# THE PHENOMENON OF VISION AND BLINDNESS
## *CONSTITUTIONAL EQUALITY AND THE ANNULMENT OF WORLDVIEW*[*]

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*"We hold these truths to be self-evident, that all men are created equal…"*

— The U.S. Declaration of Independence adopted by the Continental Congress on July 4, 1776.

### I. The Concept of Equality

Equality is a liberal idea. It springs from a seventeenth century cosmological proposition that "all men are created equal"—culminating in a natural rights theory embodied in the French Revolution slogan of *Liberté, Égalité et Fraternité*. It goes without saying that this libertarian idea persists, nay, even predominates to this day, despite the growing scientific certainty that humans evolved rather than being instantaneously created; that by virtue of this evolutionary process, no human possesses exactly the same traits as the other, rendering the notion of natural equality highly implausible.

Liberal theory is the result of the situatedness of human knowing. It emerged during the time when there were limited apparatus (at least, by modern standards) to discover the workings of the human body, the natural environment and the universe. And because *homo sapiens* acted the way they did—manifesting an intelligence apparently superior and independent from the complex interrelation of their constituent organs and molecules—it was thought there was a mystical element that inhered in every human being, a soul that was the quintessence of being, immutable and transcendent, and capable of intuiting a universal truth regardless of the body which hosted it. This disembodied conception of the intellect was the premise of libertarian equality deriving from a primitive form of anthropology. By making the

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invisible soul more real than the visible body, by establishing this mystical element as the center of human existence and regarding the more obvious corporeal disparities among people as mere incidents of being—it was indeed possible to say that men are by nature equal. Never mind the readily perceptible biological differences; the quintessence of being was a floating and intangible substance that was assumed equal for all, at least in its original state before it was corrupted by vice or enhanced by virtue. Socio-economic inequality was simply explained as a product of human doing—thus the religious notion of "sin" and the more recent ideas of social constructivism and postmodernism. Imagination trumped perception; the metaphysics of equality became the only visible reality in this phenomenon and the biology of differences was relegated into a paradigmatic blind spot.

Liberal theory was an adaptation to the prevailing epistemic conditions in a particular period in human history. We have the benefit of hindsight to say that this is quite expected. Human cognition, after all, evolved to have the bias of agency as a survival mechanism. We are more inclined to impute intentionality to things and events rather than understand the causal processes that brought them. This is a matter of efficiency both in our daily activities and in evolutionary time: when we see a wild tiger, for instance, we do not predict its behavior by understanding its physiology or the physics of its molecules; we immediately see its "intention" to eat us inasmuch as it becomes instinctual for us to flee or kill the tiger whenever we possess superior weapons.[1] Instead of adopting the more costly method (costly in terms of time and energy) of mentally processing the underlying physics of events, we take the mental shortcut of attributing intentions to produce swift action in favor of the greater benefit of survival. This evolutionary cost-benefit calculus was naturally selected over time not so much because it facilitated our comprehension of reality as it increased our chances of survival. Now that the aggrupations of human beings evolved into a highly complex structure of modern society, with differentiation of labor and specialization of functions, devising increasingly sophisticated means of creating wealth and improving our quality of life, we now have more luxury to think about the workings of the universe than our ancestors. We are now capable of moving from the infantile epistemology of anthropomorphism to a more empirical and structured form of knowing called science.

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[1] Example taken from RICHARD DAWKINS, THE GOD DELUSION (2006), 182. Daniel Dennett calls this the "intentional stance". This is distinguished from other forms of adaptationist thinking such as the "physical stance" where one tries to comprehend the underlying physics of events and the "design stance" where one simply tries to know how things are meant to be. DANIEL DENNETT, DARWIN'S DANGEROUS IDEA, 229-38 (1995). *Cf.* DANIEL DENNETT, THE INTENTIONAL STANCE (1987) and FREEDOM EVOLVES (2004).

The scarcity of data on the workings of the human body impelled us to invent the soul in order to explain human actions in the same way we invented gods and spirits to explain the anger of storms, the fertility of fields and the treachery of forests. This epistemological development is not so much a willful design as it is an evolutionary process given the particular environmental conditions of our history. But as we are always in the midst of this on-going process, our consciousness also evolves through our own activities as evidenced by our contemporary understanding of evolution, causality, relativity or quantum indeterminacy. In fact, we are evolutionarily equipped to choose between enslavement of dogmatic traditions and mastery through critical interrogation.

To be sure, the idea of the soul is not a purely liberal construct; indeed, it may even antedate recorded history. The point, however, is the manner by which liberalism appropriated this idea to support its core values of individuality, autonomy and equality. By "appropriate", I do not mean that it was willfully done by someone or some people, but that the liberal paradigm evolved from this epistemic background—an essential part of which is the anthropology of the soul—and thus by a complex and systemic process came to "appropriate" this idea. Whether this was a result of a slow memetic process or by a confluence of various selection pressures[2] or a sudden and revolutionary gestalt-change in perspective as in Thomas Kuhn's paradigm-shifts[3], the anthropology of the soul fused with the idea of *homo sapiens* as a free and autonomous entity in order to fortify—much like in the creation of alloys—the liberal conception of the person. In here, I do not want to engage in superfluous semantics as when popular culture equates the soul to human value or depth; for purposes of this paper, our definition is clear: that of an invisible and ethereal substance, supposedly the *summum bonum* of human existence—a fact-claim regarding human nature which surely affect the way we view the physical universe.

Hence, the normative goal of equality is sustained by the factual claim of the soul. Equality in the face of inequality: humans are assumed equal in the face of patent biological, social and economic differences—Democritean atoms moving about in a flat and neutral space. But as David Hume himself recognized in the eighteenth century, descriptive or factual claims can be falsified (though the idea of falsifiability was popularized and given new meaning by Karl Popper) while demanding—rashly perhaps—

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[2] *See* RICHARD DAWKINS, THE SELFISH GENE (2006); SUSAN BLACKMORE, THE MEME MACHINE (1999); ROBERT AUNGER, DARWINIZING CULTURE: THE STATUS OF MEMETICS AS A SCIENCE (2000); JACK BALKIN, CULTURAL SOFTWARE, A THEORY OF IDEOLOGY (1998).

[3] *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1996).

that ethical cogitations, "divinity or school metaphysics", anything that does not exhibit "any experimental reasoning concerning matter of fact and existence" be "[c]ommitt[ed] to the flames for [they] can contain nothing but sophistry and illusion".[4] And, true enough, scientific evidence preponderates against the existence of the soul or rather that there is a soul—in the sense of that mass understanding (and if I may violate my own definition) of what it means to be "human"—only that it is composed of brain matter and neurons.

The liberal idea of equality is a disembodied form of equality that can only exist in imaginations and computer simulations, say, by making programs with the same quantifiable measures of capabilities and resources and letting them interact in a simulated world. But the complexity of the real world, the curvature of space-time and the eventualities of evolution deny us this simplistic, sugar-coated and, if I may say so, Newtonian view of humanity. Worldviews, however fallacious, may prove to be omnipotent as we embed this notion of equality into the normative structures of our society. In American legal history, for instance, this kind of equality signified the liberty of *laissez faire* capitalism that *Lochner v. New York*[5] read into the Due Process Clause of the U.S. Constitution leading Justice Oliver Holmes to say that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[6] It may appear absurd to us today (but incidentally not to Sartrean existentialism and some hardcore neoliberals), but the Court and a handful of people believed at that time the factual claim that workers and employers are equally at complete liberty to accept or reject an employment contract. Historically, no country in the world had ever achieved such a flat society. It was not that this kind of constitutionalism valued liberty over equality[7] but it operated under the fundamental premise of liberal equality, namely, that all persons were ultimately the same, whatever the differences we perceive. At least Spencer's Social Darwinism,

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[4] This famous statement of Hume bears his philosophy of logical empiricism. In the final paragraph of his *Inquiry Concerning Human Understanding*, he writes:

> When we run over our libraries, persuaded of these principles, what havoc must we make? If we take in our hand any volume—of divinity or school metaphysics, for instance—let us ask, *Does it contain any abstract reasoning concerning quantity or number?* No. *Does it contain any experimental reasoning concerning matter of fact or existence?* No. Commit it then to the flames, for it can contain nothing but sophistry and illusion.

DAVID HUME, INQUIRY CONCERNING HUMAN UNDERSTANDING 173 (1955).

[5] 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).

[6] *Id.* at 75.

[7] *Cf.* Joseph Tussman & Jacobus TenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1948), 341-43; Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 741 (1982).

despite being a distorted version of Charles Darwin's Theory of Evolution, was not incorrect when it recognized limitations and hierarchy.

The same premise of liberal equality is found in the notorious "separate but equal" doctrine of *Plessy v. Ferguson*[8] and the *Segregation Cases*. In *Plessy*, the Court, in a classic formalist rhetoric mimicked by legal technicians, justified the doctrine by saying that "Laws permitting, and even requiring their separation in places…do not necessarily imply the inferiority of either race to the other…"[9] Once again, equality in the face of inequality: no reasonable person even during that time could honestly say that the arrangement is made to ensure the equality of races and yet it is still plausible to say based on this decontextualized non sequitur argument that the races are nevertheless equal. Truly the bicameral state of the mind! "Not necessarily" is a phrase law students enjoy saying to destroy direct causality and insinuate exceptions in the pretense of purely logical argumentation. It works well in the controlled environment of the classroom where legal education (at least in postcolonial Philippines) still follows the Langdellian tradition of searching for abstract principles and shunning social context. But this argument sounds highly absurd for the Federal Supreme Court as an institution deciding an actual case in an actual society. Indeed, it is as if its members never lived in that society.[10]

Much has been said about *Lochner* and *Plessy*, but these infamous American cases illustrate the phenomenon of vision and blindness—the contemporary capacity of the liberal worldview to blind itself to nature, evolution and biology and see only its *a priori* assumption of equality. Thus it is declared: "We hold these truths to be self-evident that all men are created equal…" Consequently, this dogma of equality inheres in the legal system and fundamentally shapes our understanding of equal protection of the laws. This is particularly true in a religious country like the Philippines where scientific consciousness is, and has always been, at abysmal levels. Before Darwin, it is understandable to believe the fact-claim of equality (even deem it "enlightened" compared to the medieval view of man) because the evolution of our common sense did not equip us to understand the process of evolution itself. Today, however, this is inexcusable. The continued

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[8] 163 U.S. 537 (1896).

