COMMENTS

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

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I. INTRODUCTION

Once again, the Supreme Court of the United States, in a momentous decision promulgated on June 25, 1962, has attracted the attention not only of the legal luminaries but of the ordinary layman when it declared unconstitutional a New York school prayer on the ground that it violated that part of the First Amendment to the Federal Constitution which enjoins Congress from making laws respecting an establishment of religion. The reaction of the American people was unequaled since the Court's 1954 ruling on school desegregation.[1] The Court was criticized and praised for this decision. The decision has been called "an outrageous edict," "the most tragic decision in the history of the United States," and "a disintegration of one of the most sacred of American heritages." [2] It even caused a movement led by Senators Stennis and Robertson to amend the Constitution so as to prevent the recurrence of a similar decision.

In the Philippines, the reaction was not one of passiveness. The daily newspapers immediately editorialized for and against the decision; some conjectured on the probable consequences of the decision. At any rate, the decision provoked legal discussions on the point.

II. STATEMENT OF THE PROBLEMS

The United States Supreme Court, in the June 25 decision referred to—*Engel, et al. v. Vitale, Jr., et al.*[3]—has virtually reopened the question of the meaning and scope of the so-called establishment clause of the First Amendment,[4] or more accurately stated, has settled

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* Chairman, Student Editorial Board, *Philippine Law Journal*, 1962-63.

[1] Newsweek, July 9, 1962, p. 41.

[2] *Ibid.*, 11.

[3] 82 S. Ct. 1261 (1962).

[4] The First Amendment in part provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." The first part is the so-called establishment clause while the second part, the free-exercise clause. These two clauses forbid different kinds of state

its meaning and scope once and for all. In that case, the respondent board of education, acting in its official capacity under state law, directed the school principal to cause the following prayer to be 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:

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

The prayer was composed by and adopted on the recommendation of the State Board of Regents, a constitutional agency to which the state Congress has granted board supervisory, executive and legislative powers over the state public school system. This prayer was adopted as part of the moral and spiritual training in the schools.

In the recitation of this prayer, no student was compelled to take part. Any student, upon written request of a parent or guardian may be excused from saying the prayer or from the room in which the prayer was said. In other words, the prayer was entirely voluntary on the part of the student.

Shortly after the practice of reciting the prayer was adopted by the school, the parents of ten students brought an action in a New York court challenging the constitutionality of the state 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 this prayer on the ground that these actions of the governmental agencies violate the establishment clause of the First Amendment, which Amendment was made applicable to the New York state by virtue of the Fourteenth Amendment.

The highest court of New York sustained the validity of the use of this prayer as long as no student was compelled to take part. The United States Supreme Court, in reversing the judgment and declaring the use of the prayer unconstitutional as a violation of the establishment clause said: ". . . 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 on by government." [5] The Court, speaking through Justice Black, went further and said:

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encroachment upon religious liberty. However, in certain instances, they overlap for when a state establishes an official religion, the free exercise clause may be violated and conversely, when the individuals are deprived of their religious liberty, the practical effect is the establishment of a state religion.

[5] *Supra* note 3, at 1264.

> The First Amendment was added to the Constitution to stand as a 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 to 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 prescribe 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.[6]

This paper shall attempt *firstly*, to make a critical analysis of the meaning and scope of the establishment clause as interpreted by the United States Supreme Court, and *secondly*, to determine the probable weight and applicability of the *Engel* case to Philippine jurisprudence.

III. MEANING AND SCOPE OF THE ESTABLISHMENT CLAUSE

A. The First Amendment

The First Amendment to the Federal Constitution embodies the so-called establishment clause or as it is more popularly known, the principle of separation of church and state. Jefferson called it "a wall of separation between church and state." How high and impregnable this wall is, is the subject of inquiry of this paper.

The First Amendment in part provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." Corollary to this provision, although of a prior adoption, is the constitutional provision which provides that no religious test shall ever be required as a qualification to any office or public trust under the United States.[7] These are the only provisions in the Federal Constitution which touch on the subject of religion and which embody the same principle—the principle of separation of church and state.

B. History of the First Amendment

The history of the First Amendment is not as brief and simple as it appears to be for even the Justices of the Supreme Court of the United States, past and present, have not agreed as to just what the framers desired by the adoption of the First Amendment. In the cases interpretative of the First Amendment, the majority, concur-

[6] *Ibid.*, 1266.
[7] U.S. Const. Art. VI (3).

ring and dissenting justices have invoked the history of the First Amendment in support of their respective stands. They tried to ascertain the intent of the framers of the Constitution in determining the meaning and scope of the establishment clause. But the more the justices invoked the history of the First Amendment, the more confusion ensued.

The First Amendment was principally a reaction against the established churches existing in the original American colonies. Colonizers from Europe and Mother England purposely left the Continent in search of religious freedom. They had been persecuted, punished, and humiliated because of their religious beliefs and practices. They had known the evils attendant to a union of church and state. They had been aware of the attempts of the church to use the King, and the King the church to further their respective aims and ends. They knew that these not only brought misery to the people but has in effect been detrimental both to religion itself and the state.

But no sooner had these colonizers set foot in the New World and established themselves in power when they imposed their own religious beliefs upon dissenters. They imposed severe penalties to dissenters so much so that these dissenters had to seek new places for the exercise of their religious beliefs. The effect of this was the practical establishment of particular religious faiths in each territory. Towards the beginning of the American Revolution, there were established religions and churches in practically all the thirteen original colonies.

There were however those who spoke out against this practice. With the success of the Revolution, the idea of separation of church and state gained headway and the movement reached its climax in Virginia in 1785-6 when the Virginia legislative body was about to renew Virginia's tax levy supporting the established church. Thomas Jefferson and James Madison led the fight against the proposed bill. It was during this struggle that Madison wrote his great "Memorial and Remonstrance against Religious Assessments," which writing was relied practically by all the Justices of the Supreme Court in cases involving the establishment clause. The proposed bill was killed as a result of the vigorous opposition of Jefferson and Madison and in its place, the famous "Virginia Bill for Religious Liberty," originally written by Jefferson, was enacted.

