DENYING GOD IN THE CLASSROOM: AN ACADEMIC DISCOURSE ON JURISDICTIONAL DICHOTOMIES INVOLVING THE RELIGION CLAUSES

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> When the government puts its imprimatur on a particular religion it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some.
>
> - *Justice Harry A. Blackmun*[1]

I. INTRODUCTION

We live in a time of profound historical crisis. Domestically and globally, we confront great issues which force us to reassess, in fundamental ways, the shape and quality of our common life. Yet many of the disciplines of thought and practice that should be a rich reserve in such a time are found wanting - among them, law and religion. Law, a field presumably devoted to the ways of justice, has all too often become an array of complex, technical tools without concern for higher purpose. Religion, seemingly given to the all-embracing promises and prescriptions implied in the sense of the sacred, has all too often become privatized and neglectful of our public life.

Our Constitution provides for the free exercise of religious tenets, and conversely proscribes the establishment of a state religion.[2] The fundamental law

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[1] Lee v. Weisman, 505 U.S. 577, 606-607 n.9 (1992).

[2] CONST. art III, sec. 5. "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without

of the land mandates the government to respect this right in practice and urges the levels of government generally to protect this right and not to tolerate its abuse. Although Christianity, particularly Roman Catholicism, is the dominant religion, there is no state religion. The government should not restrict adherents of other religions from practicing their faith, and neither should it provide direct subsidies to institutions for religious purposes, including aid to the extensive school systems maintained by religious orders and church groups.[3]

However, the question presents itself as to whether or not our courts have remained faithful to this mandate. In trying to uphold the separation of church and state, have we ignored the fundamental role that religion plays in the moral education of our people? Our own Court has recognized that:

> Religious beliefs are not mere beliefs, mere ideas existing only in the mind, for they carry with them practical consequences and are the motives of certain rules of human conduct and the justification of certain acts. Religious sentiment makes a man view things and events in their relation to his God. It gives to human life its distinctive character, its tone, its happiness, or unhappiness, its enjoyment or irksomeness.[4]

This paper aims to examine the roles of free religious expression and the non-establishment clause in the public educational system.

The study begins by analyzing the history of the religion clause, both in the United States where it originated, and here in the Philippines. It then describes the various religious tests which have emerged from U.S. jurisprudence and have been applied in this jurisdiction. A comparative analysis of our Supreme Court decisions juxtaposed with relevant decisions of the U.S. Supreme Court will then follow. Furthermore, the paper will explore the impact of the "secular movement" on recent court decisions in the United States on specific areas of conflict, namely: school prayer, religious instruction, distribution of religious literature and access of religious groups to public school facilities. It will examine the permissible extent to which freedom of religion may be expressed without

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discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights."

[3] CONST. art. VI, sec. 29(2). The full text provides: "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 institution, 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."

[4] Victoriano v. Elizalde Rope Workers Union, G.R. No. 25246, September 12, 1974, 59 SCRA 54.

transgressing the separation of church and state doctrine. Permissibility of religious conduct in both jurisdictions (U.S. and Philippines) will also be explored in the light of prevailing religious culture in order to arrive at a more sophisticated appreciation of the guarantee of free religious expression.

II. THE RELIGION CLAUSES

The non-establishment clause and the free exercise clause forbid different kinds of state encroachment upon religious liberty. In certain instances, however, an intermingling of both cannot be helped. When a state establishes an official religion, the right to free exercise is diminished; conversely, when the state has a free exercise policy that is exceedingly liberal towards one religion, the practical effect is the establishment of a state religion.

The relationship between the free exercise and non-establishment clauses varies with the expansiveness of interpretation given to both. In a general sense, both clauses proscribe governmental involvement with and interference in religious matters, but there is a possible tension between a requirement of governmental neutrality derived from the Establishment Clause and a Free-Exercise-derived requirement that government accommodate some religious practices.

A dynamic interface of these twin concepts is apparent in various cases involving the public educational system. Thus, there is a need to define, delineate, analyze, and provide for a historical account of these twin principles.

A. Historical Antecedents

1. *History of the First Amendment*

The First Amendment of the U.S. Federal Constitution embodies the establishment clause. In part, it provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;. . ."[5] Tangential to this provision, although of earlier adoption, is that clause which

[5] U.S. CONST. amend. I. The full text provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

states that no religious test shall ever be required as a qualification to any office or public trust under the United States.[6]

The First Amendment was fundamentally a reaction against the established churches existing in the original American colonies. Colonizers from Europe and England fled the continent in search for religious freedom. But these once-persecuted colonizers of the New World eventually established themselves in power and imposed their religious beliefs upon dissenters. They imposed harsh penalties on their religious antagonists so much so that these dissenters sought refuge in other places for the exercise of their own religious tenets. The establishment of varied, particular faiths in practically all thirteen original colonies towards the start of the American Revolution resulted.

With the success of the American Revolution, the idea of the separation of church and state gained momentum when the Virginia legislative body was about to renew the tax levy supporting the established church. Thomas Jefferson and James Madison vigorously opposed the proposal. The bill was replaced with the celebrated "Virginia Bill for Religious Liberty".

The movement spread to other states. The constitutional provision against religious test oaths was found to be deficient and moves for strengthening religious liberty were presented before the First Congress of the United States. In 1791, the First Amendment was ratified. Originally, the provision was a restriction merely against the Federal Government. With the ratification of the Fourteenth Amendment[7] in 1868, however, religious provisions were made applicable to state governments. The U.S. Supreme Court further pronounced that the fundamental law declares that the interest of the United States in the free exercise of religion be not prohibited by the states.[8]

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[6] U.S. CONST. art. VI, sec. 3: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several states, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

[7] The Fourteenth Amendment of the United States Constitution embodies the due process clause. Section 1 of the Fourteenth Amendment, in part, provides: "...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; ..."

[8] Cantwell v. Connecticut, 310 U.S. 296 (1940); Everson v. Board of Education, 330 U.S. 1 (1947).

2. Philippine Legal History

The concept of the separation of church and state was foreign during the Spanish regime. A union of church and state existed where political authorities performed religious functions and the friars exercised civilian powers. Under the Spanish Constitution of 1876, Catholicism was the state religion.[9] While the Spanish Constitution itself was not extended to the Philippines, Catholicism was the established Church which enjoyed much protection from the state.[10]

The Malolos Constitution of the First Philippine Republic introduced the concept when it provided that the state recognizes the freedom of equality of all religious worships and the separation of church and state.[11] Despite this, it nevertheless acknowledged the religious tradition of the citizens when it beseeched, in its preamble, the aid of the Sovereign Legislator of the Universe.[12]

With the defeat of Spain by the Americans, the Treaty of Paris of December 10, 1898 was signed. One of the provisions guaranteed that the territories ceded to the United States "shall be secured in the free exercise of religion" thus providing for religious freedom to the inhabitants.[13]

During the American occupation, President McKinley issued his instructions to the Second Philippine Commission guaranteeing free exercise and providing for the non-establishment principle. The McKinley Instructions provided, in part, ". . .that no form of religion and no minister of religion shall be forced upon any community or upon any citizen of the Islands; that upon the other hand, no minister of religion shall be interfered with or molested in following his calling, and that the separation of church and state shall be real, entire and absolute."

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[9] SPAN. CONST. (1876), art. II.

[10] The state religion was protected by the Spanish Penal Code of 1884 which enumerated crimes against state religion.

[11] CONST. (Malolos), title III, art. 5.

[12] The Preamble of the Malolos Constitution states: "We, the representatives of the Philippine people, lawfully convoked, in order to establish justice, provide for common defense, promote general welfare, and insure the benefits of freedom, imploring the aid of the Sovereign Legislator of the Universe in order to attain these purposes, have voted, decreed, and sanctioned the following:..."

[13] Treaty of Paris, December 10, 1898, U.S.-Spain, art. X

This laid the ground for the incorporation of the Religion Clauses in the Philippine statute books which materialized in the Philippine Bill of 1902[14] and the Jones Law (Autonomy Act) of 1916.[15] Justice Trent, speaking for the court in *U.S. v. Balcorta* said that the Philippine Bill of 1902 "caused the complete separation of church and state and the abolition of all special privileges and all restrictions theretofore conferred or imposed upon any particular religious sect."[16] Corollary to the diminution of the privileged position of the Catholic Church was the recognition of the equal position of other religions.[17]

The 1935 Constitution, in its Bill of Rights, practically embodied the religious clauses of the First Amendment of the U.S. Constitution. At the 1934 Constitutional Convention, the basic provision itself was not a subject matter of debate. Discussions focused on the so-called concessions[18] accorded to religious sects and denominations. These concessions included tax exemption of property devoted exclusively to religious use, salary for priests and ministers in chaplaincy service and optional religious instruction in public schools.

The 1973 Constitution preserved the basic 1935 text by reproducing it as Section 8 of Article IV. The concessions were preserved with some modifications. In addition, Article XV, Section 15, borrowing the language of President McKinley's Instructions and of Justice Trent, provided that "the separation of church and state shall be inviolable."

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[14] Philippine Bill of 1902, sec. 5, provides: "That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed."

[15] The Philippine Autonomy Act (Jones Law), sec. 3, provides: "That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed; and no religious test shall be required for the exercise of civil or political rights. No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such."

[16] 25 Phil 273, 276 (1913).

[17] Justice Malcolm showed the leveling of all religions under the new sovereignty in the case of Adong v. Cheong Seng Gee, 43 Phil. 43 (1922), which recognized the validity of marriages performed or celebrated by priests and ministers of other religions, whether Christian or non-Christian.

[18] Justice Laurel coined these as "certain general concessions...indiscriminately accorded to religious sects and denominations." Aglipay v. Ruiz, 64 Phil. 201, 206 (1937).

The 1987 Constitution preserved the old law except for some changes in the provision on religious instruction in public schools.[19] The principle of inviolability of the separation of Church and State was preserved. An additional sentence, "The State, however, welcomes the cooperation of the church and religious bodies to promote the well-being of its citizens," proposed by Bishop Teodoro Bacani was rejected on the ground that it could be taken as an unnecessary, if not a dangerous invitation, to excessive entanglement of church with state and vice versa.[20] Other provisions in the 1987 Constitution expressing the non-establishment principle were included, specifically: "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 institution, 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;"[21] and the provision which prohibits religious denominations and sects from being registered as political parties.[22]

B. Definition and Scope

1. *The Non-Establishment Clause*

a. United States

The non-establishment clause has been part of the United States Constitution since 1791, but it was only in 1947, in the case of *Everson v. Board of Education*,[23] that the U.S. Supreme Court gave a comprehensive interpretation of the provision. In this case, a taxpayer challenged the constitutionality of a New Jersey statute, which authorized the reimbursement to parents for the public transportation of children attending Catholic parochial schools, on the ground that it violated the non-establishment clause.

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[19] Article XIV, sec. 3(3) of the 1987 Constitution provides: "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."

[20] JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES, A COMMENTARY (1996) [hereinafter, BERNAS].

[21] CONST. art. VI, sec. 29 (2).

[22] CONST. art. IX-C, sec. 2(5).

[23] 330 U.S. 1 (1947).

The Supreme Court upheld the constitutionality of the law and through Justice Black squarely defined the scope and meaning of the non-establishment clause for the first time.

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can openly or secretly participate in the affairs of any religious organization or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between Church and State."[24]

Though the Court was divided at 5-4, all the justices admitted the all-encompassing and broad definition of the establishment clause enunciated by Justice Black.[25] In effect, the Court expressed the absolute separation of church and state formula.

The Supreme Court, in the case of *Illinois ex. rel. McCollum v. Board of Education*,[26] speaking again through Justice Black, reaffirmed *in toto* its definition of the establishment clause in the *Everson* case. The case involved the use of tax-supported public schools for religious instruction and featured the close cooperation between public school officials and the religious authorities in utilizing the state compulsory educational system to further religious instruction.[27]

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[24] *Id.* at 15-16.

[25] Justice Rutledge's heavily documented dissent attempts to create a wall of separation higher and more impregnable than that conceived by the majority opinion. Rutledege states: "The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily, it was to uproot all such relationship. But the object was broader than separating church and state in the narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.* at 31-32.

[26] 333 U.S. 203 (1948).

