which could be subsumed under the provision's rubric, such as:

> [P]revention and control of emission of toxic fumes and smoke from factories and motor vehicles; of discharge of oil, chemical effluents, garbage and raw sewage into rivers, inland and coastal waters by vessels, oil rigs, factories, mines and whole communities; of dumping of organic and inorganic wastes on open land, streets and thoroughfares; failure to rehabilitate land after strip-mining or open-pit mining; kaingin or slash-and-burn farming; destruction of fisheries, coral reefs and other living sea resources through the use of dynamite or cyanide and other chemicals; contamination of ground water resources; loss of certain species of fauna and flora; and so on.[54]

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[52] Oposa v. Factoran [hereinafter "Oposa"], G.R. No. 101083, 224 SCRA 792, 804-805, July 30, 1993.

[53] *Id.* at 815 (Feliciano, *J.*, *concurring*).

[54] *Id.*

> As a matter of logic, by finding petitioners' cause of action as anchored on a legal right comprised in the constitutional statements above noted, the Court is in effect saying that Section 15 (and Section 16) of Article II of the Constitution are self-executing and judicially enforceable even in their present form. The implications of this doctrine will have to be explored in future cases; those implications are too large and far-reaching in nature even to be hinted at here.[55]

In clear and elegant fashion, Justice Feliciano presented his recommendations for the Court, while explaining his concerns:

> My suggestion is simply that petitioners must, before the trial court, show a more specific legal right — a right cast in language of a significantly lower order of generality than Article II (15) of the Constitution — that is or may be violated by the actions, or failures to act, imputed to the public respondent by petitioners so that the trial court can validly render judgment granting all or part of the relief prayed for. To my mind, the Court should be understood as simply saying that such a more specific legal right or rights may well exist in our corpus of law, considering the general policy principles found in the Constitution and the existence of the Philippine Environment Code, and that the trial court should have given petitioners an effective opportunity so to demonstrate, instead of aborting the proceedings on a motion to dismiss.
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> It seems to me important that the legal right which is an essential component of a cause of action be a specific, operable legal right, rather than a constitutional or statutory policy, for at least two (2) reasons. One is that unless the legal right claimed to have been violated or disregarded is given specification in operational terms, defendants may well be unable to defend themselves intelligently and effectively; in other words, there are due process dimensions to this matter.
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> The second is a broader-gauge consideration — where a specific violation of law or applicable regulation is not alleged or proved, petitioners can be expected to fall back on the expanded conception of judicial power in the second paragraph of Section 1 of Article VIII of the Constitution which reads:

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[55] *Id.* at 816-17.

> Section 1. . . .
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> 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.
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> When substantive standards as general as "the right to a balanced and healthy ecology" and "the right to health" are combined with remedial standards as broad ranging as "a grave abuse of discretion amounting to lack or excess of jurisdiction," the result will be, it is respectfully submitted, to propel courts into the uncharted ocean of social and economic policy making. At least in respect of the vast area of environmental protection and management, our courts have no claim to special technical competence and experience and professional qualification. Where no specific, operable norms and standards are shown to exist, then the policy making departments — the legislative and executive departments — must be given a real and effective opportunity to fashion and promulgate those norms and standards, and to implement them before the courts should intervene.[56]

In *Kilosbayan*, multiple state policies were invoked by petitioners in a case that involves gambling. The petitioners sought to invalidate an Equipment Lease Agreement which allowed the Philippine Charity Sweepstakes Office (PCSO) to lease online lottery equipment and accessories from the Philippine Gaming Management Corporation (PGMC). Claiming that the contract is invalid, petitioners primarily argued that the new agreement is void for being substantially the same as a contract invalidated by the Supreme Court in *Kilosbayan v. Guingona*. They further alleged that the lease agreement violated the PCSO charter, the law on public bidding, as well as Section 2(2) of Article IX-D the Constitution. Petitioners also invoked the following principles and state policies from Article II: the general welfare principle (Section 5), the policy on the moral development of the youth (Section 12), the state policy on the vital role of the youth in nation-building (Section 13), and the state policy on education and human development (Section 17).

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[56] *Id.* at 817-18.

The Court declared that these policies "are not, however, self-executing provisions, the disregard of which can give rise to a cause of action in the Courts. They do not embody judicially enforceable constitutional rights but guidelines for legislation."[57] Thus, while constitutional policies were invoked, the Court ruled that the case basically involves only questions of contract law. The Court subsequently ruled that petitioners were not real parties in interest who could bring this suit, and that the lease agreement was valid under the law.

Undeterred, petitioners filed a motion for reconsideration. In the Supreme Court's resolution dated November 16, 1995, the Court reiterated that the state policies invoked were not self-executing. Thus, they "do not confer rights which can be enforced in the Courts but only provide guidelines for legislative or executive action."[58] The Court clarified that Congress has in fact already determined that the holding of lotteries for charity is consistent with our constitutional principles and state policies when such acts were authorized.

Manila Prince Hotel v. GSIS (1997) (hereinafter, "*Manila Prince*") is one of the landmark decisions in determining whether various provisions in the Constitution are readily enforceable. Although the decision expressly states that the provisions found in Article II are usually not self-executing, it provides fertile ground to argue for the self-executing nature of various provisions by using a textualist approach.

In this case, the Court found the Filipino First Policy enshrined in one of the national patrimony clauses of the Constitution[59] to be self-executing. This allowed the Court to compel the Government Service Insurance System (GSIS) to desist from selling majority of the shares of the parent company of the historic Manila Hotel to a Malaysian firm, and to instead accept a bid belatedly submitted by a Filipino company matching it. In clarifying the self-executing nature of the Filipino First Policy, the Supreme Court, through Justice Bellosillo, explained:

> Admittedly, some constitutions are merely declarations of policies and principles. Their provisions command the legislature to enact laws and carry out the purposes of the framers who merely establish

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[57] Kilosbayan, Inc. v. Morato, G.R. No. 118910, 246 SCRA 540, 564, July 17, 1995.

[58] Kilosbayan, Inc. v. Morato, G.R. No. 118910, 250 SCRA 130, 138, Nov. 16, 1995. This is a Resolution to the Motion for Reconsideration of the July 1995 decision.

[59] CONST. art. XII, § 10, ¶ 2. "In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos [...]"

an outline of government providing for the different departments of the governmental machinery and securing certain fundamental and inalienable rights of citizens. A provision which lays down a general principle, such as those found in Art. II of the 1987 Constitution, is usually not self-executing. But a provision which is complete in itself and becomes operative without the aid of supplementary or enabling legislation, or that which supplies sufficient rule by means of which the right it grants may be enjoyed or protected, is self-executing. Thus a constitutional provision is self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.

As against constitutions of the past, modern constitutions have been generally drafted upon a different principle and have often become in effect extensive codes of laws intended to operate directly upon the people in a manner similar to that of statutory enactments, and the function of constitutional conventions has evolved into one more like that of a legislative body. Hence, unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, *the presumption now is that all provisions of the constitution are self-executing.* If the constitutional provisions are treated as requiring legislation instead of self-executing, the legislature would have the power to ignore and practically nullify the mandate of the fundamental law. This can be cataclysmic. That is why the prevailing view is, as it has always been, that –

> [i]n case of doubt, the Constitution should be considered self-executing rather than non-self-executing [...] Unless the contrary is clearly intended, the provisions of the Constitution should be considered self-executing, as a contrary rule would give the legislature discretion to determine when, or whether, they shall be effective. These provisions would be subordinated to the will of the lawmaking body, which could make them entirely meaningless by simply refusing to pass the needed implementing statute.[60]

[60] Manila Prince Hotel v. Gov't Service Insurance System [hereinafter "Manila Prince Hotel"], G.R. No. 122156, 267 SCRA 408, 431-32, Feb. 3, 1997. (Emphasis supplied.)

Explaining the interplay of the plenary powers of legislation constitutionally vested in the legislature and the rights created by self-executing provisions of the Constitution, the Supreme Court emphasized that:

> [I]n self-executing constitutional provisions, the legislature may still enact legislation to facilitate the exercise of powers directly granted by the constitution, further the operation of such a provision, prescribe a practice to be used for its enforcement, provide a convenient remedy for the protection of the rights secured or the determination thereof, or place reasonable safeguards around the exercise of the right. The mere fact that legislation may supplement and add to or prescribe a penalty for the violation of a self-executing constitutional provision does not render such a provision ineffective in the absence of such legislation. The omission from a constitution of any express provision for a remedy for enforcing a right or liability is not necessarily an indication that it was not intended to be self-executing. The rule is that a self-executing provision of the constitution does not necessarily exhaust legislative power on the subject, but any legislation must be in harmony with the constitution, further the exercise of constitutional right and make it more available. Subsequent legislation however does not necessarily mean that the subject constitutional provision is not, by itself, fully enforceable.[61]

In the 1997 case of *Tañada v. Angara* (hereinafter, "*Tañada*"), the Supreme Court emphasized that "[b]y its very title, Article II of the Constitution is a declaration of principles and state policies."[62] In this case, the petitioners relied on the nationalist provisions of the constitution including the state policy on an independent national economy,[63] as well as the Article XII provisions on national economy and patrimony, to nullify the Senate's concurrence and the President's ratification of the agreement establishing the World Trade Organization. They based their objection on the presence of many parity provisions and national treatment clauses scattered throughout the agreement and its annexes. The Court dismissed the petition, citing the rulings in *Kilosbayan* and *Basco*. It found that the provisions invoked were not intended to be self-executing. The Court, through the ponencia of Justice Panganiban, concluded its discussion on this issue by relying on the rationale expressed by Justice Feliciano in his concurring in *Oposa*. It found that "[t]he reasons for denying a cause of action to an alleged infringement of broad constitutional principles are sourced from basic considerations of due

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[61] *Id.* at 433.

[62] Tañada v. Angara, G.R. No. 118295, 272 SCRA 18, 54, May 2, 1997.

[63] CONST. art. II, § 19.

process and the lack of judicial authority to wade into the uncharted ocean of social and economic policy making."[64]

The state policy of equal access to opportunities for public service was invoked in the case of *Pamatong v. COMELEC (2004)* (hereinafter, "*Pamatong*"). The Commission on Elections (COMELEC) had refused to give due course to petitioner Elly Pamatong's certificate of candidacy for the Presidency, declaring him as a nuisance candidate. Pamatong challenged the COMELEC's resolutions, relying solely on the state policy of equal access to opportunities for public service. Relying on the constitutional commission records to clarify the intent of the framers, the Court found that this provision was not intended to be self-executing:

> Obviously, the provision is not intended to compel the State to enact positive measures that would accommodate as many people as possible into public office. The approval of the "Davide amendment" indicates the design of the framers to cast the provision as simply enunciatory of a desired policy objective and not reflective of the imposition of a clear State burden.
>
> Moreover, the provision as written leaves much to be desired if it is to be regarded as the source of positive rights. It is difficult to interpret the clause as operative in the absence of legislation since its effective means and reach are not properly defined. Broadly written, the myriad of claims that can be subsumed under this rubric appear to be entirely open-ended. Words and phrases such as "equal access," "opportunities," and "public service" are susceptible to countless interpretations owing to their inherent impreciseness. Certainly, it was not the intention of the framers to inflict on the people an operative but amorphous foundation from which innately unenforceable rights may be sourced.[65]

The Court found that since the policy invoked was not a right, the privilege of equal access to opportunities to public office may be subject to limitations such as Section 69 of the Omnibus Election Code which defines "nuisance candidates." Further, the Court correctly concluded that since petitioner was challenging neither the validity of Section 69 of the Omnibus Election Code nor the COMELEC Resolution setting the regulations for its applicability, these were presumed valid. The Court would, however, remand the case for reception of evidence to ensure conformity with the requirements of due process.

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[64] Tañada v. Angara, G.R. No. 118295, 272 SCRA 18, 55, May 2, 1997.

[65] Pamatong v. COMELEC, G.R. No. 161872, 427 SCRA 96, 102, Apr. 13, 2004.

Justice Tinga's concurring opinion in the 2004 case of *Agabon v. NLRC* (hereinafter, "*Agabon*") took occasion to discuss the constitutional protection of labor. The case involved two employees who were dismissed without notice, thereby violating their right to due process. Justice Tinga concurred with the majority decision in finding that what was involved was a question merely of statutory and not constitutional due process. However, going deeper into the discussion of the constitutional provisions involved, Justice Tinga cited *Manila Prince* in affirming that all constitutional provisions are presumed to be self-executing.[66] Discussing the state policy on the rights of workers[67] together with Article XIII Section 3, Justice Tinga said:

> [T]hus, the constitutional mandates of protection to labor and security of tenure may be *deemed as self-executing in the sense that these are automatically acknowledged and observed without need for any enabling legislation. However, to declare that the constitutional provisions are enough to guarantee the full exercise of the rights embodied therein, and the realization of ideals therein expressed, would be impractical, if not unrealistic.* The espousal of such view presents the dangerous tendency of being overbroad and exaggerated. The guarantees of full protection to labor and security of tenure, when examined in isolation, are facially unqualified, and the broadest interpretation possible suggests a blanket shield in favor of labor against any form of removal regardless of circumstance. This interpretation implies an unimpeachable right to continued employment-a utopian notion, doubtless-but still hardly within the contemplation of the framers. Subsequent legislation is still needed to define the parameters of these guaranteed rights to ensure the protection and promotion, not only the rights of the labor sector, but of the employers as well. Without specific and pertinent legislation, judicial bodies will be at a loss, formulating their own conclusion to approximate at least the aims of the Constitution.
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> Ultimately, therefore, Section 3 of Article XIII cannot, on its own, be a source of a positive enforceable right to stave off the dismissal of an employee for just cause owing to the failure to serve proper notice or hearing.[68]

Taking a closer look at the intent of the framers, Justice Tinga concluded that the provisions invoked are not self-executing. However, the

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[66] Agabon v. Nat'l Lab. Rel. Comm'n, G.R. No. 158693, 442 SCRA 573, 684-85, Nov. 17, 2004 (Tinga, *J.*, *concurring*).

[67] CONST. art. II, § 18.

[68] *Agabon*, 442 SCRA 573, 686 (Tinga, *J.*, *concurring*). (Emphasis supplied.)

Labor Code is the primary mechanism to carry out the constitutional objectives cited; it crystalizes the fundamental law's policies on labor and defines the worker's rights and the standards for their enforcement in concrete terms.[69]

From 2007 to 2010, various petitions invoking state policies reached the Supreme Court, giving it occasion to reassert rulings from earlier cases declaring that the Article II provisions invoked are not self-executing.

In *Tondo Medical Center Employees Association v. Court of Appeals (2007)* (hereinafter, "*TMCEA*"), petitioners assailed the Department of Health's Health Sector Reform Agenda. They claimed that the implementation of its proposed reforms had resulted in making free medicine and free medical services inaccessible to economically disadvantaged Filipinos. This allegedly violated various constitutional provisions.[70] The Court held that, although as a general rule the provisions are considered self-executing, some provisions have already been categorically declared by the Court as not self-executing.[71] Citing *Tañada* the Court said that it had already "specifically set apart the sections found under Article II of the 1987 Constitution as non self-executing [sic] and ruled that such broad principles need legislative enactments before they can be implemented."[72] The other provisions were also declared as not self-executing on the strength of the precedent in *Basco*. The Court explained that the reason for concluding that the assailed government program cannot be nullified based on broad non-self-executing constitutional principles was for two reasons. The first was due to basic considerations of due process; the second, based on limitations to judicial power.[73]

Bureau of Fisheries and Aquatic Resources Employees Union v. COA (2008) (hereinafter, "*BFAR Employees Union*") involved the Commission on Audit's (COA) disallowance of a PHP 10,000 Food Basket Allowance granted by the Bureau of Fisheries and Aquatic Resources (BFAR) to each of its employees in 1999. Seeking to declare the disallowance as unconstitutional, the union

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[69] *Id.* at 688-89.

[70] The right to due process (CONST. art. III, § 1), the general welfare principle (art. II, § 5), the state policies on a rising standard of living (art. II, § 9), social justice (art. II, § 10), human rights (art. II, § 11), the role of the youth (art. II, § 13), the rights of workers (art. II, § 18), the right to health (art. II, § 15) as well as provisions on the family (art. XV), and the health provisions in the article on Social Justice (art. XIII).

[71] Tondo Medical Center Employees Ass'n v. Ct. of Appeals, G.R. No. 167324, 527 SCRA 746, 763-64, July 17, 2007.

[72] *Id.* at 764.

[73] *Id.* at 766.

invoked the state policies on a rising standard of living (Section 9), and on social justice (Section 10). The Court here reasserted that it had been settled in *Kilosbayan* that the principles invoked are not self-executing.[74]

Similarly, in *Bases Conversion and Development Authority v. COA (2009)* (hereinafter, "*BCDA*"), the Supreme Court ruled that the general welfare principle (Section 5) and the state policy on the right of workers (Section 18) could not be invoked to nullify the COA's disallowance of year-end benefits granted to the Bases Conversion and Development Authority's (BCDA) board of directors and full-time consultants. The Court ruled that these provisions had already been categorically held to be not self-executing in *TMCEA*.[75]

Finally, in *Espina v. Zamora (2010)* (hereinafter, "*Espina*"), the Supreme Court declared that the Retail Trade Liberalization Act of 2000, which now allows foreign nationals to engage in retail-trade under four categories, could not be unconstitutional on the basis of the state policies on a rising standard of living (Section 9), an independent national economy (Section 19), and the indispensable role of the private sector (Section 20), as well as the provisions on National Economy and Patrimony under Article XII. The Court reiterated that as held in *Tañada,* the provisions of Article II are not self-executing.[76] Further, the Court explained that the state policy on an independent national economy does not intend to impose a Filipino monopoly on the economic environment. Rather, "[t]he objective is simply to prohibit foreign powers or interests from maneuvering our economic policies and ensure that Filipinos are given preference in all areas of development."[77]

2. Exceptional State Policies

Despite the apparent emergence of the rule that state polices are not self-executing, the Court has in various cases found exceptional provisions which may be invoked against certain state actions. In fact, merely three months after the ratification of the 1987 Constitution, the Supreme Court already found that the state policy on full public disclosure (Section 28) is a fully functional provision. In 1993, a landmark ruling declared the state policies on the right to a balanced and healthful ecology (Section 16), and the right to health (Section 15) belong to a distinct class of rights that need not

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[74] Bureau of Fisheries and Aquatic Resources Employees Union, Regional Office No. VII, Cebu City v. COA, G.R. No. 169815, 562 SCRA 134, 139, Aug. 13, 2008.