From Virginia, the movement spread to other states. The constitutional provision against religious test oaths was found to be inadequate such that proposals to strengthen religious liberty were presented before the first Congress of the United States under the Cons-

titution. Finally, in 1791, the First Amendment was ratified. As originally intended, the First Amendment was a restriction only against the Federal Government. The First Amendment was not a guarantee to the citizens of the respective states of their religious freedom; this was left entirely for the state constitutions and laws to determine. However, with the ratification of the Fourteenth Amendment [8] in 1868, the religious clauses of the First Amendment was extended to apply to the state governments.[9]

C. MEANING AND SCOPE OF THE ESTABLISHMENT CLAUSE; THE EVERSON CASE.

Although the establishment clause has been part of the United States Constitution since 1791, it was only in 1947, in the case of *Everson v. Board of Education*,[10] that the Supreme Court of the United States gave a comprehensive meaning of the clause. In the *Everson* case, a New Jersey statute authorized the district boards of education to make rules and contracts for the transportation of children to and from schools. Pursuant thereto, the respondent board of education authorized the reimbursement to parents of money expended by them for the fares of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools gave their students secular as well as religious education on the Catholic Faith. A taxpayer challenged the statute in so far as it authorized reimbursement to parents for the transportation of children attending these parochial schools on the ground that it violated the establishment clause. In upholding the constitutionality of the statute, the Supreme Court, through Justice Black, defined what establishment of religion means, to wit:

> 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

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[8] The Fourteenth Amendment embodies the due process clause. Sec. 1 of the Fourteenth Amendment provides in part: ". . . 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; . . ."

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

[10] 330 U.S. 1 (1947).

> 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."* [11] (Emphasis supplied.)

Applied to this case, the Court said that the First Amendment did not prohibit New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. 'The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited school." [12] The Court went on and said that the First Amendment has erected a wall between church and state. *"That wall must be kept high and impregnable."* [13]

It is obvious that the Court, in its definition of the establishment clause attempted to conceive of every possible actions and situations which are forbidden by the clause. The definition practically covered all interferences of the state and the church into each other's affairs. The definition has erected for the first time the wall of separation between church and state.

Two justices wrote separate dissenting opinions. Of significance is Rutledge's heavily documented dissent for it attempts to create a wall of separation higher and more impregnable than that created in the majority opinion, a wall which would prohibit one from interfering with the other in any manner whatsoever. In Rutledge's language:

> 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 this 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.*[14] (Emphasis supplied.)

It will be noted that though the Court is divided 5-4, at least all the justices expressly or impliedly admitted the all-encompassing

[11] *Ibid.*, 15, 16.
[12] *Ibid.*, 18.
[13] *Ibid.*
[14] *Ibid.*, 31, 32.

and broad definition of the establishment clause given by Justice Black. It was only in the application of this definition that the Court was divided.[15]

The *Everson* case is important because for the first time, the Supreme Court squarely defined just what is meant by the establishment clause. The uncertainties which had existed up to this time, as regards the meaning and scope of the establishment clause, the extent to which the state and church can interfere with each other's affairs, as well as the issue of whether nonpreferential aid to religion is prohibited, were answered for the first time. But the controversy did not end there. It has only begun for in several more occasions, the Court was called upon to answer the same questions.

D. THE MCCOLLUM CASE

In the subsequent case of *Illinois ex. rel. McCollum v. Board of Education,*[16] the Court was asked to repudiate its "dictum" in the *Everson* case. The Supreme Court, speaking again through Justice Black, refused to do so but instead reaffirmed *in toto* its definition of the establishment clause in the *Everson* case. The case involved the so-called "release time" program. Illinois had a compulsory education law which required parents, under penalty of fine, to send their children either to its tax-supported public schools or to private schools of their choosing. Pursuant to its broad supervisory power over public schools, the respondent board of education allowed weekly re-

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[15] ". . . The issue of aid to parochial schools was side-tracked in the majority opinion written by Mr. Justice Black. In that statement the Court made a clear distinction between aid to parochial schools as such and aid to pupils attending any school in which the compulsory attendance laws could be fulfilled. It was this latter type of aid that was upheld in the decision. The reasoning of the Court, however, seems faulty upon a closer examination of the New Jersey statute in question which reads in part:

> 'Whenever in any district there are children living remote from any school house, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of children to and from school other than a public school, *except such school as is operated for profit in whole or in part.*
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> 'When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, *except such school as is operated for profit in whole or in part.*'

"The italized phrases at the end of each paragraph are enough to shatter the reasoning of the Court; Justice Black himself almost admits this in his opinion; for, by the qualification excepting schools operated for profit in the New Jersey statute, the character of the school and not the need, character, or any other attribute of the student determines the eligibility of the parents to receive transportation for his child at public expense. It seems self-evident that the statute is clearly a violation of the First Amendment in this respect." Stout, W. D., *The Establishment of Religion under the Constitution*, 37 KY. L.J., 220, 231-232 (1949).

[16] 333 U.S. 203 (1948).

ligious instruction to be carried on in public schools, by religious teachers employed by religious authorities during class hours in favor of those pupils whose parents consented to such religious instructions. These pupils were released temporarily from their classes during the period of religious instruction. Those pupils whose parents did not choose to take religious instruction were not released but were required to go to some place in the school building to continue their secular studies. The religious instructors received no pay from the school but were subject to the approval and supervision of the superintendent of school. In holding the action of the school officials unconstitutional, the Court said:

> *The foregoing facts* without reference to others that appear in the records, *show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects.* Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all questions a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment . . .[17] (Emphasis supplied.)

The foregoing decision clearly points out two objectionable features of the Illinois "release time" program. One is the use of the tax-supported public schools for religious instruction. Since public schools are publicly supported by taxes, to allow the religious authorities the use of these schools for religious purposes would be an indirect aid by the government to religion which is forbidden by the First Amendment as interpreted in the *Everson* case. The other objectionable feature is the close cooperation between the public school officials and the religious authorities in utilizing the state compulsory education system to further the religious instruction carried on by the religious authorities. With the state compulsory education system, the act of the public school officials, in cooperation with the religious authorities, in releasing students who desired religious instruction from classroom work during school hours in effect channeled the pupils to the religious classes.

