The PHILIPPINE CONSTITUTION, STATUTES and JURISPRUDENCE

on

FREEDOM OF RELIGION

The CONSTITUTION 2
Bill of Rights
Article III, Section 5

REPUBLIC ACT NO. 386 2
THE CIVIL CODE OF THE PHILIPPINES

ACT NO. 3815 4
THE REVISED PENAL CODE
OF THE PHILIPPINES

JURISPRUDENCE

1. **Ebralinag, et als vs The Division Superintendent of Schools of Cebu,** (1995) 6
and
Amolo vs Division Superintendent
of Schools of Cebu (1995)

2. **Iglesia ni Cristo vs The Honorable Court of Appeals** (1996) 10

3. **Estrada vs Escritor** (2003) 15

4. **Soriano vs Laguardia** (2009) 130

THE CONSTITUTION

Article III

BILL OF RIGHTS

Section 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.

REPUBLIC ACT NO. 386

AN ACT TO ORDAIN AND INSTITUTE
THE CIVIL CODE OF THE PHILIPPINES

CHAPTER 2
Human Relations (n)

Article 19. Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.

Article 20. Every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same.

Article 21. Any person who wilfully causes loss or injury to another in manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.

Article 32. Any public officer or employee, or any private individual, who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs any of the following rights and liberties of another person shall be liable to the latter for damages:

(1) Freedom of religion;
(2) Freedom of speech;
(3) Freedom to write for the press or to maintain a periodical publication;
(4) Freedom from arbitrary or illegal detention;
(5) Freedom of suffrage;
(6) The right against deprivation of property without due process of law;

(7) The right to a just compensation when private property is taken for public use;
(8) The right to the equal protection of the laws;
(9) The right to be secure in one's person, house, papers, and effects against unreasonable searches and seizures;
(10) The liberty of abode and of changing the same;
(11) The privacy of communication and correspondence;
(12) The right to become a member of associations or societies for purposes not contrary to law;
(13) The right to take part in a peaceable assembly to petition the Government for redress of grievances;
(14) The right to be a free from involuntary servitude in any form;
(15) The right of the accused against excessive bail;
(16) The right of the accused to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witness in his behalf;
(17) Freedom from being compelled to be a witness against one's self, or from being forced to confess guilt, or from being induced by a promise of immunity or reward to make such confession, except when the person confessing becomes a State witness;
(18) Freedom from excessive fines, or cruel and unusual punishment, unless the same is imposed or inflicted in accordance with a statute which has not been judicially declared unconstitutional; and
(19) Freedom of access to the courts.

In any of the cases referred to in this article, whether or not the defendant's act or omission constitutes a criminal offense, the aggrieved party has a right to commence an entirely separate and distinct civil action for damages, and for other relief.

Such civil action shall proceed independently of any criminal prosecution (if the latter be instituted), and may be proved by a preponderance of evidence. The indemnity shall include moral damages. Exemplary damages may also be adjudicated.

The responsibility herein set forth is not demandable from a judge unless his act or omission constitutes a violation of the Penal Code or other penal statute.

ACT NO. 3815
THE REVISED PENAL CODE OF THE PHILIPPINES

BOOK ONE

FELONIES

Art. 4. **Criminal liability**—Criminal liability shall be incurred:

1. By any person committing a felony (*delito*) although the wrongful act done be different from that which he intended. x x x

BOOK TWO

Crimes against religious worship

Art. 132. ***Interruption of religious worship*****.** — The penalty of *prision correccional* in its minimum period shall be imposed upon any public officer or employee who shall prevent or disturb the ceremonies or manifestations of any religion.
If the crime shall have been committed with violence or threats, the penalty shall be prision correccional in its medium and maximum periods.

Art. 133. ***Offending the religious feelings****.* — The penalty of *arresto mayor* in its maximum period to *prision correccional* in its minimum period shall be imposed upon anyone who, in a place devoted to religious worship or during the celebration of any religious ceremony shall perform acts notoriously offensive to the feelings of the faithful.

OFFENSES AGAINST DECENCY AND GOOD CUSTOMS

Art. 201. ***Immoral doctrines, obscene publications and exhibitions and indecent shows*****.** — The penalty of prision mayor or a fine ranging from six thousand to twelve thousand pesos, or both such imprisonment and fine, shall be imposed upon:

(1) Those who shall publicly expound or proclaim doctrines openly contrary to public morals;

(2) (a) the authors of obscene literature, published with their knowledge in any form; the editors publishing such literature; and the owners/operators of the establishment selling the same;

(b) **Those who, in theaters, fairs, cinematographs or any other place, exhibit**, indecent or immoral plays, **scenes,** acts **or shows,** whether live or in film, which are prescribed by virtue hereof, shall include those which

(1) glorify criminals or condone crimes
(2) serve no other purpose but to satisfy the market for violence, lust or pornography;
(3) **offend any** race or **religion;**
(4) tend to abet traffic in and use of prohibited drugs; and
(5) are **contrary to law, public order, morals, and good customs,** established policies, lawful orders, decrees and edicts;

(3) Those who shall sell, give away or exhibit films, prints, engravings, sculpture or literature which are offensive to morals. (As amended by PD Nos. 960 and 969).

JURISPRUDENCE

ROEL EBRALINAG, EMILY EBRALINAG, represented by their parents, MR. & MRS. LEONARDO EBRALINAG, JUSTINIANA TANTOG, represented by her father, AMOS TANTOG, JEMIL OYAO & JOEL OYAO, represented by their parents MR. & MRS. ELIEZER OYAO, JANETH DIAMOS & JEREMIAS DIAMOS represented by parents MR. & MRS. GODOFREDO DIAMOS, SARA OSTIA & JONATHAN OSTIA, represented by their parents MR. & MRS. FAUSTO OSTIA, IRVIN SEQUINO & RENAN SEQUINO, represented by their parents MR. & MRS. LYDIO SEQUINO, NAPTHALE TUNACAO represented by his parents MR. & MRS. MANUEL TUNACAO, PRECILA PINO represented by her parents MR & MRS. FELIPE PINO, MARICRIS ALFAR,. RUWINA ALFAR, represented by their parents MR. & MRS. HERMINIGILDO ALFAR, FREDESMINDA ALFAR & GUMERSINDO ALFAR, represented by their parents ABDON ALFAR ALBERTO ALFAR & ARISTIO ALFAR, represented by their parents MR. & MRS. GENEROSO ALFAR, MARTINO VILLAR, represented by their parents MR. & MRS. GENARO VILLAR, PERGEBRIEL GUINITA & CHAREN GUINITA, represented by their parents MR. & MRS. CESAR GUINITA, ALVIN DOOP represented by his parents MR. & MRS. LEONIDES DOOP, RHILYN LAUDE represented by her parents MR. & MRS. RENE LAUDE, LEOREMINDA MONARES represented by her parents MR. & MRS. FLORENCIO MONARES, MERCY MONTECILLO, represented by her parents MR. & MRS. MANUEL MONTECILLO, ROBERTO TANGAHA, represented by his parent ILUMINADA TANGAHA, EVELYN MARIA & FLORA TANGAHA represented by their parents MR. & MRS. ALBERTO TANGAHA, MAXIMO EBRALINAG represented by his parents MR. & MRS. PAQUITO EBRALINAG, JUTA CUMON, GIDEON CUMON & JONATHAN CUMON, represented by their father RAFAEL CUMON, EVIE LUMAKANG and JUAN LUMAKANG, represented by their parents MR. & MRS. LUMAKANG, EMILIO SARSOZO & PAZ AMOR SARSOZO, & IGNA MARIE SARSOZO represented by their parents MR. & MRS. VIRGILIO SARSOZO, MICHAEL JOSEPH & HENRY JOSEPH, represented by parent ANNIE JOSEPH, EMERSON TABLASON & MASTERLOU TABLASON, represented by their parents EMERLITO TABLASON, *Petitioners,*

vs.

THE DIVISION SUPERINTENDENT OF SCHOOLS OF CEBU, and MR. MANUEL F. BIONGCOG, Cebu District Supervisor, *Respondents*.

December 29, 1995

MAY **AMOLO,** represented by her parents MR. & MRS. ISAIAS AMOLO, and other pupils and parents, *Petitioners*

vs.

THE DIVISION SUPERINTENDENT OF SCHOOLS OF CEBU, and ANTONIO A. SANGUTAN, *Respondents.*

December 29, 1995

All the petitioners in the original case 2 were minor schoolchildren, and members of the sect, *Jehovah's Witnesses* (assisted by their parents) who were expelled from their classes by various public school authorities in Cebu for refusing to salute the flag, sing the national anthem and recite the patriotic pledge as required by Republic Act No. 1265 of July 11, 1955 and by Department Order No. 8, dated July 21, 1955 issued by the Department of Education. Aimed

primarily at private educational institutions which did not observe the flag ceremony exercises, Republic Act No. 1265 penalizes all educational institutions for failure or refusal to observe the flag ceremony with-public censure on first offense and cancellation of the recognition or permit on second offense.

