

THE ESTABLISHMENT CLAUSE: AN ANTI-ESTABLISHMENT VIEW

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*The criticism of religion is the
prerequisite of all criticism.*

— KARL MARX, Introduction to
a Contribution to the Critique
of Hegel's Philosophy of Right
(1844)

I. THE RELIGIOUS CONSTITUTION

To the atheist, the experience of reading the Preamble² is one of ambivalence, if not alienation, for its invocation of an “Almighty God” means that her citizenship is not sufficient for inclusion to this category of “We, the sovereign Filipino people” and that she is out of the project of “build[ing] a just and humane society.” Right off the bat, the entire country is conscripted into god-belief (of the monotheistic flavor) as if this incantation were fundamental to citizenship and nationhood. With the ratification of the Constitution, the infidel became constitutionally invisible, covered by the overbearing influence of a colonial past that casts a dominant shadow on the affairs of the present. This is one Constitution that embarks on a mission of promoting “a regime of truth, justice, freedom, love, equality, and peace” by denying all of them to a class of human beings singularly defined by their disavowal of superstition and distaste of dogma.

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²“We, the Sovereign Filipino people, imploring the aid of Almighty God, in order to build a just and humane society and establish a Government that shall embody our ideals and aspirations, promote the common good, conserve and develop our patrimony, and secure to ourselves and our posterity the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution.”

The apologist might say that the Preamble was made only to reflect the undeniable fact that the Philippines is a god-believing nation, whether of the Christian or the Muslim or of any other type.³ She may argue that it is not as if this country were divided half and half between theists and non-theists,⁴ and that on the contrary, the number of non-theists is so negligible that their rejection of the overwhelming majority's beliefs is not worthy of constitutional respect or consideration. Indeed, it would be like accommodating the desire of a small band of secularists to disestablish religion from the Constitution against the generalized preference of the overwhelming majority. She might also take the doctrinal path of the textbook writers and say that the exclusion of the non-believers from the Preamble is no cause for worry because anyway this introductory paragraph is not a source of constitutional rights, the application of which could result in material damage to them,⁵ or that it is a minor detail secularists shouldn't even worry about. Finally, the apologist could say that there are enough counterbalancing principles in the Constitution that protect the non-believer's concerns about the kinds of entanglement⁶ between religious outfits and secular institutions of government that might prove detrimental to the affairs of society. For her, the textual declaration of the separation of Church and State is sufficient profession of the Constitution's commitment to a division between the secular and the sectarian, the civil and the religious.

My aim in this Essay is to answer these hypothetical justifications by engaging in a textual scrutiny of the Constitution through which I intend to produce an awareness of contradictions evident from the perspective of the non-theist but largely unacknowledged on the part of the god-believer. Because this piece, as legal theorists would say, is a critique from the "outside," I make no effort to relate the case-law to the text-law or seek to attain doctrinal consistency through some theory. Indeed, one of the main problem with doctrinal analysis of the religion clauses is precisely that the attempt to find mutually reinforcing and consistent threads through a supposedly impartial lens of thought is not only too contrived but even serves to mask the crucial political choices made to set the boundaries of doctrine. Suffice to say, I do not believe a liberal theory of toleration

³See The CIA World Factbook page on the Philippines, available at <https://www.cia.gov/cia/library/publications/the-world-factbook/geos/rp.html> (last visited 1 May 2008), providing the following breakdown: Roman Catholic, 80.9%; Muslim, 5%; Evangelical, 2.8%; Iglesia Ni Kristo, 2.3%; Aglipayan, 2%; other Christians, 4.5%; others, 1.8%; unspecified, 0.6%; none, 0.1%.

⁴The difference between atheists and non-theists is semantic, with the former denying the existence of any god and the latter considering themselves non-believers in any form of a supernatural being. The logically correct term is non-theism, but for purposes of this Essay I make no difference between non-theists and atheists.

⁵See JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY (1996), 4; ISAGANI CRUZ, PHILIPPINE POLITICAL LAW (1991), 48.

⁶For a survey of the relevant cases on non-establishment and free exercise, see *Estrada v. Escritor*, A.M. No. P-02-1651, 5 August 2005, applying a benevolent accommodation neutrality standard to a free exercise claim.

or pluralism can be logically coherent within a framework that equally adheres to the principle of non-establishment and free exercise, even if only because of the obvious fact that everyone cannot *just* exercise their religion without the State imposing restraints whose justification rests on a normative framework.⁷ Nor can the State set rules of non-establishment (a negative norm) and not inevitably discriminate against or favor religions and their ways (a positive act) in some ways, whether crucial or not.⁸

The second concern is to provide a normative reading of colonial history informed by the need to problematize the continuing dominance of religious thinking in public discourse and legal argumentation, with its concomitant effects on public policy and constitutionalism. My concern here is limited to raising awareness about the symbolic and practical implications for Philippine society of the various instances of entanglement between religion and constitutional text that produce normative antinomies that in turn affect the way society is organized and claims to entitlement are adjudicated.

II. THE CONSTITUTION & THE CONTRADICTION IN TEXT

There is some structure to the textual guarantees of secularism⁹ in the Constitution consistent with the division of Political and Constitutional law (or structures and powers, on the one hand, and the Bill of Rights, on the other) reflected in the curriculum employed by law schools in the Philippines. Thus the structure positively guarantees that “the separation of Church and State shall be

⁷See Stanley Fish, *Mission Impossible: Setting the Just Bounds Between Church and State*, 97 COLUM. L. REV. 2255 (1997).

⁸Which means, quite paradoxically, that you can sing praises in public schools to rock stars, poets, novelists, and painters, but can't do the same thing to the god (or gods) of your religion.