[27] The dissenting opinion of Justice Reed gave another concept of the establishment clause which according to some authorities became the majority opinion in the case of Zorach et al. v. Clauson et al., 343 U.S. 306 (1952). In Reed's language: "I agree...that none of our governmental entities can 'set up a church.' I agree that they cannot 'aid' all or any religion or prefer one 'over another' But 'aid' must be

The case of *Zorach et. al. v. Clauson et. al.*[28] surprisingly strayed from the dictates of the *Everson* and *McCollum* cases. The facts of the *Zorach* case are similar to the *McCollum* case except that in the former, the religious instruction was carried on not in public school buildings but elsewhere. The Supreme Court through Justice Douglas upheld that practice and made the following controversial statements:

> We are a religious people whose institutions presuppose a Supreme Being....When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public event to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. [29]

The classic case of *Engel v. Vitale*,[30] decided ten years later, reverted to the old norm, raising once again the high and impregnable wall of separation between church and state. It is a wall which confines church and state activities within their respective spheres, a wall which prohibits any friendly or loose cooperation between church and state, a wall which forbids government officials from composing prayers for those who want to say them, and a wall which bars the use of tax-supported public schools for religious instruction or for saying religious prayers.[31]

From these decisions and other cases relevant to American federalism, one can surmise that there is no unanimity in the political principle concerning the non-establishment clause. One interpretation of the establishment clause is the view that the clause merely insulates state policy on religion from federal interference. At the other end of the spectrum is the *Everson* formulation. Intermediate views are chiefly two: (1) the non-establishment clause prohibits only direct support of institutional religion but not support indirectly accruing to churches and church agencies through support given to members; (2) both direct

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understood as a purposeful assistance directly to the church itself or to some religious work of such a character that it may fairly be said to be performing ecclesiastical functions. 'Prefer' must give an advantage to one 'over another'."

[28] 343 U.S. 306 (1952).

[29] *Id.* at 313-14.

[30] 370 U.S. 421 (1962). In this case, the court declared unconstitutional a New York school prayer.

[31] Hector A. Martinez, *The High and Impregnable Wall of Separation Between Church and State – An Analysis of the Engel v. Vitale Rule and Its Applicability in the Philippines*, 74 PHIL. L.J. 748, 772 (1962).

and indirect aid to religion are prohibited but only if the support involves preference of one religion over another or preference of religion over religion.[32]

In a minimal sense, the non-establishment clause simply means that the state cannot establish nor sponsor an official religion.[33] The principle also calls for government neutrality in religious matters, summarized in four general propositions: (1) Government must not prefer one religion over another religion; (2) Government funds must not be applied to religious purposes; (3) Government action must not aid religion; and, (4) Government action must not result in excessive entanglement with religion.

b. Philippines

The first case dealing with the non-establishment clause under the 1935 Philippine Constitution is *Aglipay v. Ruiz*.[34] The case involved a constitutional challenge made by the Philippine Independent Church to the issuance and sale of postage stamps commemorative of the International Eucharistic Congress of the Catholic Church. The challenge was based on the Constitutional prohibition on the use of public money for religious purposes. The Supreme Court ruled that the act merely gave incidental benefits to religion. The only purpose in issuing and selling the stamps was "to advertise the Philippines and attract more tourists to this country." Officialdom merely took advantage of an event considered of international importance "to give publicity to the Philippines and its people."

In the language of Justice Laurel:

> It is obvious that while the issuance and sale of the stamps in question may be said to be inseparably linked with an event of a religious character, the resulting propaganda, if any, received by the Roman Catholic Church, was not the aim and purpose of the Government. We are of the opinion that the Government should not be embarrassed in its activities simply because of incidental results, more or less religious in character, if the purpose had in view is one which could legitimately be undertaken by appropriate legislation. The main purpose should not be frustrated by its subordination to mere incidental results not contemplated.[35]

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[32] BERNAS, *supra* note 20, at 303

[33] *Id.*

[34] 64 Phil. 201 (1937).

[35] *Id.* at 209-210, *citing* Bradfield v. Roberts, 175 U.S. 291 (1899).

Worth noting is Justice Laurel's discourse on religious freedom and the vital role religion plays in the Filipino way of life. The jurist noted how history has illustrated the prejudice caused by the union of church and state, emphasized the constitutional guarantees of religious freedom, and depicted the refining influence of religious tenets to human society at large.[36]

A non-establishment objection was also raised in the case of *Manosca v. Court of Appeals*[37] involving the expropriation of the birthplace of Felix Manalo, founder of *Iglesia ni Kristo*, for the purpose of preserving it as a historical landmark. The act was challenged on the ground that it constitutes an application of public funds, directly or indirectly, for the use, benefit, or support of a religious entity, contrary to the provision of section 29(2), article VI of the 1987 Constitution. The Court pronounced that the expropriation fell under the broad definition of "public use."[38] Moreover, the non-establishment argument was rendered nugatory

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[36] In the words of Justice Laurel: "The prohibition herein expressed is a direct corollary of the principle of separation of church and state. Without the necessity of adverting to the historical background of this principle in our country, it is sufficient to say that our history, not to speak of the history of mankind, has taught us that the union of church and state is prejudicial to both, for occasions might arise when the state will use the church, and the church the state, as a weapon in the furtherance of their respective ends and aims...It is almost trite to say now that in this country we enjoy both religious and civil freedom. All the officers of the Government, from the highest to the lowest, in taking their oath to support and defend the Constitution, bind themselves to recognize and respect the constitutional guarantee of religious freedom, with its inherent limitations and recognized implications. It should be stated that what is guaranteed by our Constitution is religious liberty, not mere religious toleration.

Religious freedom, however, as a constitutional mandate is not inhibition of profound reverence for religion and is not a denial of its influence in human affairs. Religion as a profession of faith to an active power that binds and elevates man to his Creator is recognized. And, in so far as it instills into the minds the purest principles of morality, its influence is deeply felt and highly appreciated. When the Filipino people, in the preamble of their Constitution, implored 'the aid of Divine Providence, in order to establish a government that shall embody their ideals, conserve and develop the patrimony of the nation, promote the general welfare, and secure to themselves and their posterity the blessings of independence under a regime of justice, liberty and democracy,' they thereby manifested their intense religious nature and placed unfaltering reliance upon Him who guides the destinies of men and nations. The elevating influence of religion in human society is recognized here as elsewhere." *Id.* at 205-206.

[37] G.R. No. 106440, January 29, 1996.

[38] The court quoting Justice Fernando, in THE CONSTITUTION OF THE PHILIPPINES 523-524 (2nd ed.) enunciates: "The taking to be valid must be for public use. There was a time when it was felt that a literal meaning should be attached to such a requirement. Whatever project is undertaken must be for the public to enjoy, as in the case of streets or parks. Otherwise, expropriation is not allowable. It is not so any more. As long as the purpose of the taking is public, then the power of eminent domain comes into play. As just noted, the constitution in at least two cases, to remove any doubt, determines what is public use. one is the expropriation of lands to be subdivided into small lots for resale at cost to individuals. The other is the transfer, through the exercise of this power, of utilities and other private enterprise to the government. It is accurate to state then that at present whatever may be beneficially employed for the general welfare satisfies the requirement of public use." *Id.* at 421-422.

by the argument that whatever benefits the adherents of *Iglesia ni Kristo* would reap are only incidental to the public historical purpose.

The case of *Garces v. Estenzo*[39] raised a similar non-establishment concern. Here, a statue of San Vicente Ferrer, which the barangay purchased through funds obtained by solicitations and donations from residents was involved. On the occasion of the fiesta, the statue was lent to the church and subsequently, the parish priest refused to return the statue. Resolutions were passed by the council to recover the statue. The priest challenged the resolutions as violative of the non-establishment clause. The Court held that there was no religious issue involved. The questioned resolutions did not directly or indirectly establish any religion, nor abridge religious liberty, nor appropriate public money for the benefit of religion as the image was purchased with private funds and not tax money.[40]

In *Pamil v. Teleron*,[41] the Supreme Court upheld the validity of Section 2175 of the Administrative Code disqualifying "eccelsiastics" from being elected or appointed as municipal officers. The vote of the justices for declaring the law unconstitutional was one short of the required majority to declare the law unconstitutional.[42] Seven justices approached the issue from a free exercise point of view and held the provision as inconsistent with the religious freedom guaranteed in the Constitution. On the other hand, five justices viewed the case from a non-establishment perspective and upheld the law as a safeguard against the constant peril of the melding of church and state. Justice Makasiar said, that to allow an ecclesiastic to head the executive department of a municipality is to permit the erosion of the principle of separation of Church and State and thus

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[39] G.R. No. 53487, May 25, 1981, 104 SCRA 510.

[40] The Court enunciated: "If there is nothing unconstitutional or illegal in holding a fiesta and having a patron saint for the barrio, then any activity intended to facilitate the worship of the patron saint (such as the acquisition and display of his image) cannot be branded as illegal.

As noted in the first resolution, the barrio fiesta is a socio-religious affair. Its celebration is an ingrained tradition in rural communities. The fiesta relieves the monotony and drudgery of the lives of the masses.

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We find that the momentous issues of separation of church and state, freedom of religion and the use of public money to favor any sect or church are not involved at all in this case even remotely or indirectly. It is not a microcosmic test case on those issues." *Id.* at 517-518.

[41] G.R. No. L-34854, November 20, 1978, 86 SCRA 413.

[42] Under the 1973 Constitution, the concurrence of eight justices of the Supreme Court was needed in order to declare a law or statute unconstitutional.

opens the floodgates for the violation of the cherished liberty of religion which the constitutional provision seeks to enforce and protect.[43]

Coincidentally, in the same year, the U.S. Supreme Court had the opportunity to rule on the same issue. In *McDaniel v. Paty*,[44] the U.S. Supreme Court held that a Tennessee constitutional provision barring ministers of the Gospel or priests of any denomination from public office violates the First Amendment right to the free exercise of religion made applicable to the States by the Fourteenth Amendment because it conditions his right to the free exercise of his religion on the surrender of his right to seek office.

2. *The Free Exercise Clause*

a. United States

Freedom of conscience is the basis of the free exercise clause, and the government may not penalize or discriminate against an individual or a group of individuals because of their religious views, nor may it compel persons to affirm any particular beliefs. The interpretation is complicated, however, by the fact that exercise of religion usually entails rituals or other practices that constitute "conduct" rather than pure "belief."

> When it comes to protecting conduct as free exercise, the U.S. Supreme Court has been inconsistent. It has long been held that the free exercise clause does not necessarily prevent government from requiring or forbidding the doing of some act merely because religious beliefs underlie the conduct in question. What has changed over the years is the Court's willingness to hold that some religiously motivated conduct is protected from generally applicable prohibitions.[45]

While the Court has consistently affirmed that the free exercise clause protects religious beliefs, protection for religiously motivated conduct has waxed and waned over the years. The free exercise clause "embraces two concepts—

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[43] Pamil v. Teleron, G.R. No. 34854, November 20, 1978, 86 SCRA 413, 480 (Makasiar, J., separate opinion).

[44] 435 U.S. 618 (1978).

[45] Free Exercise, of Religion FINDLAW, *at* http://caselaw.lp.findlaw.com/data/constitution/amendment01/05.html (last viewed January 3, 2001).

freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be."[46]

In its first free exercise case, involving the power of government to prohibit polygamy, the Court invoked a distinction between the two, saying that although laws "cannot interfere with mere religious beliefs and opinions, they may [interfere] with practices."[47]

The rule thus propounded protected only belief, inasmuch as religiously motivated action was to be subjected to the police power of the state to the same extent as would similar action springing from other motives. Such rule was applied in a number of cases,[48] but subsequent cases later established that religiously grounded conduct is not always outside the protection of the free exercise clause.[49] Instead, the Court began to balance the secular interest asserted by the government against the claim of religious liberty asserted by the person affected; only if the governmental interest was "compelling" and if no alternative forms of regulation would serve that interest was the claimant required to yield. Thus, while freedom to engage in religious practices was not absolute, it was entitled to considerable protection.

Recent cases evidence a narrowing of application of the compelling interest test, and a corresponding constriction on the freedom to engage in religiously motivated conduct. First, the Court purported to apply strict scrutiny, but upheld the governmental action anyhow. Next the Court held that the test is inappropriate in the contexts of military and prison discipline.[50] Then, more importantly, the Court ruled in *Employment Division v. Smith* that "if prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[51] Therefore, the Court concluded, the free exercise clause does not prohibit a state from applying generally applicable criminal penalties to use of peyote in a religious ceremony or from denying unemployment benefits to persons dismissed from their jobs because of religious ceremonial use of peyote. Accommodation of such religious practices must be found in "the political process," the Court noted; statutory religious-practice exceptions are permissible,

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[46] Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940).
[47] Reynolds v. United States, 98 U.S. 145, 166 (1878).
[48] *See* Jacobson v. Massachusetts, 197 U.S. 11 (1905).
[49] *See* Sherbert v. Verner, 374 U.S. 398 (1963).
[50] Goldman vs. Weinberger, 475 U.S. 503 (1986).
[51] 494 U.S. 872 (1990).

but not "constitutionally required."[52] The result is tantamount to a return to the belief-conduct distinction.