[9] *Id.* at 544.

[10] With the exception, of course, of Justice John Marshall Harlan who famously dissented and said: "It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons." *Id.* at 556-57.

persistence of the liberal worldview smacks in the face of scientific progress. It is as if Darwin did not exist. The liberal notion of equality is something that is simply superimposed on existing reality despite being empirically falsifiable—and indeed the notion is false. And precisely because it is a factual claim that persists to this day, we can very well conclude that its existence is merely being sustained by sheer faith in its veracity. This is expected. After all, liberal equality is also sustained by the theological idea of the soul which, in itself, is also falsifiable. But alas, facts and reason are not exactly the strong suits of religion. As Hume says, commit it to the flames, then?

## II. The Norm of Equality

Liberal equality envelopes our normative universe and accordingly molds its concrete mechanism of ordering society which is law. This is not to say, however, that we should sustain and instead normativize the inequality reflected in nature. Certainly this is a hideous regress that defeats human freedom and the teleological nature of norms. However, neither are we to maintain the patent falsehood that all humans are created equal no matter how comforting this idea may be. One stroke of Ockam's razor reveals that this is a superfluity which has no positive contribution to the human endeavor of building a just society. In the same way as we do not need a designer to explain the complexity of the human eye or the diversity of the species—indeed, the theory of a mindless process called evolution does a far more superior and elegant job—we do not need the concept of liberal equality to uphold our evolved communal notions of morality and justice. It is an unwanted excess that may only achieve oppressive results as demonstrated by *Lochner*, *Plessy* and countless other cases. In a normative universe where liberalism holds sway, the desire to be politically correct can only lead to more injustices. In upholding its concept of equality, the refusal of the liberal worldview to recognize differences in nature ironically ends up aggravating existing inequalities by its inevitable failure to remedy them. This self-inflicted blindness breeds malignancy in what is after all an expected consequence of evolution. As José Rizal says, in the annals of human adversity, the cure for a social cancer begins with its exposition.[11]

Acknowledging these natural differences does not mean validating them. This does not create a new caste system nor prescribe eugenics nor lend credence to the Aristotelian fatalism saying that some are born to be slaves and others rulers. Not only is this normatively undesirable but

[11] José Rizal's Foreword in NOLI ME TANGERE (Ma. Soledad Lacson-Locsin trans. 1996).

factually and scientifically wrong in its claim of predetermination. On the contrary, exposing natural differences increases the probability of flattening them, as this new information aids self-conscious organisms like us in shaping our environment according to what we deem desirable, just or equal. One of the deeply-rooted misconceptions of evolution, as shown by Herbert Spencer's Social Darwinism, is that it supposedly prescribes an ethical system for society. "Survival of the fittest" is believed to be not only the law of nature but also the moral dictum of humanity so that people should be predators and preys of each other in the struggle for survival. To be sure, for anyone who has a basic understanding of evolution in this day and age, this is plain and simple error that cannot even be seriously considered; however, it is also undeniable that a significant number of people still hold this mistaken belief. This is a indeed systemic problem that is due to a complexity of causes such as the ideology of liberalism, religiosity, the regrettable lack of scientific awareness or the burden of history as when sophisticated and influential thinkers like Spencer were able to construct an entire philosophical system out of the idea which, as *Lochner* showed, reinforced the rise of unbridled capitalism in the United States during the early twentieth century. As for the Philippines, its colonial history under the Spanish and American regimes is undoubtedly an important factor, which is neatly summed up in a famous quip of having spent "400 years in the convent and 50 years in Hollywood".

Now we know that it simply does not follow from the fact of evolution that we should live in a "dog-eat-dog world". Lions and gazelles exhibit a predatory relation not because "they should do it, for it is in their nature", but rather such behavior was naturally selected over time by a mindless and amoral process called evolution inasmuch as eating and obtaining the accumulated energy of another organism tend to enhance the survival of the predator. Lions are not "bad animals"; they simply evolved to be a "gazelle-eating species" because that is how reality works and nature does not make any moral judgments. Moreover, the simplistic dog-eat-dog scenario does not take into account a host of readily observable behavior in nature other than predation such as cooperation among animals,[12] altruism[13] and so on. No doubt, the erroneous claim of deriving morality from natural processes has been discussed more fully and superbly by authors like Richard Dawkins[14] and Daniel Dennett;[15] nevertheless, I still find the

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[12] ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984); Robert Axelrod & William Hamilton, *The Evolution of Cooperation*, 211 SCIENCE 1390 (1981).

[13] Robert Trivers, *The Evolution of Reciprocal Altruism*, 46 QUARTERLY REV. OF BIOLOGY 35 (1971); ROBERT TRIVERS, SOCIAL EVOLUTION (1985).

[14] RICHARD DAWKINS, THE GREATEST SHOW ON EARTH (2009); Dawkins, *supra* note 2.

necessity of a bit clarifying the issue here for after all, as I said, this is a deeply-rooted misconception and this will help the reader in understanding the underlying premise of this paper. In any case, as Justice William Douglas would say, common sense revolts at the idea.[16] We clearly have a choice of not following the lion-eating-gazelle, why should we forcibly extrapolate from nature such a normatively undesirable outcome? Genes tend to replicate themselves and it is logically revolting to say that we should forever be replicating or reproducing. Electrons revolve around the atomic nucleus and planets revolve around the sun—this does not mean that we are morally obliged to revolve around objects perhaps as a physical exercise. *Reductio ad absurdum*.

David Hume tendered the proposition that it is logically fallacious to derive normative or "ought" statements from descriptive or "is" statements. Such an absolute separation led him to say that "[m]orals excite passion, and produce or prevent actions. Reason itself is utterly impotent in this particular. The rules of morality, therefore, are not conclusions of reason"[17]—a sentimentalist theory of morality shared by his close friend Adam Smith as shown by the latter's *The Theory of Moral Sentiments*[18] and later, by the famous legal positivist H. L. A. Hart in *The Concept of Law*.[19] This so-called *is-ought fallacy*, more graphically known as Hume's Guillotine, does indeed sever morals from nature, but this may not be entirely true considering that our normative world is inexorably undergirded by a material substrate—in other words, that there is no entity in this universe without its corresponding physical matter. Ideas, concepts, morals, souls and spirits cannot exist without the brain; and what we consider as our "self" cannot simply *be* without the complex and arcane workings of blood, genes, neurons, oxygen, carbon *ad infinitum*. As carriers or physical hosts of our mindless self-replicating genes, we are also induced to engage in behavior that enhances the probability of survival of these genes.[20] Thus we find interactions with a mate(s) or sexual intercourse pleasurable—the pleasure being a biological incentive to produce offspring or more physical hosts for the genes that we carry. A more mundane example is that most of us like

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[15] Dennett, *supra* note 1.

[16] United States v. Causby, 328 U.S. 256, 260-61 (1946). (It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe. *Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea).

[17] DAVID HUME, A TREATISE OF HUMAN NATURE 325 (2003 ed.).

[18] ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Haakonssen ed. 2002).

[19] HERBERT LIONEL ADOLPHUS HART, THE CONCEPT OF LAW (1961). Herbert Lionel Adolphus Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

[20] Dawkins, *supra* note 2.

sweet foods because we are evolutionarily wired to recognize the benefits of sugar for our bodies as a source of energy, subject to what Owen Jones calls as time-shifted rationality—"a kind of evolutionary time lag or novel environment effect that leads to maladaptation"[21] like obesity and diabetes.

On a general normative level, as we can glean from our example of the workings of what Dawkins calls as the selfish gene, we increasingly understand that what we usually consider as moral behavior such as acts of kindness and altruism or depravity and sinfulness—are importantly also evolutionary phenomena. This is only corollary to the fact that the seat of consciousness, of the mind, of human personality and the "soul", so to speak, is the brain which in itself is an evolved organ in the human body just like our eyes or hands. An examination of the brain's parts, its peculiar shape and appearance will reveal much of its evolutionary history; and a small change in its physical form can radically change a person as demonstrated by cases where personality changes occur as a result of brain tumors.[22] Such personality changes do not only mean a tragic conversion into being mentally dull because some people do live normal and healthy lives after the tumor-causing event, only that they become different persons altogether and as far as superstition goes, it is as if new souls inhabit their bodies. This only shows that consciousness—that singular fundament of human existence proclaimed by philosophers[23]—and consequently morality, go hand-in-hand with the make-up of our neural system. It is no surprise that what had been previously thought as uniquely human behavior such as altruism and more

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[21] Owen Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141, 1172-1173 (2001). The concept of Time-Shifted Rationality can be explained as: what was evolutionarily rational before is no longer rational now or in a new environment and in fact, can be detrimental to survival such as storing too much energy from sugar where seasonal shortage of food no longer occurs. Hence the term "time-shifted". Jones explains the concept as describing

> …any trait resulting from the operation on evolutionary processes on brains that, while increasing the probability of behavior that was adaptive in the relevant environment of evolutionary adaptation in the ancestral past, leads to substantively irrational or maladaptive behavior in the present environment. In other words poor behavior choices sometimes derive not from brain defects, per se, but rather from the brain's deployment of old, once successful-techniques in the face of new problems. So before judging the brain's abilities, we need to consider the effects of its choices in the environments for which the brain is principally adapted (*Id*., 1172).

[22] *See* Marc Obonsawin *et al*., *A Model of Personality Change After Traumatic Brain Injury and the Development of the Brain Injury Personality Scales*, 78 J. NEUROL NEUROSURG PSYCHIATRY 1239 (2007); Katherine Rankin, Joel Kramer, Paula Mychack & Bruce Miller, *Double Dissociation of Social Functioning in Frontotemporal Dementia*, 60 NEUROLOGY 266 (2003).