⁹Secularism as a concept, is not self-defining, although it is generally held to refer to a certain level of separation between the affairs of the State and of religious institutions. Christopher Eisgruber, in *Secularization, Religiosity, and the United States Constitution*, 13 IND. J. GLOBAL LEGAL STUDIES 445 (2006), points to four distinct concepts of secularization: differentiation (religion has ceased to be the single and pervasive organizing structure for society, and has become, or is becoming, one of the multiple, specialized social subsystems, each of which has its own place in society and none of which can be said to organize all the rest); decline (religious practices are waning); inner secularization (the content of religious belief is being drained of its distinctive character, so that there is little difference between religious and secular belief systems); and marginalization (religious institutions and arguments are being excluded from political and social decisionmaking processes). Legal secularism, my topic in this Essay, is more narrowly focused on the extent to which legal norms and political institutions are influenced by religious beliefs. For obvious reasons, atheists like myself adopt the marginalization thesis, which asserts the need to discount religious arguments/motives in public policy and institutional design.

inviolable”¹⁰ while the Bill of Rights negatively promises “no law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.”¹¹ These twin pledges comprise the constitutional foundation of our commitment to secularism/non-establishment which, in the absence of any other countervailing principles or rules, would have provided a strong rhetorical underpinning for most secularist concerns about the use of State resources to promote religious beliefs or the free-riding of religion and its symbols on public spaces.

This, however, is not the case with our Constitution which, as I show below with some examples, entrenches practices that are clearly motivated by god-belief. It is this textual contradiction that hampers the goal of promoting secularism and achieving policies through rational conversation—

Art. II, § 12. The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.

The textbook commentator, Jesuit priest Joaquin Bernas, rationalizes this anti-abortion clause—

The formula that is found as the second sentence of Section 12 is the product of much debate. It is first of all important to understand what it does not assert. It does not say that the unborn is a legal person; nor does it deny, however, that the state under certain conditions might regard the unborn as a person. It does not assert that the life of the unborn is placed on exactly the same level as the life of the mother. It recognizes that, when necessary to save the life of the mother, it may be necessary and legitimate to sacrifice the life of the unborn. It, however, denies that the life of the unborn may be sacrificed merely to save the mother from emotional suffering or to spare the child from a life of poverty. The emotional trauma of a mother as well as the welfare of the child after birth can be attended to through other means such as availing of the resources of welfare agencies. The provision, in fact, is intended primarily to prevent the state from adopting the doctrine in the United States Supreme Court decision of *Roe v. Wade* which liberalized abortion laws up to the sixth month of pregnancy by allowing abortion at the discretion of the mother any time during the first six months when it can be done without danger to the mother.

The unborn’s entitlement to protection begins ‘from conception,’ that is, from the moment of conception. The intention is to protect life from its beginning, and the assumption is that human life begins at conception and that conception takes place at fertilization. There is, however, no attempt to pin-point the exact moment when conception takes place. But while the provision does not assert with certainty when human life precisely begins, it

¹⁰CONST., ART.II, §6.

¹¹CONST., ART.III, §5.

reflects the view that, in dealing with the protection of life, it is necessary to take the safer approach.¹²

The constitutionalization of what some members of the Constitutional Commission intended to be an anti-abortion clause says a lot about the kinds of arguments some of the religious make in their effort to justify a social order founded on their beliefs as well as the methods they employ in pursuing their advocacy. Bernas, for example, declares that “it does not say that the unborn is a legal person,” conveniently obscuring the fact that the use of the phrase “life of the unborn” operates as a full proxy for legal personhood. Would anyone really want to exterminate the “life of the unborn,” even if it is not a “legal person”? And what, one may as well ask, is a “legal person”; or a “legal person” *as opposed to what?* This kind of obscurantism, added with tautological touch, is what makes it possible for him to say that “the unborn’s entitlement to protection begins ‘from conception,’ that is, from the moment of conception.” To attach “life” to the unborn, as Bernas does, is to arrogate upon oneself the right to dictate the answer to what many thoughtful people would consider a complex question and compel the people of the here and now as well as of tomorrow to accept it. It is precisely because “life” is such a slippery concept that to focus on defining it in the first place hardly makes any sense for purposes of determining when an abortion may be justified.¹³ The question is: having realized that any line that can be drawn will

¹²*Bernas, supra.*, at 77-78. (citations omitted). He acknowledges that “the provision clearly reflects a Catholic approach to the problem. Advocacy of the provision was (sic) born principally by Bishop Bacani and Commissioner Bernardo Villegas, a stalwart Catholic layman.”

¹³For the classic argument in favor of abortion that concedes that the fetus is a person, See Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971), which made use of the famous “violinist thought experiment”—I propose, then, that we grant that the fetus is a person from the moment of conception. How does the argument go from here? Something like this, I take it. Every person has a right to life. So the fetus has a right to life. No doubt the mother has a right to decide what shall happen in and to her body, and so outweighs it. So the fetus may not be killed; an abortion may not be performed.