The Court's first encounter with free exercise claims occurred in a series of cases in which the Federal Government and the territories moved against the Mormons because of their practice of polygamy. Actual prosecutions and convictions for bigamy presented little problem for the Court, inasmuch as it could distinguish between beliefs and acts. But the presence of large numbers of Mormons in some of the territories made convictions for bigamy difficult to obtain.

In contrast to the Mormons, the sect known as Jehovah's Witnesses, in many ways as unsettling to the conventional as the Mormons were, provoked from the Court a lengthy series of decisions expanding the rights of religious proselytizers and other advocates to utilize the streets and parks to broadcast their ideas, though the decisions may be based more squarely on the free speech clause than on the free exercise clause.

In the case of *Lovell vs. City of Griffin*,[53] several Witnesses were convicted of distributing Witness literature without a permit from the City Manager. The ordinance prescribed no standards for the manager in issuing the permits, nor were any application or appeal procedures set. Justice Hughes held the regulation unconstitutional on its face, violating the speech clause of the First Amendment.

In *Schneider vs. Town of Irvington*,[54] permit requirements for door-to-door distribution of materials included being fingerprinted and photographed, and the permit could be denied if the Chief of Police judged the applicant not to be "of good character." Speaking for the court, Justice Roberts stressed the importance of "liberty to communicate," and once again invoked the free-speech clause.

The leading case construing the free exercise clause is *Cantwell v. Connecticut*.[55] Three Jehovah's Witnesses sold Witness literature on the street by approaching people and asking permission to play a phonograph record. If allowed, the record was played, and it included an attack on the Church of Rome as the Scarlet Woman and the Whore of Babylon. They were convicted under a statute which forbade the soliciting of funds for a religious or philanthropic cause

[52] *Id.* at 890.
[53] 303 U.S. 444 (1938).
[54] 308 U.S. 147, 152 (1939).
[55] 310 U.S. 296 (1940).

without prior state certification and also under a general charge of breach of the peace. The solicitation count was voided as an infringement on religion because the issuing officer was authorized to inquire whether the applicant did have a religious cause and to decline a license if in his view the cause was not religious. Such power amounted to a prior restraint upon the exercise of religion and was invalid. The Court held:

> The freedom to act must have appropriate definition to preserve the enforcement of that protection [of society]. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. . . . [A] State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.[56]

There followed a series of conflicting decisions. At first, the Court sustained the application of a non-discriminatory license fee to vendors of religious books and pamphlets in the case of *Douglas vs. Jeannette.*[57] Eleven months later, it vacated its former decision and struck down such fees. The court held that the practice of carrying the gospel directly into homes through "personal visitations" was a traditionally accepted technique of evangelism and thus an exercise of religion. It has the same claim to protection as the more orthodox and conventional exercises of religion. Under the First Amendment, it could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional.[58] While the court did not suggest that such activities were absolutely free from regulations, there was little in its opinion to indicate what restraints might be imposed.

In *Martin vs. City of Struthers,*[59] a city ordinance making it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the dwellers of a residence to the door to receive such literature was held to violate the First Amendment when applied to distributors of leaflets advertising a religious meeting.

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[56] *Id.* at 304.

[57] 319 U.S. 157 (1943).

[58] Murdock v. Pennsylvania (City of Jeannette) 319 U.S. 105 (1943); *see, also,* Jones vs. Opelika, 31 U.S. 103 (1943).

[59] 319 U.S. 141 (1943).

Thus far, the court gradually abandoned its strict belief-conduct distinction, and developed a balancing test to determine when a uniform, nondiscriminatory requirement by government prescribing action or nonaction by citizens must allow exceptions for citizens whose religious scruples forbid compliance.

In the case of *Minersville School District vs. Gobitis*[60] where the Gobitis children who were members of Jehovah's Witness were expelled for refusing to salute the American flag, arguments based on the belief-conduct distinction were presented in attacking the constitutionality of the expulsion. It was argued that what was involved here was not a regulation of conduct, but the imposition of a belief. This was not behavior which the State had the right to punish in reasonable furtherance of the community interest. This was precisely the realm of ideas which the free exercise clause had historically been considered as protecting. It held that to require children to salute the flag did not foist a religious belief on them, for the exercise was purely secular. The Court ruled that "the religious liberty which the constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects."[61]

The court later reversed itself in *West Virginia State Board of Education v. Barnette*[62] when it held that they:

> [A]ppl[ied] the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

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[60] 310 U.S. 586 (1940).

[61] *Id.* at 594. But in the dissenting opinion of Justice Stone, it was suggested that secular regulation should override religious claims only when the most important social values such as monogamous marriage or the prevention of the spread of disease are involved. *Id.*

[62] 319 U.S. 624 (1943).

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[63]

b. Philippines

The earliest decided case which made reference to the free exercise of religion was *People vs. Fabillar*[64] which questioned sec. 34 of the old Marriage Law which provided that the Director of the National Library, after being satisfied that the church, sect, or religion of the applicant operates in the Philippine Islands and is in good repute, should issue an authorization for a priest or minister to solemnize marriages. In deciding in favor of the constitutionality of said law, the court ruled that "the duty thus conferred is not one of inquiry into the organization or doctrine of a particular church or religion, but a duty to distinguish and discriminate between a legitimately established religion or church and one that pretends to be as such, as a prerequisite to the issuance of a certificate of authority. The law, therefore, in no sense prohibits nor impairs the free exercise of any religion."[65]

In *American Bible Society vs. City of Manila*,[66] a licensing requirement for those engaged in the business of general merchandise was applied to the selling of religious merchandise, and this was challenged as a restraint on the free exercise and enjoyment of religious profession. The court held that such license cannot be applied to the American Bible Society because while the price asked for the religious articles was in some instances a little bit higher than the actual cost of the same, it could not mean that plaintiff was engaged in the business or occupation of selling said "merchandise" for profit. An application of the licensing requirement would result in the impairment of its free exercise and enjoyment of religious profession and worship. Quoting Tañada and Fernando on the Constitution of the Philippines, Justice Felix said:

> The constitutional guaranty of the free exercise and enjoyment of religious profession and worship carries with it the right to disseminate religious information. Any restraint of such right can only be justified like other

[63] 319 U.S. 624, 641-642.
[64] 68 Phil. 584 (1939).
[65] *Id.* at 587.
[66] 101 Phil. 386 (1957).

> restraints of freedom of expression on the ground that there is a clear and present danger of any substantive evil which the State has the right to prevent.[67]

Where registration provisions of the VAT law were questioned by the Philippine Bible Society as being unconstitutional and a violation of the free exercise of religion, the Court held in *Tolentino vs. Secretary of Finance*[68] that the registration fee was a mere administrative fee, not imposed on the exercise of a privilege, much less a constitutional right. The license was upheld and no violation of religious freedom was declared. However, in his concurring opinion, Justice Padilla excepted to the majority ruling of the court insofar as RA 7716 violated sections 4 and 5 of Article III of the Constitution, and referred to the *American Bible Society* case as precedent.[69]

In 1959, a case[70] similar to the *Gobitis* case in American jurisprudence was brought before the Court. A Department Order was issued prescribing compulsory flag salute in schools. Several Jehovah's Witness children were expelled for refusing to salute the flag. The Court held that such requirement did not violate religious freedom:

> In requiring school pupils to participate in the flag salute, the State thru the Secretary of Education was not imposing a religion or religious belief or a religious test on said students. It was merely enforcing a non-discriminatory school regulation applicable to all alike whether Christian, Moslem, Protestant or Jehovah's Witness. The State was merely carrying out the duty imposed upon

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[67] *Id.* at 398.

[68] G.R. No. 115455, August 25, 1994, 235 SCRA 630.

[69] Justice Padilla wrote: "In the present case, the tax imposed on circulation and advertising income of newspaper publishers is in the nature of a prior restraint on circulation and free expression and, absent a clear showing that the requisite for prior restraint is present, the constitutional flaw in the law is at once apparent and should not be allowed to proliferate.

Similarly, the imposition of the VAT on the sale and distribution of religious articles must be struck down for being contrary to Sec. 5, Art. III of the Constitution which provides:

'Sec. 5. No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.'

That such a tax on the sale and distribution of religious articles is unconstitutional, has been long settled in American Bible Society, *supra*.

Insofar, therefore, as Rep. Act No. 7716 imposes a value-added tax on the exercise of the above-discussed two (2) basic constitutional rights, Rep. Act No. 7716 should be declared unconstitutional and of no legal force and effect." *Id.* at 717.

[70] Gerona vs. Secretary of Education, 106 Phil. 2 (1969).

> it by the Constitution which charges it with supervision over and regulation of all educational institutions, to establish and maintain a complete and adequate system of public education, and see to it that all schools aim to develop among other things, civic conscience and teach the duties of citizenship.[71]

It further held that, "the freedom of religious belief guaranteed by the Constitution does not and cannot mean exemption from or non-compliance with reasonable and non-discriminatory laws, rules and regulations promulgated by competent authority."[72]

Following the ruling in the *Gobitis* case, and not the more recent *Barnette* case, the court did not consider the flag as an image but as a symbol of the Republic, devoid of any religious significance. Saluting it would not involve any religious ceremony. Further, the Court seemed to consider the impact such an exemption would have on the greater majority, to allow an exemption from the requirement would disrupt school discipline and demoralize the rest of the school population which by far constitutes the great majority.[73]

However, in the later case of *Ebralinag vs. Division of Superintendent*,[74] the Court reversed itself and held that the requirement to salute the flag was unconstitutional. It held that:

> The sole justification for a prior restraint or limitation on the exercise of religious freedom...is the existence of a grave and present danger of a character both grave and imminent, of a serious evil to public safety, public morals, public health or any other legitimate public interest, that the State has a right...to prevent.[75]

Since the students were willing to stand quietly at attention without disrupting the peace, no grave and present danger to public safety, morals, health, or other legitimate public interest existed.

III. RELIGIOUS TESTS

The impregnable wall between Church and the State may well be more metaphor than mortar. Of this, it has been said that, "Far from being a 'wall,' [the

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[71] *Id.* at 23.
[72] *Id.* at 24-25.
[73] *Id.* at 24.
[74] G.R. No. 95770, March 1, 1993, 219 SCRA 256.
[75] *Id.* at 270-271.

Establishment Clause] is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[76] Its metes and bounds are often indistinguishable without the aid of certain guidelines that have evolved with jurisprudence. Over the years, the U.S. Supreme Court has developed a number of principles to aid the courts in their task of ensuring government neutrality towards and among religions. The most famous of these is the Lemon "Three Prong" test.

A. The Lemon (Three Prong) Test

For the past twenty years, courts have used the three-pronged framework to maintain the separation of government and religion through the so-called "Lemon test".

In *Lemon v. Kurtzman*,[77] the U.S. Supreme Court held invalid Rhode Island's 1969 Salary Supplement Act, providing for a 15% salary supplement for teachers in non-public schools, because it involved the state and church in excessive entanglement. Pennsylvania statutes authorizing teacher pay increases are unconstitutional under the Religion Clauses of the First Amendment, as the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion.

The Court identified "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[78] To determine whether a practice or legislation implicates any of these evils, the court delved into a three-tiered inquiry which involved these questions:

1. Does the statute have a sectarian purpose?

2. Is the principal or primary effect of the statute to advance or inhibit religion?

3. Does the statute foster excessive entanglement with religion?

An affirmative answer to all three questions must concur in order for the court to declare the act or legislation impermissible. Taken individually, the

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[76] Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).
[77] *Id.*
[78] *Id.* at 612 *quoting* Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

aforementioned questions are more commonly known as the Purpose Test, the Primary Effect Test and the Excessive Entanglement Test.