[23] The most famous being René Descartes ("*Cogito ergo sum*") and the so-called existentialists and phenomenologists.

remarkably, having a sense of justice and equality[24]—can also be found in other animals; conversely, what had been considered as "inhuman" and "animalistic" behavior as violence and acts of aggression is likewise evolutionarily rooted in human nature, not as a Hobbesian "primitive, irrational urge, nor…a 'pathology'…[but] a near-inevitable outcome of the dynamics of a self-interested, rational social organisms."[25] Indeed, it takes a certain kind of brain structure to be even capable of performing certain moral acts. Bacteria do not become angry to what is perceived to be an unfair situation, but apparently humans and chimpanzees do.[26]

Therefore, any talk of morality or more specifically, equality, must be collocated within the context of what are after all the readily perceptible biological parameters of human existence. There is no need to conjure abstractions beyond what we see in the real world to establish norms of humanity. The Enlightenment effort to engage in transcendent reason—that is, the universality principle that transcends the particularities of the body and time and space—can be seen as a futile attempt to preserve the ancient but ultimately false notion that there is an immortal soul dwelling in the human body. Alas, the brain was not technically discovered back then. The recognition of evolutionary biology dispenses with the drive towards *transcendent rationality* as exemplified by Immanuel Kant in the *Critique of Pure Reason* in favor of making sense of *bounded rationality*—the idea that there are important limitations to the actual human capacity to gather and process information.[27] The primordial nexus between normativity and our evolved physical set-up is a paradigmatic vision started in 1859 by Charles Darwin in

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[24] Sarah Brosnan, Hillary Schiff & Frans de Waal, *Chimpanzees' (Pan troglodytes) Reactions to Inequity During Experimental Exchange*, 1560 PROCEEDINGS OF THE ROYAL SOCIETY OF LONDON, SERIES B 253 (2005); Sarah Brosnan and Frans de Waal, *Monkeys Reject Unequal Pay*, 425 NATURE 297 (2003) Frans de Waal, *The Chimpanzee's Sense of Social Regularity and its Relation to the Human Sense of Justice*, 34 AMERICAN BEHAVIORAL SCIENTIST 335 (1991). Scientific American summarizes the experiment as follows:

> In the fall of 2003 Sarah Brosnan and Frans de Waal of the Yerkes National Primate Research Center in Atlanta determined that capuchin monkeys don't like being subjected to treatment they deem unjust. In the new work, the researchers tested the reactions of pairs of chimpanzees to exchanges of food that varied in quality. The animals received either a grape, which they coveted, or a less appealing cucumber, and they could see what their partner obtained. In pairs of chimps that had lived together since birth, the individual given the cucumber was less likely to react negatively to the situation than was the short-changed member of a pair that did not know each other as well. Indeed, chimps in the short-term social groups refused to work after their partner received a better reward for the same job.

<http://www.scientificamerican.com/article.cfm?id=chimps-sense-of-justice-f>. (last visited Nov. 29, 2009).

[25] STEPHEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE (2003), 329.

[26] *Supra* note 24.

[27] *Supra* note 21, at 1150. *See* HERBERT SIMON ET AL., ECONOMICS, BOUNDED RATIONALITY AND THE COGNITIVE REVOLUTION (1992).

*The Origin of Species* that annuls the soul-based worldview that blinds itself to science and the realities of nature, evolution and biology. This evolutionary worldview serves as a more informed discursive platform for norm-generation and hence law-formation. The idea and norm of equality should not ignore human nature, but must be found in it.

The possibility of establishing norms should dispel another popular misunderstanding that the influence of nature leaves us no free will. The misunderstanding arises from ignorance; however this is a particularly sensitive issue for the liberal and religious mindset since the notion of free will is a foundational axiom that supports their entire normative edifice and is a condition precedent for other important precepts as accountability and sin. Let me say outright that free will—a complicated philosophical notion in itself—is not lost in evolutionary biology. More importantly, in the evolutionary worldview, free will is not only axiomatic in the sense that it is considered a truth so obvious that it does not need proof, but has found its scientific basis. Unlike other lifeforms as bacteria or fungi, *homo sapiens* have evolved a neural system that is capable of considering the future which influences its present actions. At the very least, the rudiments of "free will" are here because humans have brains that are able to anticipate and create possibilities from the information obtained from their selves and their environment and not singularly because of a linear historic cause that is the rallying point of determinism. Notwithstanding the constraints on the information-processing power of our brains (after all, the brain is physical matter), it can be said that certain human actions originate in the actor himself by virtue of the "open-endedness of human rationality [which] resonates with the finding of cognitive science that the mind is a combinatorial, recursive system. Not only do we have thoughts, but we have thoughts about our thoughts, and thoughts about our thoughts about our thoughts."[28] One reason why humans are on top of the food chain is that we were able to evolve brains that are conscious not only of its external environment but also of itself. Such recursive or self-referential nature of the human mind reinforces the notion of free will.

The idealizations and axiomatic approach of liberalism and religions merely expose their paradigmatic blindness to facts that are well-established in science. Moreover, the problem with this approach is the assumption that at a certain point, free will is pure and absolute, which is again rooted in the superstitious worldview that the soul is separable from matter. It disregards

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[28] Pinker, *supra* note 25, at 336. See also other books for the general audience: STEPHEN PINKER, HOW THE MIND WORKS (1999); DANIEL DENNETT, FREEDOM EVOLVES (2004); DOUGLAS HOFSTADTER, I AM A STRANGE LOOP (2007).

the gradations that are inherent in nature which is the consequence of evolution not only of living organisms but also of the environment. It is fortunate that some jurisdictions around the world are already taking steps in recognizing natural limitations such as considering some genetic or psychiatric disorders as an exempting circumstance in crimes. Not that we are condoning violence, but such steps signify a degree of intellectual maturity that acknowledges human acts as not singularly the acts of detachable ghosts or souls driving a physical machine, but rather a complexity of physical processes which logically give rise to a consciousness subject to limitations. Thus there is no incentive logic to penalize acts which are not motivated by "willful evil" but are merely bugs of nature's programming. The mind or the soul, for that matter, is nothing but the information-processing of the brain. As such, it is an inexorably physical process—the complex workings of neural cells rather than a spiritual substance or a homunculus. Sure, a dead brain is not John; but a fully functioning brain, to paraphrase Iranaeus, is a human being fully alive.[29] And as the religious existentialist Gabriel Marcel casually declares "I am not only my body", blissfully ignorant that he begs the entire question of existence and to which it should be said: "Yes you are!"[30] Truth and reality does not gloriously descend whole and immutable from the heavens, but the outcomes of a slow and on-going process from the grounds. This is why degrees abound; the universe is not flat and neither is it simply split into fields of black and white but into infinite spectra of colors. It is in this context that the norm of equality should be understood.

If the universe were flat, then it is conceptually feasible to entertain the soul-based claim that "all men are created equal" and the disparities that we do see everyday are merely part of a worldly veil that conceals this ultimate reality. The premise allows us to imagine God manufacturing souls with impeccable quality-control and throwing them like perfectly identical marbles into the worldly plane, allowing them to roll, bump into each other, interact and fend for themselves. And if morality were simply a matter of black and white, good and evil, heaven and hell, 0 and 1, then come Judgment Day, it's just a matter of separating the good marbles from the bad marbles. God does not play dice, so it seems, because he thinks in binaries. Judgment Day is probably the only time inequality is recognized by this worldview; an inequality borne by free will which God so felicitously gave to these souls. But before such day arrives, equality is the metaphysical

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[29] This is Iraneus's famous statement: "*Homo vivens, Gloria Dei"* translated as "The greatest glory of God is a human being fully alive".

[30] GABRIEL MARCEL, MYSTERY OF BEING 95 - 126 (1970).

dogma because from creation to existence all people are equal in God's eyes: everyone has a chance to repent and be good marbles. The inequalities of the material world are not an excuse because they are just shadows of the ideal world; they are temptations that restrict the soul from realizing its true potential. This is Plato's metaphor of the cave, converted by Christianity into the castigation of the flesh, and later appropriated by liberalism through its natural rights theory. Though the tenets of liberalism may no longer be striving for the otherworldly or are at least silent on that point, they retain the metaphysics of equality conjured by a creationist cosmology. The result, therefore, is phenomenal blindness.

Science seeks to turn this worldview upside-down: people were not instantaneously created from above but slowly emerged from below. Instead of going down from God to Man, we go up from dirt and bacteria to Man. The same result, yes, but vastly different implications. Instead of believing that the stuff of souls and otherworlds are more real than the world that we perceive, we believe that this world is more real than the things or otherworlds that we do not perceive. And we do not rely on belief or faith alone, but on method and evidence. Such is a complete reversal of metaphysics, ontology and epistemology. Clearly this is not a case when God and Darwin can dance the tango together.

To start from below means that the emergence of the human being and his environment is a slow and gradual process, characterized by accidents, unevenness and adaptabilities, neither final nor perfect and without a predetermined goal. The universe is not flat; the very fabric of space-time itself is curved as Albert Einstein brilliantly showed in the last century. From the moment of singularity to the expansion of the universe and the development of life, the world as we perceive it has never been characterized by a smooth-sailing uniformity or balance and neither is it governed by that great eastern equalizer called *karma*. On the contrary, balance and equilibria emerged as compromises; they are the eventualities of crises, punctuations, disorders, violence or revolutions, so to speak.[31] In sum, they are adaptations. So whatever instances of equality we see are accidents of an inexorable evolutionary process and can only last inasmuch as they are able to adapt to a changing environment. I say "accidents" because in times of crisis, there are almost always alternative ways of adapting to the same set of circumstances; thus there are significantly

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[31] *Cf.* Niles Eldredge & Stephen Jay Gould, *Punctuated Equilibria: An Alternative to Phyletic Gradualism* in MODELS IN PALEOBIOLOGY 82-115 (Schopf, Freeman, Cooper and Co. ed. 1972); Niles Eldredge & Stephen Jay Gould, *Punctuated Equilibria: The Tempo and Mode of Evolution Reconsidered*, 3 PALEOBIOLOGY 115 (1977).

varying levels of randomness involved. An existing equilibrium is not immune to another crisis-inducing event where organisms must adapt lest they become extinct, as countless did in the past. Currently, climate change can probably be considered as a crisis-inducing event that humanity must adapt—that is, to find sustainable alternative sources of energy in order to, at the very least, maintain its current standards of living.