It sounds plausible. But now let me ask you to imagine this. You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist’s circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, “Look, we’re very sorry the Society of Music Lovers did this to you—we would never have permitted it if we had known. But still, they did it, and the violinist now is plugged into you. To unplug you would be to kill him. But never mind, it’s only for nine months. By then he will have recovered from his ailment, and can safely be unplugged from you.” Is it morally incumbent on you to accede to this situation? No doubt it would be very nice of you if you did, a great kindness. But do you *have* to accede to it? What if it were not nine months, but nine years? Or longer still? What if the director of the hospital says, “Tough luck, I agree, but you’ve now got to stay in bed, with the violinist plugged into you, for the rest of your life. Because remember this. All persons have a right to life, and violinists are persons. Granted you have a right to decide what happens in and to your body, but a person’s right to life outweighs your right to decide what happens in and to your body. So you cannot ever be unplugged from him.” I imagine you would find this outrageous, which suggests that

include an element of choice, how do we arbitrate such line for purposes of balancing both the interests of the mother and of the fetus as well as the competing desire for individual freedom and social constraint—autonomy and community—and in the process make the line drawn a reasonably negotiated compromise?¹⁴

There is a further attempt to make it appear that the clause errs on the side of caution by saying that “it is necessary to take the safer approach.” But the question is: whose approach is safer and what are the conditions that make such approach safer? *And safer than what*: the possibility of eternal damnation in some speculated hell? For the benefit of the unwary, this is the same approach that gets the Catholic hierarchy worked up over contraception, masturbation, and stem cell research. Transform these views into public policy and what you have is the kind of population explosion that rides on the rhetoric of the “natural right” of people to breed, promoted by public officials more concerned about the *material* consequences of defying the Church than they are about those unwilling, innocent by-products of humanity’s sexual urge—the younglings—and the health of women.¹⁵

The religious, by seizing the Constitution through the textualization of the anti-abortion clause, have attempted to permanently cut off any debate on this

something really is wrong with that plausible-sounding argument I mentioned a moment ago. At 49.

¹⁴See Ronald Dworkin, *LIFE’S DOMINION* (1993), which attempts to reframe the controversy in less polarizing terms, noting that people have failed to make the crucial distinction between believing that fetuses are creatures with interests which government has a derivative interest to protect, and the belief that human life has an intrinsic, innate value which the government has a *detached* responsibility to protect: “The confusion that I believe has poisoned the public controversy about abortion, and made it more confrontation and less open to argument and accommodation that it should be, is the confusion between these two kinds of reasons for believing that abortion is often, perhaps always, morally wrong. The scalding rhetoric of the “pro-life” movement seems to presuppose the derivative claim that a fetus is from the moment of its conception a full moral person with rights and interests equal in importance to those of any other member of the moral community. But very few people—even those who belong to the most vehemently anti-abortion groups—actually believe that, whatever they say. The disagreement that actually divides people is a markedly less polar disagreement about how best to respect a fundamental idea we almost all share in some form: that individual human life is sacred. Almost everyone who opposes abortion really objects to it, as they might realize after reflection, on the detached rather than the derivative ground.” At 13.

¹⁵See Juarez, Cabigon, Singh, & Hussain, *The Incidence of Induced Abortion in the Philippines: Current Levels and Recent Trends*, 31 INTERNATIONAL FAMILY PLANNING PERSPECTIVES NO.3 (2005), available at www.guttmacher.org. “Give the fact that substantial proportions of women who have [abortion-related] complications do not receive treatment at a medical facility, the estimated annual rate of 4.5 per 1,000 women most likely underestimates the size of the problem. In addition, treatment of abortion complication absorbs large costs to the public health system. Furthermore, studies suggest that the quality of such post-abortion care is poor. Women seeking care at hospitals for complications of induced abortions are often viewed as criminals and verbally admonished. In some cases, they are denied anesthesia and made to wait longer than other patients thought to be suffering from spontaneous abortion.”

question, threatening to hold people as captive, inarticulate subjects. Because of the machinations of the religious in the Constitutional Commission—however well motivated—the Constitution now seems impervious to discourse, and changes in our understanding of what good social policy is may no longer be subject to deliberation. The road to religious hegemony is surely paved with good constitutional intentions, ensuring that the Church will continue to control, indirectly through the State, decision-making by women over their own bodies. Along with the Church’s population policy,¹⁶ the anti-abortion clause ensures that almost every woman in this country will only have two choices—be tied to the home or become irresponsible mothers.

Art. VI, §28 (3). Charitable institutions, churches and parsonages or covenants appurtenant thereto, mosques, non-profit cemeteries, and all lands, buildings, and improvements, actually, directly, and exclusively used for religious, charitable, or educational purposes shall be exempt from taxation.

One can understand why charitable institutions and educational institutions may be given some exemptions from real estate taxation even if their operations appropriate a lot of property. The exemption operates as a form of devolution of what the State wants to do by itself, that is, promote welfare and education, activities that produce massive public goods. Thus, instead of cutting into the income of charitable and educational institutions, the State ends up subsidizing them in order that they may better pursue their activities. Following this line of justification, exemption from taxation of religious property just doesn’t make any sense, unless one is willing to concede that religious indoctrination qualifies as legitimate state activity.

How the exemption from taxation of churches benefits society and promotes a secular purpose is really quite difficult to explain. The idea of devotion to God does not serve any legitimate basis for State subsidy, and arguments abound as to why they are deeply problematic.¹⁷ But beyond the debate over the existence of god/s, there is the added matter of fairness in the collection of private burdens

¹⁶*Id.* The study pointed out that “the almost half a million induced abortions occurring each year in the Philippines cannot be understood in isolation from the generally restrictive social and political climate surrounding the delivery of modern contraceptive services,” pointing to the influence of the Catholic Church as one contributing factor: “the Catholic Church in the Philippines is likely to have had a strong influence on the provision of contraceptive services, given that it opposes use of modern contraceptive methods. The church accepts only periodic abstinence as a method of family planning. It was critical of the Ramos administration, which promoted the use of artificial or modern birth control methods, and has campaigned against politicians who support modern family planning. Under President Macapagal-Arroyo, the national population and reproductive health program has endorsed traditional family planning methods on the ground that they promote family values.”