1. *Purpose Test*

A "secular" purpose is one which "relat[es] to the worldly or temporal as distinguished from the spiritual or eternal."[79] In contrast to this, a "sectarian" purpose would be one which is "confined to the limits of one religious group, one school, or one party."[80]

The main principle of this test is to ensure that no government action may have as its purpose the promotion or inhibition of religion. In utilizing this test, the court determines the intent of the legislature in enacting the law or the policy. If it is apparent from the face of the law that it intends to favor or impose a certain kind of religion on the law-abiding populace, then it will be reason enough for the court to pronounce it as impermissible or unconstitutional. If a legitimate secular purpose has been indicated, the Courts will rarely look beyond this. However, there have been occasions wherein the Court looked beyond the words of the statute itself and found an impermissible purpose. One such instance occurred in *Epperson v. Arkansas*.[81]

In *Epperson*, an Arkansas statute that makes it unlawful for a teacher in any state-supported school or university to teach or to use a textbook that teaches evolution was held to violate the Fourteenth Amendment, which embraces the First Amendment's prohibition of state laws respecting an establishment of religion.

Not only did the statute favor the "creationism theory" on its face but the Court, in its analysis, also believed that this was merely a successor to an earlier Tennessee "monkey law,"[82] which was overtly religious and was similarly stricken down.

The quest for a secular purpose inevitably throws the Court into the realm of assessing motives which is, oftentimes, a dangerous and difficult area of judicial analysis. A lenient court may find a secular purpose despite an

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[79] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2053 (1961).

[80] *Id.* at 2052 (1961).

[81] 393 U.S. 97 (1968).

[82] Justice Abe Fortas declared that "it is clear that fundamentalist sectarian conviction was and is the law's reason for existence." *Id.* at 107-108.

overwhelming and obvious bias towards the sectarian. Conversely, a strict adherence to the principle of absolute separation of Church and State would disregard any finding of a secular purpose as long as a religious one emerges.

The danger of using this and this standard alone lies, therefore, in the relative disposition of the court reviewing the case. The necessity of this test concurring with the next two prongs of the Lemon test consists in providing an adequate safeguard for religious liberty and the separation of church and state.

2. *Primary Effect Test*

As mentioned above, it is not sufficient that an act merely has a legitimate secular purpose but it must not also have the primary effect of aiding or inhibiting religion to be considered impermissible. The test does not discount the fact that other effects may arise from the same circumstance; it merely prohibits that the primary effect of such should be to aid or inhibit the establishment of religion. If the court finds that the sectarian purpose is merely incidental, remote, indirect or independent from the secular purpose, the act or legislation has, most oftentimes, been permitted.

The case of *Tilton v. Richardson*[83] is illustrative of the application of this test. In that case, the bone of contention was whether or not the Higher Education Facilities Act of 1963 which provided federal construction grants for college and university facilities, excluding "any facility used or to be used for sectarian instruction or as a place for religious worship, or...primarily in connection with any part of the program of a school or department of divinity"[84] violated the non-establishment clause when several universities with religious affiliations were selected as part of the intended beneficiaries of the act. Under the act, the U.S. government retained a 20-year interest in the facilities built as a result of the grant, after the lapse of which, the beneficiary could dispose and utilize of such at his pleasure.

In upholding the validity of the act, the court acknowledged that "Congress' objective of providing more opportunity for college education is a legitimate secular goal entirely appropriate for governmental action."[85] Furthermore, the court realized that there was less danger of awarding the grant to

[83] 403 U.S. 672 (1971).
[84] *Id.* at 675.
[85] *Id.* at 678-79.

universities with religious affiliations than in church-related primary and secondary schools. While the latter deals with impressionable children, religious indoctrination was not a substantial purpose or activity of the latter. The religiously neutral nature of the facilities provided were also considered together with the fact that minimal government inspection would be needed since it was a one-time grant. Cumulatively, these factors lessen substantially the potential for divisive religious fragmentation in the political arena. The Court, however, held that the limitation of federal interest in the facilities to a period of twenty years violates the Religion Clauses as its unrestricted use afterwards would amount to a contribution by the government to a religious body.

In our jurisdiction, the cases of *Aglipay v. Ruiz*[86] and *Garces v. Estenzo*[87] applied this test. In *Aglipay*, the issuance and sale of postage stamps commemorative of the International Eucharistic Congress of the Catholic Church was upheld mainly on the basis that any benefit redounding to the Catholic Church as the result of the promotional efforts of the government was merely incidental. The Supreme Court ruled that the only purpose in issuing and selling the stamps was "to advertise the Philippines and attract more tourists to this country."

Despite the vigorous justification by the Supreme Court that the postage stamps in question did not favor Catholicism, doubt persists with regard to the primary purpose of the act. As an event sponsored by the Catholic Church for Catholics all over the world, the type of tourists that it would attract would indubitably be members of the same faith. Of what interest would the said event be to the members of different denominations if they did not subscribe to the same beliefs? Perhaps, it may be posited, that the commemorative stamps would have the effect of inducing tourists from other countries to witness the event as mere observers, but that would be stretching the point a bit too far. A hypothetical question may be raised at this point: given the fact that there are a number of Muslim countries in Asia, would a commemorative stamp by the Islamic Community, a religion composed of a definitive minority in this country, be issued by the government on the same ground –- the promotion of tourism?

The *Aglipay* decision would indicate that the government very well could. However, that act, should it come to pass, would entail taking into consideration the political repercussions and religious debate that it would engender and the

[86] 64 Phil. 201 (1937).
[87] G.R. No. 53487, May 25, 1981, 104 SCRA 510.

government might as well abstain from making a political statement. In that context, another point of cogitation would be whether or not the government, in pursuing such an act, took into account the fact that, politically, it would be more acceptable since Catholicism is the predominant religion in the islands.

In the *Garces* case, the court held that there was no establishment of religion when the barangay council purchased a religious statue with funds obtained through solicitation from residents of the barrio. The court justified its decision by reasoning out that fiestas have a secular aspect which can be made the legitimate object of state interest. In an almost vehement declaration, it said that, "We find that the momentous issues of separation of church and state, freedom of religion and the use of public money to favor any sect or church are not involved at all in this case even remotely or indirectly. It is not a microcosmic test case on those issues.[88]

With a quick stroke of the pen, the Court chose to disregard the primary effect test and instead concentrated on justifying its decision on the basis of the dual character of municipal corporations which, indubitably, was a more defensible stance. By emphasizing the fact that barangay councils could perform both proprietary and governmental functions, its act of purchasing a religious statue was justified as being a solely proprietary one.

If the primary effects test, or even the purpose test for that matter, were applied to the aforementioned case, even a liberal application of those tests would show that it would not pass muster. The main purpose of a fiesta is to give exaltation to the patron saint of the barrio. The purchase of a religious statue is done precisely to accomplish this purpose. If at all, any secular aspect a fiesta may have would be incidental to the obviously religious purpose that a fiesta has. Even the argument that the statue was purchased in the proprietary capacity of the barangay council would fail if it would be subjected to the next prong of the Lemon test, the excessive entanglement test, which test will be discussed below.

3. *Excessive Entanglement Test*

The framework for the "entanglement test" was introduced by the U.S. Supreme Court in *Walz v. Tax Commission*[89] where the court upheld tax exemption for religious bodies, stating that the legislative purpose for exemption is

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[88] *Id.*

[89] 397 U.S. 664 (1970).

not aimed at establishing religion. Moreover, it creates less involvement in religion than taxation would. It declared that courts must ensure that the end result of any piece of legislation is not an excessive government entanglement with religion.[90]

In considering the "excessive entanglement" test, administrative entanglement, political divisiveness as entanglement and the principles of benevolent neutrality and accommodation come into play.

a. Administrative Entanglement

The primary application of the entanglement test occurs mainly when the entanglement is administrative. This often happens when financial assistance is given to religious schools by the states even when there is a proviso which states that such assistance should only be applied to secular aspects of the school. To maintain separation of funds provided by the government to purely secular aspects of the institutions, the school's curriculum would have to be reviewed along with its accounting policies. This would entail a cumbersome burden for the state and the institution alike. In situations like these, courts would steer clear of the entanglement and maintain the high and impregnable wall between church and state.

In *Walz*, the Court pronounced:

> Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontation and conflicts that follow in the train of those legal processes.
>
> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement as taxing them.[91]

b. Political Divisiveness as Entanglement

The courts have also struck down statutes on the basis of excessive entanglement when it creates an atmosphere of political divisiveness. Most of the

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[90] The type of entanglement contemplated by the Court involved "programs, whose very nature is apt to entangle the state in details of administration..." *Id.* at 695.

[91] *Id,* at 674-75.

time, this test has been applied in contexts where religious groups have sought some form of government aid.

Although traditionally, the entanglement test was used to prohibit government aid to religious institutions, arguments that the entanglement prohibition might also limit government regulation of religious institutions are gaining acceptance.

c. Benevolent Neutrality and Accommodation

The Establishment and Free Exercise clauses require government to remain strictly neutral both among religions and between religion and non-religion.[92] It is the job of the judiciary to see to it that the government does not run afoul of this command of neutrality. Still, there is the realization that a strict application of the Lemon test coupled with a separationist perspective could siphon this neutrality into a perspective that is hostile to religion.

Despite the Court's assertions of neutrality on this issue, Justice Arthur Goldberg recognized the dangers of an artificial neutrality when he warned that an untutored devotion to the concept of neutrality could lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."[93]

Having been placed on guard from this occurrence, the courts have shown a willingness to utilize a more flexible standard than "absolute separation" which is oftentimes expressed in the policy of benevolent neutrality and accommodation. The kind of neutrality envisioned in this policy is one that is not blind to the religious character of the people and does not unnecessarily create a hostility to religion. When the court adopts an attitude which accommodates religion, it is most often called "accommodation neutrality."

Accommodation has been divided into that which is required, permissible and prohibited.

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[92] County of Allegheny v. American Civil Liberties Union , 492 U.S. 573, 590-91 (1989); Sch. Dist. v. Ball, 473 U.S. 373, 381-82 (1985); Wallace v. Jaffree, 472 U.S. 38, 60; Epperson v. Arkansas, 393 U.S. 97, 103-104 (1968); Jager v. Douglas County Sch. Dist., 862 F.2d 824, 828 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989).

[93] Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

It is *required* in order to preserve free exercise protections and not impermissibly infringe on important religious liberties or create penalties for religious freedom. The government's interest must be balanced against the individual's legitimate free exercise claims.

In *Braunfeld v. Brown*,[94] the court upheld the constitutionality of Sunday closing laws as long as they were primarily designed to achieve legitimate secular goals of providing rest and recreation. While in *Wisconsin v. Yoder*,[95] the state's interest in two years of education did not have as significant an impact as it would have on the Amish community who felt that its deep religious convictions would be violated.

The government must also show the absence of alternatives that are less restrictive of religious practice. In *Sherbert v. Verner*,[96] the exemptions could be administered without endangering unemployment compensation schemes. Compare this with the holding in *US v. Lee*[97] where the exemption was denied because the courts found a compelling state interest in maintaining a Social Security fund.

On the other hand, there is a *permissible accommodation* where the state may, but is not required to accommodate religious interest. *Prohibited accommodation* also occurs in certain situations where establishment concerns overwhelm potential accommodation interest.

This policy of benevolent neutrality and accommodation affords the religious some breathing space when it comes to exercising their civil and religious rights. The impression being conveyed by these cases wherein the court has chosen to accommodate the religious practice or objection is that the court will not keep that wall of separation impregnable at the expense of hostility to religion when a compromise can be made that will keep believers happy.

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[94] 366 U.S. 599 (1961).

[95] 406 U.S. 205 (1972).

[96] 374 U.S. 398 (1963). In this case, it was held that the state may not constitutionally exclude from unemployment compensation a claimant who, for reasons of conscience, turned down a suitable job involving work on Saturday.

[97] 455 U.S. 252 (1982). In this case, an objection to the imposition of social security taxes was made on religious grounds.

B. A Variation of the Lemon Test

The tripartite *Lemon test* has been supplemented by a number of cases decided by the Supreme Court. In her concurrence in *Lynch v. Donnelly*,[98] Justice O'Connor attempted to refine the "purpose" and "effect" prongs of the *Lemon* test by emphasizing that the relevant inquiry is whether the challenged government activity has either the purpose or effect of endorsing or disapproving religion.[99] In making this inquiry, the courts must "examin[e]...both the subjective and objective components of the message communicated by a government action."[100] The identification of those governmental activities which "intentionally or unintentionally make religion relevant, in reality or public perception, to status in the political community"[101] helps determine whether or not those acts are violative of the Establishment clause.

Although this variant of the *Lemon Test* has not been adopted unanimously by the Court, it has been helpful in providing a sound analytical framework for the Court's analysis in religion cases.