The implementing regulations issued by the Department of Education thereafter detailed the manner of observance of the same. Immediately pursuant to these orders, school officials in Masbate expelled children belonging to the sect of the Jehovah's Witnesses from school for failing or refusing to comply with the flag ceremony requirement. Sustaining these expulsion orders, this Court in the 1959 case of Gerona vs. Secretary of Education 3 held that:

The flag is not an image but a symbol of the Republic of the Philippines, an emblem of national sovereignty, of national unity and cohesion and of freedom and liberty which it and the Constitution guarantee and protect. Considering the complete separation of church and state in our system of government*, the flag is utterly devoid of any religious significance. Saluting the flag consequently does not involve any religious ceremony. . . . .*

After all, the *determination of whether a certain ritual is or is not a religious ceremony must rest with the courts*. It cannot be left to a religious group or sect, much less to a follower of said group or sect; otherwise, there would be confusion and misunderstanding for there might be as many interpretations and meanings to be given to a certain ritual or ceremony as there are religious groups or sects or followers.

The religious convictions and beliefs of the members of the religious sect, the Jehovah's Witnesses are widely known and are equally widely disseminated in numerous books, magazines, brochures and leaflets distributed by their members in their house to house distribution efforts and in many public places. Their refusal to render obeisance to any form or symbol which smacks of **idolatry** is based on their sincere belief in the biblical injunction found in Exodus 20:4,5, against worshipping forms or idols other than God himself. The basic assumption in their universal refusal to salute the flags of the countries in which they are found is that such a salute constitutes an act of religious devotion forbidden by God's law. This assumption, while "bizarre" to others is firmly anchored in several biblical passages. 6

And yet, while members of Jehovah's Witnesses, on the basis of religious convictions, refuse to perform an act (or acts) which they consider proscribed by the Bible, *they contend that such refusal should not be taken to indicate disrespect for the symbols of the country or evidence that they are wanting in patriotism and nationalism. They point out that as citizens, they have an excellent record as law abiding members of society* even if they do not demonstrate their refusal to conform to the assailed orders by overt acts of conformity. On the

contrary, they aver that they show their respect through less demonstrative methods manifesting their allegiance, by their simple obedience to the country's laws, 7 by not engaging in antigovernment activities of any kind, 8 and by paying their taxes and dues to society a self-sufficient members of the community. 9 While they refuse to salute the flag, they are willing to stand quietly and peacefully at attention, hands on their side, in order not to disrupt the ceremony or disturb those who believe differently.

No doubt, the State possesses what the Solicitor General describes as the responsibility "to inculcate in the minds of the youth the values of patriotism and nationalism and to encourage the involvement in public and civic affairs." The teaching of these value ranks at the very apex of education's "high responsibility" of shaping up the minds of the youth in those principles which would mold them into responsible and productive members of our society. However, the government's interest in molding the young into patriotic and civic spirited citizens is "not totally free from **a balancing process*" when it intrudes into other fundamental rights such as those specifically protected by the Free Exercise Clause,*** the constitutional right to education and the unassailable ***interest of parents to guide the religious upbringing of their children in accordance with the dictates of their conscience and their sincere religious beliefs.*** Recognizing these values, Justice Carolina Grino-Aquino, the writer of the original opinion, underscored that a generation of Filipinos which cuts its teeth on the Bill of Rights would find abhorrent the idea that one may be compelled, on pain of expulsion, to salute the flag sing the national anthem and recite the patriotic pledge during a flag ceremony. "***This coercion of conscience has no place in a free society".***

The State's contentions are therefore, unacceptable, for no less fundamental than the right to take part is the right to stand apart. In the context of the instant case, the *freedom of religion enshrined in the Constitution should be seen as the rule, not the exception*.. To view the constitutional guarantee in the manner suggested by the petitioners would be to denigrate the status of a preferred freedom and to relegate it to the level of an abstract principle devoid of any substance and meaning in the lives of those for whom the protection is addressed. The essence of the free exercise clause is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma. Moreover, the suggestion implicit in the State's pleadings to the effect that the flag ceremony requirement would be equally and evenly applied to all Citizens regardless of sect or religion and does not thereby discriminate against any particular sect or denomination escapes the fact that "[a] regulation, *neutral on its face*, may in its application, nonetheless offend the constitutional requirement for governmental neutrality if it ***unduly burdens the free exercise of religion."***

Compelling members of a religious sect to believe otherwise on the pain of denying minor children the right to an education is a futile and unconscionable detour towards instilling virtues of loyalty and patriotism which are best instilled and communicated by painstaking and non-coercive methods. Coerced loyalties, after all, only serve to inspire the opposite. The methods utilized to impose them breed resentment and dissent. Those who attempt to coerce uniformity of sentiment soon find out that the only path towards achieving unity is by way of suppressing dissent. 24 In the end, such attempts only find the "unanimity of the graveyard." 25

To the extent to which members of the Jehovah's Witnesses sect assiduously pursue their belief in the flag's religious symbolic meaning, the State cannot, without thereby transgressing constitutionally protected boundaries, impose the contrary view on the pretext of sustaining a policy designed to foster the supposedly far-reaching goal of instilling patriotism among the youth. While conceding to the idea - adverted to by the Solicitor General — that certain methods of religious expression may be prohibited 26 to serve legitimate societal purposes, *refusal to participate in the flag ceremony hardly constitutes a form of religious expression so offensive and noxious as to prompt legitimate State intervention.* It is worth repeating that the absence of a demonstrable danger of a kind which the State is empowered to protect militates against the extreme disciplinary methods undertaken by school authorities in trying to enforce regulations designed to compel attendance in flag ceremonies. Refusal of the children to participate in the flag salute ceremony would not interfere with or deny the rights of other school children to do so. It bears repeating that their absence from the ceremony hardly constitutes a danger so grave and imminent as to warrant the state's intervention.

The responsibility of inculcating the values of patriotism, nationalism, good citizenship, and moral uprightness is a responsibility shared by the State with parents and other societal institutions such as religious sects and denominations. The manner in which such values are demonstrated in a plural society occurs in ways so variable that government cannot make claims to the exclusivity of its methods of inculcating patriotism so all-encompassing in scope as to leave no room for ***appropriate parental or religious influences.*** Provided that those influences ***do not pose a clear and present danger of a substantive evil to society and its institutions,*** expressions of diverse beliefs, no matter how upsetting they may seem to the majority, are the price we pay for the freedoms we enjoy.

WHEREFORE, premises considered, the instant Motion is hereby DENIED.SO ORDERED.

IGLESIA NI CRISTO (INC.), *petitioner*,
vs.
THE HONORABLE COURT OF APPEALS, BOARD OF REVIEW FOR MOVING PICTURES AND TELEVISION and HONORABLE HENRIETTA S. MENDEZ, *respondents*.

July 26, **1996**

Petitioner *Iglesia ni Cristo*, a duly organized religious organization, has a television program entitled "Ang Iglesia ni Cristo" aired on Channel 2 every Saturday and on Channel 13 every Sunday. The program presents and propagates petitioner's religious beliefs, doctrines and practices often times in comparative studies with other religions.

Sometime in the months of September, October and November 1992, petitioner submitted to the respondent Board of Review for Moving Pictures and Television the VTR tapes of its TV program Series Nos. 116, 119, 121 and 128. *The Board classified the series as "*X" or not for public viewing *on the ground that they "*offend and constitute an attack against other religions which is expressly prohibited by law."

Petitioner pursued two (2) courses of action against the respondent Board. On November 28, 1992, it appealed to the Office of the President the classification of its TV Series No. 128. It succeeded in its appeal for on December 18, 1992, the Office of the President reversed the decision of the respondent Board. Forthwith, the Board allowed Series No. 128 to be publicly telecast.

On December 14, 1992, petitioner also filed against the respondent Board Civil Case No. Q-92-14280, with the RTC, NCR, Quezon City. Petitioner alleged that the respondent Board acted without jurisdiction or with grave abuse of discretion in requiring petitioner to submit the VTR tapes of its TV program and in x-rating them. It cited its TV Program Series Nos. 115, 119, 121 and 128. In their Answer, respondent Board invoked its power under PD No. 1986 in relation to Article 201 of the Revised Penal Code.

On January 4, 1993, the trial court held a hearing on petitioner's prayer for a writ of preliminary injunction.

The basic issues can be reduced into two:

> (1) first, whether the respondent Board has the power to review petitioner's TV program "Ang Iglesia ni Cristo," and
>
> (2) second, assuming it has the power, **whether it gravely abused its discretion when it prohibited the airing_of petitioner's religious program, series Nos. 115, 119 and 121, for the reason that they**

constitute an attack against other religions and that they are indecent, contrary to law and good customs.

The first issue can be resolved by examining the powers of the Board under **PD No. 1986.**

The law gives the Board the power to screen, review and examine all "television programs." By the clear terms of the law, the Board has the power to "approve, delete . . . and/or prohibit the . . . exhibition and/or television broadcast of . . . television programs . . ." The law also directs the Board to apply "contemporary Filipino cultural values as standard" to determine those which are objectionable for being "immoral, indecent, contrary to law and/or good customs, injurious to the prestige of the Republic of the Philippines and its people, or with a dangerous tendency to encourage the commission of violence or of a wrong or crime."