[75] Bases Conversion and Dev. Authority v. COA, G.R. No. 178160, 580 SCRA 295, 303, Feb. 26, 2009.

[76] Espina v. Zamora, G.R. No. 143855, 631 SCRA 17, 26, Sept. 21, 2010.

[77] *Id.* at 27.

even be written in the constitution to be invoked. In 2009, the policy on the protection of the welfare of the youth (Section 13) as well as the state policy of supporting parents in rearing of the youth (Section 12) was invoked to justify the compelling state interest of the state in an act of prior restraint. In the same year, the constitutional protection of labor, loosely related to the state policy on the right of workers (Section 18), was used to nullify a suspect classification created by law. In 2011, the state policy on the development of an independent national economy effectively controlled by Filipinos (Section 19) was used as a potent tool for interpreting the corporate capital requirements in public utilities. Further, in 2014, the Court found the state policy protecting the rights of the unborn (Section 12) a functional provision as well.

The following are the provisions to which the Court has accorded treatment that deviates from the general rule that state policies are not self-executing provisions.

i. Policy of Full Public Disclosure

The first state policy under the 1987 Constitution to be discussed by jurisprudence is the policy on full public disclosure.[78] In the case of *Legaspi v. Civil Service Commission (1987)* (hereinafter, "*Legaspi*"), the Court had opportunity to explain the interplay of the right to information as guaranteed by Article III, Section 7 and the state policy on full public disclosure found in Article II, Section 28.

In declaring that the constitutional right to information is self-executing, the Court found that the legislature may impose reasonable limitations on how the access to information shall be afforded; however, these limitations must still be consistent with the state policy of full public disclosure.[79] In this case, the state policy was treated as a limitation on the power of Congress to regulate the accessibility of information on transactions which involve the public interest.

The importance of the policy of full public disclosure was further emphasized in the 1989 case of *Valmonte v. Belmonte* (hereinafter, "*Valmonte*"). The Court there ruled that the policy on full public disclosure complemented

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[78] CONST. art. II, § 28. "Subject to reasonable conditions prescribed by law, the state adopts and implements a policy of full public disclosure of all its transactions involving public interest."

[79] Legaspi v. CSC, G.R. No. L-72119, 150 SCRA 530, 534-35, May 29, 1987.

the citizen's right to information as "[i]t is meant to enhance the widening role of the citizenry in governmental decision-making as well as in checking abuse *[sic]* in government."[80]

As a result of these rulings, the Supreme Court has in various cases upheld causes of action arising from the complementary provisions on the right to information and the state policy of full public disclosure.[81]

In 2008, the Supreme Court further clarified the role of the state policy on full public disclosure in our constitutional framework. In *Province of North Cotabato v. Republic of the Philippines Peace Panel on Ancestral Domain* (hereinafter, "*North Cotabato*"), the Court ruled that:

> The right to information guarantees the *right of the people to demand information*, while Section 28 recognizes the *duty of officialdom to give information even if nobody demands.*
>
> The policy of public disclosure establishes a concrete ethical principle for the conduct of public affairs in a genuinely open democracy, with the peoples [sic] right to know as the centerpiece. It is a mandate of the State to be accountable by following such policy. These provisions are vital to the exercise of the freedom of expression and essential to hold public officials at all times accountable to the people.[82]

To address the Republic's argument that the state policy on full-public disclosure was not self-executing and required implementing legislation, the Supreme Court reviewed the records of the Constitutional Commission. It found that the framers had always intended the said provision to be self-executing. Going deeper into its analysis, the Court found that the complete and effective exercise of the right to information requires that the policy on full public disclosure be self-executing.

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[80] Valmonte v. Belmonte, G.R. No. 74930, 170 SCRA 256, 266, Feb. 13, 1989. The decision also referred to the following constitutional provisions to emphasize the state policy on transparency: CONST. art. VII, § 12; art. XI, §§ 1, 17 and art. XII, § 21.

[81] *See* Chavez v. Presidential Commission on Good Gov't, G.R. No. 130716, 299 SCRA 744, Dec. 9, 1998; Chavez v. Pub. Estates Authority, G.R. No. 133250, 384 SCRA 152, July 9, 2002; Senate v. Ermita, G.R. No. 169777, 488 SCRA 1, Apr. 20, 2006; Province of North Cotabato v. Republic of the Phil. Peace Panel on Ancestral Domain, G.R. No. 183591, 568 SCRA 403, Oct. 14, 2008; Guingona v. COMELEC, G.R. No. 191846, 620 SCRA 448, May 6, 2010.

[82] *Province of North Cotabato*, 568 SCRA at 469. (Emphasis in the original; citations omitted.)

The Court said that "[s]ince both provisions go hand-in-hand, it is absurd to say that the broader right to information on matters of public concern is already enforceable while the correlative duty of the State to disclose its transactions involving public interest is not enforceable until there is an enabling law."[83] Thus, at this point, jurisprudence holds that the state policy on full public disclosure is a self-executing provision that not only imposes a limitation on the powers of Congress to legislate regulations contrary to the state policy, but is also a positive duty for all branches of government to release information to the public even if the public does not so demand.

ii. Right to a Balanced and Healthful Ecology

In 1993, the landmark case of *Oposa* would again raise the case for complete self-executing rights which may be found in our Declaration of Principles and State Policies. This case involved a class suit filed by 43 minors representing their generation and generations yet unborn. The suit was brought aiming to compel the Secretary of Environment and Natural Resources to cancel all existing timber licenses in the country, and to cease and desist from receiving, accepting, processing, renewing or approving new Timber License Agreements (TLAs).

As found by the Court, "[t]he complaint focuses on one specific fundamental legal right — the right to a balanced and healthful ecology which, for the first time in our nation's constitutional history, is solemnly incorporated in the fundamental law."[84] The Court referred to Section 16 of Article II of the 1987 Constitution, which states that "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[85] Finding this, as well as the state policy on the right to health (Section 15), as self-executing, the Court explained that:

> While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation — aptly and fittingly stressed by the petitioners — the advancement of which may even be said to predate all governments

[83] *Id.* at 471.
[84] *Oposa*, 224 SCRA at 804.
[85] CONST. art. II, § 16.

> and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which stand to inherit nothing but parched earth incapable of sustaining life.[86]

As a complete and self-executing right, the Court found that this state policy imposed upon the government a correlative duty to refrain from impairing the environment. The Court found that petitioner's right "to a balanced and healthful ecology is as clear as the DENR's duty — under its mandate and by virtue of its powers and functions under E.O. No. 192 and the Administrative Code of 1987 — to protect and advance the said right."[87] Thus, the Court found that the affirmative allegations in the complaint adequately showed a *prima facie* claim that the petitioner's rights had been violated. The Court set aside the assailed order and said that the petitioners may implead the holders and grantees of the TLAs as they were indispensable parties to the case.[88]

Groundbreaking in various ways, *Oposa* elevated the understanding of the state policy for a balanced and healthful ecology to a complete and readily enforceable right which imposes on the state a correlative duty to refrain from impairing the environment. This case also gives justification to a similar treatment of the state policy on health which has been invoked in later cases.[89] Moreover, this decision has allowed for the development of Philippine legal

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[86] *Oposa*, 224 SCRA at 804-805.

[87] *Id.* at 808.

[88] *Id.* at 809.

[89] Imbong v. Ochoa [hereinafter "Imbong"], G.R. No. 204819, 721 SCRA 146, Apr. 8, 2014.

scholarship on "third generation rights"[90] which are essentially collective in dimension.[91]

Despite the elegant opposition to the self-executing nature of this state policy expressed in Justice Feliciano's concurring opinion,[92] the majority's finding that the state policy on the right to a balanced and healthful ecology was complete and enforceable was reaffirmed by the Court just one year later.

In *Laguna Lake Development Authority v. Court of Appeals* (hereinafter, "*Laguna Lake*"), the Court declared that the state policy on the right to a balanced and healthful ecology should be seen together with the state policy on the right to health as "a constitutionally guaranteed right of every person, [which] carries the correlative duty of non-impairment."[93] This doctrine has not been reversed by the Court to this day.

In December 2015, the right to a balanced and healthful ecology would feature prominently in Justice Leonen's concurring opinion in *International Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines)* (hereinafter, "*Greenpeace*"). The Court in this case nullified existing government regulations on the testing of genetically modified organisms (GMOs) for failing to provide standards for the evaluation of GMO applications. To support his agreement with the majority's holding, Justice Leonen categorically declared that "Sections 15 and 16 of Article II are, thus, not simply hortatory rights. They are as much a part of the fundamental law as any other provision in the Constitution."[94] Thus, as

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[90] These are rights which are expressed as group or collective rights; they heavily depend on the substantial cooperation of social forces for their realization. They are said to include the right to political, economic, and cultural self-determination, the right to participate in and benefit from the common heritage of mankind, and the right to humanitarian relief. These rights may be distinguished from first-generation rights or civil and political rights which include those protected by the Bill of Rights, as well as the right to suffrage. These rights may also be distinguished from second-generation rights or social, economic, and cultural rights which include some of the various rights enshrined as state policies and in the provisions on labor, social justice, and education. *See* Alman Quiboquibo, *The Land Feels: Conflicts Between the Constitutional Right to a Balanced and Healthful Ecology and State Policies on Waste Management,* 74 PHIL. L.J. 147, 150-51 (2000), *citing* P. TAYLOR, AN ECOLOGICAL APPROACH TO INTERNATIONAL LAW: RESPONDING TO CHALLENGES OF CLIMATE CHANGE 201-202 (1998).

[91] Quiboquibo *supra* note 90, at 150.

[92] *See infra* Part III.

[93] Laguna Lake Dev. Authority v. Ct. of Appeals, G.R. No. 110120, 231 SCRA 292, 307, Mar. 16, 1994.

[94] Int'l Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines), G.R. No. 209271, Dec. 8, 2015, at 8-9 (Leonen, *J.*, *concurring*).

a bare minimum, Sections 15 and 16 imply that the standards used by the state in the discharge of its regulatory oversight should be clear.[95]

Justice Leonen elaborated by arguing that having "constitutionally ordained goals and principles are, per se, compelling state interests."[96] Thus, in recent jurisprudence,[97] the Court has imposed a higher degree of review for regulatory measures by requiring that there be a judicially discernable demonstration that the measure is least restrictive of fundamental rights. This standard means that "respondent agencies must show that there were alternatives considered within the democratic and deliberative forums mandated by law and that clear standards were considered within transparent processes."[98] And while it is not for the Courts to consider the validity of the standards chosen, it must be convinced that "there is such a standard, that it was assiduously applied, and the application was consistent."[99] In this case, it was found that the assailed regulation, Administrative Order No. 8, failed to refer to any standard for evaluating the applications to be presented to the Department of Agriculture or, in field testing, the Scientific Review Technical Panel. Thus, the regulation is void.

Notably, in reaching this conclusion, Justice Leonen discussed that:

> Sections 15 and 16 [...] impose on the state a positive duty to "promote and protect" the right to health and to "promote and advance" [sic] the right of "the people to a balanced and healthful ecology." With respect to health and ecology, therefore, the state is constitutionally mandated to provide affirmative protection. The mandate is in the nature of an active duty rather than a passive prohibition.[100]

Explaining the imperative of the state's active participation in matters that relate to health and ecology, he stated that these state policies indicate a shift in the role of governance in relation to society's health. He argued that these constitutional provisions embed the idea that "there is no invisible hand

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[95] *Id.* at 11.

[96] *Id.* at 7.

[97] Justice Leonen cites the following cases: Serrano v. Gallant Maritime Services, Inc., G.R. No. 167614, 582 SCRA 255, Mar. 24, 2009; Estrada v. Escritor, A.M. No. P-02-1651, 492 SCRA 1, June 22, 2006; Diocese of Bacolod v. COMELEC, G.R. No. 205728, 747 SCRA 1, Jan. 21, 2015; and Social Weather Stations, Inc. v. COMELEC, G.R. No. 208062, Apr. 7, 2015.

[98] *Id.* at 8.

[99] *Id.*

[100] *Id.* at 9.

that guides the participants in the economic market to move toward optimal social welfare in the broadest developmental sense."[101]

iii. Right to Health

The state policy on the right to health provides that "[t]he State shall protect and promote the right to health of the people and instill health consciousness among them."[102] The state policy on the right to health was first declared to be self-executing in the 1993 case of *Oposa*. The majority, speaking through Justice Davide, said that:

> Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation — aptly and fittingly stressed by the petitioners — the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.[103]

Although this provision was among those sweepingly declared by the Court as not self-executing merely because it was part of Article II in 2007,[104] the Supreme Court would again re-assert the self-executing nature of this provision in the 2014 case of *Imbong v. Ochoa* (hereinafter, "*Imbong*"). This case involved a facial challenge to the constitutionality of the Reproductive Health Law (RH Law). Among the many arguments raised by the petitioners in this case was that the RH Law violates the right to health (Article II, Section 15). This claim is based on the fact that the law requires the inclusion of various types of contraceptives, which allegedly posed certain health risks, in the regular purchase of essential medicines and supplies of all national hospitals. In defense of the law, the Office of the Solicitor General (OSG) argued that the state policy invoked was not self-executing; even if it were, medical authorities refute the claim that contraceptives pose a danger to the health of women.

The Court, through the majority decision penned by Justice Mendoza, rejected the OSG's argument that the provision was not self-executing for being a mere statement of a state policy. Relying on the rule laid down in

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[101] *Id.*

[102] CONST. art. II, § 15.

[103] *Oposa*, 224 SCRA at 805.

[104] Tondo Medical Center Employees Ass'n v. Ct. of Appeals, G.R. No. 167324, 527 SCRA 746, July 17, 2007.

Manila Prince, the Court maintained that "unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, the presumption now is that all provisions of the constitution are self-executing."[105] However, while disagreeing with the OSG on this point, the Court also rejected the petitioners' claim that the RH Law violates the public's right to health. It found that the RH Law does not do away with existing laws that provide safeguards to ensure to the public that only contraceptives that are safe are made available to the public.[106]

Concurring with the majority on this issue, Justice Del Castillo examined the state policy on the right to health in relation to the constitutional provisions on health found in Sections 11 to 13 of Article XIII. He categorically declared that "[t]he right to health is, thus, recognized as a fundamental right."[107]

Also concurring with the majority on this issue is Justice Abad. In his separate opinion, he stated:

> Section 15, Article II, of the 1987 Constitution makes it the duty of the State to "protect and promote the right to health of the people." Health means physical and mental well-being; freedom from disease, pain, or defect; health means normalcy of physical functions. Maternal health according to Section 4 of the RH Law refers to the health of a woman of reproductive age including, but not limited to, during pregnancy, childbirth and the postpartum period.
>
> *This means that women have the right to be free from government-sponsored sickness, government-sponsored pain, and government-sponsored defect.* Since healthy vital organs of the body form part of the right to health, women have the right to have normally functioning vital organs. They have the right to walk in the park or in the malls free from debilitating illnesses and free from worries and fears over contraceptives that the government assures them are safe. The government cannot promote family planning programs that violate the women's right to health. A law that misleads women and states that hormonal contraceptives and IUDs are safe violates their constitutional right to health.[108]

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[105] *Imbong*, 721 SCRA at 315.

[106] *Id.* at 315-16.

[107] *Id.* at 591 (Del Castillo, *J.*, *concurring and dissenting*).

[108] *Id.* at 657-58 (Abad, *J.*, *concurring*). (Emphasis supplied.)

For purposes of this paper, it is important for us to note how Justice Abad construed the affirmative language of the state policy "to protect and promote the right to health of the people" in order to identify the negative command of "freedom from disease, pain, or defect." Such a right, in relation to the RH law, means a woman has a right to be "free from government-sponsored sickness, government-sponsored pain, and government-sponsored defect." Necessarily implying negative commands from the state policies is integral to the classification to be made in Part IV.

iv. Right of the Unborn to Protection

A state policy also extensively discussed in *Imbong* is the policy on the right of the unborn to protection found in the second sentence of Section 12. It provides that "[the State] shall equally protect the life of the mother and the life of the unborn from conception." Petitioners cited the said provision to assail the RH Law and its implementing rules and regulations for violating the right to life and health of the unborn child. They argued that the assailed legislation allows access to abortifacients and thus effectively sanctions abortion.

On the other hand, the respondents defended the RH Law by pointing out that the intent of the framers was merely to prohibit abortion. Thus, the RH Law does not violate the Constitution since it emphasizes that only "non-abortifacient" reproductive health care services, methods, devices, products and supplies shall be made available to the public. For his part, respondent Lagman argued that the constitutional protection of one's right to life is not violated considering that various studies of the WHO shows that life begins from the implantation of the fertilized ovum.[109]

On whether the RH Law is a statute that sanctions abortion, Justice Mendoza, the *ponente*, announced that "[t]he clear and unequivocal intent of the Framers of the 1987 Constitution in protecting the life of the unborn from conception was to prevent the Legislature from enacting a measure legalizing abortion. It was so clear that even the Court cannot interpret it otherwise."[110] This intent can be gleaned from the deliberations on the state policy on the right of the unborn to protection from the moment of conception. As explained by Commissioner Bernardo Villegas, the principal proponent of this state policy: "The intention [...] is to make sure that there would be no pro-

[109] *Id.* at 291.
[110] *Id.* at 305.

abortion laws ever passed by Congress or any pro-abortion decision passed by the Supreme Court."[111]

The Court found that the RH Law proscribes abortion and is therefore in line with constitutional intent. Various provisions of the law mandate that protection be afforded to the unborn from the moment of fertilization. Moreover, the RH Law prohibits not only drugs or devices that prevent implantation, but also those that induce abortion and those that induce the destruction of a fetus inside the mother's womb. The RH Law also recognizes that abortion is a crime under the Revised Penal Code.

However, the Court found that the Implementing Rules and Regulations on the RH Law (RH-IRR) are problematic because of its provisions that define an abortifacient as "any drug or device that primarily induces abortion," and a contraceptive as any device which does "not primarily destroy a fertilized ovum or prevent a fertilized ovum from being implanted in the mother's womb."[112] The Court found that the insertion of the qualifier "primarily" in the RH-IRR was ultra vires and will pave the way for a violation of the state policy on the right of the unborn to protection since it insinuates that a contraceptive is only considered an abortifacient if its sole known effect is abortion, or the prevention of the implantation of the fertilized ovum. The Court concluded that:

> Indeed, consistent with the constitutional policy prohibiting abortion, and in line with the principle that laws should be construed in a manner that its constitutionality is sustained, the RH Law and its implementing rules must be consistent with each other in prohibiting abortion.
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> * * *
>
> To repeat and emphasize, in all cases, the "principle of no abortion" embodied in the constitutional protection of life must be upheld.