IV. SPECIFIC AREAS OF CONFLICT

Although a general discussion of cases involving the free exercise and the establishment clause has been made, a more detailed discussion of jurisprudence involving religious conduct in public school is in order. The following section will expound on certain jurisdictional dichotomies in specific areas of conflict.

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[98] 465 U.S. 668 (1984).
[99] *Id.* at 688 (O'Connor, J., concurring).
[100] *Id.* at 690 (O'Connor, J., concurring).
[101] *Id.* at 692 (O'Connor, J., concurring).

A. School Prayer

1. *Student-led Prayer and Bible Reading*

In *Engel, et. al. v. Vitale, Jr., et. al*[102] a momentous decision promulgated on June 25, 1962, the Supreme Court of the U.S. declared unconstitutional a New York school prayer statute on the ground that it violated the Establishment clause. In this historic case, the Board of Education acting in its official capacity under New York law, directed the school principal to cause the following prayer to be said aloud by each class:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country.[103]

The prayer was said aloud by each class in the presence of a teacher at the beginning of each school day immediately following the Pledge of Allegiance to the Flag. As part of the moral and spiritual training of state schools, the prayer was adopted by the State Board of Regents, a constitutional body that has broad supervisory, executive and legislative powers over the state public school system. No student was compelled to take part in the recitation of the prayer. Upon written request of a parent or guardian, any student may be excused from uttering the prayer or may be excused from the room where the prayer was said.

The parents of ten students brought an action in a New York court challenging the constitutionality of the New York law authorizing the Board of Education to direct the use of the prayer in public schools as well as the school's regulation ordering the recitation of the prayer on the ground that these actions run contrary to the establishment clause.

The Supreme Court of New York sustained the validity of the use of the prayer as long as it remained voluntary. The Federal Supreme Court reversed the judgment and pronounced: "We think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried

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[102] 370 U.S. 421 (1962)
[103] *Id.* at 422.

on by government."[104] The Court, speaking through Justice Black, went further and said:

> The First Amendment was added to the Constitution to stand as guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say – that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected into office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to presribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally-sponsored religious activity.[105]

The U.S. Supreme Court made it clear that prayers organized or sponsored by a public school violate the First Amendment, whether they are said in the classroom or over the public-address system. The same tenet is applied whether the activity is prayer or devotional Bible reading.

In *School District of Abington v. Schempp*,[106] the U.S. Court found unconstitutional the officially sponsored reading of the Bible and recitation of the Lord's Prayer in public schools. Also, in *Chamberlin v. Dade County Board of Public Instruction*,[107] devotional Bible reading and recitation of prayers required by a statute in Florida public schools were ruled as unconstitutional.

In the United States, because of the prohibition of the First Amendment against the enactment of any law "respecting an establishment of religion," which is made applicable to the States by the Fourteenth Amendment, state officials may not compose an official state prayer and require that it be recited in the public schools of the State - even if the prayer is denominationally neutral and pupils who wish to do so may remain silent or be excused from the room while the prayer is being recited.

The non-establishment clause has often been misconstrued to mean that any link to religion is "establishing" religion. One of the causes of this is a simple alteration of the phrasing in the First Amendment. The clause reads, "Congress

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[104] *Id.* at 1264, n.3.
[105] *Id.* at 1266.
[106] 374 U.S. 203 (1963).
[107] 377 U.S. 402 (1964).

shall make no law respecting *an* establishment of religion." It does not read, "Congress shall make no law respecting *the* establishment of religion," as it is often misquoted. If the article is read as "the," then it connotes establishment of all religion in general. If the article is "an," then it clearly refers to a specific religion or denomination — an interpretation backed up by historical records. A realization that the amendment uses the word "an" helps elucidate the meaning of the framers. So, rather than attempting to separate themselves from religious belief and expression, the framers were trying to keep one denomination from being favored over another. It seems that U.S. jurisprudence pertinent to the issue of school prayer has not recognized these differences.

In unmistakable contrast to the U.S., Philippine jurisprudence has assembled a sparse amount of cases on the relationship of the religion clauses with education in general. There has been no decision in controversies involving school prayers in public schools, in particular.

Generally, individual students are free to pray, read their bibles and even invite others to join their particular religious group as long as they are not disruptive of the school or disrespectful of the rights of other students. A student should not be allowed to pressure or coerce others in a public school setting, but within these broad parameters a student has wide latitude to exercise his faith. For example, a student may wish to pray before meals, read the Bible during study hall, create an art project with a religious theme or invite other students to attend church. These mentioned activities appear to be permissible, even in the Philippine setting. In fact, the public educational institution might be guilty of violating the student's free speech and free exercise right if it attempted to disallow such nondisruptive religious activities.

Students have the right to gather, with their fellow students for prayer and other evangelical activities within the above-described limits. A school is not required, however, to allow adults to come on campus to lead such event. It has been argued that it is the rights of students, not outside adults, that are protected. As representatives of the state, the public school teachers are under an obligation to protect the rights of all students, including non-believers. In the United States, under the U.S. Federal Equal Rights Act, if a school permits extracurricular student groups to meet during non-instructional time, the Act requires that religious groups be given equal treatment.[108]

[108] This U.S. Federal Statute applies only to secondary schools as defined by state law.

If our Constitution allows the school officials to cooperate with religious authorities to further religious instruction, there is no reason why the school officials cannot similarly recommend the recitation in public schools of prayers which they compose as part of moral training of schools. If the Constitution permits the tax-supported public schools to be used for religious instruction, there is no reason why the students of tax-supported public schools should not be allowed to recite prayers if they desire it. It may seem unreasonable that public schools now allow open discussion about sex but do not allow open discussion about God. Public schools can set guidelines that would allow students who object to prayer or to some prayers, not to participate, just as many religious students may opt out of sex education classes. This would clearly respect the rights of the minority, without infringing upon the rights of the majority.

2. *Moments of Silence*

In the United States, even moments of silence will be struck down if used to promote prayer. In the case of *Wallace v. Jaffree,*[109] an Alabama statute authorizing a one-minute period of silence in all public schools "for meditation or voluntary prayer" was declared to be a law respecting the establishment of religion and thus violates the First Amendment. A school district may not require that students observe a moment of silence at the beginning of the school day where the purpose of such a requirement is that students use that time for prayer.

It is probable that a "neutral" moment of silence that does not encourage prayer over any other quiet, contemplative activity may not be struck down, even though many students choose to use the time for prayer.

3. *Graduation Prayer, Baccalaureates and Special School Events*

The most contentious and controversial part of the current school prayer debate involves graduation prayer. In 1992, the U.S. Supreme Court confronted this issue in the case of *Lee v. Weisman.*[110] The controversy involved prayers delivered by the clergy at middle school commencement exercises in Providence, Rhode Island. The school designed the program, crafted the invocation and even provided guidelines. The Court held that prayer – even "non-sectarian" and "non-proselytizing prayer" at public school graduation ceremonies violated the Non-Establishment clause of the Constitution because of its inevitably coercive

[109] 472 U.S. 38 (1985).
[110] 505 U.S. 577 (1992).

effect on students and because it conveyed a message of government endorsement of religion. The prayer exercises in this case are especially improper because the state has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student and the objecting student had no real alternative to avoid. The coercive effect was not cured by the fact that attendance at the graduation was "voluntary." In the Court's view, few students would want to miss the culminating event of their academic career.

One year after the *Weisman* decision, confusion arose when the Supreme Court refused to grant an appeal in the case of *Jones v. Clear Creek Independent School District,*[111] a Texas case upholding the practice of graduation prayer. The distinguishing features of the prayer in the Jones decision were: 1) the prayer was student-initiated (the students voted to have a prayer); 2) the prayer was student-led, as opposed to being led by clergy or other adults; and 3) the prayer was "nonsectarian" and "non-proselytizing." Many are encouraging schools to use the *Jones* case to circumvent the *Weisman* decision. In fact, some state legislatures have passed laws encouraging schools to pattern their graduation exercises after the Jones model.

In *Jager v. Douglas Country Sch. Dist.,*[112] the Court of Appeals for the 11th Circuit Court held that prayers at public high school football games violated the Establishment clause, even though student clubs designated the individuals who gave the prayers. Consistent with this ruling, a U.S. circuit court even held that a prayer uttered during a high school basketball game is unconstitutional.[113]

The controversy involving prayers in these kinds of school events reveled in the national legal limelight as a result of the recent case of *Santa Fe Independent School District v. Jane Doe.*[114] The Supreme Court struck down a school district's policy that allowed an elected student chaplain to open football games with a public prayer. Even though high school football games are purely voluntary activities, the Court concluded that the policy "establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates

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[111] 977 F.2d 963 (5th Cir. 1992)
[112] 862 F.2d. 824, 828 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989).
[113] Doe v. Duncanville Ind. Sch. Dist., 70 F.3d 402, 406-07 (5th Cir. 1995).
[114] 530 U.S. 290 (2000).

the perception of encouraging the delivery of prayer at a series of important school events." [115]

Philippine public schools may choose to adopt the *Jones* model in graduation exercises. However, its features may be criticized in the following ways. Constitutional rights are not subject to vote and were conceived as beyond the reach of political majorities. Thus, it is unlikely that students can vote to suspend the non-establishment of religion and have organized prayer. It may also be immaterial that a student leads the prayer. Graduation exercises are still state-sponsored events where the students are subtly coerced. Furthermore, the requirement that the prayer be deemed "nonsectarian" and "non-proselytizing" may cause other problems. It may put public school officials, and eventually the courts in the difficult position of evaluating the content of prayers to determine if they are indeed too sectarian. The entanglement of school officials in the situation may itself be unconstitutional.

An alternative to the *Jones* model is the provision of a forum for student speech within a graduation ceremony. A school might choose to allow the valedictorian or the student council president to open the ceremony in whatever manner he or she wished. If such a student chose to utter a prayer, it is unlikely that it would be found unconstitutional unless the school had suggested or encouraged the prayer.

B. Religious Instruction

Religious instruction has been the subject of many debates. Whether it be the controversy surrounding teaching "creationism," teaching religion on or off campus during school hours or even the simple act of a public school teacher expressing his personal views about religion have been questioned.

A quick glimpse of world history would acquaint one with the privileged position that religion has occupied throughout the centuries. One's education would not be "complete without a study of comparative religion, or the history of religion and its relationship to the advancement of civilization."[116] Religious influences abound in the arts, music, literature and various social studies that to

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[115] *Id.* at 317.

[116] The American Civil Liberties Union, *Religion in the Public Schools: A Joint Statement of Current Law, at* http://www.aclu.org/issues/religion/relig7.html (1996).

totally disregard them in deference to the wall of separation between Church and State would not only be impractical but also absurd.

The foremost principle which guides public school teachers in the matter concerned is that students may be taught about religion but schools may not teach religion. Therefore, the history of religion, comparative religion or even the Bible as literature are all permissible public school subjects. As long as the treatment of the subject is objective, it will not be held to be constitutionally impermissible.

1. *Creation Science*[117]

Among the problems in "creation science" that constitutionalists and academicians find objectionable is that it "creates in the academic environment...a foreclosure of scientific inquiry. The unifying principle of 'creationism' is not the law of nature, but divinity."[118] Its conclusion – that the universe was created by God – is one that has not been arrived at as a result of experimentation, discovery, other particular modes of scientific inquiry or by the rules of logic but one that relies solely on the belief and faith of the individual espousing the theory.

"The constitutional defect of any law or policy requiring the teaching of creationism, or of 'evidence against evolution,' is not that it requires instruction about facts which coincide with a religious belief, but that it requires instruction in one religious belief as the unifying explanation of facts."[119] This would result in a situation wherein the government places "the power, prestige and financial support of government...behind a particular religious belief."[120] Under the establishment clause, this is not allowed.

In *School District of the City of Grand Rapids v. Ball*,[121] the Court held that the second ("effects") prong of the *Lemon* test will not be satisfied where the government fosters a "close identification of its powers and responsibilities with

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[117] Creation science is the theory adhered to by several religious denominations who believe that the earth was created by God in the manner and process laid out in the Book of Genesis, the first book of the King James Bible.

[118] American Civil Liberties Union, *ACLU Position Statement on "Creation Science,"* at http://www.aclu.org/issues/religion/relig2.html (1996).

[119] *Id.*

[120] Lynch v. Donnelly, 465 U.S. 668, 702 (1984) (Brennan, J., dissenting).