Justice Reed wrote a dissenting opinion, significant because it gave another concept of the establishment clause which according to some authorities[18] became the majority opinion in the subsequent

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[17] *Ibid.*, 209, 210.

[18] Manning, L. F., *Aid to Education—Federal Fashion*, 29 FORDHAM L.J. 495, 520 (1961). See O'Brien, F. W. *Justice Reed and the First Amendment* (Georgetown University Press, 1958), pp. 170-178.

case of *Zorach et al. v. Clauson et al.*[19] In his dissent, Justice Reed said:

> 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 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."[20] (Emphasis supplied.)

Justice Reed was therefore of the opinion that the establishment clause does not *per se* forbid a friendly cooperation between church and state provided this cooperation does not amount to a "purposeful aid" to one or all religion.

A cursory perusal of the *Everson* and *McCollum* cases will show that the latter is a mere reiteration of the first. But a closer scrutiny will reveal that the latter has in effect broadened the already broad scope of the establishment clause as enunciated in the *Everson* case. The *McCollum* case[21] has indeed reinforced the high and impregnable wall of separation created by the *Everson* case.

E. THE ZORACH CASE.

The unqualified *McCollum* case, however, was not to stay long, for four years later, the Supreme Court decided the *Zorach et al. v. Clauson et al.* case[22] 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 the public school buildings but elsewhere. In upholding the constitutionality of the practice, the Supreme Court distinguished this case from the *McCollum* case in that the latter involved the use of tax-supported public schools for religious instruction while this case did not. But the Court, through Justice Douglas, went further and made the following controversial statements:

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[19] 343 U.S. 306 (1952).

[20] *Supra* note 16, at 248.

[21] "The Supreme Court through its decision in the McCollum case, has opened a virtual 'Pandora's box' the result of which are still in doubt. It has also brought home the fact that the First Amendment as stated is not sufficiently clear to meet modern situations, and as traditionally interpreted either becomes an empty phrase or, if stretched to the limit, an outright threat to our basic traditions. It seems that before we can properly interpret our constitutional guarantees against religious establishment, indeed before we can feel legally secure in using our society's chief attitude moulding agency for bringing up our children in the basic concepts of our society, we may need to pass a new amendment either to clarify or replace the wording of the First Amendment." Stout, *supra* note 15, at 239.

[22] *Supra* note 19.

> *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. *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.* To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any persons. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. . . .[23] (Emphasis supplied.)

Thus, the *Zorach* case held that the state may encourage religious instruction and cooperate with the religious authorities. The Court, in all practicality, held that the facts of the case showed that the cooperation between the state and the religious authorities was not of such a *degree* as would amount to a violation of the establishment clause. But if the school buildings were allowed by the state officials to be used for religious instruction, such cooperation would violate the establishment clause. The issue thus resolved itself into a question of degree. The church and the state may, to a certain degree, interfere with each other's affairs without violating the establishment clause.

In a dissenting opinion, Justice Black, maintaining his consistent stand in the *Everson* and *McCollum* cases, tried to hold high his concept of the high and impregnable wall of separation. In his dissent, he clarified his ruling in the *McCollum* case to mean that *what was unconstitutional in that case was not only the use of the public school building for religious instruction but also the close cooperation between church and state whereby both the church and state made use of the state compulsory educational system to further the religious instruction given by sectarian groups.* To him,

> In considering whether a state has entered this forbidden field, the question is not whether it has entered *too far* but whether it has entered *at all.* New York is manipulating its compulsory education laws to help

[23] *Ibid.*, 313, 314.

religious sects get pupils. This is not *separation* but *combination* of Church and State.[24] (Emphasis supplied.)

With the promulgation of the *Zorach* ruling, the impregnable wall kept so high in the *Everson* and *McCollum* cases was at last pierced. It was not after all as impregnable as Justice Black desired it to be.

F. The Everson, McCollum and Zorach Rulings

Prior to the *Everson* case, there was a state of confusion as to what exactly is forbidden by the establishment clause. After the *Zorach* case, the same state of confusion recurred. How high and impregnable is the wall of separation established by the First Amendment? Up to what extent or degree can the state and the church interfere with each other's affairs without violating the establishment clause or can one interfere at all with the other's affairs? Is non-preferential aid to religion prohibited? Did the *Zorach* case overrule the *McCollum* case? These were the questions generated by the *Everson, McCollum* and *Zorach* cases.

1. State of the Law Prior to the *Everson* Case.—Prior to the *Everson* case, no state court was in agreement as to just what is the meaning of the establishment clause. Each state court had its own concept. State courts have declared unconstitutional laws providing free transportation in going to and from schools in so far as they applied to sectarian schools.[25] Others upheld the constitutionality of such laws.[26] State courts have not been in agreement as to the constitutionality of laws authorizing the use of public funds to furnish textbooks to students in so far as they were made to apply to sectarian schools.[27] Such was also the situation as re-

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[24] *Ibid.*, 318.

[25] State v. Milquet, 180 Wisc. 109, 192 N.W. 392 (1923); State v. Brown, 36 Del. 181 (1938); Judd v. Board of Education, 278 N.Y. 200, 15 N.E. 2d 576 (1938).

[26] Board of Education v. Wheat, 174 Md. 314, 199 Atl. 628 (1938).

[27] Smith v. Donahue, 195 N.Y.S. 715, 719, 202 App. Div. 656, 661 (1922) declared it unconstitutional. Borden v. Louisiana State Board of Education, 168 La. 1005, 1020, 123 So. 655, 661 (1929); Chance v. Mississippi State Textbook R. & P. Board, 190 Miss. 453, 200 So. 706 (1941) sustained its constitutionality.