Concurring with the majority, Justice Brion stated that the respect for the life of the unborn now expressly provided in the 1987 Constitution aims not so much to create a right, but to "[strengthen] the protection we extend to the unborn life against varied external threats to it."[113] Thus, while the provision does not intend to consider the unborn as a person, it requires the

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[111] *Id.*

[112] *Id.*

[113] *Id.* at 499 (Brion, *J.*, *concurring*).

extension of the State's protection to the life of the unborn from conception. Justice Brion continued:

> I submit that the mandate to equally protect the life of the mother and the life of the unborn child from conception under *Section 12, Article II of the Constitution is self-executing to prevent and prohibit the state from enacting legislation that threatens the right to life of the unborn child.*
>
> To my mind, Section 12, Article II should not be read narrowly as a mere policy declaration lest the actual intent of the provision be effectively negated. While it is indeed a directive to the State to equally protect the life of the mother and the unborn child, this command cannot be accomplished without the corollary and indirect mandate to the State to inhibit itself from enacting programs that contradict protection for the life of the unborn.[114]

Justice Brion ratiocinated that the second paragraph of Section 12 contains two mandates for the state. The first is a positive command to enact legislation to protect and strengthen the Filipino family, and to recognize and protect equally the life of the unborn child and the mother. The second is "a negative command to refrain from implementing programs that threaten the life of the unborn child or that of the mother. This is a constitutional directive to the Executive Department."[115] It is a negative command which implies that the Constitution not only recognizes the rights protected by the state policy, but also provides a minimum level of protection for the unborn child. The Constitution prohibits the state from implementing programs that are contrary to this avowed policy.

Also concurring with the majority on this issue, Justice Del Castillo stated in his separate opinion that the state policy on the right of the unborn to protection is self-executing because:

> (1) It prevents Congress from legalizing abortion; from passing laws which authorize the use of abortifacients; and from passing laws which will determine when life begins other than from the moment of conception/fertilization;
>
> (2) It prevents the Supreme Court from making a *Roe v. Wade* ruling in our jurisdiction; and

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[114] *Id.* at 504. (Emphasis supplied.)

[115] *Id.* at 505.

> (3) It obligates the Executive to ban contraceptives which act as abortifacients or those which harm or destroy the unborn from conception/fertilization.[116]

This means that the state policy imposes a "direct, immediate and effective limitation on the three branches of government and a positive command on the state to protect the life of the unborn."[117]

He also anchored his argument on the intent of the framers, arguing that the state policy at issue is a recognized *sui generis* constitutional right of the unborn to the protection of its right to life.[118]

More interesting is Justice Del Castillo's argument that since the unborn has been accorded a constitutional right to life from conception or fertilization under Section 12, it is within the Court's power to issue rules for the protection and enforcement of constitutional rights under Article VIII, Section 5(5) of the Constitution. He argued that such rule-making power follows a precedent in the promulgation of the Writ of Kalikasan, where the Court gave flesh to the state policy on the right to a balanced and healthful ecology found in the Declaration of Principles and State Policies. Thus, the Court has greater reason to wield its rule-making power in accordance with the state policy on the right of the unborn from conception because "the unborn is totally defenseless and must rely wholly on the State to represent its interest in matters affecting the protection and preservation of its very life."[119]

Also concurring on this point is Justice Abad who declared that "Section 12, Article II (Declaration of Principles and State Policies), of the 1987 Constitution makes it the duty of the State to protect the right to life of the unborn from conception."[120]

v. Right of the Youth for the Protection of their Well-Being

The state policy on the right of the youth for the protection of their well-being (Article II, Section 13) states that "[t]he State recognizes the vital

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[116] *Id.* at 558 (Del Castillo, *J.*, *concurring and dissenting*).

[117] *Id.*

[118] As opposed to the rights to life, liberty or property available to natural persons.

[119] *Id.* The implications of this argument will not be discussed in this paper, but may be thoroughly discussed in the future. *See, generally*, Bryan Tiojanco & Leandro Aguirre, *The Scope, Justifications and Limitations of Extradecisional Judicial Activism and Governance in the Philippines*, 84 PHIL. L.J. 73 (2009).

[120] *Imbong*, 721 SCRA at 644 (Abad, *J.*, *concurring*).

role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual, and social well-being. It shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs." From 1991 through 2007 the Court repeatedly found this provision to be not self-executing, as in the cases of *Basco*, *Kilosbayan*, and *TCMEA*. However, the 2009 case of *Soriano v. Laguardia* (hereinafter, "*Soriano*") found that this provision was sufficient to buttress the curtailment of petitioner's right to speech and to validate the state's act of prior restraint.[121]

Soriano was based on a petition for certiorari filed by Eliseo Soriano, the host of a religious television program called "Ang Dating Daan." He assailed a three-month suspension imposed on him by the Movie and Television Review and Classification Board (MTRCB) after he uttered certain invectives in his program.[122] Soriano argued that the suspension was an act of prior restraint that violated his right to free speech.

In resolving this issue the Court, speaking through Justice Velasco, gave much weight to the fact that the utterances were made in a television program that is rated G or for general viewership and in a time slot that will likely reach the eyes and ears of children.[123] It found that "[w]hile adults may have understood that the terms thus used were not to be taken literally, children could hardly be expected to have the same discernment. Without parental guidance, the unbridled use of such language as that of petitioner in a television broadcast could corrupt impressionable young minds."[124]

Thus, the Court found that within the very narrow context of a child's possible exposure to and misappreciation of the language used in the absence of parental guidance, the utterances may be treated as "obscene and not entitled to protection under the umbrella of freedom of speech."[125] Invoking the state policy on the right of the youth to the protection of their well-being, the Court further ratiocinated:

> No doubt, one of the fundamental and most vital rights granted to citizens of a State is the freedom of speech or expression, for without the enjoyment of such right, a free, stable, effective, and progressive democratic state would be difficult to attain. Arrayed

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[121] Soriano v. Laguardia [hereinafter "Soriano"], G.R. No. 164785, 587 SCRA 79, Apr. 29, 2009.

[122] *Id.* at 87. "*Gago ka talaga* [...] *masahol ka pa sa putang babae* [...] *Yung putang babae ang gumagana lang doon yung ibaba, [dito] kay Michael ang gumagana ang itaas, o di ba!*"

[123] *Id.* at 101.

[124] *Id.*

[125] *Id.* at 102.

> against the freedom of speech is the right of the youth to their moral, spiritual, intellectual, and social being which the State is constitutionally tasked to promote and protect. Moreover, the State is also mandated to recognize and support the vital role of the youth in nation building as laid down in Sec. 13, Art. II of the 1987 Constitution.
>
> The Constitution has, therefore, imposed the sacred obligation and responsibility on the State to provide protection to the youth against illegal or improper activities which may prejudice their general well-being. The Article on youth, approved on second reading by the Constitutional Commission, explained that the State shall extend social protection to minors against all forms of neglect, cruelty, exploitation, immorality, and practices which may foster racial, religious or other forms of discrimination.
>
> Indisputably, the State has a compelling interest in extending social protection to minors against all forms of neglect, exploitation, and immorality which may pollute innocent minds. It has a compelling interest in helping parents, through regulatory mechanisms, protect their children's minds from exposure to undesirable materials and corrupting experiences. The Constitution, no less, in fact enjoins the State, as earlier indicated, to promote and protect the physical, moral, spiritual, intellectual, and social well-being of the youth to better prepare them fulfill their role in the field of nation-building. In the same way, the State is mandated to support parents in the rearing of the youth for civic efficiency and the development of moral character.
>
> Petitioner's offensive and obscene language uttered in a television broadcast, without doubt, was easily accessible to the children. His statements could have exposed children to a language that is unacceptable in everyday use. As such, the welfare of children and the State's mandate to protect and care for them, as *parens patriae*, constitute a substantial and compelling government interest in regulating petitioner's utterances in TV broadcast as provided in PD 1986.

Notably, although the Court did not expressly declare the state policy on the right of the youth to the protection of their well-being as self-executing, it nevertheless relied heavily on this state policy to resolve the issue before it.

vi. Policy for an Independent National Economy

Article II, Section 19 states that "[t]he State shall develop a self-reliant and independent national economy effectively controlled by Filipinos."[126] *Manila Prince Hotel v. GSIS (1997),* one of the landmark decisions in determining whether various provisions in the constitution are readily enforceable, touched upon this provision. In this case, the Court found the Filipino First Policy enshrined in one of the national patrimony clauses[127] to be self-executing. This allowed the Court to compel the Government Service Insurance System (GSIS) to desist from selling majority of the shares of the parent company of the historic Manila Hotel to a Malaysian firm, and to instead accept the matching bid belatedly brought by a Filipino company. In clarifying the self-executing nature of the Filipino First Policy, the Court, through Justice Bellosillo, explained:

> As against constitutions of the past, modern constitutions have been generally drafted upon a different principle and have often become in effect extensive codes of laws intended to operate directly upon the people in a manner similar to that of statutory enactments, and the function of constitutional conventions has evolved into one more like that of a legislative body. Hence, unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, *the presumption now is that all provisions of the constitution are self-executing.* If the constitutional provisions are treated as requiring legislation instead of self-executing, the legislature would have the power to ignore and practically nullify the mandate of the fundamental law. This can be cataclysmic. That is why the prevailing view is, as it has always been, that –
>
> > [I]n case of doubt, the Constitution should be considered self-executing rather than non-self-executing x x x x Unless the contrary is clearly intended, the provisions of the Constitution should be considered self-executing, as a contrary rule would give the legislature discretion to determine when, or whether, they shall be effective. These provisions would be subordinated to the will of the lawmaking body, which could make them entirely meaningless by simply refusing to pass the needed implementing statute.[128]

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[126] CONST. art. 2, § 19

[127] Art. 12, § 10 ¶ 2. "In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos [...]"

[128] *Manila Prince Hotel*, 267 SCRA at 431-32. (Emphasis supplied.)

The separate opinions of Justice Torres and Justice Puno both advocated for the importance of considering this state policy in determining whether the constitutional provisions at issue should be treated as self-executing.

In his concurring opinion, Justice Torres asserted that "[t]he nationalistic provisions of the 1987 Constitution reflect the history and spirit of the Malolos Constitution of 1898, the 1935 Constitution and the 1973 Constitution."[129]

Meanwhile, in determining whether constitutional provisions are self-executing, Justice Puno agreed with the majority on the importance of looking intently into the provision. Laying down guidelines to determine if a provision is self-executing, he said that:

> The key lies on the intent of the framers of the fundamental law oftentimes submerged in its language. A searching inquiry should be made to find out if the provision is intended as a present enactment, complete in itself as a definitive law, or if it needs future legislation for completion and enforcement. The inquiry demands a micro-analysis of the text and the context of the provision in question.[130]

The provisions of the constitution are thus generally treated as self-executing. However, case law has laid down the rule that a constitutional provision is not self-executing where it merely announces a policy and its language empowers the legislature to prescribe the means by which the policy shall be carried into effect. Thus, generally, the provisions of Article II and some provisions of Articles XIII and XIV cannot be the basis of judicially enforceable rights. Their enforcement is addressed to the discretion of Congress as they provide the framework for legislation that would effectuate their policy content.

In this case, Justice Puno was of the view that paragraphs two and three of the provision[131] is not directed to Congress alone, but to the State—that is, all three branches of government. He stated that:

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[129] *Id.* at 459 (Torres, *J.*, *concurring*).

[130] *Id.* at 472 (Puno, *J.*, *dissenting*).

[131] CONST. art. XII, § 10. "The Congress shall, upon recommendation of the economic and planning agency, when the national interest dictates, reserve to citizens of the Philippines or to corporations or associations at least sixty per centum of whose capital is owned by such citizens, or such higher percentage as Congress may prescribe, certain areas of

> Beyond debate, they cannot be read as granting Congress the exclusive power to implement by law the policy of giving preference to qualified Filipinos in the conferral of rights and privileges covering our national economy and patrimony. Their language does not suggest that any of the State agency or instrumentality has the privilege to hedge or to refuse its implementation for any reason whatsoever. Their duty to implement is unconditional and it is now. The second and the third paragraphs of Section 10, Article XII are thus self-executing.
>
> This submission is strengthened by Article II of the Constitution entitled Declaration of Principles and State Policies. Its Section 19 provides that "[T]he State shall develop a self-reliant and independent national economy effectively controlled by Filipinos." It engrafts the all-important Filipino First Policy in our fundamental law and by the use of the mandatory word shall, directs its enforcement by the whole State without any pause or a half-pause in time.[132]

In the 2011 case of *Gamboa v. Teves* (hereinafter, "*Gamboa*"), the majority, through Justice Carpio, asserted that the proper interpretation of the word "capital" in Article XII, Section 11 of the Constitution does not refer to the total outstanding capital stock, but to shares of stock entitled to vote. To reach this conclusion, the Court relied heavily on the state policy on the development of an independent national economy effectively controlled by Filipinos. Discussing an anomaly created by giving a broad definition to the term capital in the provision at issue, the majority illustrated the possibility of a public utility where Filipinos own 99.99% of the total outstanding capital stock by holding non-voting shares, and yet have foreigners own all of the voting shares which comprise only 0.01% of the outstanding capital stock of the corporation. This would result in a situation where despite owning 99.99% of the corporation, Filipinos cannot participate in the election of directors and thus would have no control of the public utility. The majority emphasized that this scenario would render illusory the state policy of an "independent national economy *effectively controlled* by Filipinos:"[133]

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investments. The Congress shall enact measures that will encourage the formation and operation of enterprises whose capital is wholly owned by Filipinos.

"In the grant of rights, privileges, and concessions covering the national economy and patrimony, the State shall give preference to qualified Filipinos.

"The State shall regulate and exercise authority over foreign investments within its national jurisdiction and in accordance with its national goals and priorities."

[132] *Manila Prince Hotel*, 267 SCRA at 476-77 (Puno, *J.*, *dissenting*).

[133] Gamboa v. Teves, G.R. No. 176579, 652 SCRA 690, 732, June 28, 2011. (Emphasis in the original.)

> Indisputably, construing the term capital in Section 11, Article XII of the Constitution to include both voting and non-voting shares will result in the abject surrender of our telecommunications industry to foreigners, amounting to a clear abdication of the States [sic] constitutional duty to limit control of public utilities to Filipino citizens. Such an interpretation certainly runs counter to the constitutional provision reserving certain areas of investment to Filipino citizens, such as the exploitation of natural resources as well as the ownership of land, educational institutions and advertising businesses. The Court should never open to foreign control what the Constitution has expressly reserved to Filipinos for that would be a betrayal of the Constitution and of the national interest. The Court must perform its solemn duty to defend and uphold the intent and letter of the Constitution to ensure, in the words of the Constitution, a self-reliant and independent national economy effectively controlled by Filipinos.[134]

The Court thus concluded that "Section 11, Article XII of the Constitution, like other provisions of the Constitution expressly reserving to Filipinos specific areas of investment, such as the development of natural resources and ownership of land, educational institutions and advertising business, is *self-executing*[,]"[135] citing the rule laid down in *Manila Prince.*

In the 2012 Resolution of *Gamboa*, the Court looked into how the state policy on the development of an independent national economy effectively controlled by Filipinos complemented the ideals found in the Preamble. This state policy was further fortified by Article XII, Section 10 of the Constitution.[136]

Although the Court did not go deeply into a discussion on the self-executing nature of the state policy on the development of an independent national economy, it is clear that Article II, Section 19 of the Constitution had a profound impact on how the case was decided.

vii. Rights of Workers

Article II, Section 18 of the 1987 Constitution provides that "[t]he State affirms labor as a primary social economic force. It shall protect the rights of workers and promote their welfare."

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[134] *Id.* at 738.

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

[136] Gamboa v. Teves, G.R. No. 176579, 682 SCRA 397, 427-28, Oct. 9, 2012. This is a Resolution to the Motion for Reconsideration of the 2011 decision.

Retired Chief Justice Reynato Puno is perhaps among the leading advocates for revolutionizing the state policies on the rights of workers. He has strongly advocated for the appreciation of the constitutional dimension of labor cases.

In the 2000 case of *Serrano v. NLRC,* he vehemently dissented. The majority ruled that in case an employee is dismissed without due notice and hearing, the employee is entitled only to separation pay if dismissal is due to an authorized cause;[137] meanwhile, if the employee was dismissed due to a just cause,[138] he must be "paid backwages from the time his employment was terminated until it is determined that the termination of employment is for a just cause because the failure to hear him before he is dismissed renders the termination of his employment without legal effect."[139] The majority claimed that "the employer's failure to comply with the notice requirement does not constitute a denial of due process but a mere failure to observe a procedure for the termination of employment which makes the termination of employment merely ineffectual."[140]

Incensed, Justice Puno was of the revolutionary view that a termination without due notice and hearing would constitute not only a violation of the constitutional right of due process, buttressed by the constitutional provisions guaranteeing the rights of workers, but also the constitutional right to security of tenure. In his dissent, he argued that the 1989 case of *Wenphil Corporation v. NLRC* did not modify the doctrine that violation of the pre-dismissal notice requirement is an infringement of due process; therefore, a termination that does not comply with the notice and hearing requirement should be deemed null and void. He gave great importance to the fact that:

> The 1987 Constitution guarantees the rights of workers, especially the right to security of tenure in a separate article — section 3 of Article XIII entitled Social Justice and Human Rights. Thus, a 20-20 vision of the Constitution will show that the more specific rights of labor are not in the Bill of Rights which is historically directed against government acts alone. *Needless to state, the constitutional rights of labor should be safeguarded against assaults from both government and private parties.* The majority should not reverse our settled rulings

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[137] LAB. CODE, art. 283.

[138] Art. 282.

[139] Serrano v. Nat'l Lab. Rel. Comm'n, G.R. No. 117040, 323 SCRA 445, 476, Jan. 27, 2000.

[140] *Id.* at 472.