[121] 473 U.S. 373 (1985).

those of any – or all – religious denominations."[122] Therefore, using this precedent, the Court in *Edwards v. Aguillard*[123] held invalid Louisiana's "Creationism Act" which forbade the teaching of the theory of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of "creation science". The court found the statute violative of the establishment clause and did not find a clear secular purpose to uphold the act.

An attempt to illegitimize the "evolution theory" almost twenty years before that was made in Arkansas. The Court dismissed that attempt in *Epperson v. Arkansas*[124] when it held that a statute making it unlawful for a teacher in any state-supported school or university to teach or to use a textbook that teaches evolution violates the Fourteenth Amendment, which embraces the First Amendment's prohibition of state laws respecting an establishment of religion.

a. Released-Time Programs

A "released-time" program involves the authorized exemption of a student from regular instruction in accordance with the school's curriculum in order to avail of religious instruction. These programs require written authorization from the parents in order for the child to avail of teachings from the religious instructor of his or her choice.

There are two leading US cases involving released-time programs. In the first, *McCollum v. Board of Education*,[125] the court struck down a "released time" program providing voluntary religious instruction in public schools during regular school hours. In the second, *Zorach v. Clauson*,[126] the Court upheld the "released time" program primarily because it was held off the school premises.

In *McCollum*, religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law. This came about when a voluntary association called the Champaign Council on Religious Education, composed of Jewish, Roman

[122] *Id.* at 389.
[123] 482 U.S. 578 (1987).
[124] 393 U.S. 97 (1968).
[125] 333 U.S. 203 (1948).
[126] 343 U.S. 306 (1952).

Catholic, and a few of the Protestant faiths, obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in the elementary grades. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend and were held in the regular classrooms of the school building. Those who were able to obtain written permission from their parents were required to be present during the religious instruction while those who did not opt for the religious instruction were not dismissed and were required to study for their secular subjects.

The court held that the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council promoted religious education indeed. The concurring opinion of Justice Frankfurter in that same case elucidates us with the rationale of the court for deciding against the released-time program when he said that,

> [T]he sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered.[127]

On the other hand, the court in *Zorach* came to a different conclusion with regard to "released time" programs. In that case, 3210 of the New York Education Law and the regulations thereunder came under the court's scrutiny when the city permitted its public schools to release students during school hours, on written requests of their parents, so that they may leave the school buildings and grounds and go to religious centers for religious instruction or devotional exercises. Similar to the situation obtaining in *McCollum*, the students' attendance in school was compulsory whether or not they joined religion class and the program did not involve public funds.

However, this case distinguishes itself from *McCollum* in that the classrooms were not turned over to religious instructors. The court, therefore, did not find any constitutional objection to having the classes conducted outside of the school premises as it did not involve any coercion on the students to attend these classes. It pronounced that "No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of

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[127] Mccollum v. Board of Education, 333 U.S. 203, 216 (1948) (Frankfurter, J., concurring).

the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any."[128]

It was in the *Zorach* case wherein the accommodation neutrality principle was laid down. It pronounced:

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. *The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other.* That is the common sense of the matter. Otherwise the state and religion would be aliens to each other - hostile, suspicious, and even unfriendly.[129] (emphasis supplied)

The court even lauded the government for its considerate efforts to be sensitive to the spiritual needs of its people by saying that "when the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."[130]

The situation obtaining in our jurisdiction is somewhat different from these two cases. By constitutional provision,[131] religious instruction is permitted to be taught on public school premises within regular class hours as long as it does not involve an additional cost to the government.

The history of this constitutional provision dates years before the *McCollum* decision was rendered.[132] In the 1935 Constitution, Article XIV, Section 5 read: "Optional religious instruction in public schools as now authorized by law shall be maintained."[133]

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[128] Zorach v. Clauson, 343 U.S. 306, 311 (1952).
[129] *Id.* at 312.
[130] *Id.* at 313-314.
[131] CONST., art. XIV, sec. 3(3).
[132] The Mccollum decision was rendered in 1948.
[133] JOSE M. ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 992 (1937).

An amendment was originally proposed to include compulsory instruction in religion and morals. But since this would run counter to the principle of separation of church and state in the Tydings-McDuffie Law, the proposal was changed to allow religion and morals as part of the curriculum but to be taken only at the option of parents or guardians.[134] The reason for the suggestion was that unlike certain skills (arithmetic and language for example) which can and will be learned even without classroom training because they are a necessary part of survival, the importance of religion will escape many students if not inculcated early on in life. They will not concretely feel its relevance to their immediate needs.

Two arguments were presented against this proposal. First, there would have to be a professor for every religion. Second, aside from violating the Non-Establishment clause and the prohibition against using public funds for religious purposes, there was the possibility of exposing young minds to dangerous books as well as anarchical ideas. As a result, the amendment was rejected.

Under the 1973 Constitution, the provision was changed to read:

> At the option expressed in writing by the parents or guardians, and without cost to them and the government, religion shall be taught to their children or wards in public elementary and high schools as may be provided by law.135 (emphasis supplied)

The new provision under the 1987 Constitution specified that religion classes be held during regular class hours. It also removed from the school administrator the responsibility of deciding who should teach a particular religion by placing it with the "religious authorities of the religion to which the children or wards belong."

Considering the fact that the establishment clause is operative in our jurisdiction, the very same arguments posited by the *Mccollum* court would obtain in this case. Ideally, there would be a violation of the Establishment clause because religious instruction in public school buildings is tantamount to the government's sanction and endorsement of a particular religion. The government funds used in erecting those buildings would therefore be used for a religious

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[134] *Id.*

[135] CONST. (1973) art. 15, sec. 8(8).

purpose. The objection is negated due to the fact that this activity is permitted by the highest law of our land, the Constitution.

What, therefore, makes our constitutional provision permitting religious instruction in public schools non-violative of the Establishment clause? It can be argued that both are accorded equal status because of their constitutional descent. However, it must also be noted that the Establishment clause is enshrined in the Bill of Rights which has often been given primacy when construed with another constitutional provision.

Another question to consider is that if the religious instruction provision were to be considered as subsumed under the free exercise clause, what would be the basis for giving primacy to the free exercise clause when it would be at par with the establishment clause insofar as constitutional status is concerned? It must be noted that the *McCollum* and *Zorach* decisions defining and delimiting the extent of the application of the establishment and free exercise clauses were handed down years before. Since that time, we have had three Constitutions already[136] and all have included the provision in question without many alterations. It is entirely possible that our framers have taken the aforementioned decisions into consideration and instituted the "teaching" provision in our Constitution in order to spare it from secularist attack.

Nevertheless, the implication remains that in our jurisdiction the free exercise of religion will prevail over non-establishment if and when both concepts will come to clash. The framers of our Constitution have made it clear that the state will cooperate in endeavors meant to further the religious conviction of students by giving them the opportunity and the venue for these activities. Furthermore, the state gives them the freedom to choose the spiritual or religious director who will be designated to conduct these classes.

2. *Student Assignments and Religion*

With regard to student assignments, students may express their religious beliefs in their homework, reports and other academic expressions and these would be constitutionally protected. A teacher may not reject a report on the basis that its theme partakes of a religious nature. These assignments should be

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[136] The Mccollum and the Zorach rulings were laid down in 1948 and 1952 respectively. Since then we have produced three constitutions: the 1973 Constitution, the Freedom Constitution in 1986 and the 1987 Constitution.

judged by ordinary academic standards of substance, relevance, appearance and grammar.

From the discussion above, we can see that religious instruction is not prohibited *per se*. Any individual can be instructed in his or her preferred religion as long as the practice subscribes to the reasonable limitations in respect of the Non-Establishment clause. The wisdom of this can be more adequately seen in the following statement: "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."[137] Conversely, those who do not want to avail of the opportunity for religious instruction will not be pressured or coerced into attending the same in the guise of fulfilling an academic requirement.

C. Distribution of Religious Literature

The distribution of fliers and religious literature on public school campuses is not a new phenomenon. U.S. Supreme Court decisions on the issue generally fall into two categories. The majority view holds that while schools may place some restrictions of the distribution of student publications, they may not ban them altogether.[138] Courts have generally upheld the right of students to distribute non-school publications subject to the right of the school to suppress them if the literature creates substantial disruption, infringes upon the compelling interests of the school and harms the rights of others. Courts have repeatedly held that the schools may place reasonable "time, place and manner" restrictions on student materials distributed in campus.

A minority of U.S. decisions holds that schools can prohibit the distribution of any publication that is not sponsored by the school, and the ban must be evenly applied to all publications.[139] A school could not, for example, allow the distribution of political literature while barring religious publications.

Adults and teachers considered as outsiders, on the other hand, have no right to distribute materials to students in a public school. Furthermore, schools

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[137] American Civil Liberties Union, *supra* note 118.

[138] The United States courts have based their decisions on the landmark case of Tinker v. Des Moines School District, 393 U.S. 503 (1969), which upheld the right of students to wear black armbands protesting the Vietnam War, even in a public school.

[139] Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990)

may not give Gideons and other religious groups access to distribute their materials on campus. The U.S. case of *Berger v. Rensselaer Central School Corp.*[140] ruled that an Indiana school district's policy and practice permitting representatives of Gideon International to distribute Bibles in public schools during school hours violated the Non-Establishment clause. Even though the teachers did not participate in handing out the Bibles to students, and even though the Bibles were not used for pedagogical purposes, the Court held that the distribution was "a far more glaring offense to First Amendment principles"[141] than the nonsectarian graduation prayer in *Lee*.

When the government, through the public school system, permits a religious group to take over instructional time and permits the distribution of religious material, it strongly implies official endorsement of that religion. U.S. Courts have stressed the importance of avoiding any "symbolic" link between government and religion.[142] In such a case, the second prong of the *Lemon* test will not be satisfied.

With respect to distribution of materials by students and student groups themselves, the issue seems clear. This seems permissible since the preservation of freedom of speech and the maintenance of the integrity of public education are not mutually exclusive. Schools should model freedom of expression principles by encouraging and supporting the rights of students to express their ideas in writing. Conversely, students should not expect to have unfettered access to their classmates and should be prepared to abide by reasonable time, place and manner restrictions. Schools must continue to maintain order, discipline and the educational mission of the school as they seek to accommodate the rights of students.

Cases involving distribution of materials in public school by outsiders becomes an altogether different issue. The issue of the sale and distribution of religious material (however, not in the public school setting) was touched upon by our own Supreme Court in the case of *American Bible Society v. City of Manila*. Here, the Court upheld the Society's right to distribute the religious material sans the required municipal license. Any restraint on the right to free exercise can only be justified if there is a clear and present danger of any substantive evil which

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[140] 982 F.2d 1160 (7th Cir. 1993) *cert. denied*, 508 U.S. 911, 113 S. Ct. 2344 (1993).

[141] *Id.* at 1169.

[142] School District of the City of Grand Rapids vs. Ball, 473 U.S. 373, 385 (1985) [hereinafter referred to *Grand Rapids Case*].

the State has the right to prevent. [143] In this case, the Court affirmed the use of the "clear and present danger" rule. In the U.S., the free speech rights of these individuals and religious groups to engage in religious expression has been subordinated to the non-establishment clause. The attitude of the U.S. Courts have unequivocally shown that they have utilized the "dangerous tendency" test.[144] It is submitted that outsiders may find legal solace in the "clear and present danger" test to justify distribution of religious material in Philippine public schools.

D. Access to School Facilities

Where a public school district wishes to make its facilities available for use by student or community groups during non-school hours, the religious clause issues are quite different. The non-establishment clause does not prohibit opening the school facilities to religious groups – provided no elements of school sponsorship or endorsement are present. This has been a consistent and undeviating dictum from U.S. federal jurisprudence.

In *Widmar v. Vincent,*[145] the Court upheld equal access to public university and college facilities by students for religious functions. The university must remain neutral in regulating use of public forum facilities. Once a school district opens its facilities for use by students or members of the community during non-school hours, the free speech clause of the First Amendment requires that the school district not discriminate based on the point of view of groups seeking access to those facilities[146]

In *Lamb's Chapel v. Center Moriches School District,*[147] the U.S. Supreme Court held that a school district violated the First Amendment free speech rights of a local church by refusing to permit the church to exhibit, on school property during non-school hours, a film series dealing with family values and child-rearing from a religious perspective, even though those same school facilities were open to other groups in the community desiring to address the same subjects from other perspectives.

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[143] 101 Phil. 386, 398 (1957).

[144] The dangerous tendency test provides that the act must be suppressed when the tendency of the matter at hand is to produce any of the substantive evils that the State has a right to prevent.