¹⁷*See* RICHARD DAWKINS, *THE GOD DELUSION* (2006); SAM HARRIS, *THE END OF FAITH* (2004); DANIEL C. DENNETT, *BREAKING THE SPELL* (2006); MICHEL ONFRAY, *THE ATHEIST MANIFESTO: THE CASE AGAINST CHRISTIANITY, JUDAISM, & ISLAM* (2007).

and the distribution of public benefits. The constitutionalization of this exemption is no different from compelling Protestants to pay for the upkeep of Catholic churches and vice-versa. Worse, it is compelled contribution by nonbelievers to the cause of religion. To force the nonbeliever to subsidize churches is as unjust as to compel gays to fund homophobic organizations (one of which is the Catholic Church which strongly opposes homosexual marriages). To give bread and wine to one's tormentor is no doubt generous, and some would say, "very Christian"; nonetheless, it's far different from compelling victims of the Catholic Church's discriminatory practices not only to turn the other cheek but also pay for the Church's operations.

What the exemption connotes is that everyone has to pay taxes for possessing real property, but those religious corporations that construct very expensive buildings for the veneration of their gods are constitutionally excused and are thus not made to contribute to the functioning of government. I think it is morally wrong, even by the standards of the religious, to compel nonbelievers to subsidize churches by making the former pay taxes on their property and giving the latter an exemption. This injustice is more egregious in the face of the reality that the Catholic church, Iglesia ni Kristo, and many other religious organizations own substantial amounts of real property in almost every nook and cranny in a country scrounging for habitation space and where many families are either homeless or have no financial wherewithal to own houses. Churches, as centers of faith that god-believers regularly flock to, actually impose more burden on public infrastructure than most other real properties. It is therefore only fair that they internalize their own costs and share in the maintenance of society's common property. Better yet, and this just might be consistent with "divine will," maybe churches ought to house the homeless so they will be protected in the House of the Lord. Just to serve the purpose of clarity, I do not deny that churches provide many people with spiritual health, a sense of comfort, a feeling of the transcendent, an anchor of meaning, and an opportunity for communion with others and their god/s. But it doesn't mean that it's not beside the point.

Indeed, the experience of flying—of takeoffs and touchdowns—is always a strain to the eyes and a challenge to the moral sense. The view from several thousand feet provides an idea of how power is distributed in society, and one will never fail to miss the crucial feature of land distribution all over the country: the large amounts of spaces occupied by those majestic buildings of worship, glinting alongside shanties we now euphemistically refer to as "communities." One may find it difficult to accept such preaching, emblematic of religious rhetoric, about simplicity and parsimony or even vows of poverty in the light of such display of tax-exempt opulence.

Art. VI, §29 (2). No public money or property shall be appropriated, applied, paid, or employed, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institutions, or system of religion, or of any priest, preacher, minister, or other religious teacher, or dignitary as such, except when such priest, preacher, minister, or

dignitary is assigned to the armed forces, or to any penal institution, or government orphanage or leprosarium.

The temptation to view this provision as harmless is quite strong, taken in the light of the relatively small amount of money spent by the government paying for the salaries of these religious functionaries. Nonetheless, the choice of such exemption and the symbol that it represents do invite a monstrous curiosity. What is it in the military, prisons, orphanages, and leprosaria that made our founding parents decide to go against the grain of the non-establishment clause—the direct payment of money to religion or its associated activities?¹⁸ Is there any unifying thread among these institutions that provide a reasonable justification for this kind of privilege?

In the case of those in the military, is there a constant need to provide the presence of the religious, just in case the physical dangers to which servicepersons are exposed require the comforting whisper of someone qualified to conduct rituals for the dying? In respect of those in prison, is there a need to remind them of their sins and offer a path to redemption for those who have strayed away? In the case of those in orphanages and leprosaria, do we need to tell the sufferers that some deity has a divine master plan for them in the world of spirits? These are questions that serve to reveal the highly ideological position of these constitutionalized exceptions. They show why State subsidy to religious professionals is problematic: it is not simply that they allow the use of public funds for the payment of religious activity but that they subsume important answers about meaning which the religious, through their rituals, provide answers to, but are denied by nonbelievers for sheer lack of evidence and coherence. The exceptions provide religious establishments the opportunity to control the meaning of important events in the lives of those in the military, prison, orphanage, and leprosarium and at the same time obtain payment from the government for the maintenance of a religious culture.

The argument could even be made that these instances of establishment prevent people from developing a higher level of awareness about what is at stake in what they do and in what happens to them in these government institutions. Minus the comforting presence of religious advice, those in the military might soon realize that the wars they fight endanger the only life they will ever live and so soldiers might become more concerned about the menace of being used as pawns in the game of politics; those in prison might as well be informed that there is no such thing as sin and that the guilt they carry can be remedied not by kneeling down to pray but by apologizing to those whom they have victimized; and the plight of those left in orphanages and leprosaria may remind us that pain is, at times, undeserved and that we should focus our resources on ensuring that the unfortunate do not needlessly suffer.

¹⁸See NOAH FELDMAN, *DIVIDED BY GOD* (2005).

Art. XIV, §3 (3). At the option expressed in writing by the parents or guardians, religion shall be allowed to be taught to their children or wards in public elementary and high schools within the regular class hours by instructors designated or approved by the religious authorities of the religion to which the children or wards belong, without additional cost to the Government.

Imagine for example trying to teach children of Catholic parents¹⁹ that some group of theologians had decided that what they held to have existed before—limbo—no longer exists.²⁰ Any child asking why this spiritual space had been legislated out of existence will never be presented any decent evidence why it was believed to have existed in the first place, and the curious will just have to face a wall of authority stating that what had just been declared by fiat was actually true.