The apparent balance in the human perspective — that anthropomorphic feeling that this world is made especially for us—owes its origin not to God's beneficence but to the countless adaptations of our ancestors. Indeed many of them died to give way to us. We therefore carry the traits that proved fit and stable over evolutionary time. Now that we have risen above the crude epistemology of common sense and impressions, it should come as no surprise why we have hands that can easily handle objects, eyes that seem irreducibly complex (but still have blind spots) or remarkable brains that can plan for the future and engage in the wildest of imaginations. Everything, including ourselves, evolved out of a mindless and directionless process so that unevenness, imbalances or inequalities should be expected. The soul-based worldview is predicated on the creationist fact-claim that the world is benevolently tailored to humanity such that God made all men equal before men themselves made inequality. In contrast, the evolutionary worldview recognizes inequality as an inevitable aspect of evolution and it's been there since the dawn of time. There is a preexisting and yes, unequal distribution of resources, skills and capabilities which defines the social existence of a human being. This is not a situation where given an equality of opportunity, any diligent person can prosper because the inequalities inhere in the person himself in terms of existing skills and capabilities and their development.[32] The divide of entitlements between the rich and the poor can therefore be trapped in a perpetuating and vicious cycle but on the other hand, development can also be synergistic. This may sound disheartening compared to the flat universe of souls but this is no argument to blind ourselves from what we really see in a curved universe. Such unequal distribution is really the framework of law and governance.[33]

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[32] *Cf.* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); AMARTYA SEN, ON ECONOMIC INEQUALITY (1997).

[33] According to John Rawls, the basic structure of society

> contains various social positions and that men born into different positions have different expectations of life determined, in part, by the political system as well as by economic and social circumstances. In this way the institutions of society favor certain starting places over others. These are especially deep inequalities. Not only are they pervasive, but they affect men's initial chances to life; yet they cannot possibly be justified by an appeal to the notions of merit or desert. It is these inequalities, presumably inevitable in the basic structure of any society, to which the principles of social justice must in the first instance apply. These

This is not merely a matter of economics because material existence cannot be divorced from morality in the same way as the brain cannot be divorced from the mind. A destitute man is not equally free to choose the "good" as a rich and comfortable man. Differing material conditions mean differing incentive systems, personalities and capabilities. The contrary belief can only hold true if we again admit the existence of souls that are, regardless of physical limitations, equal before a heavenly judge and can transcend both body and environment to choose "good and "evil". Besides, "good" and "evil" are fluid categories.

"Equality" or "inequality" may be subject to semantic dispute as when one says "equality" before the judge or a mother's treatment towards her children; the utilitarian, Nozick's[34] or Rawlsian conception, but for purposes of this paper, I broadly define "equality" as the desired distribution of resources, skills, capabilities and entitlements in a society—that which significantly affects both mind and matter as there is really no fine line dividing the two. It is the social arrangement that people want; a normative conception for a society, however varying and disputable from one person to the next. Our notions of equality can only come from our brains and the social reality that emerges from the complex interrelations among people. Though continuously informed by the environment, the norm of equality is not something that is simply discovered in nature as an unchanging ideal but is primarily constituted and reconstituted by our evolving consciousness. In this sense, equality is situated by evolutionary biology. In more philosophical terms, there is no *a priori* normative structure that is ontologically separate and distinct from a conscious subject but is constituted by human consciousness itself as it evolves in its material existence. Immutable ideals or natural laws presuppose transcendent reason which, in turn, presupposes souls which may not be bound by physical limitations. If we believe this, then we are back to the marbles morality of the soul-based worldview. The soul is a persistent cognitive metaphor—so ingrained in human consciousness—that inflicts paradigmatic blindness to the modalities of material reality. It seems possible to uphold an eternal and autonomous moral order because we also impute eternity unto ourselves through a well-entrenched religious construct called the "soul". This stems from the Platonic idea that what is unchanging is more real than what changes. It comes as no surprise why the soul-based worldview also places its faith on eternal moral laws and ideals and consequently an unchanging dogma of

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principles, then, regulate the choice of a political constitution and the main elements of the economic and social system. JOHN RAWLS, A THEORY OF JUSTICE 7 (1971).

[34] ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1999).

equality. We may not know the precise contours of this ideal, but it is just out there, waiting to be discovered. This is why nature's ultimate embodiment of change—the idea of evolution—is so hard to accept.

But evolution is a fact. And our normative universe goes along with the changing horizons of our bounded rationality—the recognition that our consciousness is the work of the brain[35] which is an evolved organ in the human body, finite in its capacity and not tailored to anything good or heroic but the result of selection pressures in light of regularly encountered environmental features. If we have a different brain, then most likely we'll have different moral standards. Studies[36] show that we have a kind of universal moral grammar or deep structure that underlies the cultural idiosyncrasies of humanity. This is a plausible corollary to the fact that we have an evolved organ creating consciousness. These studies, however, have not yet demonstrated the extent of this moral deep structure enough to guide regulators in making practical applications. More importantly, as species endowed with advanced neural systems, an evolved moral sense does not preempt our original capacity for norm-generation[37] over and above the rudimentary moral sensibilities acquired in the process of evolution.

The idea of equality, therefore, is an evolving norm in an uneven world, a curved universe, an evolutionary background of differences. It is an important form of adaptation in a socialized space where humans interact; a way of overcoming the patent inequalities of nature and society. Where creationist cosmology adopts a static and unchanging ideal of equality, a more realistic conception is a dynamic one that continuously adapts to the changes in the world that we inhabit. This is so because the material universe that we perceive and can empirically verify is the only reality that we affirm. As Friedrich Nietzsche says, it is "[w]eariness that wants to reach the ultimate with one leap, with one fatal leap, a poor ignorant weariness that does not want to want anymore: this created all gods and other worlds."[38] The process of norm-generation is a peculiar evolutionary concept because it involves the confluence of human consciousness and the facticities of nature. Consciousness of the process makes it purposive based

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[35] One contentious area in the philosophy of the mind is epiphenomenalism, the idea that mental activities are epiphenomena or secondary phenomena of the neural processes of the brain.

[36] *See* Debra Lieberman, John Tooby & Leda Cosmides, *Does Morality have a Biological Basis? An Empirical Test of the Factors Governing Moral Sentiments Relating to Incest*, 270 PROCEEDINGS OF THE ROYAL SOCIETY 818 (2003); *Cf. supra* note 24, DONALD BROWN, HUMAN UNIVERSALS (1991); DONALD BROWN, HUMAN UNIVERSALS AND THEIR IMPLICATIONS (2000); Pinker, *supra* note 25; RICHARD JOYCE, THE EVOLUTION OF MORALITY (2006); MARC HAUSER, MORAL MINDS (2006).

[37] *See* Robert Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983-1984).

[38] FRIEDRICH NIETZSCHE, THUS SPOKE ZARATHUSTRA 31 (Walter Kaufmann trans., 1995).

on the shared values of people in a society but nevertheless bound by the limitations of human nature. Our normative universe is fluid, wide and expansive, but it attains its most compelling realization in positive law.

## III. Constitutionalizing Equality

In his Tanner Lectures, Jürgen Habermas says that modern law has a twofold validity basis: "it rests both on the principle of enactment and on the principle of justification".[39] The principle of enactment refers to the institutionalized rules of a legal system which gives the latter a degree of independence from the wider normative background of society. While indeed law and morals do not form watertight compartments, the fact that they interpenetrate each other does not merit the conclusion that there is no point in making a distinction between the two. Similar to Ronald Dworkin's idea of "pedigree"[40], the principle of enactment validates by meeting the requirements of what Habermas calls as procedural rationality: the establishment of institutional criteria by which it can be determined, from the perspective of a nonparticipant of the legal system, whether or not a decision has come about according to such rules.[41] The principle of justification, on the other hand, is the entry point of morals in a legal system which has developed a certain level of autonomy. It recognizes the important influence of the normative background of law and as such, the principle validates as when "legality [produces] legitimacy only to the extent that the legal order reflexively responds to the need for justification that originates from the positivization of law and responds in such a manner that legal discourses are institutionalized in ways made pervious to moral argumentation."[42] The principle of enactment and justification can be subsumed under H. L. A. Hart's famous idea of a rule of recognition.[43]

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[39] Jürgen Habermas, *Law and Morality, in* 8 TANNER LECTURES ON HUMAN VALUES 278 (Sterling McMurrin ed. & Kenneth Baynes trans., 1988); JÜRGEN HABERMAS, 1 THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (1984).

[40] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1977).

[41] Habermas, *supra* note 39, at 244.

[42] *Id.* at 243-44.