> outlawing violations of due process by employers in just causes cases.[141]

He concluded that:

> Section 3 of Article XIII of the Constitution requires the State to give full protection to labor. We cannot be faithful to this duty if we give no protection to labor when the violator of its rights happens to be private parties like private employers. A private person does not have a better right than the government to violate an employee's right to due process. To be sure, violation of the particular right of employees to security of tenure comes almost always from their private employers. To suggest that we take mere geriatric steps when it comes to protecting the rights of labor from infringement by private parties is farthest from the intent of the Constitution. We trivialize the right of the employee if we adopt the rule allowing the employer to dismiss an employee without any prior hearing and say let him be heard later on. To a dismissed employee that remedy is too little and too late.[142]

Four years later, he would again vehemently dissent in the case of *Agabon v. NLRC* (hereinafter, "*Agabon*"). He disagreed with the majority's imposition of a mere PHP 30,000.00 award of nominal damages in favor of two employees who were dismissed without notice and hearing but for just cause.[143] Maintaining his advocacy to return to the pre-*Wenphil* rule, Justice Puno emphasized that "[o]ur Constitution is an ode to social justice. The Court should give due obeisance to this ode for social justice is not a mere euphony of words."[144]

To emphasize his point, he traced the history of the social justice provisions of our Constitution to the state policy on social justice first introduced as Article II, Section 5 of the 1935 Constitution. He noted that under that Constitution, the Court in *Antamok Goldfields Mining Company v. Court of Industrial Relations (1940)* held that the principle of social justice "may not just be an empty medley of words, [since] the Constitution in various sections thereof has provided the means towards its realization."[145] A

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[141] *Id.* at 511 (Puno, *J.*, *dissenting*). (Emphasis supplied.)

[142] *Id.* at 516-17. (Emphasis omitted.)

[143] Agabon v. Nat'l Lab. Rel. Comm'n, G.R. No. 158693, 442 SCRA 573, Nov. 17, 2004.

[144] *Id.* at 625 (Puno, *J.*, *dissenting*).

[145] Antamok Goldfields Mining Co. v. Court of Industrial Relations, 70 Phil. 340, 357 (1940).

definition of the principle of social justice may in fact be found in the 1940 case of *Calalang v. Williams*.[146]

In 1973, the principle of social justice was adopted in the new Constitution as Article II, Section 6. Meanwhile, a new provision, Article II, Section 9, commands that "[t]he State shall afford protection to labor, promote full employment, ensure equal work opportunities regardless of sex, race or creed, and regulate the relations between workers and employers. The State shall assure the rights of workers to self-organization, collective bargaining, security of tenure, and just and humane conditions of work. The State may provide for compulsory arbitration." Justice Puno then noted the importance of the elevation of this rather specific provision to the Declaration of Principles and State Policies, as discussed in at least two cases.[147]

The 1987 Constitution expanded our social justice provisions even more. It expanded the scope of the state policy on social justice to cover "all phases of national development" (Section 10), added a state policy on human rights (Section 11), developed the 1973 Constitution's policy on the protection of labor into an even more specific provision now found in Article XIII, Section 3, while also maintaining a state policy on the protection of the rights of workers (Section 18), and adding a policy on the promotion of full employment, and a rising standard of living, and an improved quality of life for all (Section 9). Justice Puno asserted that "[t]hese provisions protecting labor are not mere beliefs but should be reinforced by everyone's behavior."[148]

Thus, he argued that courts should always give meaning and substance to the constitutional postulates in favor of the worker. Notably, the development of the constitutional provisions protecting the worker in Article II, Sections 9, 10, and 18, and Article XIII, Section 3 represent a legacy of the evolution of rights in our society. He declared:

> [T]hese constitutional creeds should not be dwarfed by deeds. A contrary posture would convert these creeds as "meaningless constitutional patter." The principle of social justice was not embedded in the fundamental law for demagoguery. It was meant to be a vital, articulate, compelling principle of public policy. Social justice should be a living reality and not a mere high level abstraction. Thus, while the Constitution must be read as a whole,

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[146] 70 Phil. 726, 734-35 (1940).

[147] Phil. Apparel Workers Union v. Nat'l Lab. Rel. Comm'n, G.R. No. L-50320, 159 SCRA 421, Mar. 30, 1988; Phil. Air Lines, Inc. v. Phil. Air Lines Employees Ass'n, G.R. No. L-24626, 57 SCRA 489, June 28, 1974.

[148] *Agabon*, 442 SCRA at 632 (Puno, *J.*, *dissenting*).

> even if we do not invoke its Due Process Clause, the coherent application of the separate constitutional creeds on social justice and labor is enough to uphold the workers' constitutional right to work and their consequent right to job security. These substantive rights are not to be weakened by a diminished procedural right. For in weakening the procedure, we weaken the substantive right. The importance of the procedure to protect the exercise of the right to work cannot be overemphasized.[149]

Despite Justice Puno's arguments, it is important to note that the doctrine laid down by the majority in *Agabon* for illegal dismissals without due notice and hearing remains good law to this day.

Just one month later, however, he would finally find himself in the majority. His *ponencia* in the 2004 case *Central Bank Employees Association v. Bangko Sentral ng Pilipinas* (hereinafter, "*CBEA*") would lay the groundwork for a doctrinal appreciation of how the constitutional protection of labor affects other provisions of our Constitution. At issue in this case is whether the last paragraph of a provision in the New Central Bank Act makes an unconstitutional distinction between two classes of employees in the Bangko Sentral ng Pilipinas (BSP): the first class who are officers of the BSP exempted from the coverage of the salary standardization law (SSL) and the second class who are rank-and-file employees not exempted from the SSL.

The Court would ultimately find that the distinction created by the assailed proviso created an invalid classification:

> [It] is akin to a distinction based on economic class and status, with the higher grades as recipients of a benefit specifically withheld from the lower grades. Officers of the BSP now receive higher compensation packages that are competitive with the industry, while the poorer, low-salaried employees are limited to the rates prescribed by the SSL. The implications are quite disturbing: BSP rank-and-file employees are paid the strictly regimented rates of the SSL while employees higher in rank - possessing higher and better education and opportunities for career advancement - are given higher compensation packages to entice them to stay. Considering that majority, if not all, the rank-and-file employees consist of people whose status and rank in life are less and limited, especially in terms of job marketability, it is they - and not the officers - who have the real economic and financial need for the adjustment This is in accord with the policy of the Constitution "to free the people from poverty, provide adequate social services, extend to them a

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[149] *Id.* at 635.

> decent standard of living, and improve the quality of life for all. *Any act of Congress that runs counter to this constitutional desideratum deserves strict scrutiny* by this Court before it can pass muster.[150]

To reach this conclusion, the Court noted that:

> Equality is one ideal which cries out for bold attention and action in the Constitution. The Preamble proclaims equality as an ideal precisely in protest against crushing inequities in Philippine society. The command to promote social justice in Article II, Section 10, in all phases of national development, further explicated in Article XIII, are clear commands to the State to take affirmative action in the direction of greater equality. [T]here is thus in the Philippine Constitution no lack of doctrinal support for a more vigorous state effort towards achieving a reasonable measure of equality.
>
> Our present Constitution has gone further in guaranteeing vital social and economic rights to marginalized groups of society, including labor. Under the policy of social justice, the law bends over backward to accommodate the interests of the working class on the humane justification that those with less privilege in life should have more in law. And the obligation to afford protection to labor is incumbent not only on the legislative and executive branches but also on the judiciary to translate this pledge into a living reality. Social justice calls for the humanization of laws and the equalization of social and economic forces by the State so that justice in its rational and objectively secular conception may at least be approximated.[151]

Thus, in advocating for the application of the strictest judicial scrutiny when classification statutes affect constitutionally protected classes, the Supreme Court clarifies that:

> Congress retains its wide discretion in providing for a valid classification, and its policies should be accorded recognition and respect by the Courts of justice except when they run afoul of the Constitution. *The deference stops where the classification violates a fundamental right, or prejudices persons accorded special protection by the Constitution.* When these violations arise, this Court must discharge its primary role as the vanguard of constitutional guaranties, and

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[150] Central Bank Employees Ass'n, Inc. v. Bangko Sentral ng Pilipinas, G.R. No. 148208, 446 SCRA 299, 391, Dec. 15, 2004. (Emphasis supplied.)

[151] *Id.* at 388-89.

> require a stricter and more exacting adherence to constitutional limitations. Rational basis should not suffice.[152]

This approach crafted by Justice Puno in *CBEA* would be affirmed by the Court in the case of *Serrano v. Gallant Maritime Services (2009)* (hereinafter, "*Serrano*"). Petitioners assailed the last clause of the fifth paragraph of Section 10 of Republic Act No. 8042 which imposes a three-month cap for the money claims of illegally dismissed Overseas Filipino Workers (OFWs) who have employment contracts with an unexpired portion of one year or more. Notably, no such limitation is imposed on local workers with fixed-term employment. Neither did the limitation exist prior to the passage of the assailed law.

Adopting the confusing language of Justice Tinga's concurring opinion in *Agabon*, the Supreme Court found that:

> "[C]onstitutional mandates of protection to labor and security of tenure may be deemed as self-executing in the sense that these are automatically acknowledged and observed without need for any enabling legislation. However, to declare that the constitutional provisions are enough to guarantee the full exercise of the rights embodied therein, and the realization of ideals therein expressed, would be impractical, if not unrealistic."[153]

Despite this, however, the Court took the opportunity to clarify that although the protection of labor as more specifically detailed in Article XIII, Section 3 cannot be treated as a principal source of direct and enforceable rights, it does clothe the working class with the "status of a sector whom the Constitution urges protection through executive or legislative action and *judicial recognition*."[154] Thus, citing *CBEA*, the Court invoked the doctrine that when the challenge to a statute is premised on the perpetuation of prejudice against persons favored by the Constitution with special protection, the Court may recognize the existence of a suspect classification and subject the same to strict judicial scrutiny.[155]

Considering the constitutional provisions on equal protection, the state policy protecting the rights of workers, and the cardinal rights of workers enshrined in Article XIII, Section 3, the Court found that the constitutional

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[152] *Id.* at 386-87.

[153] Serrano v. Gallant Maritime Services, Inc., G.R. No. 167614, 582 SCRA 255, 300-301, Mar. 24, 2009.

[154] *Id.* at 301. (Emphasis in the original.)

[155] *Id.* at 301-302.

protection of the working class raises the standard to strict judicial scrutiny for it perceived in the subject clause a suspect classification prejudicial to OFWs. Upon finding that the State had not proven that the subject clause serves a compelling state interest through the least restrictive means, it was declared unconstitutional.

What is noteworthy in these cases is that the assertion of the constitutional rights of workers was often based on Article XIII, Section 3 of the Constitution, rather than the state policy on worker's rights in Article II. This is because Article XIII, Section 3 provides a more specific enumeration of what the constitutional rights of workers are. In fact, these rights have been referred to by one of the leading commentators on Philippine labor law as "the seven basic rights of workers."[156] In effect, it clarifies what is constitutionally intended to be protected by the state policy on the protection of workers' rights.

III. STATE POLICIES AND CONSTITUTIONAL CONSTRUCTION

A. Making Sense of State Policies in Jurisprudence

1. Rules, Exceptions, and Exceptions to the Exceptions

Given the varying ways the Supreme Court has treated Article II provisions in our Constitution's three-decade history, it is important for us to uncover the general hierarchy of rules applied by the Supreme Court when addressing our constitutional state policies.

As apparent from Justice Tinga's separate opinion in *Agabon*, as well as the majority decisions in *Serrano*, *Gamboa*, and *Imbong*, the general rule was most elegantly put into words by Justice Bellosillo in *Manila Prince*. Understanding our constitution to be modern, the general rule is that "unless it is expressly provided that a legislative act is necessary to enforce a constitutional mandate, *the presumption now is that all provisions of the constitution are self-executing*."[157]

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[156] CESARIO AZUCENA, EVERYONE'S LABOR CODE 5 (2012 ed.).

[157] *Manila Prince Hotel*, 267 SCRA at 432. (Emphasis supplied.)

Meanwhile, what has been claimed in certain cases[158] as the general rule is in fact the exception to the above-stated general rule. As announced by the Court in *Kilosbayan*, these state policies "are not, however, self executing [sic] provisions, the disregard of which can give rise to a cause of action in the Courts. They do not embody judicially enforceable constitutional rights but guidelines for legislation."[159]

However, various exceptions to this exception have also emerged. As previously discussed, the state policy on full public disclosure (Section 28) had been expressly declared by the Court as self-executing in *Legaspi.* In *Oposa,* the state policy on the right to a balanced and healthful ecology (Section 16) was declared by the Court to be a basic right which "need not even be written in the Constitution for they are assumed to exist from the inception of humankind."[160] The same goes for the state policy on the right to health (Section 15). Notably, it would seem that the Court in its majority opinion penned by Justice Davide avoided the use of the term "self-executing" when discussing these rights. Meanwhile, though also not expressly declaring the provision to be "self-executing," the Court used the state policy on the protection of the general welfare of the youth (Section 13) to justify the state's act of prior-restraint in *Soriano.*[161] Similarly, in *Gamboa,* though there was no extensive discussion to justify the self-executing nature of the state policy to an independent national economy effectively controlled by Filipinos (Section 19), this provision featured prominently in prohibiting the foreign ownership of capital in a public utility. The most recent state policy which has been found as an exception to this exception is the state policy on the right of the unborn to protection (Section 12) as discussed in *Imbong.*

Finally, though the state policy on the protection of the rights of workers (Section 18) has not been strictly and solely declared as self-executing by the Courts, we may consider how this state policy has been allowed by the Court to complement the equal protection clause in order to identify labor as a constitutionally protected class, first in *CBEA* and, most notably, in *Serrano.*

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[158] Basco v. Phil. Amusements and Gaming Corp., G.R. No. 91649, 197 SCRA 52, May 14, 1991; Kilosbayan, Inc. v. Morato, G.R. No. 118910, 250 SCRA 130, 564, Nov. 16, 1995; Tañada v. Angara, G.R. No. 118295, 272 SCRA 18, May 2, 1997; Tondo Medical Center Employees Ass'n v. Ct. of Appeals, G.R. No. 167324, 527 SCRA 746, July 17, 2007; Bureau of Fisheries and Aquatic Resources Employees Union, Regional Office No. VII, Cebu City v. COA, G.R. No. 169815, 562 SCRA 134, Aug. 13, 2008; Bases Conversion and Dev. Authority v. COA, G.R. No. 178160, 580 SCRA 295, Feb. 26, 2009; Espina v. Zamora, G.R. No. 143855, 631 SCRA 17, Sept. 21, 2010.

[159] *Kilosbayan, Inc.*, 250 SCRA at 564.

[160] *Oposa*, 224 SCRA at 805.

[161] *Soriano*, 587 SCRA at 109.

However, that at least six state policies have either been expressly declared or treated as self-executing exceptions to the exception in the span of less than 30 years raises questions as to how the rest of the state policies should be treated. Should we be concerned that in the span of 10 years from 2004 to 2014, the Court newly declared at least three state policies as self-executing, while considering at least one other state policy as having a significant effect in resolving the validity of a statute? Is there a risk for other provisions from the Declaration of Principles and State Policies to be validly invoked as a source of rights or as a justification for state actions? Is the Court being arbitrary when it "activates" certain state policies? Can we devise a standard by which to determine which state policies may yet be uncovered as self-executing by the Courts?

2. The "Self-Executing" Problem

One difficulty with the jurisprudence on state policies is that even the use of the words "self-executing" or "not self-executing" has only added to the confusion and muddled a full appreciation of the policies laid down in the Constitution. For instance, consider the language in Justice Tinga's concurring opinion in *Agabon*, which has been adopted as doctrinal by the Court's majority in the case of *Serrano*. The Court states that:

> [C]onstitutional mandates of protection to labor and security of tenure may be deemed as self-executing in the sense that these are automatically acknowledged and observed without need for any enabling legislation. However, to declare that the constitutional provisions are enough to guarantee the full exercise of the rights embodied therein, and the realization of ideals therein expressed, would be impractical, if not unrealistic.[162]

How then should we understand the word self-executing? Should we understand this to mean that these state policies on "self-executing" rights exist but cannot be fully enforced?

Perhaps we should first attempt to understand what the term "self-executing" means. No less than retired Chief Justice Reynato Puno has declared that the determination of whether a provision in the Constitution is self-executing as "a hard row to hoe."[163] Nonetheless, I am of the view that

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[162] Agabon v. Nat'l. Lab. Rel. Comm'n, G.R. No. 158693, 442 SCRA 573, 686, Nov. 17, 2004 (Tinga, *J.*, *concurring*); Serrano v. Gallant Maritime Services, Inc., G.R. No. 167614, 582 SCRA 255, 300, Mar. 24, 2009.

[163] *Manila Prince Hotel*, 267 SCRA at 473 (Puno, *J.*, *dissenting*).

he has given the clearest explanation of how a provision may be found as self-executing. He states:

> The key lies on the intent of the framers of the fundamental law oftentimes submerged in its language. A searching inquiry should be made to find out if the provision is intended as a present enactment, complete in itself as a definitive law, or if it needs future legislation for completion and enforcement. The inquiry demands a micro-analysis of the text and the context of the provision in question.[164]

Indeed, this explanation is closest to the word's meaning as found in Black's Law Dictionary, which defines "self-executing" as referring to a legal instrument which is "effective immediately without the need of implementing action[.]"[165] Since these provisions are effective immediately, if there is a breach of what the provision states, it may be invoked directly as a source of rights, or as provisions which complement rights already possessed by the party invoking it. But to whom does the privilege of invoking these provisions properly belong? We will discuss this more thoroughly in Part IV.

Interestingly enough, as far as state policies are concerned, the problem facing their complete appreciation in contemporary times may be found in the same opinion of Justice Puno in *Manila Prince*, where he explains:

> Contrariwise, case law lays down the rule that a constitutional provision is not self-executing where it merely announces a policy and its language empowers the Legislature to prescribe the means by which the policy shall be carried into effect. Accordingly, we have held that the provisions in Article II of our Constitution entitled Declaration of Principles and State Policies should generally be construed as mere statements of principles of the State.
>
> We have also ruled that some provisions of Article XIII of Social Justice and Human Rights, and Article XIV on Education, Science and Technology, Arts, Culture and Sports cannot be the basis of judicially enforceable rights. Their enforcement is addressed to the discretion of Congress though they provide the framework of legislation to effectuate their policy content.[166]

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[164] *Id.* at 472.

[165] BLACK'S LAW DICTIONARY 1482 (Garner ed., 9th ed.).

[166] *Manila Prince Hotel*, 267 SCRA at 474-75 (Puno, *J.*, *dissenting*).