The Supreme Court of the United States had occasion to pass on this question in the case of Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930) wherein its constitutionality was upheld. Anent the contention that there was a taking of private property for a private purpose, the court said that education served a public purpose and the state's supplying of textbooks to children attending sectarian school also served a public purpose. Unfortunately, the Supreme Court failed to discuss the meaning and scope of the First Amendment nor was the Amendment directly invoked in the case. Consequently, its determination had to await the Everson case, *supra* note 10.

gards reading the Bible without comment in the classroom.[28] Perhaps this could be explained by the fact that in the determination of these cases, the First Amendment was not invoked or applied. Each state court applied their respective constitutions and statutes which either were broader or narrower in scope than the First Amendment. This was on the belief that the First Amendment applied only to the Federal and not to the state governments. It was only in 1940 [29] that the free exercise clause, and in 1947 [30] that the establishment clause, of the First Amendment were definitely held to be equally applicable to state level.

2. The Impregnable Wall of Separation.—The concept of separation of church and state was evolved as a reaction against the established churches of the original colonies with its concomittant evils. But to adhere to the concept of complete separation of church and state as enunciated in the *Everson* and *McCollum* cases, if carried to their logical consequences, would mean the upheaval of certain established traditions and practices.[31] It would overrule all state courts' decisions sustaining the validity of tax exemptions to relitious properties and organizations. It would forbid the practice of both houses of Congress as well as the Supreme Court, at the beginning of their sessions, from invoking the protection of God. It would scrap the House and Senate chaplains as well as the army and navy chaplains from the public payroll. It would abolish the compulsory church attendance at West Point and the Annapolis Naval Academy. These are the practical consequences of the *Everson* and *McCollum* cases.

It is really doubtful whether there could be such a complete and absolute separation. The subject of both the state and the church is the individual. Each 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

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[28] T. V. K., *Reading the Bible in Public Schools*, 28 MICHIGAN L. REV., 430-436 (1930).

[29] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). The United States Supreme Court held in this case that the free exercise clause of the First Amendment is made applicable to state governments by virtue of the Fourteenth Amendment.

In previous cases involving freedom of speech and of the press, the Court accepted the doctrine that the due process clause of the Fourteenth Amendment protects all the freedoms of the First Amendment against infringement by the state governments. Gitlow v. New York, 268 U.S. 652 (1925); Fiske v. Kansas, 274 U.S. 380 (1927); Near v. Minnesota, 283 U.S. 697 (1931); Stromber v. California, 283 U.S. 359 (1931); De Jonge v. Oregon, 299 U.S. 353 (1937).

[30] Everson v. Board of Education, 330 U.S. 1 (1947). The Court in this case assumed at the outset that the establishment clause of the First Amendment is applicable to state levels by virtue of the Fourteenth Amendment.

[31] See Mr. Justice Douglas, concurring in Engel v. Vitale case, *supra* note 3.

one necessarily gives way to the other, thus piercing the impregnable wall. A person could be prosecuted for bigamy and polygamy despite the fact that pursuant to his religious belief, it was his solemn duty to practice polygamy;[32] a student could be compelled to salute the Flag though such an act would be contrary to the doctrines of his religion;[33] and a college student can be expelled from a state university if he refuses to take the required military training on religious grounds.[34]

3. Non-preferential Aid to Religion.—Prior to the *Everson*, *McCollum* and *Zorach* cases, writers on constitutional law expressed the opinion that non-preferential aid to religion in general is not prohibited. What is covered by the establishment clause is aid or support given to one religion or sect in preference or to the exclusion of others.[35] A survey and an examination of the history of and the evils sought to be remedied by the First Amendment will show that it was principally aimed against preferential aid to religion. It was intended to prevent rivalry among Christian sects and the establishment of a national religion. The First Amendment means traditionally that Congress cannot establish a church.[36] But when the movement against the existence of the union of church and state reached its climax in Virginia and during the framing

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[32] Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

[33] Minersville School District v. Gobitis, 310 U.S. 586 (1940). This case was however overruled by West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943). The Philippines followed the Gobitis case in Gerona v. Secretary of Education, G.R. No. L-13954, August 12, 1959.

[34] Hamilton v. Regents, 293 U.S. 245 (1934).

[35] "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others. It was never intended by the Constitution that the government should be prohibited from recognizing religions, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations or sects. The Christian religion was always recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly." COOLEY, T. M., THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 224-5 (3rd Ed., McLaughlin, 1898).

"The real object of the Amendment was . . . to exclude all rivalry among Christian sects and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cuts off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been tramped upon almost from the days of the apostles to the present age." 11 STORY, COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES, sec. 1873, p. 1833 (5th ed.).

[36] Stout, W. D., *supra* note 15 at 238; Manning, L. F., *supra* note 18 at 511. See also Mr. Justice Douglas, concurring in the Engel case, *supra* note 3 at 1273.

of the First Amendment, a new shape took place. Proposals to enlarge the scope of the Amendment were introduced. There were heated controversies as to the exact wordings of the Amendment. Finally, the First Amendment, as it is was adopted. But because of so much controversies, discussions and debates which preceded the adoption of the First Amendment, the exact meaning and scope of the Amendment became vague. Even the writings of Jefferson and Madison were of little help. Those who contended that the Amendment did not prohibit non-preferential religious aid relied on the writings of Jefferson and Madison. Those who maintained the opposite view likewise relied on Jefferson and Madison.[37] But the United States Supreme Court, whether correctly or wrongly, answered this question in the *Everson* and *McCollum* cases—even non-preferential aid to religion is prohibited by the establishment clause. Whether this ruling has been abrogated by the *Zorach* case, legal authorities were not in complete agreement. It was only in the *Engel* case that the United States Supreme Court definitely settled this question. It reaffirmed the *Everson* and *McCollum* cases.