This example is part of a larger set of concerns that implicates rules such as those embodied in Art. XIV, §3(3). In essence, the problem is: what is the extent to which parents may direct the life-choices of their children? Necessarily, this question brings in the State because of its traditional role as *parens patriae* in relation to the weak, the oppressed, or the vulnerable, which is a subset of its more general role as regulator of law and order. The doctrinal emanation of this problem is in the classic, if worn-out, divide between the public and the private. Conceptually, where the State feels that a particular subject matter ought to be an object of concern, it places within the category of the “public” such item for purposes of regulation. Examples would be incest, child-rape or other forms of molestation, child labor, and refusal to accept medical treatment for one’s child on religious grounds. In these cases, the State intrudes into actions/decisions of parents for the benefit of the child. Otherwise, or for those decisions that the State considers of lesser interest, it leaves the parents to decide, therefore placing their decision within the basket of “private” choices.

Education is situated at the center of this concern because many of the life-choices of children are influenced by what they learn from authority figures, such as parents and teachers, at a time when most of them simply accept what they are told. In addition, especially in the case of public education, the State plays a major role because of the amount of resources it devotes and its ability to direct learning through specific focus on certain subjects. This is why the teaching of

¹⁹Richard Dawkins proposes, and correctly so, that people ought not to label children as Catholics, Protestants, Muslims, Jewish, etc. on the same ground that we wouldn’t call children neoliberal, Marxist, or Keynesian simply because their parents believed in any of those economic philosophies.

²⁰The International Theological Commission, a group of leading Roman Catholic theologians, recommended to Pope Benedict XVI, who accepted the recommendation to abolish the idea of a limbo—the halfway house between heaven and hell, inhabited by unbaptised infants. The Pope was apparently quoted as saying he would let the idea of limbo “drop, since it has always been only a theological hypothesis.” See “How can limbo just be abolished?” Available at http://news.bbc.co.uk/2/hi/uk_news/magazine/54065522.stm. (last visited on 9 May 2007).

religion in schools²¹ has always been a highly contested subject, covering a wide range of issues—the teaching of evolution, bible reading, schools prayers, released-time programs, the use of religious symbols.²²

Do parents have the right to impose their religious beliefs on children and immerse them into the rituals of their faith?²³ Do they have the right to tell their children that a god exists or that such god is the Christian or Muslim God (or any other god for that matter)? Or that there are such presently-inaccessible places called heaven and hell where people are rewarded or punished? Or that human beings consist not only of matter but also of an immaterial, immortal stuff called the soul?²⁴ Or that there are ghosts that lurk in the shadows to punish, scare, warn, or remind the living? The suggestion that parents ought not to have the authority to impose *their* religion on children would seem so radical. But this is only so if we think that parents have proprietary interests in their children in same way that men owned women in earlier days. To be sure, the idea that parents, however innocently, can impose religion on *their* children is a radical idea when one considers the fact that religions furnish a worldview—an epistemology and an ontology—that is immune to contestation and one that is so constitutive of life-choices children will have to make for the rest of their lives. From this perspective, one could actually posit that, as a matter of constitutional law, children have an existing privacy right to be free from non-rational parental impositions grounded on their prospective status as citizens with full moral capacity. Put bluntly, if society believes that parents have no right to teach their children to become bigots, shouldn't it equally believe that parents have no right to teach children that God created the universe in six days or ten thousand years, or that evolution is *just* a theory?

This is not to say that religion is outside the sphere of legitimate conversation between parents and children, or that it is easy to envision a norm against parental indoctrination on religious matters. The point here is that there is a legitimate conflict between parents and children in the matter of the former's having the default right to choose the latter's religion, and that this conflict is grounded on the assumption that parents are proprietors, instead of stewards, of their children who, while sharing the same genes with them, certainly didn't have the choice to become their wards.

²¹See Javier Martínez-Torrón, *School and Religion in Spain*, 47 J. CHURCH & ST. 133 (2005); Àlex Seglers Gomez-Quintero, *Religious Education in the Spanish School System*, 46 J. CHURCH & ST. 561 (2004).

²²See R. MURRAY THOMAS, *GOD IN THE CLASSROOM: RELIGION AND AMERICA'S PUBLIC SCHOOLS* (2007).

²³Cf. Maureen D. Manion, *Parental Religious Freedom, the Rights of Children, and the Role of the State*, 34 J. CHURCH & ST. 77 (1992).

²⁴Cf. ANTONIO R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1995); Steven Pinker, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE* (2002).

This conflict is also the reason why secularists have a legitimate complaint when the State, through the public school system, decides to legitimize and favor parents' imposition of their religion on children. The very idea of an option freely chosen by the parents hides the real purpose of Art. XIV, §3(3)—the use of State educational institutions as sites for religious indoctrination of children into Catholics.²⁵ The sheer number of Catholics in this country ensures that the greatest, if not the only, beneficiary of this rule is the Catholic church itself, as it gets to perpetuate its belief system through the public schools, with a little help from parents. The ones who bear the cost of these decisions are the children who, through no fault of their own, simply follow what their parents tell them and end up being immersed in a belief system that has long been rejected by what many would consider “gifted” human beings.²⁶ This is a clear instance where the State, the church, and the traditional family—the most powerful regulatory and constructive institutions of culture and law—have commingled both the public and the private spheres to ensure the maintenance of religion in the country, oblivious to the fact that a secular public education is impossible to achieve in a constitutional regime that permits sectarian indoctrination upon the request of parents.