[145] 454 U.S. 263 (1981).

[146] Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788 (1985); Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983).

[147] 508 U.S. 384 (1993).

The Supreme Court further held that allowing Lamb's Chapel to exhibit its film series would not contravene the non-establishment clause because the showing of the films "would not have been during school hours, would not have been sponsored by the school, and would have been open to the public" and because school property "had repeatedly been used by a wide variety of private organizations."[148] The presence of these four factors, the Court held, ensured that there was "no realistic danger that the community would think that the District was endorsing religion or any particular creed" and that the school's action satisfied the three-part test of *Lemon*.[149]

In effect, the Supreme Court found that the school district engaged in impermissible viewpoint discrimination in allowing community groups to use school facilities to address family and child-rearing issues from non-religious perspectives while denying the Chapel's access to school property to address the same issues from a religious point of view.

In *Stone v. Graham*,[150] the U.S. Supreme Court ruled that a Kentucky statute requiring the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public school classroom in the State has no secular legislative purpose, and therefore is unconstitutional as violating the Establishment Clause.

In *Lamb's Chapel*, the proposed use of the public school auditorium was limited, occasional, and comparable to other uses already permitted by the school district. The proposed use was to occur in the evenings, well after school hours. The activity was not uniquely religious, like worship or prayer; it was open to the public; it concerned a subject of general interest addressed to the entire community; and it was not to be promoted by the school. The result clearly would be different, however, if a religious group were to seek special access to public school students during the school day. Any request by a religious group for special privileges – including access that is significantly different in either quality or quantity from the access granted to other student or community groups not available to secular groups – would truly raise serious establishment clause problems.

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[148] *Id.* at 395.
[149] *Id.*
[150] 449 U.S. 39 (1980).

Although there remains no case in Philippine jurisprudence on the matter of the use of school facilities by students for religious functions, the issue has been the subject of many opinions from the Department of Justice. In one opinion, the question considered was "whether or not they (sectarian student societies) may make occasional and temporary use of school facilities such as rooms, school grounds, and bulletin boards." The Secretary of Justice held that the proper school authority may "allow student organizations, including sectarian groups, to temporarily use school facilities during such time and in such manner as will not interfere in any way with the occupation and use of school facilities for school purposes."[151] Subject to same limitations, the proper school authority may allow "the use on Sundays and holidays of public school buildings and/or campus for the purpose of holding religious services for the benefit of students."[152]

There is sufficiently comprehensive authority to support the view that the school authorities may, in the exercise of their discretion, allow non-student sectarian groups to make occasional use of public school buildings or campuses subject to time, place and manner restrictions.

The question of when a religious group's use of government property presents a valid claim of equal access crosses the line into government endorsement of religion, can be a perplexing one to answer. Though the solution inevitably turns on issues of context and on the facts of the particular case, the U.S. Supreme Court's decision in *Lamb's Chapel* provides some helpful guideposts to assist public schools in this area.

V. EMERGING ISSUES: A CRITICAL REVIEW

A. The Clash Between Non-Establishment and Free Exercise

We have seen the importance of both the establishment and free exercise clauses and the purpose they serve in protecting the liberty of conscience of every citizen by providing the legal basis for religious freedom. A brief survey of the cases involving these concepts have shown that the courts have had much difficulty in determining the boundary line between the church and the state which, most often, has not been well-defined. Using the various tests mentioned in the earlier part of this paper, the courts engage in a balancing act and try to

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[151] Opinion No. 77, series of 1958 of the Secretary of Justice
[152] Opinion No. 92, series of 1958 of the Secretary of Justice

weigh the interests of the individual concerned against the interest of the state in maintaining a government that would be free from religious interference.

However, a more difficult and complex scenario arises when the establishment and the free exercise clauses are pitted against each other. The inherent tension between the religion clauses becomes apparent, when, for example, a religious group may be asking for some government benefit. If the benefit is given, there may be an establishment clause problem as this may be interpreted as support for that particular religion. On the other hand, if the benefit is not given, this may be a burdening of religion and a denial of the free exercise clause.

In the specific context of public schools, the complexity involved manifests itself in the following scenario. Supposing the students, on their own initiative, form a religious association and preach, learn more about religion, or even merely discuss the same on public school grounds. Would this action be permissible and non-violative of the Constitution? From the students' point of view, they would be merely exercising rights derived from the free exercise clause. The government, however, would be more concerned with whether or not such action would constitute an unofficial endorsement of the religion that group espouses.

Given the fact that both clauses find their mandate in the Constitution, courts would be hard put to decree, by the simple expedient of just saying so, that one has supremacy over the over. As Justice William Brennan astutely observed, "There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment."[153]

In the disposition of the case, extreme care must be made that all factors relevant to the issue at hand should be considered. In the example given above, these factors would include whether or not the association formed has been formally recognized by the school, the degree of imposition of their beliefs and ideologies on the rest of the student body, how they comply with certain time and place restrictions, and whether this results in a disruption of the school's official business.

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[153] Abington School District v. Schempp, 374 US 203, 296 (1963) (O'Connor, J., concurring).

In all fairness, the Court has sided with the free exercise concerns of religious freedoms in numerous instances.[154] The rights of the conscientious objector have been upheld when the act required of him would, in his perception, be in furtherance of any other end condemned by his conscience as irreligious or immoral. As pronounced in *Hamilton v. Regents of University of California*, "[t]he right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government."[155]

In cases involving educational institutions, however, the Establishment clause seems to have taken precedence. It is almost peculiar why the Free Exercise clause has to take a hobbled stance in this arena. Why is it that even if some objecting students are not required to participate in moments of silence or in school prayer, the same is stricken down on the basis of the establishment clause when, in all actuality, the court could take a more tolerant stance and uphold the same on the basis of free exercise? This strict adherence in maintaining a rigid secular stance eventually results in a denial of equal protection where students are concerned.

The undue emphasis on the Establishment clause has no basis in the Constitution, whether ours or in the United States. It stands on the same footing with the Free Exercise clause and even the courts have acknowledged it. The increasing paranoia from those quarters who insist that the even the most minute manifestation of religion could start the crumbling of the impregnable wall between church and state has, unfortunately, been validated by the U.S. Supreme Court. It is unfortunate because it is unnecessary, especially when accommodation to religion could be availed of in keeping with the spirit of the law.

The ideal would be to refrain from the thought that the two clauses are at odds with each other. Both secure the rights of believers and non-believers alike. Together, they secure religious freedom. In the words of the Williamsburg Charter, the two Religious Liberty clauses are "mutually reinforcing provisions [that] act as a double guarantee of religious liberty."[156] If the courts could take a

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[154] In re Summers, 325 U.S. 561 (1945), Chatwin v. United States, 326 U.S. 455 (1946), Cruz v. Beto, 405 U.S. 319 (1972), Wooley v. Maynard, 430 U.S. 705 (1977).

[155] 293 U.S. 245, 267 (1934). In this case, the consbientious objector refused to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end at odds with his conscience and his religious convictions.

[156] Oliver Thomas, *The Supreme Court, Religion and Public Education*, *at* http://www.fac.org/publicat/cground/ch04_1.html.

definitive stance as guardians of both, the scales would not be tipped in favor of either, and a satisfying balance as regards both would ensue.

B. Pluralism Deteriorating into Secularism

The belief in a Supreme Being responsible for all creation and the grand design of life is one of the core values of human beings since time immemorial. Throughout the centuries, people have looked towards divine entities to guide them throughout their lot in life. Oftentimes, they attribute the blessings they receive and oppressions that they experience on the temporal plane as a sign of favor or disfavor from the divinities they worship.

This central belief in God accompanied the pilgrims when they set foot on American soil.[157] Government and organized religion then became inseparable. Sooner or later, the wisdom of creating a wall between the two became apparent and James Madison authored the Religious Clauses as amendments to the U.S. Constitution.

The jurisprudence interpreting those clauses have evolved into a sophisticated understanding of the separation doctrine. The question that remains to be asked is this: In the course of interpreting the establishment and the free exercise clauses, have the courts remained faithful to the spirit of the law?

It would seem that the answer to that question would differ depending on the peculiar predilection and predisposition of the court reviewing the case. However, for the past 10 years, it is apparent that the courts in the U.S. have adopted a rigid construction of the law which calls for a strict separation of church and state. *Stone v. Graham*[158] prohibited the posting of a copy of the Ten Commandments, purchased with private contributions, on the wall of each public school classroom. *Wallace v. Jaffree*[159] struck down a "moment of silence" for prayer in public schools. The *Grand Rapids*[160] case prohibited "shared time and community education" programs simply because most of the volunteer teachers were identified with religious schools. Likewise, prayers at high school football

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[157] When the Plymouth colony was established in 1607, in what they called the Mayflower Compact, the residents pledged to God and to each other that they would establish a "civil body politick" and would submit to the laws that were to be written. Many of the colonies established churches and these churches were sponsored by the government.

[158] 449 U.S. 39 (1980).

[159] 472 U.S. 38 (1985).

[160] 473 U.S 373 (1985).

games,[161] basketball games[162] and even during graduation ceremonies[163] have been struck down.

It has been argued by most 20th century courts that the Constitution intended to separate all religious expression from public life. Yet, that would ignore the textual history and the broad, historical context of the origin of the religion clauses. Michael Malbin, in his volume, *The Intent of the Framers*, insists that this wording was deliberately chosen.[164] The colonists meant to prohibit official activities that tended to promote one sect over another, rather than to prohibit non-discriminatory aid to religion. Justice Joseph Story, in his commentary on the First Amendment, concurs with Malbin's analyis. It was a particular religion (in the sense of one sect or church denomination) that was not to be established. It was not a prohibition of favoritism toward religion itself.[165]

The decision in *Zorach v. Clauson*[166] validated this argument when it said:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.[167]

Still and all, the pervasive judicial attitude seems to be a result of a growing paranoia. In their haste and zeal to maintain the separation of church and state, they have managed not only to suppress the positive and beneficial effects of religion, but also to obliterate the same insofar as its influence on public school children are concerned.

What is ironic in this picture is that a Christian cultural dominance no longer exists in the United States. In its place sprang the market of free thought,

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[161] Jager vs. Douglas County Sch. Dist., 862 F.2d 824, 828 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989).

[162] Doe vs. Duncanville Ind. Sch. Dist., 70 F.3d 402, 406-07 (5th Cir. 1995).

[163] Lee vs. Weisman, 505 U.S. 577 (1992).

[164] Malbin makes the observation that some reviewers of the language and the debates of the Constitutional Convention have noted that the wording does not prohibit *the* establishment of religion, but *an* establishment of religion.

[165] BUZZARD, LYNN R. and SAMUEL ERICSSON, THE BATTLE FOR RELIGIOUS LIBERTY 47 (1982).

[166] 343 U.S. 306, 313 (1952).

[167] *Id.* at 313.

where children in public schools are encouraged to espouse and express their thoughts on different ideologies and alternative lifestyles such as homosexuality, hedonism, Marxism, variants of humanism, utilitarianism, and existentialism. A cultural shift has occurred and society now places more emphasis on these emerging ideologies and lifestyle. The law kept in step with the times and it has decriminalized conduct it formerly prohibited, given legal status to such conduct, and finally protected it.

The "pluralism" touted by the original framers, placed in today's context, would be suspicious at best. Coupled with the distaste for religion by the U.S. Courts today, it would seem that this pluralism as originally envisioned has degenerated into an increasing dominance of our public life by a hostile secular philosophy more aptly called "secular humanism."[168] It has come to the point wherein the student may promote ideas if they come from Marx or Freud or some philosopher or scientist, but not if they come from the Bible.

In the Philippines, the urgency of this problem has not yet emerged. Religiosity is still given a high premium in our culture and society while its expression, be it in a public or private school, has been tolerated, accepted and even lauded at times.

C. The Public School System as Caretaker

The U.S. Supreme Court has emphasized that it is not the business of government to promote or sponsor religious exercises – especially among young students who are in school as a result of compulsory attendance laws. This is in furtherance of the notion that the symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.

Moreover, the U.S. Supreme Court has repeatedly emphasized the impressionability of primary and secondary school children and the pressure they are apt to feel from teachers, administrators and peers to conform. As the Supreme Court observed in *Lee v. Weisman*, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[169] Foremost of these concerns is that the classroom

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[168] *Supra*, note 6, at 13.