4. Did the *Zorach* Case Overrule the *McCollum* Case?—Although the Supreme Court in the *Zorach* case distinguished this case from the *McCollum* case and expressly said that "we follow the *McCollum* case," [38] some legal scholars believe that the *Zorach* ruling impliedly abrogated the *McCollum* case.[39] No less than Justice Black himself in his dissent in the *Zorach* case admitted this change in the attitude of the Court when he said:

> . . . it is only by wholly isolating the state from the religious sphere and compelling it to be completely neutral that the freedom of each and every denomination and of all nonbelievers can be maintained. It is this neutrality the Court abandons today when it treats New York's coercive system as a program which *merely* "encourages religious instructions or cooperates with religious authorities." [40]

If at all, the *Zorach* ruling at least means that the wall of separation was after all, not so high and impregnable as that erected in the *Everson* and *McCollum* cases. The rule in the *McCollum* case that a friendly or close cooperation between church and state violates the establishment clause, was at least abandoned. The school of-

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[37] See the classic debate between Professors Pfeffer and O'Neill on whether the establishment clause forbids non-preferential religious aid, 2 BUFFALO L. REV. 225-78 (1953). Both relied heavily on the writings of Jefferson and Madison.

[38] *Supra* note 19 at 315.

[39] O'Brien, *op. cit., supra* note 18; O'Neill, J. M., *Non-Preferential Aid to Religion is Not an Establishment of Religion*, 2 BUFFALO L. REV. 263 (1953).

[40] *Supra* note 19 at 319.

ficials, in cooperation with religious authorities, may adjust the compulsory school hours or release the consenting students from the compulsory secular education during certain hours of school works to promote the religious instruction carried on by religious authorities as long as the tax-supported public schools were not utilized for the purpose.

This was the state of the law after the *Zorach* case until nine years later when, in the *Torcaso v. Watkins*[41] case, the Spureme Court gave the hint that the high and impregnable wall of separation of Justice Black would in the end triumph. Finally, on June 25, 1962, the final triumph of Justice Black came with the promulgation of the *Engel* case.

G. THE ENGEL CASE

Significantly, Justice Black limited his opinion to an analysis of the constitutionality of the use of the optional and non-denominational Regents' prayer without digressing to the probable consequences of his decision. The use of the Regents' prayer was declared unconstitutional because it "breaches the constitutional wall of separation between church and state" which Justice Black has long fought for.[42]

Without attempting to praise or criticize the Court's decision, an analysis of it at this stage would be proper. It seems that there were two objectionable features which Justice Black considered as violative of the establishment clause: (1) the act of the government officials in composing the above quoted prayer; and (2) the use of this prayer in the classrooms of tax-supported public schools. Reasonably, the first is but a reiteration of Justice Black's belief that under the First Amendment, there can be no close cooperation between church and state whereby either may interfere to a *certain extent* with the other's affairs. Each must be kept *strictly* within their respective spheres. When the public school officials composed the prayer and encouraged the recitation of this prayer by the use of the public school system, they went out of their sphere and ven-

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[41] 367 U.S. 488, 493-4 (1961).

[42] Commenting on the Engel case, Kirven said: "While our courts must always intercede to prevent infringement upon freedom of religion, the court should guard against decisions which will identify the power of government with anti-religion. Freedom of religion does not compel the entire denial to public school children of the influence of religion in their schools. The government is not neutral in the matter of religion when at the instance of one already adequately protected from compulsion, it lends its powers to the suppression of religion and thereby champions the cause of religion *from* religion." Kirven G., *Freedom of Religion or Freedom from Religion?* 48 AM. BAR ASSN. J. 816, 819 (1962).

tured into the exclusive prerogative of the religious authorities. This is a violation of the establishment clause notwithstanding the fact that the prayer was composed and adopted as part of the moral training in the schools. As regards the second, Justice Black's reasoning runs as follows: As the religious nature of the prayer was admitted, its recitation necessarily established the religious beliefs embodied in it. Consequently, the recitation of this prayer in the classroom would mean that the tax-supported public schools were being indirectly used in aid of the religious beliefs embodied in the prayer. The power, prestige and financial support of the government is placed behind those particular religious beliefs. Since the First Amendment was a guarantee that neither the power nor the prestige of the government would be used to control, support or influence the kinds of prayer the American people can say, the use of the public schools in the recitation of the prayer violates the establishment clause.

This in effect is the *McCollum* decision applied to a more particular case: (1) neither can there be close cooperation between church and state nor (2) may public schools be used in any manner whatsoever to aid any religion.[43]

IV. THE DOCTRINE OF SEPARATION OF CHURCH AND STATE AND THE PHILIPPINE CONSTITUTION.

Considering the propensity of both the Philippine Bench and Bar to adhere to American decisions regardless of any difference which might occur between American and Philippine laws, the question of how authoritative the *Engel* case to Philippine jurisprudence is, inevitably crops up.

Suppose that the Bureau of Public Schools, as part of the moral training in the schools, fashions out a prayer of the same sort and tenor as that involved in the Engel case and recommends its use in the public schools to students who desire to say it. Would it be acting outside the constitutional framework? Could the *Engel* case be invoked as authority to strike down the prayer? I submit that the answer to both questions is no.

In this regard, two points must be emphasized. First, the recitation of the prayer must be optional. No student must be com-

[43] Mr. Justice Douglas, concurring in the Engel case, *supra* note 3 at 1271, opined that the McCollum case does not decide the Engel case. He said that in the McCollum case, the public schools were used for religious instructions while in the Engel case, there was no attempt at indoctrination. If the prayer were long and of such a character as to amount to an attempt at religious instruction, the McCollum case is applicable.

pelled to say the prayer against his wish. If any form of compulsion is exercised another question would be involved—the free exercise clause of the Constitution. Second, the prayer must be non-denominational, otherwise the effect would be a state preference of one religion over another which is precisely forbidden by the establishment clause. The non-believers cannot object to the recitation of the non-denominational prayer in schools for they, being non-believers and not being compelled to take part, are not thereby prejudiced, or, to the extent to which they may be prejudiced, the state, if it has the power at all to compose the prayer and recommend its use in public schools, cannot be thwarted to undertake an activity which it can lawfully do just because of a dissenting minority. The minority's interest must give way to the interest of the majority. In other words, what is important is that the prayer must be of such a nature as would show no preference by the state of one sect or religion over another or a discrimination against non-believers—the state must appear to be neutral.