What I have tried to show in this section is how the promise of secularism embodied in the Declaration of Principles is actually defeated by the very language of the Constitution in its other parts. As is apparent by now, the conflict is resolved in favor of establishment considering that the abstract, high-level principle of separation of Church and State cannot defeat the specific guarantees of tax exemption, hiring of religious ministers, and religious indoctrination in public

²⁵Quite clearly as well, the text of the Constitution was written precisely to legitimize a similar practice the United States Supreme Court struck down in *McCullum v. Board of Education*, 333 U.S. 203 (1948), which held against the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. “The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.” At 209-210.

²⁶Edward Larson and Larry Witham reported in *Nature* (Vol. 394, 13 July 1998) under the title “Leading Scientists Still Reject God”: The question of religious belief among US scientists has been debated since early in the century. Our latest survey finds that, among the top natural scientists, disbelief is greater than ever—almost total. Research on this topic began with the eminent US psychologist James H. Leuba and his landmark survey of 1914. He found that 58% of 1,000 randomly selected US scientists expressed disbelief or doubt in the existence of God, and that this figure rose to near 70% among the 400 ‘greater’ scientists within his sample. Leuba repeated his survey in somewhat different form 20 years later, and found that these percentages had increase to 67 percent and 85, respectively. In 1996, we repeated Leuba’s 1914 survey and reported our results in *Nature*. We found little change from 1914 for American scientists generally, with 60.7% expressing disbelief or doubt. This year, we closely imitated the second phase of Leuba’s 1914 survey to gauge belief among ‘greater’ scientists, and find the rate of belief lower than ever—a mere 7% of respondents.” (internal citations omitted)

schools. This situation results in a superficial guarantee of secularism that hides the State's commitment to promoting religiosity in the national community. In the next section I try to provide a cultural reading of the problem of establishment from a postcolonial perspective. My aim is to show that one of the major failures of the Philippine revolution was its inability to defy the powerful religious sector—the Filipino clergy—that had come to assume a salient role decades before the outbreak, and how this shift of cultural/political capital from the Spanish friars to the Filipino priests was simply a changing of the guards—a lateral movement—instead of a forward movement towards secularism.

II. THE CONSTITUTION & THE CONTRADICTION IN CONTEXT

The dismal failure of the project of secularism in the Philippines is susceptible to historicization. There is a narrative to this disappointment the major threads of which are not difficult to identify. The cause of this failure authenticates the success of three centuries of enforced Catholic identity burned into the consciousness of both the emergent Filipino sense of self and community. Mabini wrote of this violent epistemic environment and the extent to which it bore the enduring stamp of religious colonialism—

All of us are Catholics, because our parents could not register the birth, marriage, and death of their children and relative outside the Roman Catholic Church; because booksellers could not sell books except those on devotions or those used as texts in schools and colleges, and whose authors were not the wisest but the most Catholic ones; because all literary productions had to be censored by ecclesiastical authorities before publication; because anyone who boasted of his little belief on Catholic doctrines ran the risk of imprisonment, tortures, or exile as a filibuster, mason, or heretic, etc....²⁷

The product of this enforced religiosity reared its saintly head in the only genuine revolution the country has ever had—the struggle for the ouster of the Spanish regime at the turn of the 20th century—when the time came to identify the specific object of upheaval. Many of the revolutionaries, in a rationalizing mix of their Catholicism and nationalist outrage, found a happy distinction between the Catholic Church as an institution of belief to which continued allegiance remained unquestioned²⁸ and the friars that defined the pernicious practices of such an

²⁷Cuestiones Sobre las Corporaciones Religiosas, *La Revolucion Filipina*, cited in CESAR ADJIB MAJUL, MABINI AND THE PHILIPPINE REVOLUTION (1960) at 297.

²⁸See MARCELO H. DEL PILAR, FRAILOCRACY IN THE PHILIPPINES (1889). *La Frailocracia Filipina* is a general attack on the friars and sectarianism prior to the revolution. Its last statement, indicative of the distinction between peoples and institutions, makes the following plea—"The Government must make a true effort to understand the case. It is an obligation it must take upon

institution whose troubles reverberated from Spain.²⁹ The former, as a divine institution whose agency is traceable to God himself, remained safe and untouched, while the latter—those hideous autonomous human agents accountable for their own deeds—were made to assume the brunt of national indignation. And so the Filipinos wanted the Spanish bureaucrats gone, but wished their religio-cultural artifacts to remain.

The same understanding informed the debate among the revolutionaries regarding the role of the Church in the drafting of the Malolos Constitution.³⁰ The question on the role of religion, specifically Catholicism, revolved around two interrelated topics. The first was whether to disestablish the church and follow the emerging principles of secularism popular in the West to replace the sectarian model that had so dominated the colonial mindset. This was sought to be achieved by proposing an explicit separation of Church and State in the revolutionary constitution. The second was, assuming they decided to drop the project of secularism, whether a national church, this time controlled by Filipinos, should be established in the Constitution.

This significant moment of tension is instructive on the political dynamic among the revolutionaries, and the constraints of what Heidegger called the “system of Catholicism” that had been deeply embedded in the culture liberal Filipinos wished to transcend. Revolutionary Philippines was controlled by three major political factions—the military, the oligarchy, and the Filipino clergy—that sought independence but differed in details as to their vision of the postcolonial state. The military headed by Aguinaldo—the face of the revolutionary movement—had popular support; the oligarchs, because of their ownership of land and business, had significant control of the economy; and the Filipino clergy, because of their militancy, was the symbol of the fight against the abuses of the friars.

The Filipino clergy possessed significant political capital because of their sacrifices prior to the revolution³¹ and sought the establishment of a national church in the constitution as pragmatic and symbolic compensation for their efforts. The oligarchs, some of whom were either schooled in Europe (and so were able to develop a sense of difference of the conditions in the Islands with those of

itself. May God illumine it!”; CEDSAR ADIB MAJUL, *THE POLITICAL & CONSTITUTIONAL IDEAS OF THE PHILIPPINE REVOLUTION* (1967): “In spite of their bitter hatred toward the monastic orders, the majority of Filipino leaders and followers professed their loyalty toward and love for the Catholic Church.” At 104.