Religious Profession and Worship

The right to religious profession and worship has a two-fold aspect, viz., **freedom to believe** and freedom ***to act on one's beliefs*****. The first is absolute** as long as the belief is **confined *within the realm of thought***.

The second is subject to regulation where the belief is translated into external acts that affect the public welfare.

(1) Freedom to Believe

The individual is free to believe (or disbelieve) as he pleases concerning the hereafter. He may indulge his own theories about life and death; worship any god he chooses, or none at all; embrace or reject any religion; acknowledge the divinity of God or of any being that appeals to his reverence; recognize or deny the immortality of his soul — in fact, cherish any religious conviction as he and he alone sees fit. ***However absurd his beliefs may be to others***, even if they be hostile and heretical to the majority, ***he has full freedom to believe*** as he pleases. He may not be required to prove his beliefs. He may not be punished for his inability to do so. Religion, after all, is a matter of faith. 'Men may believe what they cannot prove.' ***Every one has a right to his beliefs and he may not be called to account because he cannot prove what he believes.***

(2) Freedom to Act on One's Beliefs

But where the individual externalizes his beliefs in acts or omissions that affect the public, his freedom to do so becomes subject to the authority of the State. **As great as this liberty may be, religious freedom, like all the other rights guaranteed in the Constitution, *can be enjoyed only with a proper regard for the rights of others.*** It is error to think that the mere invocation of religious freedom will stalemate the State and render it impotent in protecting the general

welfare. *The inherent* **police power** *can be exercised to prevent religious practices inimical to society.* And this is true even if such practices are pursued out of sincere religious conviction and not merely for the purpose of evading the reasonable requirements or prohibitions of the law.

Accordingly, while one has full freedom to believe in Satan, he may not offer the object of his piety a human sacrifice, as this would be murder. Those who literally interpret the Biblical command to "go forth and multiply" are nevertheless not allowed to contract plural marriages in violation of the laws against bigamy. A person cannot refuse to pay taxes on the ground that it would be against his religious tenets to recognize any authority except that of God alone. An atheist cannot express his disbelief in acts of derision that wound the feelings of the faithful. The police power can be validly asserted against the Indian practice of the suttee born of deep religious conviction, that calls on the widow to immolate herself at the funeral pile of her husband.

We thus reject petitioner's postulate that its religious program is per se beyond review by the respondent Board. Its public broadcast on TV of its religious program brings it *out of the bosom of internal belief*. Television is a medium that reaches even the eyes and ears of children. The Court reiterates the rule that ***the exercise of religious freedom can be regulated by the State when it will bring about the clear and present danger of some substantive evil which the State is duty bound to prevent, i.e., serious detriment to the more overriding interest of public health,*** **public morals, or public welfare**. X x x For sure, we shall continue to subject any act pinching the space for the free exercise of religion to a heightened scrutiny but we shall not leave its rational exercise to the irrationality of man. For ***when religion divides and its exercise destroys, the State should not stand still.***

Deeply ensconced in our fundamental law is its **hostility against all prior restraints on speech, including religious speech**. Hence, any act that restrains speech is hobbled by the presumption of invalidity and should be greeted with furrowed brows. It is the burden of the respondent Board to overthrow this presumption. If it fails to discharge this burden, its act of censorship will be struck down. It failed in the case at bar.

Second. The evidence shows that the respondent Board x-rated petitioners TV series for "attacking" other religions, especially the Catholic church. An examination of the evidence, especially Exhibits "A," "A-1," "B, "C," and "D" will show that ***the so-called "attacks" are mere criticisms of some of the deeply held dogmas*** and tenets of other religions. <u>The videotapes were not viewed by the respondent court as they were not presented as evidence</u>. Yet they were considered by the respondent court as indecent, contrary to law and good customs, hence, can be prohibited from public viewing under section 3(c) of PD 1986. This ruling clearly suppresses petitioner's freedom of speech and interferes with its right to free exercise of religion. It misappreciates the essence

of **freedom to differ** as delineated in the benchmark case of Cantwell v. Connecticut, 20 viz.:

xxx xxx xxx

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. **To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are prominent in church or state or even to false statements. But the people of this nation have ordained in the light of history that in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of democracy.**

The respondent Board may disagree with the criticisms of other religions by petitioner but that gives it no excuse to interdict such criticisms, however, unclean they may be. Under our constitutional scheme, it is not the task of the State to favor any religion by protecting it against an attack by another religion. Religious dogmas and beliefs are often at war and to preserve peace among their followers, especially the fanatics, the establishment clause of freedom of religion prohibits the State from leaning towards any religion. Vis-a-vis religious differences, the State enjoys no banquet of options. Neutrality alone is its fixed and immovable stance. In **fine, respondent board cannot squelch the speech of petitioner Iglesia ni Cristo simply because it attacks other religions, even if said religion happens to be the most numerous church in our country**. In a State where there ought to be no difference between the appearance and the reality of freedom of religion**, the remedy against bad theology is better theology.** The bedrock of freedom of religion is freedom of thought and it is best served by encouraging **the marketplace of dueling ideas**. When the luxury of time permits, the marketplace of ideas demands that speech should be met by more speech for it is the spark of opposite speech, **the heat of colliding ideas that can fan the embers of truth**.

It is opined that the respondent board can still utilize "attack against any religion" as a ground allegedly ". . . because section 3 (c) of PD No. 1986 prohibits the showing of motion pictures, television programs and publicity materials which are contrary to law and Article 201 (2) (b) (3) of the Revised Penal Code punishes anyone who exhibits "shows which offend any race or religion."

We respectfully disagree for it is plain that **the word "attack" is not synonymous with the word "offend.**" Moreover, Article 201 (2) (b) (3) of the Revised Penal Code should be invoked to **justify the *subsequent* punishment** of a show which offends any religion. **It cannot be utilized to justify prior censorship of speech.** It must be emphasized that E.O. 876, the law prior to PD 1986, included "attack against any religion" as a ground for censorship. The ground was not, however, carried over by PD 1986. Its deletion is a decree to disuse it. There can be no other intent

Fourth. In x-rating the **TV program of the petitioner, the respondents failed to apply the clear and present danger rule**. In *American Bible Society v. City of Manila,* 22 this Court held: "The constitutional guaranty of free exercise and enjoyment of religious profession and worship carries with it the right to disseminate religious information. ***Any restraint of such right can be justified*** like other restraints on 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." In *Victoriano vs. Elizalde Rope Workers Union*, 23 we further ruled that ". . . it is only where it is unavoidably necessary **to prevent an immediate and grave danger to the security and welfare of the community** that infringement of religious freedom may be justified, and only to the smallest extent necessary to avoid the danger."

The records show that the decision of the respondent Board, affirmed by the respondent appellate court, is completely bereft of findings of facts to justify the conclusion that the subject video tapes constitute impermissible attacks against another religion. There is ***no showing whatsoever of the type of harm the tapes will bring*** about especially the gravity and imminence of the threatened harm. Prior restraint on speech, including religious speech, cannot be justified by hypothetical fears but only by the showing of a substantive and imminent evil which has taken the life of a reality already on ground.

IN VIEW WHEREOF , the Decision of the respondent Court of Appeals dated March 24, 1995 is affirmed insofar as it sustained the jurisdiction of the respondent MTRCB to review petitioner's TV program entitled "Ang Iglesia ni Cristo," and is reversed and set aside insofar as it sustained the action of the respondent MTRCB x-rating petitioner's TV Program Series Nos. 115,119, and 121. No costs.

SO ORDERED.

[A.M. No. P-02-1651. August 4, 2003]

ALEJANDRO **ESTRADA,** ***Complainant***

vs.

SOLEDAD S**. ESCRITOR,** ***Respondent*****.**

D E C I S I O N

PUNO, *J.*:

The case at bar takes us to a most difficult area of constitutional law where man stands accountable to an authority higher than the state. To be held on balance are the state's interest and the respondent's religious freedom. In this highly sensitive area of law, the task of balancing between authority and liberty is most delicate because to the person invoking religious freedom, the consequences of the case are not only temporal. The task is not made easier by the American origin of our religion clauses and the wealth of U.S. jurisprudence on these clauses for in the United States, there is probably no more intensely controverted area of constitutional interpretation than the religion clauses.[1] The U.S. Supreme Court itself has acknowledged that in this constitutional area, there is "considerable internal inconsistency in the opinions of the Court."[2] As stated by a professor of law, "(i)t is by now notorious that legal doctrines and judicial decisions in the area of religious freedom are in serious disarray. In perhaps no other area of constitutional law have confusion and inconsistency achieved such undisputed sovereignty."[3] Nevertheless, this thicket is the only path to take to conquer the mountain of a legal problem the case at bar presents. Both the penetrating and panoramic view this climb would provide will largely chart the course of religious freedom in Philippine jurisdiction. That the religious freedom question arose in an administrative case involving only one person does not alter the paramount importance of the question for the "constitution commands the positive protection by government of religious freedom -not only for a minority, however small- not only for a majority, however large- but for each of us."[4]

I. Facts

The facts of the case will determine whether respondent will prevail in her plea of religious freedom. It is necessary therefore to lay down the facts in detail, careful not to omit the essentials.