The question may now be asked, by what authority does the public school officials propose to compose the prayer? The answer may be found in the Constitution itself. The Constitution provides: "All educational institutions shall be under the supervision of and subject to regulation by the State. The Government shall establish and maintain a complete and adequate system of public education, and shall provide at least free public primary instruction, and citizenship training to adult citizens. All schools shall aim to develop moral character, personal discipline, civic conscience, and vocational efficiency, and to teach the duties of citizenship." [44] It thus becomes clear that the duty of all schools, including public schools, to develop among others moral character has been elevated to the status of a constitutional mandate. No one will argue that strictly speaking, the development of moral character is not one of the primary functions of the school. It properly belongs to the family, the church and the community in which the pupil lives in. But with this constitutional provision, the development of moral character ceases to be an incidental function of the school but becomes a primary one. The field of education is opened wide beyond the primarily intellectual objectives of the school.[45]

It may still be asked how this constitutional provision which commands all schools to develop moral character authorizes the

[44] PHIL. CONST. Art. XIV, Sec. 5.

[45] "An analysis of these aims (Art. XIV, sec. 5 of the Philippine Constitution) discloses a very broad conception of the role of the school, making it supplant the family, the church, the factory, and other social institutions." SINCO, V. G., PHILIPPINE POLITICAL LAW 490 (10th ed.).

school officials to compose the prayer when it speaks of moral and not spiritual or religious character. The answer is that the term "moral character" is broad enough to cover the spiritual or religious character. It is a settled rule of constitutional interpretation that words appearing in a constitution are presumed to have been used according to their plain, natural and usual signification and import.[46] And as a general rule, words in a constitution are employed in a comprehensive sense as expressive of general ideas, with a view of covering all contingencies.[47] Thus, the term "moral" must be taken to have a plain, natural and general meaning. The Court of Appeals of Georgia, citing Webster, has defined the term "moral" to mean "manner, custom, habit, way of life, conduct."[48] The term "immoral," as the antithesis of the term "moral" has been equated with that which is contrary to *bonos mores*.[49] In other words, the term "moral," in its ordinary sense, is equivalent to the term *bonos mores*, a term which includes the spiritual and religious character of the people. Thus, the standard of morality of a particular locality is largely determined by the religious character of the people. What may be moral in a pagan or Mohammedan society may not be moral in a Christian society. Polygamy may be moral or even virtuous in one society but immoral in another. A statement may be considered blasphemy in a Catholic country but not in a Protestant country. Since it is an accepted fact that the Filipinos, by custom, way of life, and conduct are a religious people,[50] the term "moral character" in the Constitution may be taken to include the spiritual or religious character. This interpretation is in accord with the opinion of the Secretary of Justice regarding the role of public schools that the framers of the Constitution, by allowing optional religious instruction in public schools, had in mind "the development and upbuilding of the spiritual standards and moral values of the public school pupils, *with the end in view of producing straight-thinking, morally upright and God-fearing citizens of the nation.*[51]

It may still be argued that the act of composing prayer is exclusively within the domain of the church. This is true. The state has absolutely no power to compose prayers *for religious purposes.* But the line dividing the prerogatives of church and state is not as clear as it may appear. Church and state activities may sometimes overlap. When the act of composing the prayer acquires a secular

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[46] United States v. Sprague, 282 U.S. 716 (1931); Meyer v. United States, 272 U.S. 52 (1926); Hodges v. United States, 203 U.S. 1 (1906).
[47] Re Strauss, 197 U.S. 324 (1905).
[48] Jones v. Poole, 8 S.E. 2d 532, 534, 62 Ga. App. 309.
[49] State Board of Pharmacy v. Haag, 111 N.E. 178, 180, 184 Ind. 333.
[50] Araneta, S., *Our Constitutional Heritage*, 37 PHIL. L.J., 439 (1962).
[51] *Infra* note 74.

significance, as when it aims to develop the moral character of the pupil as commanded by the Constitution, the exclusive religious character of the act ceases. The act ceases to be the exclusive prerogative of the church; the state acquires the right and power to engage in such activity.

Consequently, since the state has absolute control over the public educational system, the public school officials, cognizant of the fact that the Filipinos are a religious people, and pursuant to the constitutional provision which commands all educational institutions to develop among others moral character, have authority to compose the prayer and recommend its use in the public schools as part of the moral training.

Finding authority in the Constitution itself for the public school officials to engage in spiritual or religious upliftment of the pupil as part of his moral training, the next question that comes up is, to what extent may the public school officials engage in religious activities? More specifically, is the act of composing the prayer, recommending its use in public schools, and the use of this prayer in the public schools forbidden by the establishment clause? In other words, is the wall of separation envisioned by the Constitution as high and impregnable as that enunciated in the *Everson, McCollum,* and *Engel* cases? Does it forbid any close or friendly cooperation between church and state? Is the separation of church and state in the Philippines complete and absolute?

A. History of the Separation of Church and State in the Philippines.

During the Spanish regime, the concept of separation of church and state was foreign. There was a union of church and state. The civil authorities exercised religious functions and the friars exercised civil powers. According to the report of the Schurman Commission, there was a confusion of the functions of the state, and the church, and the religious orders.

It was the short-lived Malolos Constitution of the First Philippine Republic which introduced the doctrine of separation of church and state in the Philippines. It provided that the state recognizes the freedom and equality of all religious worships and the separation of the church and state.[52] Although it expressly provided for such separation, it nevertheless recognized the religious

[52] Malolos Const. Title III, Art. 5.

tradition of the Filipino people when it implored the aid of the Sovereign Legislator of the Universe in its preamble.[53]

With the defeat of Spain by the Americans, the Treaty of Paris was signed. One of its provisions guaranteed religious freedom to the inhabitants.[54]

As soon as the American forces have occupied the territory, President McKinley issued his Instructions to the Second Philippine Commission. It created a complete wall of separation by providing that the separation between the church and the state shall be *real, entire,* and *absolute.*[55]

When the American government was definitely established in the Philippines and peace restored, the American concept of separation of church and state was definitely extended to the Philippines by the enactment of the Philippine Bill of 1902 [56] and the Jones Law of 1916.[57] The establishment clause, at last, definitely found its place in the statute books of the Philippines.