[43] HERBERT LIONEL ADOLPHUS HART, THE CONCEPT OF LAW (1961). See the Postscript which is Hart's reply to Ronald Dworkin's criticisms. Hart clarifies that he never intended to use the word "rule" as being limited to "all-or-nothing" or "near-conclusive" directives (263) and that the rule of recognition may include, but not only limited to procedural or pedigree criteria:

> …contrary to Dworkin's contention the acceptance of principles as part of the law is consistent with the doctrine of a rule of recognition, even if Dworkin's interpretive test were as he claims the sole appropriate criterion for identifying them. But in fact a stronger conclusion is warranted: namely that a rule of recognition is necessary if legal principles are to be identified by such criterion. This is so because the starting point for the identification

From a systems point of view, the separation between law and morals ought not to be blurred because it is this divide that gives stability and efficiency to the legal system. Its elimination is simply bad policy because it will create vast uncertainties which are "heightened by the contingencies connected with the context-sensitive application of highly abstract rules to complex situations..."[44] Surely information asymmetries impair the functioning of any system as basic economics teaches us. We cannot rely on the inevitability argument of so-called legal realists and critical legal scholars ("inevitable" because they say there's no stopping law and morals from controlling each other) for not only because is this a dubious fact-claim that requires a high burden of proof to be the basis of social policy, it completely disregards the normative aspect of the law and morals debate—that is, whether or not it is socially desirable to achieve their separation.[45] To be sure, there are numerous instances where law and morals are hardly distinguishable, but this only tells the level of development of a legal system. Primitive societies characteristically have law, morality, tradition and religion lumped together because they can survive with it; however, as societies develop there is an increasing differentiation of these domains as a way of adapting to the needs of organizational expansion.[46]

The institutionalization of impersonal normative structures such as law are needed to ensure order and stability in larger societies simply because it is unsustainable to rely on charisma, bloodlines or whims of chieftains and rulers or the moral sensibilities of people—all disastrously short-term in the perspective of social development. The idea of being governed by impersonal institutions is probably hard to accept in light of our evolutionary propensity to personify (what I earlier described as the "bias of agency"), but it is precisely bridging this temporal mismatch[47] between the past environment in which natural selection shaped the brain and the needs of the present environment that we are able to evolve a consciousness adaptive to the development of modern society. The formalization of law

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of any legal principle to be brought to light by Dworkin's interpretive test is some specific area of the settled law which the principle fits and helps to justify (at 266).

[44] Habermas, *supra* note 39, at 245; *citing* KLAUS GÜNTHER, ANWENDÜNGSDISKÜRSE (1986).

[45] The same inevitability argument is being used by these socialist thinkers to collapse the Private-Public Divide in constitutional law and say that private matters always have a public aspect, thereby justifying more state intervention. It suffers the same problem of factual dubiousness and disregard of the normative character of the distinction.

[46] *See* NIKLAS LUHMANN, THE DIFFERENTIATION OF SOCIETY (1982); NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW (1985); TALCOTT PARSONS, SOCIETIES: EVOLUTIONARY AND COMPARATIVE PERSPECTIVES (1966); HERBERT SPENCER, STRUCTURE, FUNCTION AND EVOLUTION (Stanislav Andreski ed., 1972).

[47] This is again the concept of Time-Shifted Rationality. Jones, *supra* note 21.

occurs when previously amorphous norms crystallize into determinate or determinable legal directives thereby reducing the uncertainties that arise from overlapping norms such as morality or religion, thus reinforcing the autonomy of the law. The level of formalism and autonomy of law therefore indicates the level of development of a legal system. They establish the boundaries that separate law from what is otherwise an undifferentiated mass of norms. Law is then posited as against its normative background and the formalization of its constituent norms establishes an autonomous normative system with its own rationality and validating criteria. It is therefore a legal system that creates a framework of relatively permanent rules upon which people rely to undertake their private transactions and which State regulation must accordingly reinforce to achieve efficiency and stability.

To be sure, there are open-textured norms such as "equality" or "justice" that are hardly delimited by "all-or-nothing", determinate or what Rudolph von Ihering calls "formally realizable" rules.[48] However, rather than adopt postmodern rhetoric saying that they are hopelessly determined by multiple interpretations, we say that they are subject to an evolving consciousness. Norms, however general and abstract, are susceptible of being measured against more or less objective standards—if only in a particular time and space—for they necessarily operate within an identifiable legal system undergirded by an evolved moral sense. It should be noted that the process of institutionalization and formalization are themselves limited in time and space as they are society's way of adapting to specific environmental needs. Thus as law gains autonomy and extricates itself from the broad normative space, it is countervailed by changes in the latter, inasmuch as the mismatch between an independent legal system—commonly referred to as the "rule of law"—and its environment, can once again lead to maladaptive consequences at the institutional level. Time-shifted rationality is again at hand: what may have been rational before is no longer rational now.

The differentiation of law, though necessary for development, at some point becomes a hindrance by reason of its rigidity and insulation—an inability to adjust to the material changes of its surroundings. The institutional boundaries of an autonomous legal system make possible Habermas's principle of enactment as a validating mechanism of norms; but it is these same boundaries, once hardened and rendered inflexible, that

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[48] 3 RUDOLF VON IHERING, DER GEIST DES DES ROMSICHEN RECHT § 4, 50-55 (1883). I got this from Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-89 (1976).

make these validated norms futile as they are situated in a wider but discrepant normative universe. What has been validated by the criteria of the legal system then suffers a spatio-temporal mismatch with the more fluid normative moorings of human consciousness. Thus ideas charged with contentious moral content (precisely because of their importance to humanity) must have an entry point in the legal system under pain of the latter's irrelevance and eventual extinction. This is akin to Habermas's second validity basis—the principle of justification—where the legal system must evolve some sort of semi-permeable membrane to selectively allow moral argumentation to mesh with legal discourse; where law is positivized in ways that will accommodate the influences of its normative background. Specifically, as the idea of equality is an evolving norm in an uneven world, it can never be circumscribed by any particular legal system. Equality, much like any open-textured norm, can only be justified by legal structures that recognize the changes that pervade time and space; indeed, those which acknowledge the reality of evolution. As will be discussed further, this is fundamentally incompatible with a legal doctrinalism that tries to divine an ideal of equality which, by definition, is unchanging.

It should be emphasized that the entry of morals into law is not, or should not be (depending on the level of development) too indiscriminate as this would render useless the boundaries that a legal system came to develop. It need not also be belabored that within a legal system, much like any human institution, there are inevitably leakages, flaws or avenues for politicization and rent-seeking behavior—a reality exaggerated, I would say, by the Realist-CLS critique. This, however, does not detract from the normative precept of evolving positive law as a necessary requirement for long-term sustainability. A government of laws and not of men is still a reasonable ideal in a realm of undeniable imperfections; objectivity is still a desired characteristic rather than just subjectivity or worse, arbitrariness. In short, it is not wise to rest on flaws rather than goals, even from a purely theoretical standpoint. When outsider norms enter into the field of law, they must comport well with the law's own rationality. Such norms must be independently recognized by the legal system's own validating criteria to be properly considered as "law". The evolution of a rule of recognition—one of H. L. A. Hart's most important contribution to legal theory—is but a corollary to the social development of law.

The American invention of a written constitution is its own project of positivization: first as an experiment,[49] now a continuing effort to evolve an autonomous normative source that is relatively permanent and primordial. John Marshall crystallized this in *Marbury v. Madison*[50] when he said that "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void."[51] The principle of constitutional supremacy, reinforced by the specter of a written document, creates a normative architecture of the legal system. This evolved to be America's brand of positivism. By creating a permanent hierarchy where the constitution is both the highest (from a delegation of powers perspective) and foundational (from a constituent powers perspective) mechanism of validation, norms can only be posited as law insofar as they are not repugnant to it. Legal discourse centers on the idea of that the constitution is the ultimate rule of recognition; a *grundnorm*[52] inasmuch as if an act is constitutionally invalid, it is as if there is no act at all in the eyes of the law. In other words, law is what is constitutional. In here, as Marshall said, there is no middle ground; in fact, it is "a proposition too plain to be contested" for otherwise, "written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable."[53]

Of course, as law cannot exist *in vacuo*, likewise the constitution cannot be completely divorced from the broader political, social and cultural sphere. I think this much is admitted today. In the 1930s, Karl Llewellyn lamented what appeared to him to be an inevitable temporal mismatch between the U.S. Constitution and the status quo: "The Document was framed to start a governmental experiment for an agricultural, sectional, seaboard folk of some three millions. Yet it is supposed to control and describe our Constitution after a century and a half of operation; it is conceived to give basic information about the government of a nation, a hundred and thirty millions strong, whose population and advanced industrial civilization have spread across a continent."[54] A "sane theory of constitutional law", he concluded, "would no more be a substitute for

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[49] *Cf.* AKHIL REED AMAR, AMERICA'S CONSTITUTION, A BIOGRAPHY (2006); PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT (2006).

[50] 1 Cranch (5 U.S.) 137 (1803).

[51] *Id.* at 177.

[52] HANS KELSEN, PURE THEORY OF LAW (Knight trans., 1967).

[53] Marbury, *supra* note 50, at 177.

[54] Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934).

adequate personnel than is the prevalent modified and halfway reworking of the ancient orthodoxy."[55]

Well put; but Llewellyn, who typifies the Realist-CLS movement, sorely misses the point. As explained above, the possibilities of anachronism and adaptation are continuing challenges of any legal system. There is little regulatory logic in simply hoisting our hopes on a handful of people like judges. Regulation is about creating systems of incentives and restructuring environments, not about personal moral renewal or the selection of righteous people. More importantly, despite semantic shifts in the text of the document, the core idea of constitutionalism, as a socially envisioned form of governance, is that the document must indeed constrain actions and must be relatively permanent amidst the flux of policies, personnel and habits. The purpose of establishing a constitution is abrogated when the document is seen as a transparent and infinitely malleable thing, so as to amount to nothing. Unfortunately, this is what the Realist-CLS critique misunderstands: that the founders of the 1789 American Document, or the drafters of any constitution for that matter, wanted to create a stable normative source that will govern generations and accordingly adapt to change.

Principles and values embedded in the text, history and structure[56] of constitutions are precisely meant to provide an authoritative and durable framework for the resolution of society's long-term concerns. John Marshall understood this when he said in *McCulloch v. Maryland*[57] that "we must never forget that it is a constitution that we are expounding"[58]; and in all practical terms is the fact that the hegemony of a constitution is generally undisputed by ordinary citizens; judges claiming that their decisions are dictated by it; executive and legislative officers justifying their actions on that basis; lawyers using the constitution in their arguments and pleadings; public officials solemnly swearing to preserve and defend the constitution. This is not simply mass delusion but society's recognition of the project of evolving an autonomous foundational norm. A constitution is a shared plan[59] of entrenching, formalizing and positivizing society's norms; as a human institution, it is not without imperfections. But positivization—as an aspect of social development—makes the perception of law a distinct discipline which cannot be naively collapsed into a study of politics and behavior.