In a sworn letter-complaint dated July 27, 2000, complainant Alejandro Estrada wrote to Judge Jose F. Caoibes, Jr., presiding judge of Branch 253,

Regional Trial Court of Las Piñas City, requesting for an investigation of rumors that respondent Soledad Escritor, court interpreter in said court, is living with a man not her husband. They allegedly have a child of eighteen to twenty years old. Estrada is not personally related either to Escritor or her partner and is a resident not of Las Piñas City but of Bacoor, Cavite. Nevertheless, he filed the charge against Escritor as he believes that she is committing an immoral act that tarnishes the image of the court, thus she should not be allowed to remain employed therein as it might appear that the court condones her act.[5]

Judge Caoibes referred the letter to Escritor who stated that "there is no truth as to the veracity of the allegation" and challenged Estrada to "appear in the open and prove his allegation in the proper forum."[6] Judge Caoibes set a preliminary conference on October 12, 2000. Escritor moved for the inhibition of Judge Caoibes from hearing her case to avoid suspicion and bias as she previously filed an administrative complaint against him and said case was still pending in the Office of the Court Administrator (OCA). Escritor's motion was denied. The preliminary conference proceeded with both Estrada and Escritor in attendance. Estrada confirmed that he filed the letter-complaint for immorality against Escritor because in his frequent visits to the Hall of Justice of Las Piñas City, he learned from conversations therein that Escritor was living with a man not her husband and that she had an eighteen to twenty-year old son by this man. This prompted him to write to Judge Caoibes as he believed that employees of the judiciary should be respectable and Escritor's live-in arrangement did not command respect.[7]

Respondent Escritor testified that when she entered the judiciary in 1999,[8] she was already a widow, her husband having died in 1998.[9] She admitted that she has been living with Luciano Quilapio, Jr. without the benefit of marriage for twenty years and that they have a son. But as a member of the religious sect known as the Jehovah's Witnesses and the Watch Tower and Bible Tract Society, their conjugal arrangement is in conformity with their religious beliefs. In fact, after ten years of living together, she executed on July 28, 1991 a "Declaration of Pledging Faithfulness," *viz*:

DECLARATION OF PLEDGING FAITHFULNESS

I, Soledad S. Escritor, do hereby declare that I have accepted Luciano D. Quilapio, Jr., as my mate in marital relationship; that I have done all within my ability to obtain legal recognition of this relationship by the proper public authorities and that it is because of having been unable to do so that I therefore make this public declaration pledging faithfulness in this marital relationship.

I recognize this relationship as a binding tie before 'Jehovah' God and before all persons to be held to and honored in full accord with the principles of God's Word. I will continue to seek the means to obtain

legal recognition of this relationship by the civil authorities and if at any future time a change in circumstances make this possible, I promise to legalize this union.

Signed this 28th day of July 1991.[10]

Escritor's partner, Quilapio, executed a similar pledge on the same day.[11] Both pledges were executed in Atimonan, Quezon and signed by three witnesses. At the time Escritor executed her pledge, her husband was still alive but living with another woman. Quilapio was likewise married at that time, but had been separated in fact from his wife. During her testimony, Escritor volunteered to present members of her congregation to confirm the truthfulness of their "Declarations of Pledging Faithfulness," but Judge Caoibes deemed it unnecessary and considered her identification of her signature and the signature of Quilapio sufficient authentication of the documents.[12]

Judge Caoibes endorsed the complaint to Executive Judge Manuel B. Fernandez, Jr., who, in turn, endorsed the same to Court Administrator Alfredo L. Benipayo. On July 17, 2001, the Court, upon recommendation of Acting Court Administrator Zenaida N. Elepaño, directed Escritor to comment on the charge against her. In her comment, Escritor reiterated her religious congregation's approval of her conjugal arrangement with Quilapio, *viz*:

Herein respondent does not ignore alleged accusation but she reiterates to state with candor that there is no truth as to the veracity of same allegation. Included herewith are documents denominated as Declaration of Pledging Faithfulness (Exhibit 1 and Exhibit 2) duly signed by both respondent and her mate in marital relationship with the witnesses concurring their acceptance to the arrangement as approved by the WATCH TOWER BIBLE and TRACT SOCIETY, Philippine Branch.

Same marital arrangement is recognized as a binding tie before "JEHOVAH" God and before all persons to be held to and honored in full accord with the principles of God's Word.

xxx xxx

xxx

Undersigned submits to the just, humane and fair discretion of the Court with verification from the WATCH TOWER BIBLE and TRACT SOCIETY, Philippine Branch . . . to which undersigned believes to be a high authority in relation to her case.[13]

Deputy Court Administrator Christopher O. Lock recommended that the case be referred to Executive Judge Bonifacio Sanz Maceda, RTC Branch 255, Las Piñas City for investigation, report and recommendation. In the course of Judge Maceda's investigation, Escritor again testified that her congregation allows her conjugal arrangement with Quilapio and it does not consider it immoral. She offered to supply the investigating judge some clippings which explain the basis of her congregation's belief and practice regarding her conjugal arrangement. Escritor started living with Quilapio twenty years ago when her husband was still alive but living with another woman. She met this woman who confirmed to her that she was living with her (Escritor's) husband.[14]

Gregorio Salazar, a member of the Jehovah's Witnesses since 1985, also testified. He had been a presiding minister since 1991 and in such capacity is aware of the rules and regulations of their congregation. He explained the import of and procedure for executing a "Declaration of Pledging Faithfulness", *viz*:

Q: Now, insofar as the pre-marital relationship is concern (*sic*), can you cite some particular rules and regulations in your congregation?

A: Well, we of course, talk to the persons with regards (*sic*) to all the parties involved and then we request them to execute a Public Declaration of Pledge of faithfulness.

Q: What is that document?

A: Declaration of Pledge of faithfulness.

Q: What are the relations of the document Declaration of Pledge of faithfulness, who are suppose (*sic*) to execute this document?

A: This must be signed, the document must be signed by the elders of the congregation; the couple, who is a member (*sic*) of the congregation, baptized member and true member of the congregation.

Q: What standard rules and regulations do you have in relation with this document?

A: Actually, sir, the signing of that document, ah, with the couple has consent to marital relationship (*sic*) gives the Christian Congregation view that the couple has put themselves on record before God and man that they are faithful to each other. As if that relation is validated by God.

Q: From your explanation, Minister, do you consider it a pledge or a document between the parties, who are members of the congregation?

A: It is a pledge and a document. It is a declaration, pledge of a (*sic*) pledge of faithfulness.

Q: And what does pledge mean to you?

A: It means to me that they have contracted, let us say, I am the one who contracted with the opposite member of my congregation, opposite sex, and that this document will give us the right to a marital relationship.

Q: So, in short, when you execute a declaration of pledge of faithfulness, it is a preparation for you to enter a marriage?

A: Yes, Sir.

Q: But it does not necessarily mean that the parties, cohabiting or living under the same roof?

A: Well, the Pledge of faithfulness document is (*sic*) already approved as to the marital relationship.

Q: Do you mean to say, Minister, by executing this document the contracting parties have the right to cohabit?

A: Can I sir, cite, what the Bible says, the basis of that Pledge of Faithfulness as we Christians follow. The basis is herein stated in the Book of Matthew, Chapter Five, Verse Twenty-two. So, in that verse of the Bible, Jesus said "that everyone divorcing his wife, except on account of fornication, makes her a subject for adultery, and whoever marries a divorced woman commits adultery.[15]

Escritor and Quilapio transferred to Salazar's Congregation, the Almanza Congregation in Las Piñas, in May 2001. The declarations having been executed in Atimonan, Quezon in 1991, Salazar had no personal knowledge of the personal circumstances of Escritor and Quilapio when they executed their declarations. However, when the two transferred to Almanza, Salazar inquired about their status from the Atimonan Congregation, gathered comments of the elders therein, and requested a copy of their declarations. The Almanza Congregation assumed that the personal circumstances of the couple had been considered by the Atimonan Congregation when they executed their declarations.

Escritor and Quilapio's declarations are recorded in the Watch Tower Central office. They were executed in the usual and approved form prescribed by the Watch Tower Bible and Tract Society which was lifted from the article, "Maintaining Marriage in Honor Before God and Men,"[16] in the March 15, 1977 issue of the Watch Tower magazine, entitled *The Watchtower*.