B. THE PHILIPPINE CONSTITUTION.

The Philippine Constitution, in its Bill of Rights practically embodied the establishment and free-exercise clauses of the First Amendment. However, while the Constitution of the United States on the one hand contained only two provisions on the subject of religion, one which prohibits religious test oaths and the other, the First Amendment, the Philippine Constitution on the other hand contains

[53] 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: . . ."

[54] Treaty of Paris, Art. X.

[55] The Instructions provide 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 between state and church shall be real, entire and absolute."

[56] Sec. 5 of the Philippine Bill of 1902 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."

[57] Sec. 3 of the Jones Law 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, system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary as such."

several provisions touching religion, provisions which create a wall of separation yet at the same time limiting and piercing this wall.

C. CONSTITUTIONAL PROVISIONS CREATING THE WALL OF SEPARATION.

The Constitution expressly provides for a separation between church and state in its Bill of Rights.[58] And as corollary to this, the Constitution also forbids the use, application or appropriation of public money or property for the use, benefit or support, directly or indirectly, 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.[59] These provisions, if taken alone, would suggest that there is such a complete separation between church and state as to probably justify the adoption of the ruling in the *Everson, McCollum*, and *Engel* cases in the Philippines. But there are other constitutional provisions which militate against this interpretation. The establishment clause is a vague provision. At the time of the adoption of the Philippine Constitution, the *Everson, McCollum* and *Zorach* rulings were still inexistent. So it could not be argued that the Philippine Constitution has adopted the American ruling. When the Philippine Constitution took effect, the clause was as vague as it was in the American jurisdiction. Therefore, to determine precisely the intent and meaning of the clause, resort must be had to the entire instrument.[60]

D. CONSTITUTIONAL PROVISIONS LIMITING THE WALL OF SEPARATION.

1. The Preamble to the Philippine Constitution.—Although the preamble is not considered as part of the Constitution such as to be considered a source of governmental powers, nevertheless, it is a settled rule of constitutional construction that it may be resorted to in the interpretation of ambiguous words and phrases where the intention of the framers does not clearly and definitely appear.[61] The Preamble of the Philippine Constitution expressly invokes the

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[58] Art. III, Sec. 1(7) of the Phil. Const. provides: "No law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and 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."

[59] PHIL. CONST. Art. VI, Sec. 23(3).

[60] Virginia v. Tennessee, 148 U.S. 503 (1893); Downes v. Bidwell, 182 U.S. 244 (1901); Old Wayne Mut. L. Assn. v. McDonough, 204 U.S. 8 (1907).

[61] 1 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES, sec. 37, p. 62 (1929).

aid of "Divine Providence." [62] By this, the Constitution recognizes the religious nature of the Filipinos as well as the religious heritage they inherited from their ancestors. With this preamble imploring, or stated in another way, praying for the aid of Divine Providence, can it be safely claimed that the establishment clause intended to forbid the public school officials from composing a prayer imploring or praying the aid of the same Divine Providence when such act is necessary for the moral development and spiritual upliftment of the pupils? In the words of Justice Laurel:

> 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 place 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.[63] (Emphasis supplied.)

2. Tax Exemption of Religious Properties.—The Constitution expressly provides that cemeteries, churches, and parsonages or convents appurtenant thereto, and all lands, buildings, and improvements used exclusively for religious, charitable, or educational purposes shall be exempt from taxation.[64] There can be no doubt that this is a purposeful aid to religion.[65] To put it in another way, it is practically saying that the government taxed these properties and handed it back to them in subsidies.[66] Although in the United States, state courts have upheld the validity of tax exemptions of religious properties under different justifications, those decisions did not involve the First Amendment but were based on state constitutions and statutes granting such exemptions. In fact some authorities

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[62] In contrast, the United States Constitution contains no such express invocation although it impliedly recognized the existence of the Supreme Being by provisions like the requirement of an official oath or affirmation before public officials can enter upon the duties of their office, the exemption of Sunday from the days during which the President may sign a bill, and the use of the phrase "in the year of our Lord," in its conclusion.

[63] Aglipay v. Ruiz, 64 Phil. 201, 206 (1937).

[64] PHIL. CONST. Art. VI, Sec. 22(3).

[65] Trustees of First Methodist Episcopal Church v. City of Atlanta, 76 Ga. 181, 191 (1886); Commonwealth v. Y.M.C.A., 116 Ky. 711, 719 (1905).

[66] O'Neill, *supra* note 39 at 264.

are of the opinion that such tax exemptions are violative of the First Amendment.[67] The unconstitutionality of tax exemptions to religious institutions was recognized by many constitutional authorities and writers long before the *Everson* and *McCollum* decisions.[68] If there really is a high and impregnable wall of separation under the Constitution, such tax exemption provision would not have been there.

3. Use of Public Funds for Priest, Minister, Preacher, or Dignitary Assigned to the Armed Forces, or Penal Institutions, Orphanage or Leprosarium.—Although the Constitution prohibits the use of public funds for the support or benefit of any sect, denomination, priest, minister or religious dignitary, it nevertheless exempts from this provision the use of public funds for the benefit or support of any priest, preacher, minister, or dignitary when he is assigned to the armed forces, or to any penal institution, orphanage, or leprosarium.[69] Once again, we cannot deny that this is a purposeful aid to religion and to the priest or minister concerned.[70] And although such is also an admitted practice in the United States where chaplains of both houses of Congress and the chaplains of the army, navy, and West Point are in public payroll, such practice has never been questioned. Consequently, their constitutionality is still open to question. If the *Everson, McCollum,* and *Engel* cases be carried to their logical conclusions, the only result would be the declaration of the unconstitutionality of such admitted practice. But such practice could not be questioned here in the Philippines for there is an express sanction to that effect in the Fundamental Law.