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[55] *Id.* at 34.

[56] Akhil Reed Amar, *The Supreme Court 1999 Term—Foreword: Document and Doctrine*, 114 HARV. L. REV. 26 (2000); Amar, *supra* note 49; JOHN HART ELY, DEMOCRACY AND DISTRUST (2002).

[57] 4 Wheat. (17 U.S.) 316 (1819).

[58] *Id.* at 407.

[59] Scott Shapiro, *What is the Rule of Recognition (and does it Exist)?, in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Adler & Himma ed., 2009).

If the establishment of a constitution is precisely to erect walls against fickleness and caprice, it is a socially conscious effort to differentiate law from other normative domains like tradition, religion and social mores. As a result of this social awareness, the positivism of a constitution is a well-entrenched belief, almost an indubitable dogma not only in law and jurisprudence, but in the ordinary discourse of a more or less developed constitutional democracy. It is a notion fundamentally embedded in its public sphere—that discursive space of institutions and practices that defines the social being of humans who evolved to have brains complex enough to cognize the realities that emerge from the interrelations of their fellow species. In justifying judicial review in the Philippines, José Laurel articulated the same idea in *Angara v. Electoral Commission*[60]: "In times of social disquietude or political excitement, the great landmarks of the Constitution are apt to be forgotten or marred, if not entirely obliterated… Certainly, the limitations and restrictions embodied in our Constitution are real as they should be in any living constitution."[61] To be sure, the Philippines, as a constitutional democracy, leaves much to be desired. However, despite the imperfections of human institutions, the autonomy of a constitution is very much real as a normative and, to a certain extent, descriptive principle and equally real is its influence on the conduct of society. Norms which surreptitiously enter a constitutional legal system without satisfying the latter's independent validating mechanism cannot and should not be considered as law. A rule of recognition quintessential in the theory of a constitution is the basis by which we say something is constitutional or unconstitutional, valid or void, permissible or impermissible, legal or illegal. To argue in such manner and say at the same time that law is simply a matter of politics is to suffer cognitive dissonance.

As a stand-alone reality, the interesting aspect of constitutionalism is the inclusion of such broad normative categories as "due process", "equal protection", "liberty", "social justice"[62] and even that of maintaining a "regime of truth, justice, freedom, love, equality and peace".[63] For the purpose of this paper, however, we focus on the constitutionalization of the idea of equality as evidenced by the equal protection jurisprudence of the Philippines. The meaning of such category as "equal protection" is certainly contentious, there being no metaphysical definition carved in the sky. By

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[60] G.R. No. 45081, 63 SCRA 139, Jul. 15, 1936.

[61] *Id.* at 157.

[62] While the prior examples are found in the U.S. Constitution (where the Philippines patterned its Constitution by reason of its colonial history), the constitutional provisions of social justice is specific to the 1987 Philippine Constitution. *See* 1987 PHIL. CONST. art. II, §10, art. XII, §15 and art. XIII.

[63] Preamble, 1987 PHIL. CONST.

reason of this so-called "opentexturedness", some see this as a green sign for unbridled legislation by practically anyone who exercises governmental power. This becomes problematic in a separation of powers scheme of government, where creative or legislative power is constitutionally collocated in a particular branch of government. This places electorally irresponsible judges in an awkward position because, tasked with merely interpreting the law, end up introducing norms and standards not previously contemplated by the legislature.[64] On a higher level of generality, the opentexturedness of important constitutional standards is seen as an eloquent illustration of the indiscriminate entry of outsider norms in the constitutional order.

This view once again misunderstands the idea of constitutionalism. Such a situation is more of a defect than a license. The absence of any positive standard in the imposition of a norm upon a populace is certainly a defective situation within the framework of a constitutional order. The fact that personal biases and prejudices often become constitutionalized should not lead into some sort of self-fulfilling prophecy of their validity but should instead show a symptom of an underdeveloped and undifferentiated legal system. It cannot be denied that oftentimes constitutional norms cannot be readily determined or enforced; indeed, the most important concerns of a society are often fraught with the deepest legal questions precisely because different interests are at stake. But again difficulty does not translate into license and the inability to distinguish such significant epistemic categories is the failure of the Realist/CLS enterprise. The fact-claim that we cannot help the entry of biases, prejudices, predilections and ideologies is too extravagant to be entertained and it negligently overlooks the fundamental question of degree. Certainly such anomalies in a constitutional framework can be empirically minimized; granting that they cannot altogether be abolished, the allowable level of these leaks in the system, as it were, is an important question in itself. In any case, their existence does not negate the reality of norms properly established by a constitutional system which, by their very nature, direct and impel people to act in a certain way. Breaches of these norms do not necessarily mean that the latter cease to exist; indeed they may nonetheless have considerable influence in the behavior of society despite such violations. Rules of recognition are such kind of norms but more than that, they go into the core idea of a constitution in that without them, constitutions are truly absurd attempts in being called constitutions.

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[64] On the idea of countermajoritarianism, *see* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1986); James Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 17 (1893); Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

The textualization of the so-called "equal protection of the laws" in the constitution is the entry point of the norm of equality in our legal system. "Equal protection" of course is a broad normative concept; an idea charged with contentious moral content. But rather than being considered as a leakage in a positive system of constitutional law, it is seen as institutionalizing Habermas' principle of justification, where the legal system is made pervious to evolving community conceptions of equality in the human species. It contributes to the robustness of the constitutional order by warding off mismatches between norms of equality which had been constitutionalized at a particular period and the wider normative space where the constitution is situated. As a matter of judicial function, judges are able to incorporate (clearly)[65] evolved community standards through this broad normative category. The concept of equality in *Plessy*, for example, assumed new meaning in *Brown v. Board of Education*[66] as the U.S. Constitution adapted to the changing landscape of American society as a result of the Civil Rights Movement. Success is not always guaranteed of course; and it is not uncommon that the equal protection clause truly becomes a leakage for idiosyncrasies and sentimentalities rather than an institutional mechanism of adaptation. But again this only tells us of the fragility of the legal system whereas maturity manifests itself in strong institutions which are not easily swayed by means of power play or short-term excitements. "The great ideals of liberty and equality", according to Benjamin Cardozo, "are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions…"[67]

As a social project of positivization, it only makes sense that the Constitution derives its meaning of equal protection from the *socius* while at the same time, maintaining the long-term integrity and permanence of its legal structures. This is the better reading of the 1987 Philippine Constitution when it provides that "[s]overeignty resides in the people and all government authority emanates from them"[68] rather than the self-contradicting proposition that the constitution authorizes populism or "extra constitutional methods" to override itself. This social set-up endures because it implicitly recognizes that the norm of equality is not a static

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[65] It is problematic if the question of existence of a new community standard is genuinely disputable, for then it becomes an avenue for judicial legislation of the judge's personal preferences. I say "genuinely" because the dispute may only be concocted to suit ulterior motives.

[66] 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

[67] BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 92-93 (1964).

[68] 1987 PHIL. CONST. art. II, §1.

metaphysical ideal, but one that evolves along with the asymmetries of the material universe. In this way, the time-constrained rationality of the legal system does not ossify by updating itself with the movements of human consciousness.

Equally important is that this update process must also be constrained inasmuch as the stability of the legal system depends on its capacity to hold up to the long-term vision of general principles. Thus not just any idea, theory or inkling of equality may be deemed to be within the purview of equal protection if they cannot meet a constitutional rule of recognition, be it in the text or jurisprudence or in the doctrine of *stare decisis et non quieta movere*. An outsider norm must satisfy the gatekeeper of the legal system. One of H.L.A. Hart's most important insights in legal theory is that the answer to the question of "what is law?" is found in the legal system itself and not externally from some capricious sovereign.[69] A rule of recognition may change over time and indeed, depending on the circumstances, its lifespan may vary for particular legal systems. It is, after all, a social institution. Nonetheless, a rule of recognition must be relatively permanent to ensure the stability of the legal system. The increased permeability of the legal system compromises its independence which society took long to accomplish. The fact, however, that a rule of recognition is not immutable (an absurd claim in itself, bordering on Thomistic natural law) makes it no less fundamental, let alone to deny its existence. The whole theory of a constitution necessitates that something which purports to be "law" must have a basis, and a constitutional rule of recognition affords that basis.

Thus for a legal system to endure, it must strike the balance between the needs of positivization and adaptation. In Habermas's terms, law validates itself when what it enacts, it justifies. Law lives in an existential tension between implacability and accommodation, generality and particularity, hyperopia and myopia, being and becoming. After all, the life of the law has always been logic and experience, not one or the other.[70] A

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[69] As Scott Shapiro explains in *supra* note 59, at 235:

> [A]s Hart painstakingly showed, we cannot account for the way in which we talk and think about the law—that is, as an institution which persists over time despite turnover of officials, imposes duties and confers powers, enjoys supremacy over other kinds of practices, resolves doubts and disagreements about what is to be done in a community and so on—without supposing that it is at bottom regulated by what he called the secondary rules of recognition, change and adjudication.

[70] *Cf.* OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881). (The life of the law has not been logic, it has been experience).

constitution is a social invention which reaches out to the future but firmly grounds itself in the present. Particular controversies must always be seen within the perspective of general constitutional principles. Thus it is that law "gives a vision depth of field, by placing one part of it in the highlight of insistent and immediate demand while casting another part in the shadow of the millennium."[71] The establishment of a constitutional norm of equality must be situated in a paradigmatic vision which peers into time and space and the evolution of our species, nature and the universe.