The declaration requires the approval of the elders of the Jehovah's Witnesses congregation and is binding within the congregation all over the world except in countries where divorce is allowed. The Jehovah's congregation requires that at the time the declarations are executed, the couple cannot secure the civil authorities' approval of the marital relationship because of legal impediments. It is thus standard practice of the congregation to check the couple's marital status before giving imprimatur to the conjugal arrangement. The execution of the declaration finds scriptural basis in Matthew 5:32 that when the spouse commits adultery, the offended spouse can remarry. The marital status of the declarants and their respective spouses' commission of adultery are investigated before the declarations are executed. Thus, in the case of Escritor, it is presumed that the Atimonan Congregation conducted an investigation on her marital status before the declaration was approved and the declaration is valid everywhere, including the

Almanza Congregation. That Escritor's and Quilapio's declarations were approved are shown by the signatures of three witnesses, the elders in the Atimonan Congregation. Salazar confirmed from the congregation's branch office that these three witnesses are elders in the Atimonan Congregation. Although in 1998 Escritor was widowed, thereby lifting the legal impediment to marry on her part, her mate is still not capacitated to remarry. Thus, their declarations remain valid. Once all legal impediments for both are lifted, the couple can already register their marriage with the civil authorities and the validity of the declarations ceases. The elders in the congregations can then solemnize their marriage as authorized by Philippine law. In sum, therefore, insofar as the congregation is concerned, there is nothing immoral about the conjugal arrangement between Escritor and Quilapio and they remain members in good standing in the congregation.[17]

Salvador Reyes, a minister at the General de Leon, Valenzuela City Congregation of the Jehovah's Witnesses since 1974 and member of the headquarters of the Watch Tower Bible and Tract Society of the Philippines, Inc., presented the original copy of the magazine article entitled, "Maintaining Marriage Before God and Men" to which Escritor and Minister Salazar referred in their testimonies. The article appeared in the March 15, 1977 issue of the *Watchtower* magazine published in Pennsylvania, U.S.A. Felix S. Fajardo, President of the Watch Tower Bible and Tract Society of the Philippines, Inc., authorized Reyes to represent him in authenticating the article. The article is distributed to the Jehovah's Witnesses congregations which also distribute them to the public.[18]

The parties submitted their respective memoranda to the investigating judge. Both stated that the issue for resolution is whether or not the relationship between respondent Escritor and Quilapio is valid and binding in their own religious congregation, the Jehovah's Witnesses. Complainant Estrada adds however, that the effect of the relationship to Escritor's administrative liability must likewise be determined. Estrada argued, through counsel, that the Declaration of Pledging Faithfulness recognizes the supremacy of the "proper public authorities" such that she bound herself "to seek means to . . . legalize their union." Thus, even assuming *arguendo* that the declaration is valid and binding in her congregation, it is binding only to her co-members in the congregation and serves only the internal purpose of displaying to the rest of the congregation that she and her mate are a respectable and morally upright couple. Their religious belief and practice, however, cannot override the norms of conduct required by law for government employees. To rule otherwise would create a dangerous precedent as those who cannot legalize their live-in relationship can simply join the Jehovah's Witnesses congregation and use their religion as a defense against legal liability.[19]

On the other hand, respondent Escritor reiterates the validity of her conjugal arrangement with Quilapio based on the belief and practice of her religion, the Jehovah's Witnesses. She quoted portions of the magazine article entitled,

"Maintaining Marriage Before God and Men," in her memorandum signed by herself, *viz*:

The Declaration of Pledging of Faithfulness (Exhibits "1" and "2") executed by the respondent and her mate greatly affect the administrative liability of respondent. Jehovah's Witnesses admit and recognize (*sic*) the supremacy of the proper public authorities in the marriage arrangement. However, it is helpful to understand the relative nature of Caesar's authority regarding marriage. From country to country, marriage and divorce legislation presents a multitude of different angles and aspects. Rather than becoming entangled in a confusion of technicalities, the Christian, or the one desiring to become a disciple of God's Son, can be guided by basic Scriptural principles that hold true in all cases.

God's view is of first concern. So, first of all the person must consider whether that one's present relationship, or the relationship into which he or she contemplates entering, is one that could meet with God's approval, or whether in itself, it violates the standards of God's Word. Take, for example, the situation where a man lives with a wife but also spends time living with another woman as a concubine. As long as such a state of concubinage prevails, the relationship of the second woman can never be harmonized with Christian principles, nor could any declaration on the part of the woman or the man make it so. The only right course is cessation of the relationship. Similarly with an incestuous relationship with a member of one's immediate family, or a homosexual relationship or other such situation condemned by God's Word. It is not the lack of any legal validation that makes such relationships unacceptable; they are in themselves unscriptural and hence, immoral. Hence, a person involved in such a situation could not make any kind of "Declaration of Faithfulness," since it would have no merit in God's eyes.

If the relationship is such that it can have God's approval, then, a second principle to consider is that one should do all one can to establish the honorableness of one's marital union in the eyes of all. (Heb. 13:4). If divorce is possible, then such step should now be taken so that, having obtained the divorce (on whatever legal grounds may be available), the present union can receive civil validation as a recognized marriage.

Finally, if the marital relationship is not one out of harmony with the principles of God's Word, and if one has done all that can reasonably be done to have it recognized by civil authorities and has been blocked in doing so, then, a Declaration Pledging Faithfulness can be signed. In some cases, as has been noted, the extreme slowness of official action may make accomplishing of legal steps a matter of many, many years of effort. Or it may be that the costs represent a crushingly heavy burden that the individual would need years to be able to meet. In such cases, the declaration pledging faithfulness will provide the congregation with the basis for viewing the existing union as honorable while the individual continues conscientiously to work out the legal aspects to the best of his ability.

Keeping in mind the basic principles presented, the respondent as a Minister of Jehovah God, should be able to approach the matter in a balanced way, neither underestimating nor overestimating the validation offered by the political state. She always gives primary concern to God's view of the union. Along with this, every effort should be made to set a fine example of faithfulness and devotion to one's mate, thus, keeping the marriage "honorable among all." Such course will bring God's blessing and result to the honor and praise of the author of marriage, Jehovah God. (1 Cor. 10:31-33)[20]

Respondent also brought to the attention of the investigating judge that complainant's Memorandum came from Judge Caoibes' chambers[21] whom she claims was merely using petitioner to malign her.

In his Report and Recommendation, investigating judge Maceda found Escritor's factual allegations credible as they were supported by testimonial and documentary evidence. He also noted that "(b)y strict Catholic standards, the live-in relationship of respondent with her mate should fall within the definition of immoral conduct, to wit: 'that which is willful, flagrant, or shameless, and which shows a moral indifference to the opinion of the good and respectable members of the community' (7 C.J.S. 959)' (Delos Reyes vs. Aznar, 179 SCRA, at p. 666)." He pointed out, however, that "the more relevant question is whether or not to exact from respondent Escritor, a member of 'Jehovah's Witnesses,' the strict moral standards of the Catholic faith in determining her administrative responsibility in the case at bar."[22] The investigating judge acknowledged that "religious freedom is a fundamental right which is entitled to the highest priority and the amplest protection among human rights, for it involves the relationship of man to his Creator (at p. 270, EBRALINAG *supra*, citing Chief Justice Enrique M. Fernando's separate opinion in German vs. Barangan, 135 SCRA 514, 530-531)" and thereby recommended the dismissal of the complaint against Escritor.[23]

After considering the Report and Recommendation of Executive Judge Maceda, the Office of the Court Administrator, through Deputy Court Administrator (DCA) Lock and with the approval of Court Administrator Presbitero Velasco, concurred with the factual findings of Judge Maceda but departed from his recommendation to dismiss the complaint. DCA Lock stressed that although Escritor had become capacitated to marry by the time she joined the judiciary as her husband had died a year before, "it is due to her relationship with a married man, voluntarily carried on, that respondent may still be subject to disciplinary action."[24] Considering the ruling of the Court in **Dicdican v. Fernan, et al**.[25] that "court personnel have been enjoined to adhere to the exacting standards of morality and decency in their professional and private conduct in order to preserve the good name and integrity of the court of justice," DCA Lock found Escritor's defense of freedom of religion unavailing to warrant dismissal of the charge of immorality. Accordingly, he recommended that respondent be found guilty of immorality and that she be penalized with suspension of six months and one day without pay with a warning that a repetition of a similar act will be dealt with more severely in accordance with the Civil Service Rules.[26]

II. Issue

Whether or not respondent should be found guilty of the administrative charge of "gross and immoral conduct." To resolve this issue, it is necessary to determine the sub-issue of whether or not respondent's right to religious freedom should carve out an exception from the prevailing jurisprudence on illicit relations for which government employees are held administratively liable.

III. Applicable Laws

Respondent is charged with committing "gross and immoral conduct" under Book V, Title I, Chapter VI, Sec. 46(b)(5) of the Revised Administrative Code which provides, *viz*:

> Sec. 46. Discipline: General Provisions. - (a) No officer or employee in the Civil Service shall be suspended or dismissed except for cause as provided by law and after due process.
>
> (b) The following shall be grounds for disciplinary action:
>
> xxx xxx
>
> xxx
>
> (5) Disgraceful and immoral conduct; xxx.

Not represented by counsel, respondent, in layman's terms, invokes the religious beliefs and practices and moral standards of her religion, the Jehovah's Witnesses, in asserting that her conjugal arrangement with a man not her legal husband does not constitute disgraceful and immoral conduct for which she should be held administratively liable. While not articulated by respondent, she invokes religious freedom under Article III, Section 5 of the Constitution, which provides, *viz*:

> 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.

IV. Old World Antecedents of the American Religion Clauses

To understand the life that the religion clauses have taken, it would be well to understand not only its birth in the United States, but its conception in the Old World. One cannot understand, much less intelligently criticize the approaches of the courts and the political branches to religious freedom in the recent past in the United States without a deep appreciation of the roots of these controversies in the ancient and medieval world and in the American experience.[27] This fresh look at the religion clauses is proper in deciding this case of first impression.