²⁹For the turbulent history of the Catholic church and its struggles against liberalism, See WILLIAM J. CALLAHAN, *CHURCH, POLITICS, AND SOCIETY IN SPAIN, 150-1874* (1984); William J. Callahan, *THE CATHOLIC CHURCH IN SPAIN, 1875-1998* (2000); FRANCES LANNON, *PRIVILEGE, PERSECUTION AND PROPHECY: THE CATHOLIC CHURCH IN SPAIN, 1875-1975* (1987).

³⁰See CESAR ADIB MAJUL, *ibid.*, Ch.6 & 7.

³¹See MANUEL ARTIGAS Y CUERVA, *LOS SUCESOS DE 1872* (1913) Trans. O.D. Corpuz (1996).

more progressive nations) or more familiar with libertarian ideals fashionable at the time, had a less than confident stance on the need for a national church. The military, on the other hand, was more concerned about maintaining the sense of unity required to promote the cause of independence and therefore was more interested in a compromise, one that did not unsettle the already fragile situation among the different factions.

The result was a vote of 26-25 in the Malolos Congress instituting a separation of Church and State. By secular standards this was a close and barely acceptable decision, but a revolutionary idea nonetheless considering the situation that demanded unity in the face of an established foreign enemy. Title III, §5 of the Malolos Constitution provides that “the state recognizes the freedom and equality of religious worship, as well as the separation of the church and state.” But the most revealing part of the story is not the vote; rather, it was what happened when the draft constitution was sent to Mabini, who proposed the following amendment which was eventually accepted by Congress—

Temporary Provisions: Article 100. The execution of the 5th article of title 3 is hereby suspended until the meeting of the constituent assembly. In the meantime, the municipalities of those places which may require the spiritual offices of a Filipino priest shall provide for his maintenance.

This text is important not as a historical documentation of the betrayal of liberal principles by even such a committed secularist like Mabini, but as an example of the difficulty of practicing a politics purely defined by principle when faced with adverse political terrain.³² It is not that he conveniently dropped the ball of secularism when faced with a challenge, but that he thought he had to drop it so that he could continue juggling the many other concerns of the revolution. More importantly, this short narrative provides the avenue of context within which to situate the contradiction of texts in our Constitution that purports to guarantee non-establishment, but nonetheless operationalizes an antinomial set of rules.

The secularist project in Europe relied on the idea that the hold of religious hierarchies on the temporal existence of the people rested on questionable premises and the rhetoric that it was high time the Age of Reason supplanted the Age of Superstition.³³ The long history of warring sects, the scandalous malleability of political will to religious motivations, and the successes of science all contributed to an environment that promoted the emergence of the Westphalian State system whose legitimacy eventually depended on popular, rather than divine, will. And while the enlightenment did not promote atheism, its core values of liberty and

³²It appears, for example, that Mabini, who wanted to promote the goal of unity, was willing to oust the foreign religious orders and replace it with a Filipino-controlled religious hierarchy, even if it meant supervision by Rome. *See* APOLINARIO MABINI, *THE PHILIPPINE REVOLUTION* VOL.II, p.97-100 (1931).

³³*See* PETER GAY, *THE ENLIGHTENMENT: THE RISE OF MODERN PAGANISM* (1966); PETER GAY, *THE ENLIGHTENMENT: THE SCIENCE OF FREEDOM* (1969).

equality, summed up by Kant's challenge—*sapere aude!*—certainly undermined the authority of the church to dictate on god-believers. This change in the mode of social organization, from theocratic to republican, represented a gestalt shift in the way people saw their relationship to their community, one from passive subjects to involved citizens.³⁴ The weakening of religious claim to power was an essential ingredient in the movement towards democratization the culmination of which was the secularization of Europe and the disestablishment of the church in many countries.³⁵

In stark contrast, the secularist project in the Philippines relied on the idea—without the benefit of the full flavor of the context that made it possible to promote the project in the first place and make it relatively successful—that the western project was desirable, but nonetheless not indispensable to pursue given the demands of the situation.³⁶ The revolution, after all, sought the expulsion of foreign rule, not the rejection of the religious culture that had been deeply entrenched. The result of this mindset, both during Malolos and today, is a formal and shallow commitment to secularism and an implicit recognition that the project of nation building must include obeisance to religious authority and a practice of politics with theocratic assumptions. Not because the Filipino secularist project was of a different temperament, but because the conditions for its success were not available. Secularization in Europe was but an effect of a movement of ideas—the scientific method, humanism, reason—that swept the continent and which paved the way for the recognition that religion occupied a separate sphere and relied on a transcendent basis of legitimacy largely divorced from a State focused on material and social progress. The Philippines, on the other hand, has never been swept by a torrent of similar ideas, either because of the absence of a public *intelligentsia* that could take on powerful institutions such as the Church or the inexistence of a wealth-creating industrialization that gave a substantial number of elites the power to challenge the primacy of the Church for social control.

³⁴As Christopher Grenda points out in *Thinking Historically about Diversity: Religion, the Enlightenment, and the Construction of Civil Culture in America*, 48 J. CHURCH & ST. 567 (2006), a deeper theoretical problem that became prominent around 1700 was the notion of the potential incommensurability of diverse conceptions of the good: “[F]ollowing the religious and nation-state wars of earlier generations, they sought to restructure the basis of their politics. With a new focus on human will and desire, they reconceived the relationship between individual and society. And with a new sensitivity regarding the limited purpose of politics, they sought to construct a civic culture independent of state coercion. The print trade and secular politics were parts of such efforts.” At 569.