4. Optional Religious Instruction—The Constitution provides that optional religious instruction shall be maintained in the public schools as now authorized by law.[71] The law referred to is Section 928 of the Revised Administrative Code[72] which allows priests or

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[67] *Supra* note 37.
[68] *Ibid.*, 271.
[69] PHIL. CONST. Art. VI, Sec. 23(3).
[70] O'Brien, *op. cit., supra* note 18 at 146.
[71] PHIL. CONST. Art. XIV, Sec. 5.
[72] Sec. 928. *Provision for religious instruction by local priest or minister.* —It shall be lawful, however, for the priest or minister of any church to establish in the town where a public school is situated, either in person or by a designated teacher of religion, to teach religion for one-half hour three times a week, in the school building, to those public school pupils whose parents or guardians desire it and express their desire therefor in writing filed with the principal teacher of the school, to be forwarded to the division superintendent, who shall fix the hours and room for such teaching. But no public school teachers shall either conduct religious exercise or teach religion or act as a designated religious teacher in the school building under the foregoing authority, and no pupils shall be required by any public-school teacher to attend and receive the religious instruction herein permitted. Should the opportunity thus given to teach religion be used by the priest, minister, or religious teacher

ministers of any church to teach religion for one-half hour three times a week in the school building at the hour and room to be fixed by the division superintendent to those public school pupils whose parents or guardians desire it. This constitutional provision, as implemented by the Revised Administrative Code [73] is probably the the strongest argument against a holding that the Philippine Constitution erected a high and impregnable wall of separation. This is also the reason why the *McCollum* case, the doctrine of which was applied in the *Engel* case, has no application here in the Philippines.

The philosophy or reason behind this constitutional provision has been aptly stated by then Acting Secretary of Justice Roberto Gianzon:

> It cannot be seriously considered that the framers of the Constitution incorporated to the fundamental law the provisions of Sec. 928 of the Revised Administrative Code simply to satisfy a priest or minister of a religious sect or denomination by giving him free access to the public school building in which to preach the tenets of his faith. The fact that the constitutional convention has to provide an exception to a time-honored principle suggests that cogent and impelling reasons inspire such a deviation from the general rule. Delving deeper into the spirit of the provision under consideration and the philosophy that underlies its incorporation to the Constitution, it is evident that *optional religious instruction was authorized in the public schools in recognition of the great need of spiritual training among the school population.* The elevating influence that religion plays in instilling in the minds the purest principles of morality, must have impelled the framers of the Constitution in authorizing optional religious instruction in the public schools as an exception to the doctrine of the separation of church and state. Indeed, it may be safely assumed that *optional religious instruction in the public school was decreed as a constitutional mandate not so much for the benefit or support of any particular sect or system of religion as for the development and upbuilding of the spiritual standards and moral values of the public school pupils, with the end in view of producing straight-thinking, morally upright and God-fearing citizens of the nation.*[74] (Emphasis supplied.)

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for the purpose of arousing disloyalty to the Philippines, or of discouraging the attendance of pupils at such public school, or creating a disturbance of public order, or of interfering with the discipline of the school, the division superintendent, subject to the approval of the Director of Public Schools, may, after due investigation and hearing, forbid such offending priest, minister, or religious teacher from entering the public-school building thereafter.

[73] Rep. Act No. 386 (Civil Code of the Philippines: enacted June 18, 1949; effective Aug. 30, 1950), also provides: "Art. 359. The government promotes the full growth of the faculties of every child. For this purpose, the government will establish, whenever possible: (1) Schools in every barrio, municipality and city where optional religious instruction shall be taught as part of the curriculum at the option of the parent or guardian; . . ."

[74] Opinion of the Secretary of Justice No. 157, series of 1953.

The Constitution, as it incorporated Section 928 of the Revised Administrative Code,[75] impliedly allowes the public school authorities to closely cooperate with the religious authorities in furtherance of religious instruction. The school authorities, cooperating with the religious authorities, could fix the hour and room for religious instruction which are most convenient to the student in order to promote religious education. The Constitution also permits the use of the tax-supported public school building for religious purposes, thus, indirectly aiding religion. These are precisely the two objectionable features declared unconstitutional in the *McCollum* case. If the 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 the moral training in the schools. And if the Constitution permits the tax-supported public schools to be used for religious instruction, there is no reason why the lesser privilege cannot be granted of permitting the tax-supported public schools to be used in the recitation of the prayer by those students who desire it.

V. CONCLUSIONS

Everson erected the high and impregnable wall of separation between church and state. *McCollum* reinforced it. *Zorach* almost shattered it. *Engel* plastered it. The wall as it stands now is as high and impregnable as it was during the reign of *McCollum*. It is a wall which confines church and state activities within their respective spheres, a wall which prohibits any friendly or close 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.

But the *Engel* case which has kept high and impregnable the wall of separation could not be taken as authoritative here in the Philippines. The public school authorities can find authority in the

[75] It is worthy to note in this regard that the Revised Administrative Code took effect in 1917, prior to the Constitution and when the Jones Law was in force. The Jones Law, as the organic act, contained no provision regarding optional religious instruction. Sec. 928, as it existed then, was of doubtful constitutionality since it was already well settled that tax-supported public schools can't be used for religious instructions or purposes without violating the principle of separation of church and state. See Balonkita, J. R., *Is Section 928 of the Revised Administrative Code Constitutional?* 12 PHIL. L. J. 123 (1932). However the question of the constitutionality of the said law was never brought to the Court. And when the Constitution took effect, all doubts regarding its constitutionality were removed.

Constitution itself in composing the prayer as part of the moral training in school. And this as well as the use of this prayer in public schools do not violate the principle of separation of church and state because the Constitution did not create a complete, entire and absolute separation. The wall of separation is not as high and impregnable as that created by the United States Supreme Court. Public property may, in certain instances, be used for religious purposes. And the church and state may to a certain extent, interfere with each other's affairs or perform acts which inherently are the prerogative of the other without violating the establishment clause. As stated by one authority:

> . . . There is now demanded, as a necessary consequence, the practical neutrality of the State in regard to religion. But this practical neutrality does not mean that it should not cooperate with religion in order to promote the ethical and moral standards of the community.[76]

[76] COQUIA, J. R., *Religious Freedom in the Philippines*, 21 LAWYER'S J. 255, 256 (1956).