In primitive times, all of life may be said to have been religious. Every significant event in the primitive man's life, from birth to death, was marked by religious ceremonies. Tribal society survived because religious sanctions effectively elicited adherence to social customs. A person who broke a custom violated a taboo which would then bring upon him "the wrathful vengeance of a superhuman mysterious power."[28] Distinction between the religious and non-religious would thus have been meaningless to him. He sought protection from all kinds of evil - whether a wild beast or tribe enemy and lightning or wind - from the same person. The head of the clan or the Old Man of the tribe or the king protected his wards against both human and superhuman enemies. In time, the king not only interceded for his people with the divine powers, but he himself was looked upon as a divine being and his laws as divine decrees.[29]

Time came, however, when the function of acting as intermediary between human and spiritual powers became sufficiently differentiated from the responsibility of leading the tribe in war and policing it in peace as to require the full-time services of a special priest class. This saw the birth of the social and communal problem of the competing claims of the king and priest. Nevertheless, from the beginning, the king and not the priest was superior. The head of the tribe was the warrior, and although he also performed priestly functions, he

carried out these functions because he was the head and representative of the community.[30]

There being no distinction between the religious and the secular, the same authority that promulgated laws regulating relations between man and man promulgated laws concerning man's obligations to the supernatural. This authority was the king who was the head of the state and the source of all law and who only delegated performance of rituals and sacrifice to the priests. The Code of Hammurabi, king of Babylonia, imposed penalties for homicide, larceny, perjury, and other crimes; regulated the fees of surgeons and the wages of masons and tailors and prescribed rules for inheritance of property;[31] and also catalogued the gods and assigned them their places in the divine hierarchy so as to put Hammurabi's own god to a position of equality with existing gods.[32] In sum, the relationship of religion to the state (king) in pre-Hebreic times may be characterized as a union of the two forces, with the state almost universally the dominant partner.[33]

With the rise of the Hebrew state, a new term had to be coined to describe the relation of the Hebrew state with the Mosaic religion: *theocracy*. The authority and power of the state was ascribed to God.[34] The Mosaic creed was not merely regarded as the religion of the state, it was (at least until Saul) the state itself. Among the Hebrews, patriarch, prophet, and priest preceded king and prince. As man of God, Moses decided when the people should travel and when to pitch camp, when they should make war and when peace. Saul and David were made kings by the prophet Samuel, disciple of Eli the priest. Like the Code of Hammurabi, the Mosaic code combined civil laws with religious mandates, but unlike the Hammurabi Code, religious laws were not of secondary importance. On the contrary, religious motivation was primary and all-embracing: sacrifices were made and Israel was prohibited from exacting usury, mistreating aliens or using false weights, all because God commanded these.

Moses of the Bible led not like the ancient kings. The latter used religion as an engine to advance the purposes of the state. Hammurabi unified Mesopotamia and established Babylon as its capital by elevating its city-god to a primary position over the previous reigning gods.[35] Moses, on the other hand, capitalized on the natural yearnings of the Hebrew slaves for freedom and independence to further God's purposes. Liberation and Exodus were preludes to Sinai and the receipt of the Divine Law. The conquest of Canaan was a preparation for the building of the temple and the full worship of God.[36]

Upon the monotheism of Moses was the theocracy of Israel founded. This monotheism, more than anything else, charted not only the future of religion in western civilization, but equally, the future of the relationship between religion and state in the west. This fact is acknowledged by many writers, among whom is Northcott who pointed out, *viz*:

Historically it was the Hebrew and Christian conception of a single and universal God that introduced a religious exclusivism leading

to compulsion and persecution in the realm of religion. Ancient religions were regarded as confined to each separate people believing in them, and the question of change from one religious belief to another did not arise. It was not until an exclusive fellowship, that the questions of proselytism, change of belief and **liberty of religion** arose.[37] (*emphasis supplied*)

The Hebrew theocracy existed in its pure form from Moses to Samuel. In this period, religion was not only superior to the state, but it was all of the state. The Law of God as transmitted through Moses and his successors was the whole of government.

With Saul, however, the state rose to be the rival and ultimately, the master, of religion. Saul and David each received their kingdom from Samuel the prophet and disciple of Eli the priest, but soon the king dominated prophet and priest. Saul disobeyed and even sought to slay Samuel the prophet of God.[38] Under Solomon, the subordination of religion to state became complete; he used religion as an engine to further the state's purposes. He reformed the order of priesthood established by Moses because the high priest under that order endorsed the claim of his rival to the throne.[39]

The subordination of religion to the state was also true in pre-Christian Rome which engaged in emperor-worship. When Augustus became head of the Roman state and the priestly hierarchy, he placed religion at a high esteem as part of a political plan to establish the real religion of pre-Christian Rome - the worship of the head of the state. He set his great uncle Julius Caesar among the gods, and commanded that worship of Divine Julius should not be less than worship of Apollo, Jupiter and other gods. When Augustus died, he also joined the ranks of the gods, as other emperors before him.[40]

The onset of Christianity, however, posed a difficulty to the emperor as the Christians' dogmatic exclusiveness prevented them from paying homage to publicly accepted gods. In the first two centuries after the death of Jesus, Christians were subjected to persecution. By the time of the emperor Trajan, Christians were considered outlaws. Their crime was "hatred of the human race", placing them in the same category as pirates and brigands and other "enemies of mankind" who were subject to summary punishments.[41]

In 284, Diocletian became emperor and sought to reorganize the empire and make its administration more efficient. But the closely-knit hierarchically controlled church presented a serious problem, being a state within a state over which he had no control. He had two options: either to force it into submission and break its power or enter into an alliance with it and procure political control over it. He opted for force and revived the persecution, destroyed the churches, confiscated sacred books, imprisoned the clergy and by torture forced them to sacrifice.[42] But his efforts proved futile.

The later emperor, Constantine, took the second option of alliance. Constantine joined with Galerius and Licinius, his two co-rulers of the empire, in issuing an edict of toleration to Christians "on condition that nothing is done by them contrary to discipline."[43] A year later, after Galerius died, Constantine and Licius jointly issued the epochal **Edict of Milan** (312 or 313), a document of monumental importance in the history of religious liberty. It provided "that **liberty of worship shall not be denied to any**, but that the mind and will of every individual shall be free to manage divine affairs according to his own choice." (*emphasis supplied*) Thus, all restrictive statutes were abrogated and it was enacted "that every person who cherishes the desire to observe the Christian religion shall freely and unconditionally proceed to observe the same without let or hindrance." Furthermore, it was provided that the "same free and open power to follow their own religion or worship is granted also to others, in accordance with the tranquillity of our times, in order that **every person may have free opportunity to worship the object of his choice."**(*emphasis supplied*)[44]

Before long, not only did Christianity achieve equal status, but acquired privilege, then prestige, and eventually, exclusive power. Religion became an engine of state policy as Constantine considered Christianity a means of unifying his complex empire. Within seven years after the Edict of Milan, under the emperor's command, great Christian edifices were erected, the clergy were freed from public burdens others had to bear, and private heathen sacrifices were forbidden.

The favors granted to Christianity came at a price: state interference in religious affairs. Constantine and his successors called and dismissed church councils, and enforced unity of belief and practice. Until recently the church had been the victim of persecution and repression, but this time it welcomed the state's persecution and repression of the nonconformist and the orthodox on the belief that it was better for heretics to be purged of their error than to die unsaved.

Both in theory as in practice, the partnership between church and state was not easy. It was a constant struggle of one claiming dominance over the other. In time, however, **after the collapse and disintegration of the Roman Empire, and while monarchical states were gradually being consolidated among the numerous feudal holdings, the church stood as the one permanent, stable and universal power. Not surprisingly, therefore, it claimed not merely equality but superiority over the secular states.** This claim, symbolized by Pope Leo's crowning of Charlemagne, became the church's accepted principle of its relationship to the state in the Middle Ages. As viewed by the church, the union of church and state was now a union of the state in the church. The rulers of the states did not concede to this claim of supremacy. Thus, while Charlemagne received his crown from the Pope, he himself crowned his own son as successor to nullify the inference of supremacy.[45] **The whole history of medieval Europe was a struggle for supremacy between prince and Pope and the resulting religious wars and**

persecution of heretics and nonconformists. At about the second quarter of the 13th century, the Inquisition was established, the purpose of which was the discovery and extermination of heresy. Accused heretics were tortured with the approval of the church in the bull *Ad extirpanda* issued by Pope Innocent IV in 1252.