## IV. Doctrinalizing Equality

The problem with the Philippine legal system is that its constitution remains more or less a copy of the one handed down by its former colonial master during the early twentieth century. At present, Philippine judges and justices indiscriminately cite, quote or cherry-pick U.S. decisions—from the federal down to the district court—collapsing any pretensions between authoritativeness and persuasiveness, and justifying it under the *in pari materia* rule. I problematize this colonial mimicry,[72] as it were, not from a nationalistic standpoint, but from the standpoint of the legal system itself: it means that constitutional norms did not really evolve out of the peculiar circumstances of Philippine society, but was transplanted in Philippine soil by the force of its colonial history. Rather than H.L.A. Hart, we have here John Austin at work where law becomes a command of the sovereign.[73] But this is seriously not to portray Austin's view as an alternative theory to Hart's, and neither is it to say that the former is the proper framework to describe Philippine law than the latter. Indeed, as a contemporary constitutionalist would say, "we have cut the umbilical cord"[74] from our colonial master (although not entirely so, I might add) and it may very well be that approximately a century from such severance, Philippine society has evolved its own set of norms. But the problem of a transplanted constitutionalism[75] remains—that is, that the norms are still tenuous and precocious from the perspective of legal systems, as the idea of a constitution never did originate from the Filipino consciousness.

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[71] Cover, *supra* note 37, at 9.

[72] The term "colonial mimicry" was coined by Homi Bhabha. *See* Homi Bhabha, *Of Mimicry and Man: The Ambivalence of Colonial Discourse* in THE LOCATION OF CULTURE 86 (1994).

[73] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1861).

[74] This phrase is attributed to Joaquin Bernas as quoted in *Francisco v. House of Representatives*, G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003.

[75] This is a term I borrowed from the title of Dean Raul Pangalangan's article. *See* Raul Pangalangan, *Transplanted Constitutionalism: The Philippine Debate on the Secular State and the Rule of Law*, 82 PHIL. L. J. 1 (2008).

In particular, the Philippines has evolved a peculiar equal protection jurisprudence.[76] This is summarized in a 1939 case of *People v. Cayat*:[77]

> It is an established principle of constitutional law that the guaranty of the equal protection of the laws is not violated by a legislation based on reasonable classification. And the classification, to be reasonable, (1) must rest on substantial distinctions; (2) must be germane to the purposes of the law; (3) must not be limited to existing conditions only; and (4) must apply equally to all members of the same class.[78]

To date, this is the mantra of equal protection and Philippine courts almost always regurgitate this test every time they need to resolve an equal protection challenge. This test applies across the board and so far we did not see it fit to split it into different levels of review. At least, in this aspect, we have yet to catch up in parroting the law of our colonial master[79] (the *Cayat* test is taken from a 1911 decision of the Supreme Court of Wisconsin) although the Carolene Products footnote already found its way in a recent Supreme Court decision nullifying a city ordinance prohibiting motels from offering pro-rated or "wash up" rates to its customers.[80]

I describe this test as "peculiar" because it appears to be inconsistent. It says that the equal protection of the laws is not violated when based on "reasonable" classification—seemingly endorsing a rationality review—but at the same time, demanding that distinctions must be "substantial" and "germane" to the purposes of the law (aside from the last two requirements)—apparently strict scrutiny or perhaps an intermediate level of review. At first blush, the statement is already counterintuitive as all laws necessarily discriminate and requiring that all be substantial and germane may not at all be reasonable. Consider, for example, the laws of suffrage. The 1987 Philippine Constitution requires that a citizen

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[76] The equal protection clause in the 1987 Philippine Constitution is at the end of the provision in art. III, sec. 1: No person may be deprived of life, liberty and property without due process of law, nor shall nay person be denied the equal protection of the laws.

[77] G.R. No. 45987, 68 SCRA 12, May 5, 1939.

[78] *citing* Borgnis v. Falk Co., 133 N.W., 209; Lindsley v.. Natural Carbonic Gas Co., 220 U.S. 61; 55 Law. ed., Rubi v. Provincial Board of Mindoro, 39 Phil., 660; People and Hongkong & Shanghai Banking Corporation v. Vera and Cu Unjieng, 37 Off. Gaz ., 187.

[79] Standard American constitutional textbooks recognize three levels of review in U.S. equal protection jurisprudence: strict scrutiny, intermediate and minimum rationality review. *See* KATHLEEN SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (16th ed., 2007), ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (2nd ed., 2002). Some argue that there are more levels of review, see R. Randall Kelso, *Standards of Review under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Supreme Court Practice*, 42 U. PA. J. CONST. L., 255 (2002) who argues for the possibility of ten levels of review.

[80] White Light Corp. v. City of Manila, G.R. No. 122846, Jan. 20, 2009.

must be at least eighteen years old to be able to vote.[81] Not by any stretch of the imagination can we divine any substantial distinction between a 17-year old and an 18-year old citizen, nor can we see the germaneness to the purpose of promoting a participatory democracy by drawing the line at that point. This is indeed discrimination against those falling below the age of eighteen and it is fair to say that the distinction is arbitrary—in other words, that the degree of maturity supposedly needed to participate in the political process is arbitrarily pegged at eighteen. The members of the Constitutional Commission were not exactly skilled psychologists. However, I do not think that the provision on suffrage violates the equal protection clause (after all, they are in the same document) by being neither substantial nor germane, but simply because it is not invidious. Although hardly anyone will contest this view and the problem may be more on draftsmanship than understanding, the inherent conflict in the test of equal protection raises a more fundamental issue.

While the doctrine in *Cayat* does not expressly state the requirements of "compelling state interest" and narrow-tailoring of means; or whether courts should take a uniformly deferential stance in the exercise of judicial review, it is this doctrinal silence which is problematic. As it is, the test effectively subsumes the extreme ends of the review spectrum and everything in-between. Thus there is much leakage in this doctrine, as judges are able to freely move from one end to the other without any guiding principle; they can shift from exactingness to laxity whenever convenient or by reason of personal or transient political considerations. Just to be clear, I do not propose to adopt the levels of review of American jurisprudence (since this is the expected reaction, by virtue of our postcolonial ties); the Philippines can evolve a multi-tiered equal protection review based on grounds derived from its own experience. For this paper, however, I just want to point out the problems that may arise from the lack of standards that define the contours of judicial discretion in resolving equal protection challenges. Unfortunately, the *Cayat* doctrine offers little in terms of standards and may even legitimize inconsistent judicial shifting from heightened to deferential modes of review. This is attested by decisions of the Philippine Supreme Court.

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[81] 1987 PHIL. CONST. art. V, §1. Suffrage may be exercised by all citizens of the Philippines not otherwise disqualified by law, who are at least eighteen years of age, and who shall have resided in the Philippines for at least one year and in the place wherein they propose to vote for at least six months immediately preceding the election. No literacy, property, and other substantive requirement shall be imposed on the exercise of suffrage.

*People v. Cayat* is a curious and amusing old case. Cayat was a native from Baguio, "a member of a non-Christian tribe" and by statute, he was prohibited from possessing or drinking any liquor other than those so-called native wines or liquors which his tribe has been accustomed. According to the Court, the purpose of the law was to ensure peace and order because "the free use of highly intoxicating liquors by the non-Christian tribes have often resulted in lawlessness and crimes, thereby hampering the efforts of the government to raise their standard of life and civilization."[82] But Cayat got his drink (a bottle of gin); thus he was prosecuted and eventually convicted. Cayat brought an equal protection challenge to the Supreme Court while admitting to the charges against him. His lawyer described his brief as the "brief of the non-Christian tribes" whose people are "jealous of their rights to a democracy", "any attempt to treat them with discrimination or 'mark them as inferior or less capable race and less entitled' will meet with their instant challenge."[83] The distinction that the law makes is not substantial, according to Cayat, being based upon "accident of birth or parentage."

All this for a drink; but who would not be so annoyed if one is meted out a fine or made to suffer subsidiary imprisonment in case of insolvency, just to get a taste of "modern" gin? But the Court rejected the challenge saying that the true distinction is not birth or parentage, but the degree of civilization. It held that the distinction is reasonable, because the law

> is designed to promote peace and order in the non-Christian tribes so as to remove all obstacles to their moral and intellectual growth and, eventually, to hasten their equalization and unification with the rest of their Christian brothers. Its ultimate purpose can be no other than to unify the Filipino people with a view to a greater Philippines.[84]

It is worth noting how the same *Cayat* test that was used to adopt an extravagantly deferential stance to a colonial government could be easily shifted to a stricter application in more recent cases[85]. In the case of *Cayat*, however, treating the doctrine as a leakage in the legal system may be inapposite, as the Constitution[86] was never conceived as a social project of positivization, but rather as a new normative system handed down by a colonizer to the colonized. At that time, the *Cayat* doctrine bore the

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[82] People v. Cayat, 68 SCRA 12.
[83] *Id.* at 16.
[84] *Id.* at 20-21.
[85] For examples, *see infra.*
[86] During this time, it was already the 1935 Constitution that was in force.

colonizer's eyes, where distinctions only became distinctions if they were within its field of vision and everything else was characterized by blindness.

More than a hundred years from its independence, the Philippines suffers from weak legal institutions which are easily swayed by its messy politics. This is borne by the country's evolution as a nation, where law is usually a personalized bidding by those who are in power—from the long period of colonialism under the Spanish and American rule to Ferdinand Marcos's Martial Law and until today, albeit in a more or less dispersed form. Such is only telling of the tenuousness of constitutional norms in the legal system. As of this writing, the Supreme Court (which was packed by Gloria Macapagal-Arroyo as one of the longest staying president second to Marcos) reversed decades of settled understanding regarding the ban of midnight appointments in *De Castro v. Judicial and Bar Council*[87] so that the president can appoint the next chief justice. As one of the presidents who have the lowest approval rate in history, the situation merely confirmed the growing consensus that the highest court in the Philippines has been compromised to suit the personal interests of its Chief Executive.