Thus, by these broad declarations, when state policies are invoked, the common defense is to readily dismiss them as not self-executing because they belong to a mere "Declaration of Principles and State Policies."[167] Here lies the difficulty, for every now and then, provisions once invoked and declared as not self-executing[168] are activated by the Court as constitutional bases significantly affecting how it decides the case before it. [169] Worse, in some of those decisions, the Court merely invokes the general rule declared in *Manila Prince* that a modern constitution is generally treated as self-executing, adding little to no explanation as to why the specific state policies are treated as self-executing.[170] Even worse still, at times, the Court directly applies the state policy without even justifying why it is exceptionally self-executing despite being found in Article II.

Is the Court's selection of provisions to activate purely arbitrary? And do provisions become self-executing just to support the Court's preferred interpretation of the constitution?

At this point, it will do well to recall that in his concurring opinion in *Oposa*, Justice Feliciano warned of the risks in the Court's finding that certain state policies were self-executing:

> One is that unless the legal right claimed to have been violated or disregarded is given specification in operational terms, defendants may well be unable to defend themselves intelligently and

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[167] Tañada v. Angara, G.R. No. 118295, 272 SCRA 18, May 2, 1997.

[168] Article II has been generally declared as not self-executing in Basco v. Phil. Amusements and Gaming Corp., G.R. No. 91649, 197 SCRA 52, May 14, 1991; Kilosbayan, Inc. v. Morato, G.R. No. 118910, 250 SCRA 130, Nov. 16, 1995; Tañada v. Angara, G.R. No. 118295, 272 SCRA 18, May 2, 1997; Tondo Medical Center Employees Ass'n v. Ct. of Appeals, G.R. No. 167324, 527 SCRA 746, July 17, 2007; Espina v. Zamora, G.R. No. 143855, 631 SCRA 17, Sept. 21, 2010; *Manila Prince Hotel*, 267 SCRA 408.

[169] The State policy on the youth (CONST. art. II, § 13) was specifically invoked and declared as not self-executing in *Basco*, 197 SCRA 52, and *Kilosbayan*, 250 SCRA 130; but featured prominently in resolving the case of *Soriano*, 587 SCRA 79. The State policy on an independent national economy effectively controlled by Filipinos (art. II, § 19) was specifically invoked and declared as not self-executing in *Manila Prince Hotel*, 267 SCRA 408, and *Espina*, 631 SCRA 17; but featured prominently in resolving the main issue in Gamboa v. Teves, G.R. No. 176579, 652 SCRA 690, June 28, 2011. The state policy on the right to health was treated as self-executing in *Oposa*, 224 SCRA 792, and Laguna Lake Dev. Authority v. Ct. Appeals, G.R. No. 110120, 231 SCRA 292, Mar. 16, 1994; but was declared as not self-executing together with other Article II provisions in *Tondo Medical Center Employees Ass'n*, 527 SCRA 746, and again declared as self-executing in *Imbong*, 721 SCRA 146.

[170] *Imbong*, 721 SCRA 146, discussing CONST. art. II, § 15.

> effectively; in other words, there are due process dimensions to this matter.
>
> The second is a broader-gauge consideration — where a specific violation of law or applicable regulation is not alleged or proved, petitioners can be expected to fall back on the expanded conception of judicial power in the second paragraph of Section 1 of Article VIII of the Constitution [...]
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> * * *
>
> When substantive standards as general as "the right to a balanced and healthy ecology" and "the right to health" are combined with remedial standards as broad ranging as "a grave abuse of discretion amounting to lack or excess of jurisdiction," the result will be, it is respectfully submitted, to propel Courts into the uncharted ocean of social and economic policy making. [171]

Perhaps we have reached the point forewarned. Is there a way to understand how the Court has worked through the jurisprudence on our state policies to address the concerns raised by Justice Feliciano? Or are we really just paddling aimlessly on the uncharted waters of constitutional interpretation?

3. Theories of Interpretation

To be sure, various scholars have offered theories on how to address the provisions on our state policies. Let us examine them.

i. Theory of Constitutional Imprimatur

First among the theories of interpretation is one advocated by the leading constitutional scholars in interpreting the "Declaration of Principles" and the "Declaration of Principles and State Policies" of the previous Constitutions.

In his authoritative book on Philippine Political Law discussing the 1935 Constitution, Dean Vicente Sinco lays down what would be the basis for treating Article II provisions as not self-executing. He states, "[T]hese provisions prescribe the fundamental obligations of the government, particularly the legislative and executive departments as its policy determining

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[171] *Oposa*, 224 SCRA at 815 (Feliciano, *J.*, *concurring*).

organs. It is incumbent on the people to demand fulfillment of these government duties through the exercise of the right of suffrage[.]"[172]

This portion of Dean Sinco's commentary, as discussed by Fr. Joaquin Bernas, lays the foundation for the Court's declaration in *Basco* which established the exception that provisions found in Article II are not self-executing. Excluded from the Court's discussion, however, is the immediately succeeding sentence which explains Dean Sinco's interpretation of how such provisions can be made useful to the courts: "But indirectly some of these principles may aid the Courts in determining the validity of statutes or executive acts in legislative cases."

Fr. Bernas notes that as a result, even during the era of the 1935 Constitution, Article II provisions obligated the judiciary to be guided by them in the exercise of its power of judicial review. Because of this, the principle of social justice revolutionized the judicial attitude to the right to property and the powers of government in relation to the regulation of property.[173]

In relation to the 1973 Constitution, Dean Froilan Bacungan noted that the rights found in it may be loosely grouped into three categories: personal rights,[174] political rights,[175] and social and economic rights.[176] He found that while personal and political rights are rights which could be easily implemented by the government by simply doing nothing to infringe them, social and economic rights are many times, at best, declarations of an aspiration or a policy and require implementing legislation in order that they may be realized for all.[177]

He adds, however, that "[i]t does not mean that social and economic rights are nothing but pious expressions of hope. For they could be considered as mandates directed at those entrusted with the power to govern so that the social and economic rights spelled out in the constitution may be realized."[178]As far as the judicial application of social and economic rights are concerned, he states that "[t]hese provisions could be the basic defense

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[172] SINCO, *supra* note 7.

[173] BERNAS, *supra* note 8, at 36.

[174] Such as the rights to life and liberty.

[175] Which refer to the right to participate in the decision-making processes of government, such as the rights to suffrage and free speech, often found in the bill of rights.

[176] Which include provisions scattered throughout the Constitution, including those in Article II.

[177] Bacungan, *supra* note 16, at 477.

[178] *Id.*

available to the political departments of government when pieces of labor and social legislation are assailed for being seemingly violative of the rights to liberty and property which are protected by the due process clause of the constitution."[179] Focusing on the provisions on labor and social justice,[180] Dean Bacungan found that "[t]hey are not only commands upon those who would pass laws to enact labor and social legislation. They are also validating provisions. Because they are in the Constitution, there is the *imprimatur of constitutionality* on labor and social legislation even if these may deprive a person of liberty or property."[181]

Thus, under this theory of constitutional imprimatur, we see that state policies possess a validating function which may be invoked by the state when its acts are challenged before the Courts.

However, relying exclusively on this theory of interpretation does not account for the development of jurisprudence since the ratification of the 1987 Constitution. For instance, strict adherence to the interpretation that state policies do not confer readily enforceable rights is directly contradicted by landmark doctrines created within the first decade of the ratification of the Constitution, most notably those made in *Oposa*.

ii. Negative Rights Theory

Another theory which argues for the importance of the exception over discovering new exceptions to the exception is the negative rights theory. No less than the Office of the Solicitor General has argued that the Supreme Court's "powers to interpret the Constitution is strongest in an area of so-called negative rights such as those found mostly in the Bill of Rights, that are part of the Constitution specifically meant for judicial enforcement."[182] This theory looks precisely into the text of the constitutional provision to determine whether it imposes a negative command on the state.

For instance, the due process and equal protection clauses found in Section 1 of the Bill of Rights states that "*[n]o person shall be deprived* of life, liberty, or property without due process of law, *nor shall any person be denied* the

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[179] *Id.* at 482.

[180] Which includes 1973 CONST. art. II, §§ 6, 9.

[181] Bacungan *supra* note 16, at 484. (Emphasis supplied.)

[182] Office of the Solicitor General, Consolidated Comment filed in Imbong v. Ochoa, G.R. No. 204819 (May 5, 2013), *available at* http://sc.judiciary.gov.ph/microsite/rhlaw/osg-comment.php.

equal protection of laws."[183] The freedoms of speech and the press and the right to peaceably assemble are enshrined in a provision which states that "*[n]o law shall be passed abridging* the freedom of speech, of expression, or the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."[184]

Following this theory would explain the wide latitude granted to the Court in crafting tests to determine whether constitutional rights couched in negative language have been violated. Thus, it is jurisprudence that has created the tests to determine if the act of the state, or even of a private person, has violated a citizen's rights. For instance, the Court has crafted a general test of validity of an ordinance for alleged violations of the due process clause.[185] Alleged violations of the equal protection clause have been subject to the jurisprudentially crafted tests of valid classification.[186] Likewise, violations of the right to free speech have been subject to the jurisprudentially crafted tests.[187]

Further, the Courts are so empowered in instances where their authority stems from the negative language of our fundamental law to declare the result of a state or private act which fails to meet these judicially crafted standards as void, conferring no rights, inoperative, and with no legal effect.[188] In not so many words, this theory implies that negative rights have a nullifying function.

Using this theory, it is easy to note that the problem with Article II is that none of its provisions are, on their face, couched in negative language. In

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[183] CONST. art. III, § 1. (Emphasis supplied.)

[184] Art. III, § 4. (Emphasis supplied.)

[185] The standards being the rational basis test, the immediate scrutiny test, and the strict scrutiny test. Notably, these standards were first laid down by the US Supreme Court in footnote 4 of United States v. Carolene Products, 304 U.S. 144 (1938), but has since been transplanted into our jurisdiction by our Supreme Court. *See* White Light Corp. v. City of Manila, G.R. No. 122846, 576 SCRA 416, Jan. 20, 2009.

[186] To be reasonable, a classification must (1) rest on substantial distinctions, (2) be germane to the purposes of the law, (3) not be limited to existing conditions only, and (4) apply equally to all members of the same class. *See* People v. Cayat, 68 Phil. 12 (1939).

[187] Generally, restraints on freedom of speech and expression are evaluated by either or a combination of three tests: (a) the dangerous tendency doctrine, (b) the balancing of interests test, and (c) the clear and present danger rule. *See* Chavez v. Gonzales, G.R. No. 168338, 545 SCRA 441, Feb. 15, 2008.

[188] *See, generally*, ISAGANI CRUZ & CARLO CRUZ, CONSTITUTIONAL LAW 71-77 (2015 ed.). *See also* Springer v. Gov't of the Phil. Islands, 277 US 189 (1928); Hacienda Luisita, Inc. v. Presidential Agrarian Reform Council, G.R. No. 171101, 660 SCRA 525, Nov. 22, 2011; Zulueta v. Ct. of Appeals, G.R. No. 107383, 253 SCRA 699, Feb. 20, 1996.

fact, all of the provisions of Article II take the form of affirmative directives addressed to the State. Nonetheless, not all self-executing provisions in Article III are couched in negative language. For instance, the right to information[189] and the right to a speedy disposition of cases,[190] though couched in affirmative language, have been found by the Supreme Court to be valid and complete rights upon which an aggrieved citizen may base his claims.[191]

Perhaps to reconcile this conflict of theory in addressing state policies, Justices of the Supreme Court have often looked into the language of the provisions in the state policies and identified as self-executing those provisions which, though stated as positive commands, necessarily imply negative ones upon the State. This was how the Court dealt with the state policy on the right to a balanced and healthful ecology where the majority found that it implies a negative command as it "carries with it the correlative duty to refrain from impairing the environment."[192]

In *Soriano,* the Court found that the state policy protecting the right of the youth to their well-being implied a "compelling interest in extending social protection to minors against all forms of neglect, exploitation, and immorality which may pollute innocent minds."[193] Discussing the state policy on the right to health, Justice Abad in his concurring opinion in *Imbong* found that this right implies a negative command on the state as it involves the

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[189] CONST. art. III, § 7. "The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development shall be afforded the citizen, subject to such limitations as may be provided by law."

[190] Art. III, § 16. "All persons shall have the right to a speedy disposition of cases before all judicial, quasi-judicial, or administrative bodies."

[191] For art. III, § 7, *see* Legaspi v. CSC, G.R. No. L-72119, 150 SCRA 530, May 29, 1987; Chavez v. Presidential Commission on Good Government, G.R. No. 130716, 299 SCRA 744, Dec. 9, 1998; Chavez v. Public Estates Authority, G.R. No. 133250, 384 SCRA 152, July 9, 2002; Senate v. Ermita, G.R. No. 169777, 488 SCRA 1, Apr. 20, 2006; Akbayan Citizens Action Party v. Aquino, G.R. No. 170516, 558 SCRA 468, July 16, 2008; Province of North Cotabato v. Republic of the Phil. Peace Panel on Ancestral Domain, G.R. No. 183591, 568 SCRA 403, Oct. 14, 2008; Guingona v. COMELEC, G.R. No. 191846, 620 SCRA 448, May 6, 2010.

For art. III, § 16, *see* Tatad v. Sandiganbayan, G.R. No. 72335, 159 SCRA 70, Mar. 21, 1988; Cadalin v. POEA's Administrator, G.R. No. L-104776, 238 SCRA 722, 765, Dec. 5, 1994; Angchangco v. Ombudsman, G.R. No. 122728, 268 SCRA 301, Feb. 13, 1997; Coscolluela v. Sandiganbayan, G.R. No. 191411, 701 SCRA 188, July 15, 2013; People v. Sandiganbayan, G.R. No. 188165, 712 SCRA 359, Dec. 11, 2013.

[192] *Oposa*, 224 SCRA at 805.

[193] *Soriano*, 587 SCRA at 109.

public's "right to be free from government-sponsored sickness, government-sponsored pain, and government-sponsored defect."[194] Similarly, the majority in the same case found that as intended by the framers, the state policy on right of the unborn to protection implied a prohibition on both Congress and the Courts from enacting measures to legalize abortion.[195]

But even this approach does not give us a complete picture on how to treat constitutional provisions couched in affirmative language. For instance, this approach will fail to discuss how the policy on full public disclosure—wholly couched in positive terms in the same way as its counterpart in the Bill of Rights—is self-executing. Further, even if we treat Section 28 as an exceptional provision and maintain the rule created by this negative rights theory, there are many ways to read a provision to determine whether it implies a negative directive on government. To illustrate, if we follow the Court's application of this theory in *Oposa*, *Soriano,* and *Imbong,* should we not also treat the state policy on the role of women in nation building as, on its own, a self-executing provision that possesses a nullifying function, especially considering how its language[196] may be interpreted to prohibit laws where men and women are not treated equally?

B. A Living Constitution and the Question of Predictability

Moving forward, one of the most important concerns is resolving the problem of predictability. We cannot be placed in a precarious situation where we are constantly uncertain when state policies may suddenly be treated in the same way as negative rights. As argued by Justice Feliciano, such a situation would trigger a due process dimension—a defendant may not have been able to put up a proper defense for the issues raised against him when state policies are invoked.[197] Thus, from the perspective of legal method, our task is to uncover the Court's methodology in deciding the cases on our state policies.[198]

I argue that there is a way to understand how the Court took on its role in modernizing the law. Based on precedents, the Court has impliedly placed mechanisms for controlling arbitrariness in future decisions.[199] Understanding this methodology would allow us to bring a sufficient defense in future cases whenever proper. This methodology requires an understanding

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[194] *Imbong*, 721 SCRA at 658 (Abad, *J.*, *concurring*).

[195] *Id* at 293.

[196] CONST. art. II, § 14. "The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men."

[197] *Oposa*, 224 SCRA at 814-15 (Feliciano, *J.*, *concurring*).

[198] GATMAYTAN, *supra* note 47, at 4-6.

[199] *See* GATMAYTAN, *supra* note 47, at 6.

of the interplay of the concepts of judicial activism, originalism, and textualism in the development of our living constitution.

1. Judicial Activism v. Judicial Restraint

To reach this methodology, we review the prevailing ideology for constitutional interpretation. Let us address the concerns regarding the role of the Courts in social and economic policy making. Central to resolving this issue are the ideologies which advocate for either judicial activism or judicial restraint.

Recall that in Part III.A. of this paper, we clarified that as an exception to the general rule which treats constitutional provisions as self-executing, state policies have generally been considered as provisions that do not confer judicially enforceable rights, and are mere guidelines for legislation. In treating state policies as being exclusively within the realm of the political branches of government, the Court advocates for judicial restraint. This view is buttressed by Justice Feliciano's warning in *Oposa* that the majority's decision might "propel courts into the uncharted ocean of social and economic policy making." This is perhaps why certain scholars have highlighted that case to undeniably manifest an attitude of judicial activism.[200] In the cases discussed in Part II of this paper, we may find the same attitude of judicial activism in the cases of *Manila Prince, Serrano, Gamboa,* and *Imbong.*

But is the Court's attitude of judicial activism wrong? Not necessarily. For one, Chief Justice Panganiban is of the radical view that the Constitution itself mandates judicial activism.[201] Of course, this view has not been fully accepted by the Courts. But some of its manifestations have emerged in jurisprudence. For instance, in *Imbong,* part of the majority's justification for allowing a facial challenge to the RH Law was due to how "the framers of Our Constitution envisioned a proactive Judiciary, ever vigilant with its duty to maintain the supremacy of the Constitution."[202]

Conversely, this is not to say that a continued advocacy for judicial restraint is no longer correct or constitutionally supported. It is an equally acceptable alternative to an attitude of judicial activism. In many respects, judicial restraint may even be preferable depending on the circumstances.

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[200] Enrique Fernando, *The Constitution and Environmental Law: The Relevance of the Malcolm Activist Approach,* 69 PHIL. L.J. 117, 119 (1996); Dante Gatmaytan, *Artificial Judicial Environmental Activism:* Oposa v. Factoran *as Aberration,* 17 IND. INT'L & COMP. L. REV. 1, 1 (2007).

[201] Artemio Panganiban, *Judicial Activism in the Philippines,* 79 PHIL. L.J. 265, 268 (2004).

[202] *Imbong,* 721 SCRA at 282.

Because of this, we must recognize the importance of criticisms which advocate for a restoration to an attitude that advocates for judicial restraint.

However, if we are to address the question of predictability, we must also consider that exceptional cases that employ an ideology of judicial activism have attained doctrinal significance because of the principle of *stare decisis*. A continued reliance on a belief that the Supreme Court will maintain its attitude of judicial restraint in resolving cases involving the other state policies may prove problematic. Thus, we must look into the rationale for accepting an attitude of judicial activism in interpreting state policies.