[169] 505 U.S. 577, 592 (1992). *See* Edwards, 482 U.S. at 584; *see also* Grand Rapids, 473 U.S. at 390.

must not be purposely used to advance religious views that may conflict with the private beliefs of the student and his family.[170]

The trend of decisions in U.S. courts supports the view of complete and absolute separation, but it is doubtful whether our own judiciary will assume the same posture. Such a view will find little application here, where religion indeed provides spiritual comfort and guidance and where that spirituality is inextricably linked to the lifestyle of every citizen.

The subject of both the church and state is the individual. Each institution exerts compulsion upon the individual. One governs his temporal or material life, the other his spiritual life. But the line of distinction oftentimes overlaps and one necessarily gives way to the other.[171] A student can be compelled to salute the flag though such an act would be contrary to his religious doctrines.[172]

The Constitution itself mandates all educational institutions to "strengthen ethical and spiritual values, develop moral character and personal discipline."[173] The duty of all schools, including public schools, to develop moral values and strengthen spiritual values has been elevated to the status of a constitutional mandate. The field of education is opened wide beyond the primary intellectual objectives of the school. The term "moral character" is broad enough to cover the spiritual or religious character. The Filipinos, by custom, conduct and way of life, are a religious people. Thus, the term "moral character" in the Constitution may be taken to include the spiritual or religious quality, cognizant of the fact that the Filipinos are a religious people.

Pursuant to these Constitutional commands, it may be argued that public school officials may actually have authority to compose a prayer and recommend its use in public schools as part of moral training. It is submitted, however, that the line becomes more conspicuous as an individual advances to higher education where moral indoctrination and spiritual growth have little or no place. In tertiary

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[170] *Id.*

[171] Martinez, supra note 31, at 764.

[172] Gerona v. Secretary of Eduction, 106 Phil. 2 (1960).

[173] The full text of sec. 3(2) of art. XIV reads: "They shall inculcate patriotism and nationalism, foster love and humanity, respect for human rights, appreciation of the role of national heroes in the historical development of the country, teach the rights and duties of citizenship, strengthen ethical and spiritual values, develop moral character and personal discipline, encourage critical and creative thinking, broaden scientific and technological knowledge, and promote vocational efficiency."

public education, it is posited that school prayers or religious indoctrination will be of doubtful constitutionality. [174]

As caretaker for all the children in the community, a public school has the responsibility to protect the conscience of every student. This will necessarily include children of various religious faiths, as well as those of no religious faith. Only by maintaining a posture of neutrality can the school be fair to all. This does not mean the school should be disrespectful of the important role religion plays for many students. Patrick Lord Devlin, an English jurist once said:

> The role of law in any society is to establish and as far as possible to secure, the minimal standards of behaviour necessary for a society to hold together. But religion calls on people to live, not just in accordance with the minimal standards of behaviour secured by law, but by maximal standards, virtuous standards of behaviour informed by love, neighbourly care, generosity of spirit. It is not so much a matter of law as of grace. The law requires us, on pain of punishment, for example, to contribute to the nation's running costs by paying taxes; but the stories of a religious tradition call us to generosity of spirit, to share our energies and resources in a manner over and above that required of us by law.[175]

Students retain the right to exercise their religion, subject to some limitations.

D. The Wall In the Philippine Scenario

From the foregoing discussions on the evolving concepts surrounding the religion clauses, it is evident that in this jurisdiction, our Supreme Court has had little opportunity to contribute their erudite wisdom on the issue of separation of church and state, let alone its effect on public schools. Relatively few cases have been filed, and fewer have reached the highest court in the land.

At the outset, it might seem like an almost ideal situation to the legalist if minimal complaints would be considered a reflection of minimal infraction of the law. That is not the situation obtaining in this case, however. A casual observation by an individual trained to spot violations of the establishment and free exercise clauses would show that numerous transgressions of the law are

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[174] It will be noted that the Constitutional provision on optional religious instruction refers only to primary and secondary education.

[175] http://web.hamline.edu/law/lawrelign/jlr/ (last visited Dec. 28, 2001).

committed everyday. Religious images and icons abound in government offices; masses and other religious rituals are held in the courthouses, and government funds are being funnelled to religious organizations. It makes one wonder why, despite all these violations, very few are crying "foul!."

The answer is simple. It is because those who will be injured by those acts are, indeed, very few.

When the Philippines was discovered by Magellan, a Spanish Conquistador, in 1521, the colonizers converted the natives to Catholicism thereby effectively conquering the people of the islands.[176] For over 400 years, Spain ruled the Philippines and the dominant power during this period was in the hands of the Spanish friars.[177] Although the Protestants held an influential position because of their involvement in public education during the American period,[178] subsequently, the balance shifted to reflect a much stronger influence by the Catholic majority when the Philippines regained its independence.

Today, over 90% of the population are Christians. "From the figure of over 90%, 83% of these are Roman Catholics, 9% are Protestants, 5% are Muslims while the remaining 3% are Buddhists or belong to other religion groups."[179] It is therefore no wonder why the silent majority choose to remain silent and the minority choose not to complain. The former, because in the pendulum of power between Catholicism and the other religions, it has the status quo in its favor; the latter, because opposition by the substantial majority would indeed be formidable. This has engendered a culture of religious tolerance that is pervasive throughout the country today.

The facts above are in stark contrast to the widespread distribution of members of various religious denominations in the United States. The admonition of the U.S. Supreme Court when it pronounced that, "just as religion has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord

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[176] TEODORO AGONCILLO, ANG PILIPINAS AT ANG MGA PILIPINO NOON AT NGAYON 64.

[177] Jack Miller for the Asia Society's *Focus on Asian Studies*, 2 *Asian Religions* 26-27.

[178] Most of the teachers who went to the Philippines were Protestants, many were even Protestant ministers.

[179] http://www.marimari.com/content/philippines/general_info/religion.html (last visited Feb. 12, 2001).

with particular religions or sects that have from time to time achieved dominance,"[180] may have been proven to be prophetic.

Indubitably, the influence of the clergy over the faithful is acknowledged by all sectors of Philippine society, including the government. This was recently manifested in the peaceful revolution fondly called EDSA DOS wherein former President Joseph Estrada was ousted. Cardinal Sin, the Archbishop of Manila, called the members of the Catholic church to gather at the Edsa Shrine to protest the death of democracy when majority of the members of the impeachment court refused to open an envelope containing vital evidence for the State's cause. The people heeded his call and in less than five days, sheer pressure from this majority block toppled over the highest executive in the land. It must also be noted that that very same Cardinal also instigated the first People Power Revolution which ousted a dictator.[181]

Filipinos listen to their spiritual leaders – whether it be Cardinal Sin for the Catholics, Felix Manalo for the Iglesia ni Kristo, Brother Mike Velarde for the El Shaddai, and many others. Those seeking public office consider paying homage to these personalities a virtual necessity in order to get their endorsement. That endorsement translates to votes and a political debt. Considering that these politicians will be the ones that will eventually get elected in office, it is not surprising that a strict implementation of the separation of church and state will not occur during their watch. Perhaps, in time, an attempt would be made but given the socio-cultural background of Filipinos, that attempt would most likely be his or her last as it would be tantamount to political suicide.

Will there ever be a strict separation of church and state in this jurisdiction?

In a country where its people holds religion close to its bosom, it would be highly unlikely that the legalistic ideal embodied in numerous U.S. cases would come to fruition. Government officials will still attend religious rallies to gain the support of the masses especially when election time comes around. Contributions

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[180] 473 U.S., 373, 382 (1985).

[181] The first People Power revolution in the Philippines occurred from February 21 to 25, 1986. The protest began when the electorate became suspicious of election fraud in the snap presidential elections between Corazon Aquino and Ferdinand Marcos where Marcos was declared the winner despite overwhelming popular support for Aquino. At the height of the peaceful revolt, Marcos and his family, together with several cronies and loyalists, fled to Hawaii where he maintained his residence in exile until his death.

to religious organizations will still be made by the government as a manifestation of its continued support. In fact, the Ulama League of the Philippines, the biggest Muslim religious organization in the country accounting for about 75% of the Muslim population, obtained a generous donation of nine billion pesos from the government during President Ramos' term.[182]

It would seem that this situation would still be the status quo for many years to come. The fact remains that these activities of the government could very well be questioned under the law. However, given the fact that the powers that be are cognizant of the power play between the church and the state, that person who will rock the boat must and should be a very brave man.

VI. RECOMMENDATIONS AND CONCLUSION

American jurisprudence has shown that the introduction of religion—whether it be prayer, traditional instruction or any of its configurations—into the public school system would more likely run afoul of the Establishment Clause rather than the Free Exercise Clause.

The guidance of religious tests, the foremost of which is the *Lemon* test, has proved invaluable in helping the courts ascertain the impermissibility of certain statues, policies or activities by scrutinizing its purpose, primary effect and the extent of the entanglement of religion with the state.

Official reading of prayers in public schools has been held to be unconstitutional by U.S. courts, as seen in the *Engel* case.[183] This is because the primary effect of prayer is to advance a particular religious persuasion. There are several variants of the problem on school prayer. The first is the "moment of silence." While there is no hard and fast rule as regards this practice, it will generally violate the Establishment Clause since a moment-of-silence statute will usually turn out to have been solely motivated by the legislators' intent to advance a religion, or will at least have the primary effect of advancing religion.[184] Similarly, public schools may not conduct a prayer as part of a graduation

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[182] APPIN, *Religious Congregations and Associations*, http://www.asianphilanthropy.org/countries/philippines/religion.html (last modified December 2000).

[183] *Supra* note 30.

[184] *Supra* note 106.

ceremony, at least where school officials can fairly be said to be sponsoring the religious message.[185]

In the United States, religious instruction may not be permitted in public schools. However, it is probably allowable for the government to allow students to leave school early to attend religious instruction elsewhere. As regards religious instruction, the state may not design or modify the curriculum of its schools in order to further religion at the expense of non-religion, or to further one set of religious beliefs over others. For example, as held in *Epperson vs. Arkansas,*[186] a state may not forbid the teaching of evolution. Similarly, it probably may not demand that "creationism" be taught in addition to evolution, since "creationism" is mainly a religious doctrine the teaching of which would have the primary effect of advancing religion.[187]

Following the neutrality principle in the *Smith* case, it could be acceptable for government to let religious groups have access to school facilities, as long as non-religious groups are given equal access. But this is subject to debate.

The American religion cases, particularly those on school prayer, have focused on the Establishment Clause to the detriment of the Free Exercise Clause. That has been the evident trend of the 20th century American courts who seem to have too quickly forgotten that the fundamental law of the land explicitly protects the free exercise of religion.

With a myriad of problems facing the public educational system, the American justices have instead set their sights on eliminating the best solution – a reliance on the Creator. In the United States, pluralism has been utilized as an excuse to relegate not only religion, but even civic morality into a caliginous private realm.

In controversies involving religion and the public school system, our courts must maintain a position of benevolent neutrality and accommodation. We must recognize that the struggle for religious liberty involves the character of our society and the way it nourishes or penalizes vibrant religious faith. The battle revolves around whether or not our culture will acknowledge the legitimacy of religious values and expression in our public life. Developing an informed

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[185] Tinker v. Des Manis School District, 393 U.S. 97 (1968).
[186] American Civil Liberties Union, *supra* note 118.
[187] *Supra* note 118.

perspective among the populace is imperative. Information campaigns and traditional educational institutions that will inform the people and educate them on the merits of separation of church and state are essential.

In most cases, churches should de-emphasize direct political action since the exercise of power politics between church and state will only polarize people in the long run. If we must act, it must be on issues that are critical to our survival and our actions must reflect our organization's essence. As individuals, we can seek to combine the personal dimensions of religion, politics and education to arrive at a comfort zone where a deeper understanding of these concepts empower us to recognize and assert our religious rights in the proper forum and with the appropriate manifestation.

Guidelines providing for public school prayer in the lower levels of education with due respect to the rights of the minority may be set without constitutional objection. As part of the constitutional mandate of all schools to promote moral and spiritual training, the practical and permissible mechanism of optional religious instruction may be availed of. Also, the distribution of religious materials within the public school setting can find legal comfort within the confines of the free expression clause. Finally, there will be no constitutional hindrance to granting access to religious groups as long as sufficient time, place, manner restrictions are in proper place.

As the government does not have the right to impose religion, government also does not have the authority to constrain religious expression. The balance is indeed possible. In the United States, Americans overwhelmingly favor a remedy for the jurisprudence of error that suppressed their rights of free exercise for too many decades. Unlike our Federalist counterpart, we must maintain our heritage as a free nation, unencumbered by the bonds that can easily entangle us.

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