The corruption and abuses of the Catholic Church spurred the Reformation aimed at reforming the Catholic Church and resulting in the establishment of Protestant churches. While Protestants are accustomed to ascribe to the Reformation the rise of religious liberty and its acceptance as the principle governing the relations between a democratic state and its citizens, history shows that it is more accurate to say that the "same causes that gave rise to the Protestant revolution also resulted in the widespread acceptance of the principle of religious liberty, and ultimately of the principle of separation of church and state."[46] Pleas for tolerance and freedom of conscience can without doubt be found in the writings of leaders of the Reformation. But just as Protestants living in the countries of papists pleaded for toleration of religion, so did the papists that lived where Protestants were dominant.[47] Papist and Protestant governments alike accepted the idea of cooperation between church and state and regarded as essential to national unity the uniformity of at least the outward manifestations of religion.[48]Certainly, Luther, leader of the Reformation, stated that "neither pope, nor bishop, nor any man whatever has the right of making one syllable binding on a Christian man, unless it be done with his own consent."[49] But when the tables had turned and he was no longer the hunted heretic, he likewise stated when he made an alliance with the secular powers that "(h)eretics are not to be disputed with, but to be condemned unheard, and whilst they perish by fire, the faithful ought to pursue the evil to its source, and bathe their hands in the blood of the Catholic bishops, and of the Pope, who is a devil in disguise."[50] To Luther, unity among the peoples in the interests of the state was an important consideration. Other personalities in the Reformation such as Melanchton, Zwingli and Calvin strongly espoused theocracy or the use of the state as an engine to further religion. In establishing theocracy in Geneva, Calvin made absence from the sermon a crime, he included criticism of the clergy in the crime of blasphemy punishable by death, and to eliminate heresy, he cooperated in the Inquisition.[51]

There were, however, those who truly advocated religious liberty. Erasmus, who belonged to the Renaissance than the Reformation, wrote that "(t)he terrible papal edict, the more terrible imperial edict, the imprisonments, the confiscations, the recantations, the fagots and burnings, all these things I can see accomplish nothing except to make the evil more widespread."[52] **The minority or dissident sects also ardently advocated religious liberty.** The Anabaptists, persecuted and despised, along with the Socinians (Unitarians) and the Friends of the Quakers founded by George Fox in the 17th century, endorsed the supremacy and freedom of the individual conscience. They regarded religion as outside the realm of political governments.[53] The English Baptists proclaimed that the "magistrate is not to

meddle with religion or matters of conscience, nor compel men to this or that form of religion."[54]

Thus, out of the Reformation, three rationalizations of church-state relations may be distinguished: the *Erastian* (after the German doctor Erastus), the *theocratic*, and the *separatist*. The first assumed state superiority in ecclesiastical affairs and the use of religion as an engine of state policy as demonstrated by Luther's belief that civic cohesion could not exist without religious unity so that coercion to achieve religious unity was justified. The second was founded on ecclesiastical supremacy and the use of state machinery to further religious interests as promoted by Calvin. **The third, which was yet to achieve ultimate and complete expression in the New World, was discernibly in its incipient form in the arguments of some dissident minorities that the magistrate should not intermeddle in religious affairs**.[55] After the Reformation, Erastianism pervaded all Europe except for Calvin's theocratic Geneva. **In England, perhaps more than in any other country, Erastianism was at its height.** To illustrate, a statute was enacted by Parliament in 1678, which, to encourage woolen trade, imposed on all clergymen the duty of seeing to it that no person was buried in a shroud made of any substance other than wool.[56] Under Elizabeth, supremacy of the crown over the church was complete: ecclesiastical offices were regulated by her proclamations, recusants were fined and imprisoned, Jesuits and proselytizing priests were put to death for high treason, the thirty-nine Articles of the Church of England were adopted and English Protestantism attained its present doctrinal status.[57] Elizabeth was to be recognized as "the only Supreme Governor of this realm . . . as well in all spiritual or ecclesiastical things or causes as temporal." She and her successors were vested, in their dominions, with "all manner of jurisdictions, privileges, and preeminences, in any wise touching or concerning any spiritual or ecclesiastical jurisdiction."[58] Later, however, Cromwell established the **constitution in 1647** which granted **full liberty to all Protestant sects, but denied toleration to Catholics.**[59] In 1689, William III issued the **Act of Toleration** which established a *de facto* toleration for all except Catholics. The Catholics achieved **religious liberty in the 19th century when the Roman Catholic Relief Act of 1829** was adopted. **The Jews followed suit in 1858** when they were finally permitted to sit in Parliament.[60]

When the representatives of the American states met in Philadelphia in 1787 to draft the constitutional foundation of the new republic, the theocratic state which had flourished intermittently in Israel, Judea, the Holy Roman Empire and Geneva was completely gone. The prevailing church-state relationship in Europe was Erastianism embodied in the system of jurisdictionalism whereby one faith was favored as the official state-supported religion, but other faiths were permitted to exist with freedom in various degrees. **No nation had yet adopted as the basis of its church-state relations the principle of the mutual independence of religion and government and the concomitant principle that neither might be used as an engine to further the policies of the other, although the principle was in its seminal form in the arguments of some**

dissident minorities and intellectual leaders of the Renaissance. The religious wars of 16th and 17th century Europe were a thing of the past by the time America declared its independence from the Old World, but their memory was still vivid in the minds of the Constitutional Fathers as expressed by the United States Supreme Court, *viz*:

> The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecution generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, non-attendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.[61]

In 1784, **James Madison** captured in this statement the entire history of church-state relations in Europe up to the time the United States Constitution was adopted, *viz*:

> Torrents of blood have been spilt in the world in vain attempts of the secular arm to extinguish religious discord, by proscribing all differences in religious opinions.[62]

In sum, this history shows two salient features: First, with minor exceptions, the history of church-state relationships was characterized by persecution, oppression, hatred, bloodshed, and war, all in the name of the God of Love and of the Prince of Peace. Second, likewise with minor exceptions, this **history witnessed the unscrupulous use of religion by secular powers to promote secular purposes and policies, and the willing acceptance of that role by the vanguards of religion in exchange for the favors and mundane benefits conferred by ambitious princes and emperors in exchange for religion's invaluable service. This was the context in which the unique experiment of the principle of religious freedom and separation of church and state saw its birth in American constitutional democracy and in human history.**[63]

V. Factors Contributing to the Adoption of the American Religion Clauses

Settlers fleeing from religious persecution in Europe, primarily in Anglican-dominated England, established many of the American colonies. British thought pervaded these colonies as the immigrants brought with them their religious and political ideas from England and English books and pamphlets largely provided their cultural fare.[64] But although these settlers escaped from Europe to be freed from bondage of laws which compelled them to support and attend government favored churches, some of these settlers themselves transplanted into American soil the oppressive practices they escaped from. The charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized them to erect religious establishments, which all, whether believers or not, were required to support or attend.[65] At one time, six of the colonies established a state religion. Other colonies, however, such as Rhode Island and Delaware tolerated a high degree of religious diversity. Still others, which originally tolerated only a single religion, eventually extended support to several different faiths.[66]

This was the state of the American colonies when the unique American experiment of separation of church and state came about. The birth of the experiment cannot be attributed to a single cause or event. Rather, a number of interdependent practical and ideological factors contributed in bringing it forth. Among these were the "English Act of Toleration of 1689, the multiplicity of sects, the lack of church affiliation on the part of most Americans, the rise of commercial intercourse, the exigencies of the Revolutionary War, the Williams-Penn tradition and the success of their experiments, the writings of Locke, the social contract theory, the Great Awakening, and the influence of European rationalism and deism."[67] Each of these factors shall be briefly discussed.

First, the practical factors. England's policy of opening the gates of the American colonies to different faiths resulted in the multiplicity of sects in the colonies. With an Erastian justification, English lords chose to forego protecting what was considered to be the true and eternal church of a particular time in order to encourage trade and commerce. The colonies were large financial investments which would be profitable only if people would settle there. It would be difficult to engage in trade with persons one seeks to destroy for religious belief, thus tolerance was a necessity. This tended to distract the colonies from their preoccupations over their religion and its exclusiveness, encouraging them "to think less of the Church and more of the State and of commerce."[68] The diversity brought about by the colonies' open gates encouraged religious freedom and non-establishment in several ways. First, as there were too many dissenting sects to abolish, there was no alternative but to learn to live together. Secondly, because of the daily exposure to different religions, the passionate conviction in the exclusive rightness of one's religion, which impels persecution for the sake of one's religion, waned. Finally, because of the great

diversity of the sects, religious uniformity was not possible, and without such uniformity, establishment could not survive.[69]

But while there was a multiplicity of denomination, paradoxically, there was a scarcity of adherents. Only about four percent of the entire population of the country had a church affiliation at the time the republic was founded.[70] This might be attributed to the drifting to the American colonies of the skepticism that characterized European Enlightenment.[71] Economic considerations might have also been a factor. The individualism of the American colonist, manifested in the multiplicity of sects, also resulted in much unaffiliated religion which treated religion as a personal non-institutional matter. The prevalence of lack of church affiliation contributed to religious liberty and disestablishment as persons who were not connected with any church were not likely to persecute others for similar independence nor accede to compulsory taxation to support a church to which they did not belong.[72]

However, for those who were affiliated to churches, the colonial policy regarding their worship generally followed the tenor of the English Act of Toleration of 1689. In England, this Act conferred on Protestant dissenters the right to hold public services subject to registration of their ministers and places of worship.[73] Although the toleration accorded to Protestant dissenters who qualified under its terms was only a modest advance in religious freedom, it nevertheless was of some influence to the American experiment.[74] Even then, for practical considerations, concessions had to be made to other dissenting churches to ensure their cooperation in the War of Independence which thus had a unifying effect on the colonies.