The Supreme Court is an arbiter of policy.[203] Realistically speaking, we cannot deny that when courts decide cases, they are involved in choosing between two or more conflicting policies.[204] In this limited sense, we cannot escape a finding that even the Supreme Court is a political agency.[205] It is the Court that is tasked with making sense of new political realities that shape the cases and controversies before it. In the words of Justice Fernando, "[a]long with the executive and legislative branches, it can chart the course of the state."[206] Thus, with its power to legitimize and make sense of state acts, it cannot be denied that even the judiciary is involved in statecraft and constitutional construction.[207]

With this in mind, let us revisit our constitutional state policies. When the provisions of Article II refer to "The State," we cannot interpret this to exclusively mean "the political branches of government." The Judiciary is as much a part of the State as the Executive or Legislative branches. Thus, these provisions ought to be equally valuable to the Courts.

However, this does not mean that the judiciary is free to engage in judicial legislation to further our state policies. The value and function of the provisions on our state policies are useful to the Courts only in a way that is sanctioned by the Constitution—that is, it must always be within the context of the exercise of judicial power.

As far as the decisional powers of the Supreme Court are concerned, the rules are well-settled. The power of judicial review is limited by four

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[203] Enrique Fernando, *Judicial Supremacy*, 23 PHIL. L.J. 607, 617 (1948).

[204] John Glenn Agbayani, Jr. and Paolo Tamase, Note, *Assessing Compliance with Foreign Ownership Restrictions Under Narra Nickel*, 89 PHIL. L.J. 297, 319-20 (2015).

[205] Fernando, *supra* note 203.

[206] *Id.*

[207] *See, generally*, Balkin, *supra* note 46.

exacting requisites: (a) there must be an actual case or controversy; (b) the petitioners must possess *locus standi*; (c) the question of constitutionality must be raised at the earliest opportunity; and (d) the issue of constitutionality must be the *lis mota* of the case.[208] Quite obviously, the Court cannot, as an example, on its own, create a new agrarian reform law pursuant to the state policy promoting comprehensive agrarian reform. If correctly raised in a proper case, however, it may consider the state policy promoting agrarian reform as a valid argument against a *haciendero* who claims that such a law unduly deprives him of his property.

As far as the Court's rulemaking powers are concerned, we are guided by the Constitution itself. Although the Supreme Court is allowed to promulgate rules concerning the protection and enforcement of constitutional rights, such rules "shall not diminish, increase, or modify substantive rights [...]"[209] To do so is tantamount to judicial legislation.[210] Thus, while the state validly promulgated the rules on the Writ of Kalikasan[211] since it protects and enforces the public's right created by the state policy on the right to a balanced and healthful ecology,[212] the Court may not promulgate the procedural rules which would enforce the prohibition of an individual who belongs to a political dynasty from being elected, absent a law which provides for such a prohibition.

Now that we have clarified the judiciary's necessary involvement in statecraft enabled by an attitude of judicial activism, let us evaluate certain theories of constitutional construction that have been applied in appreciating our state policies.

2. Characterizing Framework Originalism

Another concern that ultimately affects the predictability of Court decisions is the concept of "originalism." In various cases interpreting provisions of our constitutional state policies, great weight has been given to a portion of the original intended role of these provisions in our constitutional framework. For instance, in *Basco*, the Court justified the non-self-executing nature of our constitutional principles and state policies. It relied on the

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[208] *Imbong*, 721 SCRA at 278-79; Biraogo v. Phil. Truth Commission, G.R. No. 192935, 637 SCRA 78, 148, Dec. 7, 2010; Southern Hemisphere Engagement Network, Inc. v. Anti-Terrorism Council, G.R. No. 178552, 632 SCRA 146, 166-67, Oct. 5, 2010.

[209] CONST. art. VIII, § 5 ¶ 5.

[210] *See, generally,* Tiojanco & Aguirre, *supra* note 121, at 109-29.

[211] A.M. No. 09-6-8-SC, Rule 7 (2010). Rules of Procedure for Environmental Cases.

[212] Why a public right can be identified in this state policy is more thoroughly discussed in Part IV.

discussion of Fr. Bernas which declared that these provisions were not intended to be self-executing in its counterpart in the 1935 Constitution. The intent of the framers of the 1987 Constitution was also considered in resolving *Oposa, Pamatong,* and *Imbong.* Given that state policies as a general rule were intended by our framers to be merely addressed to the political branches of government, is there room for constitutional construction to develop a different interpretation?

Certainly, under Philippine jurisprudence, the intent of the framers may be clarified by consulting the debates and proceedings of the constitutional convention.[213] However, at best, the opinions of the framers are merely persuasive[214] because from the moment the constitution is ratified, it becomes charged by the intent of all of the many millions of Filipinos who ordained to promulgate our constitution. Thus, jurisprudence has advocated that the "proper interpretation therefore depends more on how it was understood by the people adopting it than the framers' understanding thereof."[215] This is where the Court's occasionally dismissive attitude regarding our constitutional state policies gets a little tricky.

It is hard to prove that, beyond the small portion of the population that has taken up legal studies, the many millions of Filipinos who ratified our Constitution's not so-terse-text would have interpreted our constitutional state policies as mere suggestions to Congress. This is especially so if one considers that these provisions are stated as affirmative commands highlighted by the word "shall." More so are the provisions which mandate the state to "protect."

Does this, however, mean that the Supreme Court's interpretation of the constitutional provisions on state policies ought to be restricted to what the Filipinos of 1987 understood them to be? That, assuming that the ordinary Filipino of 1987 understood our state policies as mere suggestions to Congress, this interpretation is completely binding on the Filipinos of 2016?

These types of questions are not peculiar to our legal system. Various scholars of constitutional law in the United States have also tackled the problem of originalism. One understanding of the original intent that I find valuable is the opinion of Professor Akhil Amar which states that "modern

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[213] Civil Liberties Union v. Executive Secretary, G.R. No. 83896, 194 SCRA 317, 325, Feb. 22, 1991.

[214] *Id.*

[215] *Id.*

interpreters should attend to the understandings at the time of enactment not because the old unwritten understandings always and everywhere tightly bind us today and thereby effect strict interpretive restraint, but because we can learn from our predecessors."[216] Thus, we must recognize the original intended function of the constitution's provisions because of its wisdom and not only because we ought to consider ourselves bound by them.[217] Similarly, Professor Jack Balkin of Yale Law School proposes a theory of interpretation which is faithful to the intent, but allows room for evolving interpretations to meet the modern problems of governance.

> Framework originalism [...] views the Constitution as an initial framework for governance that sets politics in motion and must be filled out over time through constitutional construction. The goal is to get politics started and keep it going (and stable) so that it can solve future problems of governance. Later generations have a lot to do to build up and implement the Constitution, but when they do so they must always remain faithful to the basic framework.[218]

Framework originalism recognizes that fidelity to the original meaning does not require fidelity to the original expected application of a constitutional text. It embraces the view that the political branches of government and the judiciary "work together to build out the Constitution over time."[219] Thus, while judges are bound by the constitution's original meaning, they must engage in constitutional construction as well as elaborate on the application of previous constructions as complex issues arise.[220] That is not to say that judges are unconstrained in their interpretation of the constitutional text. Rather, they are constrained by institutional factors such as the membership of the Court, the social and cultural influences on the judiciary, professional legal culture and professional conceptions of the role of the judiciary.[221]

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[216] Akhil Amar, *American Constitutionalism—Written, Unwritten, and Living*, 126 HARV. L. REV. 1532 (2013).

[217] *Id.*

[218] Balkin, *supra* note 46, at 550.

[219] *Id.* at 551.

[220] *Id.*

[221] *Id.* Professor Balkin contrasts this theory with what he calls the interpretative theory of skyscraper originalism. Skyscraper originalism views the Constitution as a more or less finished product, with fixed limits. This means that it does not consider the judicial and political branches as engaged in constitutional construction. Thus, in its purest form, this theory finds that when the courts must address constitutional questions involving abstract rights, it becomes important for the courts to interpret the text into something as determinate and rule-like as possible since it is only then that such provisions can demarcate the space upon which ordinary politics may proceed. One way of doing this is to identify the original

Applying framework originalism to the Philippine context allows us to better understand why the Supreme Court in some cases considered as aberrant treated certain state policies as self-executing despite the absence of either the framers' express intent or the ratifiers' apparent intent.[222]

Since we have accepted the Supreme Court's role in constitutional construction due to *stare decisis*, it is fruitless to merely consider these decisions as flukes or cases which have been wrongly decided. Instead, we may understand the Court to have applied the interpretative theory of framework originalism. This theory resolves the issue of predictability since it is well within the discretion of the Court to not be definitively bound by the intent of the framers or the Filipinos of 1987. Rather, the Court may look to these considerations for their wisdom. It may also consider the subsequent acts of constitutional construction which the three branches of government have since engaged in.

My view is that a theory of framework originalism is the best tool to fully appreciate the development of Philippine Constitutionalism. It embraces the constitutional importance of all decisions—including those which may have been initially criticized as erroneous[223] but have developed through time as durable and canonical doctrines that lay the building blocks for later constitutional decisions.[224] As we observe how the three branches of government build the Constitution, we see that our Constitution is one that lives and is constantly evolving along with the society that ordained it. At the same time, we see that it remains faithful to its original framework as laid down in its text.[225]

3. What about the Text?

Finally, let us round out our discussion on the issue of predictability by examining the role of the text in how the Court has settled the cases in our constitutional state policies. Isn't looking only and precisely at the text of the Article II provisions not the best way to predict how the Courts will appreciate our state policies?

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meaning of the constitutional text as closely as possible with the framers' and ratifiers' original intended application. *Id.* at 550-58.

[222] Such as *Soriano*, 587 SCRA 79; Serrano v. Gallant Maritime Services, Inc., G.R. No. 167614, 582 SCRA 255, Mar. 24, 2009; and Gamboa v. Teves, G.R. No. 176579, 652 SCRA 690, June 28, 2011.

[223] Cases that may have been initially considered as aberrations by some include *Oposa*, 224 SCRA 792; and *Manila Prince Hotel*, 267 SCRA 408.

[224] *See, generally,* Balkin, *supra* note 46.

[225] *Id.*

Yes and no.

Let us start with why applying a purely textualist approach is not the best answer to the problem of predictability. The best textualist criticism against treating state policies as self-executing was raised by Justice Feliciano in his concurring opinion in *Oposa*. He said that the state policy on the right to a balanced and healthful ecology, though declaring a fundamental right, "could not be characterized as 'specific' without doing excessive violence to language."[226] He then proceeded to list various activities which may be deemed harmful to the environment, pointing out that the provision's lack of specificity raises certain concerns regarding due process. This view is pointed and elegant but may not be invoked to resolve the problem of predictability precisely because it was not adopted by the majority. As a result, the textually broad right to a balanced and healthful ecology has since been affirmed as a full and complete right in various cases. Other similarly textually broad state policies have also made an impact on our jurisprudence.

That is not to say that the actual text has little role to play in the process of constitutional construction. In fact, the opposite is true. The language of the provisions demarcates the general fields of statecraft in which they may take effect. If the text creates claims or defenses, it is also the text which clarifies how the claims or defenses may be properly invoked. The provisions on state policies enable the three branches of government to act pursuant to these goals. In some instances, the provisions even prescribe certain limitations on the state's exercise of power. For one, even an activist Court which uses the theory of framework originalism is constrained by the text from arbitrarily imposing their preferences when deciding cases. Even the most liberal of theories on living constitutionalism require fidelity to the text.

The importance of the text is highlighted most in the case of negative rights. It bears repeating that Justice Feliciano's apprehensions are correct: when invoked, negative rights have a prohibitive effect that triggers a due process dimension. They may also be considered as constraints on the constitutional powers of each or all of the three branches of government. Thus, for purposes of predictability, it is important for us to identify the textual anchor which may have been relied on by the Court when it found that certain state policies possess a nullifying function.

Does this textually demonstrable anchor exist? We shall find out in Part IV.

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[226] *Oposa*, 224 SCRA at 815 (Feliciano, *J.*, *concurring*).

IV. A FUNCTION-BASED FRAMEWORK FOR APPRECIATING STATE POLICIES

A. Some Preliminary Considerations in Appreciating State Policies

1. Abandoning the Traditional "Self-executing" Doctrine

Understanding that the Supreme Court has fully embraced the judiciary's involvement in constitutional construction clarifies that when our Constitutional State Policies impose affirmative commands on the "State," these commands are not directed exclusively to the political branches of government but also to the judiciary.

In line with the principles previously discussed, I believe that it is time to abandon the dismissive attitude that finds Article II provisions on state policies as not self-executing because they are a mere declaration of state principles and policies. To maintain this course reduces the importance of these provisions, carefully crafted by the framers as the nation's fundamental political creed, to mere platitudes that add little value to how our society develops. Worse still, this doctrine forgets that these provisions are charged not only by the intent of the framers, but also by the intent of the entire nation upon the ratification of the 1987 Constitution.

The development of the civil, social, economic, cultural and political aspects of our society in the past 30 years has shown that the time is ripe for a doctrinal shift in the constitutional appreciation of our state policies. However, not every state policy should be considered in the same way as the provisions in the Bill of Rights even though both types of provisions are now considered self-executing. Doing so would confuse how we should understand the phrase "self-executing" in the modern sense with how it has been applied in the traditional sense.

What I advocate is that, unless the provision expressly provides otherwise, state policies must be treated as "self-executing," in the sense that each provision must be considered and not readily dismissed as mere surplusage. Furthermore, the inquiry into the applicability of these provisions should not end in a declaration that a provision is self-executing. Rather, it should carefully consider whether the various functions that may be possessed by a state policy were validly invoked.

The Supreme Court's involvement in statecraft in the various cases which have uncovered the exceptional provisions show that state policies

ought to be evaluated based on each provision's individual merits. Each should be evaluated on what it says and how it interacts with the rest of the Constitution. This is how we should understand the general rule established by the Court in *Manila Prince*, which clarifies that we must presume that all provisions in our constitution are self-executing. This is what we should consider the words "self-executing" to mean in the modern sense. This interpretation underscores the fact that the "right-conferring"[227] characteristic of the traditional understanding of the "self-executing" doctrine is only one aspect of the constitutional provision which does not fully proscribe the applicability of a provision under the right circumstances.

Thus, the distinction between our state policies and the provisions of the Bill of Rights is that the provisions of the latter generally possess a nullifying function,[228] while the functions possessed by the former vary. As originally intended, all state policies possess a validating function. Certain provisions possess a nullifying function based on a textually demonstrable anchor found in the provision. Meanwhile, some state policies also have a complementing function based on how they interact with other constitutional provisions.

2. Why Not Principles

Before we proceed, I find it prudent to clarify that this framework focuses on state policies enshrined in sections 7-28 of Article II of the Constitution. While the framework may also be applied to the principles in terms of how the text of provisions should be scrutinized, I follow the wisdom of the Constitution's framers who intended for constitutional principles to have a different function as compared to state policies.

For one, a cursory examination of Article II shows that the phraseology of Sections 1-6 is entirely different from those of the state policies.[229] The provisions on our constitutional principles are certainly more complex. To illustrate, the principle on the renunciation of war (Article II, Section 2) has a constitutionally sanctioned, traditionally self-executing,

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[227] More correctly, this should be understood as conferring negative rights which have a prohibitive or nullifying function.

[228] Even the provisions couched in positive terms have been found by jurisprudence to possess a nullifying function.

[229] The declaration of principles are phrased in a way that does not follow the "The State shall [...]" format generally used for Article II's constitutional state policies.

legislating provision that is best tackled in a different paper.[230] Much can also be said about the complexity and the implications of the principles of separation of church and state (Section 6)[231] and the principle of civilian supremacy (Section 3). Because of the complexity of these provisions, I believe that it would do them justice by not focusing on these for purposes of this paper.

That said, let us now chart these constitutional waters.

B. The Framework

1. Exceptional Provisions

To uncover our function-based framework for appreciating our state policies, we first read the text itself. Heeding the advice of the Supreme Court in *Manila Prince,* we keep in mind the general rule that the provisions of the Constitution are presumed to be self-executing. Thus, we search for exceptional provisions by looking at each state policy to see if the text provides a textually demonstrable cue which leaves implementation to a coordinate branch of government. For instance, the state policy prohibiting political dynasties is constitutionally directed to Congress because of the words "as may be defined by law."[232] Similarly, the state policy of freedom from nuclear weapons is also reserved for the political branches of government because of the phrase "consistent with the national interest."[233]

2. Validating Function

Next, we must appreciate the wisdom of the original intended function of our state policies which reveals its validating function. The validating function adopts the theory of constitutional imprimatur which has guided the Court in validating certain state acts pursuant to the country's basic

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[230] CONST. art. II, § 2. "The Philippines renounces war as an instrument of national policy, *adopts the generally accepted principles of international law as part of the law of the land* and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations." (Emphasis supplied.)

[231] *See* Estrada v. Escritor, A.M. No. P-02-1651, 408 SCRA 1, Aug. 4, 2003.

[232] CONST. art. II, § 26. "The state shall guarantee equal access to opportunities for public service, *and prohibit political dynasties as may be provided by law.*" (Emphasis supplied.) By its phrasing, the Constitution exclusively reserves only the prohibition of political dynasties to Congress.

[233] Art. II, § 8. "The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory." (Emphasis supplied.)

political creed—even if such a state act may, at first glance, appear to violate certain constitutional rights.

Following the theory as originally explained by Dean Sinco, further clarified by Dean Bacungan, and adopted by the major commentaries on the 1987 Constitution,[234] these state policies may be invoked by the State to validate state actions compliant with a constitutional command. This is true even if they initially appear to violate the rights to liberty and property as protected by the due process clause. For instance, as previously discussed, this could have been invoked by the State to defend a Comprehensive Agrarian Reform Law. Such a law would involve the taking of private property which may appear to violate the due process clause, but may still be sustained for being pursuant to the state policies on social justice[235] and the state policy on comprehensive agrarian reform.[236]

In fact, the theory of constitutional imprimatur, though not invoked, may have been applied when the Court validated the MTRCB's suspension of Eliseo Soriano in *Soriano*.[237] In this case, we can say that the Court considered the constitutional imprimatur created by the state policy protecting the general welfare of the youth as sufficient to affirm MTRCB's act of restraint, even if this state act was pitted against Soriano's right to freedom of speech.

Though hardly ever invoked by the State, the recognition of this validating function is consistent with treating our constitution as a modern, self-executing one. Finally, as this was the original intended function for our state policies, we must consider this validating function as inherent in all of the 21 provisions found in our constitutional state policies.