³⁵See Martin Heckel, *The Impact of Modern Law on Church and State in Germany*, 13 TEL AVIV U. STUD. L. 187 (1997); Michel Troper, *French Secularism, or Laïcité*, 21 CARDOZO L. REV. 1267 (2000); Gloria M. Morán, *The Spanish System of Church and State*, 1995 BYU L. REV. 535 (1995).

³⁶In a sense, the revolutionaries faced the problems faced by Spain during the Franco regime, which took advantage of the power of the Catholic Church that was at that time reeling from the libertarian onslaught of the First Republic. See E.J. Heubel, *Church & State in Spain: Transition Towards Independence and Liberty*, 30 THE WESTERN POLITICAL QUARTERLY 125 (1977).

The effect of the failure of secularism on the Filipino legal consciousness is clear: we are comforted by the presence of texts and thus rationalize the contradictory contexts through which we derive their meanings. It is the soothing presence of texts that allow us to say that we are, just like some other countries, committed to the separation of Church and State because the pledge appears in our Constitution as well as theirs, conveniently overlooking the screaming contradiction in contexts through which this pledge operates in ours and theirs. It is formalism at its crudest, this reliance on textual identity as the full measure of identity in meaning.

This kind of formalism is what makes it possible for the Filipino justices to cut and paste declarations of the U.S. Supreme Court on questions of non-establishment and free exercise and at the same time publicly profess that “[w]hile man is finite, he seeks and subscribes to the Infinite.”³⁷ What else is the reason for the citation of those “landmark cases in American constitutional law” other than to signify the colonial’s attempt to mimic the master’s legal language and show some semblance of facility with the master’s discourse? Isn’t it just utterly fascinating and troubling how we locate the point of compromise between American secular legal discourse and Spanish religio-cultural influence? For this intersection is full of doublespeak: this effort of the religious mind to try to sound secular and seem believable.

We are now ready to ask: is there a place for secular constitutionalism where the Supreme Court distributes “ecumenical prayers”³⁸ and allows the holding of Catholic masses in its main session hall, where politicians regularly invoke God as the source of everything that they do and what happens to them, where public school teachers pray and post religious icons in their classrooms, where public airports display statues of Mary the supposedly-virgin mother of Christ, where the Church has a say on appointments to public office crucial to its cause, where the main campus of the University of the Philippines is the site of the Church of the Holy Sacrifice, where government institutions decorate their buildings and offices

³⁷See *Estrada v. Escritor*, A.M. No. P-02-1651, 22 June 2006.

³⁸“Almighty God, we stand in Your holy presence as our Supreme Judge. We humbly beseech You to bless and inspire us so that what we think, say, and do will be in accordance with Your will. Enlighten our mind, strengthen our spirit, and fill our hearts with fraternal love, wisdom and understanding, so that we can be effective channels of truth, justice, and peace. In our proceedings today, guide us in the path of righteousness for the fulfillment of Your greater glory. Amen.”

In an address before the University of Santo Tomas Central Seminary on 19 February 2002, then Justice, later Chief Justice Artemio V. Panganiban declared—

“...You may be interested to know that this prayer is recited at the beginning of each session of the Supreme Court. The justices take turns in leading the prayer. Moreover, the Court has authorized its recitation at the start of all proceedings in all courts in the country. The ecumenical prayer was composed last year by the Executive Committee for the Supreme Court Centenary Celebrations which I have the honor of chairing. Its wordings were finalized after patient and repeated consultations with major religious groups in the country: Catholic, Protestant, Muslim, Born-again, and others.”

with Christ-mas trees and nativity scenes, where most public holidays are Christian holidays, where divorce and abortion are banned, where religious organizations endorse candidates for public office, where religious organizations obtain money from government, where the Catholic Bishops Conference of the Philippines gets to say whether the President ought to be impeached, where towns and villages are regularly named after saints, where revolting includes trooping to a Catholic Church in EDSA?

The atheist is in a position to reply to the hypothetical answer, given at the start of this essay, that hers is a nation that presupposes Christian values, whose institutions assume the existence of a monotheistic god, and that this is not incompatible with a secular civil government. The straightforward reply is that this is the mark of false consciousness, of the inability to historicize the reason why the Philippines has become dominantly religious in the first place. To say that this form of god-belief is an essential part of what we now call Philippine culture is no different from saying that the Philippines is a wonderful name for this country, for monotheism and the national label are both powerful symbols of three centuries of slavery. They are not badges of honor, only marks of continued colonial status, now on autopilot, that consign the unmindful to a future of colonial culture capture. It is a clear instance of the reach of colonialism, of the haunting presence of three hundred years of inability to narrate one's history, and of the ability of the past to justify its astounding currency.

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.³⁹ And if one were to view the cultural space in which the national community is immersed and from where it derives its tools of meaning-making, it may be possible to posit, to set in metaphor, the existence of certain vortices—ideas, sets of ideas, ideologies—that have become reified. These vortices construct the contours of the arena where lives become meaningful and living becomes political; and so far as this country is concerned, religion, by sheer length of time, has become the meta-narrator of our lives, condemning most of us to lives of uncritical spirituality, as we daydream about the future of our religionized selves and underestimate the value of the moment.

For the secularist, this heuristic maps out the problematic environment where both national community and self are situated. It is the terrain where she seeks to practice her politics and deploy her philosophy of hope.

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³⁹Robert Cover, *Foreword: Nomos And Narrative*, 97 HARV. L. REV. 4 (1983).