In the shadow of postcoloniality, however, the Philippines has developed (and continues to develop) a degree of understanding of having a shared plan of establishing a constitution. The fact that the *De Castro* ruling is causing much agitation means that there are elements in Philippine society that are interested in upholding the so-called "rule of law"—which is essentially a positivist conception of law—although unavoidably, there are also elements that are not so interested and are just joining the fray to satisfy their own personal motives. While the 1987 Constitution is still more or less a copy of its 1935 predecessor established under American tutelage, the social desire to institutionalize the rule of law under the present Constitution may be seen as a conscious act of ratifying what was handed down by the United States. This process of ratification may be imperfect, as when the Philippine legal system indiscriminately adopts American doctrines whenever convenient, or due to lack of originality or ignorance of other sources, such are the expected consequences of a transplanted constitutionalism in a fledgling nation. The Preamble in the Constitution may only be honored for its hortatory value, but it is symbolically potent in evidencing the social project of positivization: "We, the sovereign Filipino people…do ordain and promulgate this Constitution."[88]

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[87] G.R. No. 191002, March 17, 2010.
[88] Preamble, 1987 PHIL. CONST.

Viewed in this light, the inherent inconsistency of the *Cayat* doctrine becomes a leakage in today's constitutional order. The judicial shifting of the Supreme Court in two recent controversial decisions which dealt with equal protection challenges illustrates how this colonial test can be a constitutional pantomime. The first decision in *Quinto v. Commission on Elections*[89] held that there is an equal protection violation when the law[90] treats appointive officials as resigned from their posts when they run for elective offices, while existing elective officials are not. The classification is invalid, according to this ruling, because it is not "germane" to the legislative policy of preventing these officials from using their current posts in promoting their candidacy. In using the germaneness requisite in *Cayat*, the Court adopted a decidedly strict or heightened level of scrutiny in arriving at a conclusion widely seen as enabling President Arroyo's allies in using the administration's political machinery to get elective offices. After about three months, in the resolution[91] of the motion for reconsideration, the Supreme Court reversed itself. Now taking a deferential approach, it declared that "as long as 'the bounds of reasonable choice' are not exceeded, the courts must defer to the legislative judgment.'"[92] "[T]he fact that the legislative classification, by itself, is underinclusive will not render it unconstitutionally arbitrary or invidious."[93] This, apart from castigating the *ponente* of the first decision for relying on an overruled American decision,[94] short of saying that he has obsolete knowledge of constitutional law.

*League of Cities v. Commission on Elections*[95] is another illustration of the uncanny privilege of the Supreme Court to change its mind under the auspices of *Cayat*. After all, as Justice Fred Ruiz Castro allegedly said: "When the Supreme Court makes a mistake, it is a Supreme Mistake."[96] So, the logic goes, the Court better make amends lest its mistake become part of the law of the land. And the Court did change its mind in *League of Cities* after denying the first and second motions for reconsideration of the losing party (of the original decision) and ordering that "No further pleadings shall be

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[89] G.R. No. 189698, Dec. 1, 2009.

[90] Batas Blg. 881, §66. This is the Omnibus Election Code; R.A. 9369, §§13-14.

[91] G.R. No. 189698, Feb. 22, 2010.

[92] *citing* Taxpayers Ass'n of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 40, 364 A.2d 1016 (1976).

[93] *citing* De Guzman v. Commission on Elections, G.R. No. 129118, 336 SCRA 188, 197, Jul. 19, 2000; City of St. Louis v. Liberman, 547 S.W.2d 452 (1977); First Bank & Trust Co. v. Board of Governors of Federal Reserve System, 605 F.Supp. 555 (1984); Richardson v. Sec. of Labor, 689 F.2d 632 (1982); Holbrook v. Lexmark Int'l Group, Inc., 65 S.W.3d 908 (2002).

[94] Mancuso v. Taft, 476 F.2d 187 (1973).

[95] G.R. No. 176951, 571 SCRA 263, Nov. 18, 2008.

[96] I heard this from Prof. Araceli Baviera during my Civil Law Review class in the University of the Philippines. I have yet to find a documentation of this statement by Fred Ruiz Castro.

entertained. Let entry of judgment be made in due course."[97] The first decision accepted the equal protection challenge against a set of laws granting cityhood status to certain municipalities which used lower requirements than those prescribed under the newly amended Local Government Code.[98] It ruled that there is no substantial distinction between the municipalities covered by the questioned statute and those that need to conform to the general law. While I do not consider this as strict scrutiny and the decision may well be correct in saying that it is based on a rationality review,[99] the second *League of Cities* decision is inordinately loose. The latter invoked the plenary power of Congress and upheld substantiality and germaneness on the ground that it is "unfair" to the municipalities who were expecting to be cities under the old requirements of Local Government Code. It should be mentioned that seven of the eleven justices who took part in the divided first decision (i.e. 6-5 vote) were already retired during the second decision. The *Cayat* doctrine was but a platform to support the politics of the justices.

To be sure, the problem is also due to the inherent manipulability of such words as "reasonable", "substantial" or "germane". This has almost been an inevitability if one deals with legal texts, so this changes little. But over and above this opentexturedness is the intrinsic uncertainty of doctrine because it swallows all possible positions that the Court can take. Its across-the-board application means that it fails to distinguish whether there is an important state policy involved; or if the classification is too trivial to merit strict scrutiny. Thus it leaves these matters entirely to the judge. It may be argued that even if equal protection review is split in levels, the judge *ex ante* decides the importance of the case at hand and accordingly chooses the level of review *ex post*. True, but in this way, the decision communicates the interests involved (by explicitly identifying the level of review), which is not obtained by employing the *Cayat* doctrine where judges can easily shift from reasonability to lack of substantiality and/or germaneness and vice versa. Except when the judge specifies, the interest involved is obscured in silence.

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[97] This procedural curiosity was justified by saying that the resolution denying the first motion for reconsideration for lack of merit and the second one for being a prohibited pleading was based on a 6-6 vote. According to the Court, this does not satisfy the constitutional provision which states that "All cases involving the constitutionality of a treaty, international or executive agreement, or law shall be heard by the Supreme court *en banc*…[which] shall be decided with a concurrence of a majority of the Members who actually took part in the deliberations on issues in the case and voted thereon" [1987 PHIL. CONST. art. VIII, §4(2)]. However, there was majority vote in the original decision albeit a very close one, i.e. 6-5.

[98] R.A. 7160, §450. This is the Local Government Code of 1991.

[99] In the words of the first decision: "To be valid, the classification in the present case must be based on substantial distinctions, rationally related to a legitimate government objective which is the purpose of the law, not limited to existing conditions only, and applicable to all similarly situated" (citations omitted).

I am comparing Philippine equal protection jurisprudence and its American counterpart, only to show the flaws of *Cayat*. But to reiterate, I am not suggesting that we should mindlessly adopt the doctrine of our former colonizer. U.S. equal protection jurisprudence arose out of its peculiar legal history such as when race constitutionally evolved to be a suspect classification in the context of discrimination against African-Americans. The Philippines should establish a well-defined equal protection test—either by splitting it in levels of review based on its own legal environment or a more transparent uniform test—without sacrificing, of course, the broad normative nature of equal protection as an adaptationist mechanism of the constitutional order. Opentexturedness only serves the legal system to this end, not as an avenue for legislating personal preferences and political interests. I do not propose a concrete solution yet, but that may be the subject of another paper.

The continued reliance on *Cayat* shows the failure of our laws to positivize and evolve a consistent general principle. This colonial test is a chameleon that suits any political color. If we follow the plain import of *Cayat*—that is, for law to classify, it must be based on substantial distinctions and germane to its purpose[100] (if this is what "reasonable" really means)—then we are in a ridiculous situation because law can hardly classify if it does not satisfy the demands of substantiality and germaneness. This revolts against the nature of human cognition which inevitably discriminates, even though such discrimination has no substantial basis. Moreover, as law necessarily discriminates, this in effect vasectomizes legislative power. If *Cayat* is followed to the letter, the law on suffrage should be declared unconstitutional because there is no substantial distinction between an 18-year old and a 17-year old citizen. But then again, it is faced with the awkward fact that the law on suffrage and the equal protection clause are found in the same Constitution. Similarly, there is no substantial distinction between a person in his late fifties and a 60-year old to avail of the benefits under the Expanded Senior Citizens Act[101]. The list can go on; and these distinctions are definitely arbitrary, but it does not mean that they are constitutionally invalid. *Cayat*'s understanding of equal protection seems to be: as a general rule, laws should not classify, and if they do classify, they bear the burden of justifying such classification as substantial and germane.

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[100] There are the other two requirements—i.e. that the classification must not be limited to existing conditions only; and must apply equally to all members of the same class—but they are not as problematic as the requirements of substantiality and germaneness.

[101] R.A. 9257.

Again, I doubt if anyone in his right mind will accept this interpretation but it is warranted by the schizophrenic statement of the doctrine. At the very least, judicial shifting is the better result than outlawing "un-substantial" and "un-germane" discrimination. If *Cayat* only conveys the idea of deferential review ("reasonability"), then it should have been simplified into a test of non-invidiousness. But there may be a more fundamental worldview animating *Cayat*'s apparent disdain against classification. It is that cosmological claim that all men are created equal and thus the State should not confer any benefit or disfavor to any class. This vision of a flat world is only matched by its paradigmatic blindness to the natural unevenness of the material universe. Real inequalities are therefore perpetuated by ignoring them. However, I am hopeful that modern society is moving away from this misguided metaphysics by its recognition of, among others, the notion of affirmative action and social justice in law. Society may be slow in articulating the theoretical shift from spiritualism to materialism, but some of its effects are already being felt, such as the reliance on science to address important social concerns rather than religion or other forms of superstition. The danger is the possibility that society continues to be hypnotized by the soul-based worldview, and the State intervenes to forcibly flatten worldly differences to attain God's ideal place. In this case, individual freedoms are sacrificed to journey to the Promised Land. We should take our cue from José Laurel who—though not exactly the atheistic type—did declare in the oft-cited definition of social justice in *Calalang v. Williams*[102]: that it is not achieved "through a mistaken sympathy towards any given group…but the humanization of laws and equalization of social and economic forces by the State, so that justice in its rational and objectively secular conception may at least be approximated."

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[102] G.R. No. 47800, 70 Phil. 726, Dec. 2, 1940.