3. Nullifying Function

To identify the next function which a certain state policy may possess, we look to the exceptional provisions found by the Court in jurisprudence. In *Oposa,* the Court found the state policy on the right to a balanced and healthful ecology, acting in unison with the state policy on the right to health, as full and complete rights sufficient to establish a cause of action for the

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[234] SINCO, *supra* note 7; Bacungan, *supra* note 16; BERNAS, *supra* note 8; CRUZ & CRUZ, *supra* note 37.

[235] CONST. art. II, § 10. "The State shall promote social justice in all phases of national development."

[236] Art. II, § 21. "The State shall promote comprehensive rural development and agrarian reform."

[237] *Soriano*, 587 SCRA at 122.

nullification of all the Timber License Agreements issued by the DENR.[238] Likewise, in *Imbong,* the Court even allowed a facial challenge of the statute considering that the state policy on the right to health was one of the arguments invoked. Another state policy invoked was the right of the unborn from protection. This led to a lively discussion from the Court, which declared that this state policy may be used to nullify any legislative attempts to legalize abortion.[239] What these cases reveal is that the state policies involved possess a nullifying function.

The nullifying function of these state policies is derived from the application of a modified negative rights theory. As discussed in Part III.A.3.b., the Court has, in *Oposa* and *Imbong*, found a way to interpret the affirmative language of the state policies involved to necessarily imply a negative command on the state. Following this theory, state policies that possess a nullifying function are the bases on which the Supreme Court can most exercise its power of judicial review over the unconstitutional acts of its co-equal branches of government. These types of state policies properly belong to the most distinguished class—they possess all of the functions that a state policy may have.

That said, the next question is how to identify which of our state policies possess a nullifying function. Has the Court arbitrarily activated these state policies? I think not. As discussed in Part III.C.3., for purposes of predictability, it is important for us to identify a textually demonstrable anchor on which our interpretation of the constitution is based.

If we look at the state policies on the right to health, the protection of the unborn, and the right to a balanced and healthful ecology, what is common is the textually identifiable root of the "negative directive" necessarily implied by the Court from its provisions: the word "protect."[240] The importance of the word "protect" in some of the constitutional state policies is explained by Justice Leonen in his concurring opinion in *Greenpeace.* Discussing the phraseology of the state policies on the right to a balanced and healthful ecology and the right to health, Justice Leonen stressed that these

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[238] *Oposa*, 224 SCRA at 809.

[239] *Imbong*, 721 SCRA at 462.

[240] CONST. art. II, § 16. "The State shall *protect* and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." (Emphasis supplied.) Art. II, § 15. The State shall *protect* and promote the right to health of the people and instill health consciousness among them." (Emphasis supplied.) Art. II, § 12. "The State [...] shall equally *protect* the life of the mother and the life of the unborn from conception [...]" (Emphasis supplied.)

policies mandate the state to "promote and protect" the right to health and to "[protect] and advance"[241] the right of the people to a balanced and healthful ecology. He concluded that here, "the state is *constitutionally mandated to provide affirmative protection*. The mandate is in the nature of an active duty rather than a passive prohibition."[242] With this in mind, I believe that state policies which feature the command "the State shall protect" confer a public right that may be vindicated by any citizen before a court.

Following the modified negative rights theory, invoking this public right triggers the policy's nullifying function. That is why the Court was very liberal in its approach to standing in *Oposa* and allowed a facial challenge of the RH Law even before the same was implemented in *Imbong*. That rights belonging to the public were at risk in the questioned state acts in those cases may have urged the Court's liberality.

However, the word "protect" has also been constitutionally implanted into three other state policies: the protection of the general welfare of the youth (Section 13),[243] the protection of the rights of workers (Section 18),[244] and the protection of the family (Section 12).[245] Would it then be safe to assume that these provisions may also be declared self-executing in the future? How should we consider the cases that have expressly dismissed the first two of these state policies as not being self-executing?

Let us first consider the state policy on the general welfare of the youth. I do not believe that because the Court did not act upon the nullifying function of this policy in the cases of *Basco*, *Kilosbayan*, and *TMCEA*, it does not possess one. I believe that the state policy was merely not properly invoked in these cases—the petitioners failed to show a fundamental link between the act assailed and the state's duty to protect the general welfare of the youth.

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[241] Justice Leonen here mistakenly writes the word "promote" in place of protect, but if we are to refer to the actual text of the provision which he cites, his intention of highlighting the word "protect" becomes clear.

[242] Int'l Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines), G.R. No. 209271, Dec. 8, 2015 (Leonen, *J.*, *concurring*). (Emphasis supplied.)

[243] CONST. art. II, § 12. "The State recognizes the vital role of the youth in nation-building and shall promote and *protect* their physical, moral, spiritual, intellectual, and social well-being [...]" (Emphasis supplied.)

[244] Art. II, § 18. "[The State] shall *protect* the rights of workers and promote their welfare." (Emphasis supplied.)

[245] Art. II, § 12. "The State recognizes the sanctity of family life and shall *protect* and strengthen the family as a basic autonomous social institution." (Emphasis supplied.)

In fact, *Soriano* illustrates how this policy may be properly raised. In this case, the Court appreciated the idea that while the utterance may be considered as merely indecent speech for adults, that they were made in a G-rated program easily accessible to children justified the MTRCB's acts of restraint and regulation.[246] Of course, though *Soriano* properly showed the direct link between the act at issue and the duty to protect imposed by the state policy, what was used in this case was the provision's validating function. But that does not mean this policy does not have a nullifying function—only that the proper case to demonstrate this function has yet to be raised before the Supreme Court. Nonetheless, this state policy showed its heightened importance by acting as a counterweight against the privileged right to free speech which caused the Court to carefully evaluate the nuances of the case in order to ensure state compliance with it. To illustrate a case where the nullifying function may be properly invoked, I believe that should the Legislature pass an act which legalizes child pornography, this law may be nullified even by relying solely on the state policy for the protection of the welfare of the youth.

If we look into the state policy on the protection of the rights of workers, we again note that, together with the more specific constitutional provision on the seven cardinal rights of workers, it has many times been dismissed by the Court as not being traditionally self-executing. Thus, invoking the policy alone has never been found as sufficient basis to nullify a state act.

However, I do not believe that this means the state policy protecting the rights of workers does not possess a nullifying function. Similar to the state policy on the protection of the youth, its nullifying function has not been used because it has yet to be properly invoked. This is because, as correctly declared by Justice Tinga in *Agabon,* the Labor Code has laid out mechanisms and safeguards for ensuring that the constitutionally protected rights of workers are not violated. Moreover, these constitutional rights have specific counterparts in the Labor Code and in other social legislation. That the law sufficiently provides mechanisms for ensuring the protection of these constitutional rights does not mean that the state policy does not possess a nullifying function. The nullifying function exists; but, in this case, the protection granted by the Labor Code and other social legislation have, thus far, sufficiently ensured that the state policy's nullifying function need not be triggered. Again, to illustrate a case where the nullifying function of this state policy may be properly invoked, I believe that if the state passes a law absolutely prohibiting labor and management to enter into collective

[246] *Soriano*, 587 SCRA at 102.

bargaining agreements, then this could be readily nullified on the basis of the state policy to protect the rights of workers.

For the same reasons as above, I believe we can be certain that given the proper case, the Court will also affirm the nullifying function of the state policy protecting the family as a basic autonomous social institution. I can imagine that this provision may be invoked to nullify any law that seeks to abolish family relations in the country.

4. Complementing Function

Lastly, we must consider how beyond the validating and nullifying functions, the Court has, in some cases,[247] allowed state policies to affect the application of other constitutional provisions. I refer to this as the complementing function. This complementing function of constitutional state policies is perhaps the trickiest function to identify. To do so, we examine the cases where the Court relied on certain constitutional state policies' complementing function.

First, let us discuss the state policy on full public disclosure.[248] The earliest clarification into this function of our constitutional state policies was made by the Court in the 1989 case of *Valmonte*. The Court said that "the right to information goes hand-in-hand with the constitutional policies of full public disclosure."[249] This was further clarified in 2008 when the Court in *North Cotabato* said that "[s]ince both provisions go hand-in-hand, it is absurd to say that the broader right to information on matters of public concern is already enforceable while the correlative duty of the State to disclose its transactions involving public interest is not enforceable until there is an enabling law."[250]

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[247] Legaspi v. CSC, G.R. No. L-72119, 150 SCRA 530, May 29, 1987; Central Bank Employees Ass'n, Inc. v. Bangko Sentral ng Pilipinas, G.R. No. 148208, 446 SCRA 299, Dec. 15, 2004; Serrano v. Gallant Maritime Services, Inc, G.R. No. 167614, 582 SCRA 255, May 24, 2009; Gamboa v. Teves, G.R. No. 176579, 652 SCRA 690, June 28, 2011; Int'l Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines), G.R. No. 209271, Dec. 8, 2015 (Leonen, *J.*, *concurring*).

[248] CONST. art. II, § 28. "Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest."

[249] Valmonte v. Belmonte, G.R. No. 74930, 170 SCRA 256, 265-66, Feb. 13, 1989.

[250] Province of North Cotabato v. Republic of the Phil. Peace Panel on Ancestral Domain, G.R. No. 183591, 568 SCRA 403, Oct. 14, 2008.

Second, let us discuss the state policy on an independent national economy effectively controlled by Filipinos.[251] In his separate concurring opinion in *Manila Prince,* Justice Torres argued that Article XII, Section 10 should be read in conjunction with the constitutional state policy on the development of a self-reliant and independent national economy effectively controlled by Filipinos.[252] A similar approach was applied by the Court in the majority's decision in *Gamboa.* The Court there ruled that the correct interpretation of the word "capital" in Article XII, Section 11 is that it refers to the total voting shares and not the total outstanding capital stock, for a contrary interpretation would render illusory the constitutional state policy of an independent national economy effectively controlled by Filipinos.[253]

Finally, let us examine cases that involve the state policy on rights of workers.[254] In *CBEA,* the Court laid down the doctrinal groundwork for how constitutional state policies may complement the constitutional right to equal protection. Here the Court ruled that the deference to Congress' wide discretion in legislating classifications "stops where the classification violates a fundamental right, or prejudices persons accorded special protection by the Constitution."[255] It is our constitutional state policies that guide us in identifying these constitutionally protected classes. Justice Puno continued, "When these violations arise, this Court must discharge its primary role as the vanguard of constitutional guaranties, and require a stricter and more exacting adherence to constitutional limitations. Rational basis should not suffice."[256] This doctrine was further refined in *Serrano.* The Court clarified that when a challenge to a statute is premised on the perpetuation of a prejudice against persons specially protected by the constitution, the Court may recognize the existence of a suspect classification and subject the same to strict judicial scrutiny.[257]

How do we discern the complementing function from how our constitutional state policies were applied in these cases? We find that common

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[251] CONST. art. II, § 19. "The State shall develop a self-reliant and independent national economy effectively controlled by Filipinos."

[252] *Manila Prince Hotel,* 267 SCRA at 45 (Torres, *J., concurring*).

[253] Gamboa v. Teves, G.R. No. 176579, 652 SCRA 690, 732, June 28, 2011.

[254] CONST. art. II, § 18. "The State affirms labor as a primary social economic force. It shall protect the rights of workers and promote their welfare."

[255] Central Bank Employees Ass'n, Inc. v. Bangko Sentral ng Pilipinas, G.R. No. 148208, 446 SCRA 299, 386-87, Dec. 15, 2004.

[256] *Id.*

[257] Serrano v. Gallant Maritime Services Inc., G.R. No. 167614, 582 SCRA 255, 302, Mar. 24, 2009.

among these cases is the fact that the state policies are paired with other constitutional provisions from which the right invoked is derived. In the full public disclosure cases, the primary right invoked was the right to information,[258] while the state policy on full public disclosure was made to go hand-in-hand with it. In the national economy cases, primarily invoked were specific nationalist provisions,[259] while the state policy on the development of an independent national economy effectively controlled by Filipinos played a central role in clarifying the provisions. In the labor cases, the primary right invoked was the equal protection clause,[260] and was complemented by the state policies on labor which clarify the existence of a constitutionally protected class. This applies the theory of constitutional imprimatur, such that the provisions of our constitutional state policies are given great weight in interpreting and evaluating the effects of specific rights already possessed by a person.

How are we to understand the effect of the complementing function? In his concurring opinion in *Greenpeace,* Justice Leonen goes so far as to say that "[h]aving constitutionally ordained goals and principles are, per se, compelling state interests."[261] This seems to imply that all principles and policies may be understood to possess a due process or equal protection dimension which, when properly invoked, automatically requires the strictest judicial scrutiny. This would require the state to explain that there exists a compelling state interest and that it used the least restrictive means in achieving its goals.

I am not fully convinced that this view must be sustained. First, it must be made clear that since Justice Leonen's opinion was not shared by the majority, it is not doctrinal. Only time will tell if this attempt at constitutional construction will later be fully adopted by the judiciary. Second, instead of generalizing the effect of the complementing function of state policies, I believe that we must return to the nature of this function.

Since state policies here merely complement a primary right, the effect is wholly dependent on the primary right invoked. Identifying the primary rights which may be complemented by certain policies requires a close reading of the text of each state policy to see how they may interact with other constitutional provisions. Thus, the policy on full public disclosure establishes

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[258] CONST. art. III, § 7.

[259] Art. XII, §§ 10-11.

[260] Art. III, § 1.

[261] Int'l Service for the Acquisition of Agri-Biotech Applications, Inc. v. Greenpeace Southeast Asia (Philippines), G.R. No. 209271, Dec. 8, 2015 (Leonen, *J., concurring*).

the state's correlative duty in relation to the right to information. The policy on an independent national economy clarifies how nationalist provisions must be interpreted. The state policies on labor create a constitutionally protected class in relation to equal protection.

That said, from a close reading of the text, we can identify the state policy on the role of women in nation-building[262] and the state policy guaranteeing equal access to opportunities for public service[263] as possessing an equal protection dimension which may merit the application of strict judicial scrutiny under the right circumstances.

5. Order of Functions

To recapitulate, with this framework in place, we can in fact identify a hierarchy of our constitutional state policies. Highest in the hierarchy are "first-order state policies" which possess a nullifying function. We can identify these state policies because of the presence of a textually demonstrable anchor which necessarily implies its nullifying function: the word "protect."

Being closest to expressly declared negative rights, these state policies are where the Supreme Court's powers of review are strongest. As a result, provisions with a nullifying function also possess both a complementing and a validating function. This means that apart from conferring a public right that may be vindicated by any citizen, these state policies may also bolster the claim of an individual citizen who has sustained a direct injury as a consequence of an infringement of a different constitutional right. These first-order state policies may also be invoked by the state to validate a state action because of the constitutional imprimatur for such an act.

Next in the hierarchy are "second-order state policies" which possess a complementing function. Beyond affecting the interpretation of a different constitutional provision relied on by an injured citizen, these state policies may also be invoked by the state in order to validate its actions.

Finally, the remaining "third-order state policies" possess only a validating function, pursuant to the original value intended for these provisions beginning from the 1935 Constitution up to the present.

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[262] CONST. art. II, § 14. "The State recognizes the role of women in nation-building, and shall ensure the *fundamental equality before law* of women and men." (Emphasis supplied.)

[263] Art. II, § 26. "The State shall *guarantee equal access to opportunities* for public service[.]" (Emphasis supplied.)

C. Recommendations for Invoking State Policies

Having developed our framework for appreciating our constitutional state policies, let us now discuss how these state policies may be properly invoked according to the framework in prospective cases.

First, we note some initial considerations. Naturally, as these cases revolve around the resolution of constitutional questions, constitutional state policies are applicable only to public suits.[264] A public suit involves the protection of certain public interests, which are those "held by persons as members of a political community."[265] Their application is limited because when constitutional state policies are invoked, the Court is called to rule upon an alleged violation of the Constitution made by the state either through its action or inaction. These alleged violations of the constitution are equivalent to a breach of the rule of law—and the public interest lies precisely in such a breach.[266]

However, this does not mean that public suits involve only the state and an injured private or public party. As clarified by Prof. Solomon F. Lumba of the UP College of Law, "[a] public suit may be against the government or a private person."[267] As we saw in the case of *Zulueta v. Court of Appeals*, the constitutional right to privacy may be invoked even against a private person.[268] The rationale is that though the breach would have been committed by a private person, if the Court acts favorably in an action to give effect to this constitutional breach, that would mean that the State through the Court has sanctioned the breach.[269]

Similarly, the rights of private persons may be affected by the constitutional questions raised. This was why the Court in *Oposa* allowed the petitioners to amend their complaint to implead the grantees of the Timber License Agreements who the Court found as indispensable parties to the case.[270]

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[264] *See* Solomon Lumba, *Taxonomy of Suits*, 86 PHIL. L.J. 512 (2012). Note the full illustration of the taxonomy at 521.

[265] Solomon Lumba, *The Problem of Standing*, 83 PHIL. L.J. 718, 722 (2009).

[266] *Id.* at 723.

[267] Lumba, *supra* note 265, at 519.

[268] Zulueta v. Ct. of Appeals, G.R. No. 107383, 253 SCRA 699, Feb. 20, 1996.

[269] *See* Barrows v. Jackson, 346 US 249, 253-54 (1953).

[270] *Oposa*, 224 SCRA 792.

1. Fundamental Link

Before anything else, it should be clear that the text of our constitutional state policies demarcates the limits of their applicability to specific areas of statecraft. Thus, regardless of the function invoked, it is essential that there be a fundamental link between the acts assailed or supported and the constitutional state policy. When a state policy is invoked, it is the party who invokes it that has the burden of showing the direct, reasonable, and identifiable nexus between the acts and the state policy. Failure to show this nexus, or a showing that the relation of the assailed acts and the policy invoked is too remote, should lead to the dismissal of such claim or defense.

2. Validating Function

i. Invoking the Validating Function
as a Defense Available to the State

As originally intended, the validating function of a constitutional state policy should not be considered as a source of rights that may give rise to a cause of action. Instead, in a public suit, the validating function must be understood to be a defense available to the government. This is because the provisions are constitutional directives to the State to urge it to act in a certain way when it addresses certain areas of statecraft.

ii. Illustration of the Validating Function

To illustrate, let us consider a possible constitutional challenge to the Graphic Health Warnings Law which was recently passed by Congress.[271] Under this law, tobacco companies are required to print both a textual and a photographic warning of the ill-effects of smoking on the packaging of their tobacco products.[272] Let us imagine that a tobacco corporation raises a constitutional challenge to this statute. As the party assailing the statute, the tobacco company has to comply with the exacting jurisdictional standards of judicial review, showing that: (1) there is an actual case or controversy, (2) the tobacco company has *locus standi*, (3) the question of constitutionality was raised at the earliest opportunity, and 4) the issue of constitutionality is the *lis mota* of the case. The tobacco company must then show the constitutional basis of its arguments. First, it may argue on the basis of substantive due

[271] Rep. Act No. 10643. The Graphic Health Warnings Law.
[272] § 6 (h) (1).

process regarding its constitutional right to property since the law requires that the cost of printing and labeling of the graphic health warnings shall be shouldered by the tobacco companies.[273] Second, it may argue on the basis of its right to freedom of speech.[274]

As a defense, the State may dispense with the due process contention by arguing that since what is affected is merely an economic right, the law sufficiently complies with the rational basis test.[275] Against the constitutional right to speech, the State can invoke the validating function of the constitutional state policy on the right to health (Article II, Section 15). It can assert that the law itself provides[276] that it was enacted for the purpose of complying with the constitutional mandate to protect the health of the public. It may then establish the nexus between the law and the protection of the public's health. This may be done by presenting statistics, studies, and other facts that show the link between smoking tobacco and the deterioration of the health of smokers juxtaposed to how the law is expected to lower the number of persons afflicted with smoking-related diseases. If sufficiently argued, the law becomes backed by the weight of constitutional imprimatur which will cause the Court to resolve it by taking an approach similar to what was done in *Soriano*. The facts and rights involved will be very carefully weighed and considered, but the Court will ultimately hold that the state act is valid even against the privileged right to free speech.

3. Complementing function

i. Invoking the Complementing Function
in Support of an Injured Party's Primary Right

Similar to state policies that possess only a validating function, the complementing function should not be considered as a source of rights which, on its own, may give rise to a cause of action. Rather, if it is to be invoked, it must always be coupled with at least one primary right—that is, a provision sufficient to confer a right the breach thereof creates a cause of action. Because of this, the person invoking the primary right has the burden of complying with the exacting requisites of judicial review. Filed as a public suit, cases invoking the complementing function must be filed by a person who

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[273] § 9.

[274] *See, generally*, Marie Malabanan, *Beyond the Smoke and Mirrors: Graphic Health Warnings and the Tobacco Companies' Freedom of Expression*, 88 PHIL. L.J. 128 (2014).

[275] White Light Corp. v. City of Manila, G.R. No. 122846, 576 SCRA 416, 437, Jan. 20, 2009.

[276] § 2.

has experienced an injury-in-fact[277] based on a violation of the primary constitutional right. As previously discussed, the injury may have been caused by either the state or a private person. Thus, this function may be invoked to supplement a primary right in cases filed against either.

Once the requirements of judicial review are met, the injured person must then show both the fundamental link between the facts of the case and the constitutional state policy, and between the constitutional state policy invoked and the primary right. Once these are established, based on the theory of constitutional imprimatur, the Court may then assess what role the constitutional state policy may have in complementing the primary right. For instance, in due process or equal protection cases, a state policy may raise the level of judicial scrutiny. Meanwhile, for cases involving the interpretation of certain constitutional provisions, the Court may adopt an interpretation which best respects the Constitution's directives.

ii. Illustration of the Complementing Function

To illustrate, let us examine how our framework for appreciating constitutional state policies would affect the issues of citizenship in the case of *Poe-Llamanzares v. COMELEC (2016)*. Put simply, the question to be resolved is this: does the Constitution grant natural-born citizenship to foundlings whose parentage is unknown?

The Supreme Court, through the *ponencia* of Justice Perez concluded that foundlings, as a class, are natural-born citizens for several reasons. First, the Court returned to the intent of the framers of the 1935 Constitution and concluded that the prevailing view at the time was that the Constitution need not expressly state that foundlings were not natural born because their number was not enough to merit specific mention. Their lack of express mention was not because of the objection to their unknown parentage. As a consequence, the Court found that the exclusion of foundlings from the enumeration did not carry with it a discriminatory intent, which is aligned with some of our state policies. The Court then took note of the fact that domestic laws and jurisprudence on adoption have recognized foundlings as Filipinos. Finally, the Court argued that it is a generally accepted principle of

[277] "There is injury-in-fact if a person suffered damage different from the public." *See* Lumba, *supra* note 264, at 516.

international law to presume foundlings as having been born of nationals of the country in which the foundling is found.[278]

Notably, the majority's decision seems to already be aligned with some of the theories discussed in this paper. For instance, it adopted a view of framework originalism, where the framer's intent is consulted for its wisdom, but the resolution of the constitutional question required an understanding of how the three branches of government have historically engaged in constitutional construction. This is bolstered by an appreciation of how the text of the provision in question interacts with certain state policies. However, there are some leaps in the Court's analysis. Let us now see how this paper's framework may be applied to this case.

According to our framework, Senator Grace Poe must anchor her claim on the right of equal protection, as complemented by the state policy on equal access to public service (Article II, Section 26). This means that she must first comply with the exacting requisites of judicial review. Next, the burden is on Senator Poe to prove that she belongs to foundlings, as a class, and to argue how the COMELEC's act of disqualifying her serves to discriminate and marginalize the entire class through no fault of their own, preventing their equal treatment.[279] Being a discriminated and marginalized class, it must be treated as a suspect classification unduly deprived of access to constitutionally created public offices. Therefore, a standard of strict judicial scrutiny must be applied. The burden is then shifted to the COMELEC to prove the compelling state interest in sustaining the discriminatory classification.

The Court is thus correct in saying that it is the respondents who had the burden of proving the Constitution's discriminatory intent. The stringent standard imposed by the need to show a compelling state interest would justify why the disputable presumption created by a 99.83% probability that Senator Poe was born of at least one Filipino parent is enough to prevent her disqualification in this particular case. To be clear, her non-disqualification is not because we treat her Filipino parentage as a statistical certainty. Rather, it is because the COMELEC has not shown that Senator Poe belongs to the 0.17% of children born in the Philippines whose parents were both foreigners.

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[278] Poe-Llamanzares v. COMELEC, G.R. No. 221697, Mar. 8, 2016. With all due respect to the Court, I am not convinced that the arguments discussed are sufficient to show that this presumption has attained the status of a generally accepted principle of international law.

[279] Notably, in the actual case, it is the Office of the Solicitor General, acting as tribune of the people, which raised these arguments.

Since the strict scrutiny test requires that the State employ the least intrusive means to carry out its purpose, it becomes clear that the COMELEC cannot require Senator Poe to be the one to prove the identity of her parentage. This prevents the injustice of imposing on a foundling the burden of finding the parents who abandoned her as a pre-requisite to having access to an opportunity to run for a constitutionally created public office.

Further, the Court's affirmative finding on the question of the natural-born status of foundlings may also be subsequently validated[280] by the constitutional imprimatur of our state policies on social justice (Section 10), improved quality of life for all (Section 9), and human dignity and the full respect for human rights (Section 11). Not only do these state policies affirm the Solicitor General's claim of the framers' lack of intent to discriminate against foundlings, but it does away with a contextually absent discriminatory intent, even if it was present at the time of the Constitution's ratification.

To support this argument, we may thus look into how the three branches of government have engaged in constitutional construction through domestic laws and jurisprudence.[281] The state policies above mentioned validate the trajectory of the state acts which grant Filipino citizenship to foundlings. At this point, the Court may already conclude that the Constitution approves of foundlings being treated as natural-born citizens. It need not seek further validation from generally accepted principles of international law, since these also have the same effect as statutes enacted by the legislature.

The discussion on the parallel historical development of international law on the rights of foundlings to a nationality ought to be invoked only to buttress the argument that the constitutional constructions adopted by our three branches of government are attuned to the global movement for the recognition of the rights of foundlings. If there is any doubt regarding the treaties that we have signed and ratified, those constructions are validated by the state policy on human dignity and the full respect for human rights.

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[280] I say subsequently because the Court's holding in this case must be understood as an act of constitutional construction—the durability and canonicity of which may yet be contested in succeeding cases.

[281] My view is that if these acts of constitutional construction are to be validated using constitutional state policies in this case, this may be alleged only by the Solicitor General, representing the state as the tribune of the people. Pursuant to the framework of this paper, the validating function may not be invoked by Senator Poe as a private injured party.

4. Nullifying Function

i. Invoking the Nullifying Function to Vindicate a Public Right

a. Identifying the Proper Party

By now it must be clear that only constitutional state policies that possess a nullifying function can be independently invoked since these create a public right that may be vindicated by any citizen. As previously discussed, these public rights may be invoked to nullify either the acts of the state, or those of private persons. As constitutional state policies which possess a nullifying function create a public right, the suit may be brought by any proper party.

When the suit is against the government, the proper party is one which possesses the requisite "standing."[282] Pursuant to the classification in Prof. Lumba's *Taxonomy of Suits*, the proper party in a public suit is traditionally: a) the government, b) a private party who experienced an injury-in-fact, or c) a citizen.[283] The exacting test of standing has also traditionally been brushed aside when the doctrine of transcendental importance is invoked.[284] Does this mean that a public right may be vindicated by the government, an injured person, a citizen, or a person who invokes transcendental importance?

We must understand that a public right belongs to the public and not to the State. In fact, in constitutional state policies with a nullifying function, the correlative obligation to "protect" the public right is imposed on the State. For this reason, we must exclude the government as a proper party.

Next, let us examine several problems with whom the Courts have traditionally treated as the "proper party." In another article, Prof. Lumba discussed the problem with using injury-in-fact as a standard for evaluating private rights. He states:

> Injury-in-fact restrains Courts from going into the merits to determine standing; a public right requires Courts to go into the merits to determine standing. More tellingly, in a legal system where standing is based on a public right, injury-in-fact becomes irrelevant since, once the government violates the law, everyone will have standing whether or not they have suffered an injury-in-fact. On

[282] Lumba, *supra* note 264, at 519.

[283] *Id.* at 517.

[284] *Id.* at 518.

> the other hand, in a legal system where standing is based on an injury-in-fact, a public right becomes irrelevant since, even if the government violates the law, no one will have standing though they have a public right unless they have also suffered an injury-in-fact.[285]

Thus, if we understand that certain state policies create a public right, the proper party to vindicate this right must be any citizen belonging to the public, regardless of whether they have experienced an injury-in-fact. In relation to invoking a constitutional state policy, the citizen's burden to show standing is that he belongs to the portion of the public that is, or will inevitably be, affected by the State's unconstitutional act or omission. Showing a direct injury is not required because the case is being filed to vindicate the State's failure to protect the public and not to vindicate his own injury.

Next, we must reject the use of the doctrine of transcendental importance to grant standing by legal fiction. For one, it is arguably unconstitutional for it violates the constitutional requirement for an actual case or controversy.[286] Second, its purpose of ensuring non-preclusion[287] is already sufficiently addressed by allowing citizen suits. I believe that instead of using the doctrine of transcendental importance as a magic wand that allows the Supreme Court to take jurisdiction over cases, it may be used as an appropriate test to determine if a public right has been violated.

The doctrine of transcendental importance can be traced to the 1925 case of *Yu Cong Eng v. Trinidad*.[288] In this case, the Supreme Court was prompted to relax its rule on standing because of the extraordinary situation where a new law which had not yet been interpreted by the Courts would affect the personal and property rights of nearly 12,000 affected merchants.[289] This could be used as a test to see whether a state act sufficiently compromises a right belonging to the "public."

Thus, a suit to vindicate a public right created by a constitutional state policy which possesses a nullifying function is properly filed by a citizen who has the burden of showing: (1) that he belongs to the portion of the public

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[285] Lumba, *supra* note 265, at 727.

[286] *Id.*, at 735.

[287] The doctrine of "non-preclusion [...] allows standing when withholding it would preclude any legal or political resolution to the question raised." Bryan Tiojanco, *Stilted Standards of Standing, The Transcendental Importance Doctrine, and the Non-Preclusion Policy They Prop*, 86 PHIL. L.J. 605, 624 (2012).

[288] 47 Phil. 385, Feb. 6, 1925, *cited in* Tiojanco, *id.*

[289] *Id.*

that is or will inevitably be affected by the state's unconstitutional act or omission, and (2) that the magnitude of the effect of an assailed unconstitutional act—in terms of the number of persons affected and the changes in the rights of the parties concerned—is sufficient to show the State's actual or inevitable failure to protect the public.

b. Invoking the Nullifying Function

Once the exacting requirements of judicial review are met, the injured person must then show the fundamental link between the acts assailed and the State's duty to protect the area of statecraft specified by the state policy. Since the nullifying function may lead to an exercise of judicial review to nullify an act by a coordinate branch of government, the citizen-litigant must specifically identify the state act that he seeks to nullify. The nullifying function may be invoked to nullify laws, regulations, licenses—even private contracts if shown to be sufficiently harmful to the public. Since this is the area where judicial power is strongest under the modified negative rights theory, the court may also favorably act on petitions for injunction or prohibition.

Finally, since the public right to protection is of paramount importance, I believe that the public rights created by certain constitutional state policies may be a proper constitutional basis for a facial challenge.[290] This position affirms how the facial challenge to the RH Law was allowed in *Imbong*.

ii. Illustration of the Nullifying Function

To illustrate, let us examine how *Oposa* would have been resolved under this framework. Here, the minors must file a citizen suit for the vindication of the public right to a balanced and healthful ecology, relying on the nullifying function of Article II, Section 16 of the 1987 Constitution.

The minors must first comply with the exacting requirements of judicial review. They must show that there is an actual case or controversy by sufficiently alleging that they are all "citizens of the Republic of the Philippines [...] entitled to the full benefit, use and enjoyment of the natural resource treasure that is the country's virgin tropical forests."[291] They must then present detailed allegations on how the DENR Secretary's continued issuance of

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[290] *See, generally,* Solomon Lumba, *Understanding Facial Challenges,* 89 PHIL. L.J. 596 (2015).

[291] *Oposa*, 224 SCRA at 796.

Timber License Agreements (TLAs) has led to various detrimental effects that have violated the public's right to a balanced and healthful ecology.

Next, the minors must prove their standing to sue as citizens.[292] To do this, they must sufficiently allege how petitioners as citizens and members of the public have a stake in the preservation of our forests which are threatened by the government's continued grant of TLAs. They must then show the magnitude of the effect of the assailed unconstitutional act,[293] buttressed by showing that the assailed state act results in an actual and inevitable injury that is and will be borne not only by the minors' generation, but also of the generations yet unborn. That injury is on top of how the acts in question negatively affect the millions of Filipinos who have already been injured. The minors must then show that the constitutional question was raised at the earliest opportunity and that the constitutional question is the very *lis mota* of the case.

Meeting the requirements of judicial review, the minors must then show the fundamental link between the State's continued issuance of the TLAs and its duty to protect the right to a balanced and healthful ecology. To meet the requirement of specificity, citizen-litigants must specifically identify the act assailed. Similar to the case of *Greenpeace*, it may be strategic for them to seek to nullify the regulations that allow for the granting of TLAs.

Finally, the minors may then pray (1) for the nullification of the regulations for granting TLAs for violating the public right to a balanced and healthful ecology, (2) for the cancellation of all TLAs in the country because

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[292] This hypothetical case would be properly filed as a citizen suit, not a class suit. In *Oposa*, *id.*, the Court erroneously ruled the case to have been validly filed as a class suit. This ruling is erroneous because the petition does not comply with the procedural requirements of RULES OF COURT, Rule 3, § 12, which says:

> [W]hen the subject matter of the controversy is one of common or general interest to many persons so numerous that it is impracticable to join all as parties, a number of them which the court finds to be sufficiently numerous and representative as to fully protect the interests of all concerned may sue or defend for the benefit of all. Any party in interest shall have the right to intervene to protect his individual interest.

Forty-seven minors should not be understood to constitute a number sufficiently numerous and representative to fully protect the rights of the millions belonging to their generation and the millions more who are yet unborn. The ruling that the case was a class suit is erroneous also because class suits are available only in private suits, whereas this case is clearly a public suit. *See* Lumba, *supra* note 264, at 517.

[293] Similar to how petitioners in *Oposa*, *id.*, enumerated the list of various environmental tragedies that are the consequence of deforestation. *Id.*

of the nullity of the regulations that created them, and 3) to cause the DENR Secretary to cease and desist from receiving, accepting, processing, renewing or approving new TLA applications.

If sufficiently argued, the Court would nullify the assailed regulations, finding them unconstitutional. Since the TLAs were issued pursuant to these void regulations, the licenses already granted will be readily cancelled since "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[294]

C. A Final Word

I hope that nearing the end of this paper, I have sufficiently shown why the complexity of our constitutional state policies is reason enough to give these a second look, and not be readily dismissed as areas where the courts may not engage in constitutional construction.

As a final illustration, I would like to show how a functional approach to our state polices may be so sophisticated that the same provision may be used as a constitutional argument for two contrasting positions depending on the function used.

Let us imagine cases that involve the question of constitutionality of same-sex marriages. If a person assails the constitutionality of the definition of marriage in Article 1 of the Family Code,[295] the State may advocate against same-sex marriage by invoking the validating function of the state policy to protect and strengthen the family.[296] Conversely, a citizen may invoke the nullifying function of the same constitutional state policy to nullify the clause "between a man and a woman." Said citizen may argue that what the state policy protects is the autonomy of the family as a social unit, and that the inclusion of same-sex marriages in the definition of marriage is one way that

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[294] Municipality of Malabang v. Benito, G.R. No. L-28113, 27 SCRA 533, Mar. 28, 1969.

[295] FAMILY CODE, art. 1. "Marriage is a special contract of permanent union *between a man and a woman* entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences, and incidents are governed by law and not subject to stipulation, except that marriage settlements may fix the property relations during the marriage within the limits provided by this Code." (Emphasis supplied.)

[296] CONST. art. II, § 12. "The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution [...]"

the autonomy of marriage as a social institution can be achieved in the modern day.

How the Court will engage in constitutional construction using this framework when an appropriate case comes before it will be interesting to see. It is my hope that when the time is ripe to resolve these questions, our constitutional state policies will not be readily dismissed as mere surplusage.

V. CONCLUSION

It is hoped that this paper has accomplished its task of charting jurisprudence to craft a guide for a fuller appreciation of our constitutional state policies in future cases. With our ear to the calming sounds of the waves crashing before the hull, we have here uncovered the underlying framework which may have been unwittingly employed by the Court in deciding the cases before it. With this framework in mind, we may rest comfortably, steering our course away from the sea, paddling gently back to shore, knowing how we may turn back if we must.

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