Next, the ideological factors. First, the Great Awakening in mid-18th century, an evangelical religious revival originating in New England, caused a break with formal church religion and a resistance to coercion by established churches. This movement emphasized an emotional, personal religion that appealed directly to the individual, putting emphasis on the rights and duties of the individual conscience and its answerability exclusively to God. Thus, although they had no quarrel with orthodox Christian theology as in fact they were fundamentalists, this group became staunch advocates of separation of church and state.[75]

Then there was the Williams-Penn tradition. Roger Williams was the founder of the colony of Rhode Island where he established a community of Baptists, Quakers and other nonconformists. In this colony, religious freedom was not based on practical considerations but on the concept of mutual independence of religion and government. In 1663, Rhode Island obtained a charter from the British crown which declared that settlers have it “much on their heart to hold forth a livelie experiment that a most flourishing civil state may best be maintained . . . with full libertie in religious concernments.”[76] In Williams’ pamphlet, *The Bloudy Tenent of Persecution for cause of Conscience, discussed in a Conference between Truth and Peace*,[77] he articulated the philosophical basis for his argument of religious liberty. To him, religious freedom and

separation of church and state did not constitute two but only one principle. Religious persecution is wrong because it "confounds the Civil and Religious" and because "States . . . are proved essentially Civil. The "power of true discerning the true fear of God" is not one of the powers that the people have transferred to Civil Authority.[78] Williams' *Bloudy Tenet* is considered an epochal milestone in the history of religious freedom and the separation of church and state.[79]

William Penn, proprietor of the land that became Pennsylvania, was also an ardent advocate of toleration, having been imprisoned for his religious convictions as a member of the despised Quakers. He opposed coercion in matters of conscience because "imposition, restraint and persecution for conscience sake, highly invade the Divine prerogative." Aside from his idealism, proprietary interests made toleration in Pennsylvania necessary. He attracted large numbers of settlers by promising religious toleration, thus bringing in immigrants both from the Continent and Britain. At the end of the colonial period, Pennsylvania had the greatest variety of religious groups. Penn was responsible in large part for the "Concessions and agreements of the Proprietors, Freeholders, and inhabitants of West Jersey, in America", a monumental document in the history of civil liberty which provided among others, for liberty of conscience.[80] The Baptist followers of Williams and the Quakers who came after Penn continued the tradition started by the leaders of their denominations. Aside from the Baptists and the Quakers, the Presbyterians likewise greatly contributed to the evolution of separation and freedom.[81] The Constitutional fathers who convened in Philadelphia in 1787, and Congress and the states that adopted the First Amendment in 1791 were very familiar with and strongly influenced by the successful examples of Rhode Island and Pennsylvania.[82]

Undeniably, John Locke and the social contract theory also contributed to the American experiment. The social contract theory popularized by Locke was so widely accepted as to be deemed self-evident truth in America's Declaration of Independence. With the doctrine of natural rights and equality set forth in the Declaration of Independence, there was no room for religious discrimination. It was difficult to justify inequality in religious treatment by a new nation that severed its political bonds with the English crown which violated the self-evident truth that all men are created equal.[83]

The social contract theory was applied by many religious groups in arguing against establishment, putting emphasis on religion as a natural right that is entirely personal and not within the scope of the powers of a political body. That Locke and the social contract theory were influential in the development of religious freedom and separation is evident from the memorial presented by the Baptists to the Continental Congress in 1774, *viz*:

> Men unite in society, according to the great Mr. Locke, with an intention in every one the better to preserve himself, his liberty and property. The power of the society, or Legislature constituted by them, can never be

supposed to extend any further than the common good, but is obliged to secure every one's property. To give laws, to receive obedience, to compel with the sword, belong to none but the civil magistrate; and on this ground we affirm that the magistrate's power extends not to establishing any articles of faith or forms of worship, by force of laws; for laws are of no force without penalties. **The care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but pure and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God.**[84] (*emphasis supplied*)

The idea that religion was outside the jurisdiction of civil government was acceptable to both the religionist and rationalist. To the religionist, God or Christ did not desire that government have that jurisdiction ("render unto Caesar that which is Caesar's"; "my kingdom is not of this world") and to the rationalist, the power to act in the realm of religion was not one of the powers conferred on government as part of the social contract.[85]

Not only the social contract theory drifted to the colonies from Europe. **Many of the leaders of the Revolutionary and post-revolutionary period were also influenced by European deism and rationalism,**[86] **in general, and some were apathetic if not antagonistic to formal religious worship and institutionalized religion.** Jefferson, Paine, John Adams, Washington, Franklin, Madison, among others were reckoned to be among the **Unitarians or Deists**. Unitarianism and Deism contributed to the emphasis on secular interests and the relegation of historic theology to the background.[87] For these men of the enlightenment, religion should be allowed to rise and fall on its own, and the state must be protected from the clutches of the church whose entanglements has caused intolerance and corruption as witnessed throughout history.[88] Not only the leaders but also the masses embraced rationalism at the end of the eighteenth century, accounting for the popularity of Paine's *Age of Reason*.[89]

Finally, the events leading to religious freedom and separation in Virginia contributed significantly to the American experiment of the First Amendment. **Virginia was the "first state in the history of the world to proclaim the decree of absolute divorce between church and state."**[90] Many factors contributed to this, among which were that half to two-thirds of the population were organized dissenting sects, the Great Awakening had won many converts, the established Anglican Church of Virginia found themselves on the losing side of the Revolution and had alienated many influential laymen with its identification with the Crown's tyranny, and above all, present in Virginia was a group of political leaders who were devoted to liberty generally,[91] who had accepted the social contract as self-evident, and who had been greatly influenced by Deism and Unitarianism. **Among these leaders were Washington, Patrick Henry, George Mason, James Madison and above the rest, Thomas Jefferson.**

The **first major step** towards separation in Virginia was the adoption of the following provision in the Bill of Rights of the state's first constitution:

> That **religion**, or the duty which we owe to our Creator, and the manner of discharging it, **can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion according to the dictates of conscience;** and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.[92] (*emphasis supplied*)

The adoption of the Bill of Rights signified the beginning of the end of establishment. Baptists, Presbyterians and Lutherans flooded the first legislative assembly with petitions for abolition of establishment. While the majority of the population were dissenters, a majority of the legislature were churchmen. The legislature compromised and enacted a bill in 1776 abolishing the more oppressive features of establishment and granting exemptions to the dissenters, but not guaranteeing separation. It repealed the laws punishing heresy and absence from worship and requiring the dissenters to contribute to the support of the establishment.[93] But the dissenters were not satisfied; they not only wanted abolition of support for the establishment, they opposed the compulsory support of their own religion as others. As members of the established church would not allow that only they would pay taxes while the rest did not, the legislature enacted in 1779 a bill making permanent the establishment's loss of its exclusive status and its power to tax its members; but those who voted for it did so in the hope that a general assessment bill would be passed. Without the latter, the establishment would not survive. Thus, a bill was introduced in 1779 requiring every person to enroll his name with the county clerk and indicate which "society for the purpose of Religious Worship" he wished to support. On the basis of this list, collections were to be made by the sheriff and turned over to the clergymen and teachers designated by the religious congregation. The assessment of any person who failed to enroll in any society was to be divided proportionately among the societies.[94] The bill evoked strong opposition.

In 1784, another bill, entitled "Bill Establishing a Provision for Teachers of the Christian Religion" was introduced requiring all persons "to pay a moderate tax or contribution annually for the support of the Christian religion, or of some Christian church, denomination or communion of Christians, or for some form of Christian worship."[95] This likewise aroused the same opposition to the 1779 bill. The most telling blow against the 1784 bill was the monumental "Memorial and Remonstrance against Religious Assessments" written by Madison and widely distributed before the reconvening of legislature in the fall of 1785.[96] It **stressed natural rights, the government's lack of jurisdiction over the domain of religion, and the social contract as the ideological basis of separation** while also citing practical considerations such as loss of population through migration. He wrote, *viz*:

Because we hold it for a 'fundamental and undeniable truth,' that religion, or the duty which we owe to our creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence. **The religion, then, of every man, must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is, in its nature, an unalienable right.** It is unalienable, because the opinions of men, depending only on the evidence contemplated in their own minds, cannot follow the dictates of other men; it is unalienable, also, because what is here a right towards men, is a duty towards the creator. **It is the duty of every man to render the creator such homage, and such only as he believes to be acceptable to him; this duty is precedent, both in order of time and degree of obligation, to the claims of civil society. Before any man can be considered as a member of civil society, he must be considered as a subject of the governor of the universe;** and if a member of civil society, who enters into any subordinate association, must always do it with a reservation of his duty to the general authority, much more must every man who becomes a member of any particular civil society do it with the saving his allegiance to the universal sovereign.[97] (*emphases supplied*)

Madison articulated in the Memorial the widely held beliefs in 1785 as indicated by the great number of signatures appended to the Memorial. The assessment bill was speedily defeated.

Taking advantage of the situation, Madison called up a much earlier 1779 bill of Jefferson which had not been voted on, the "Bill for Establishing Religious Freedom", and it was finally passed in January 1786. It provided, *viz*:

Well aware that Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend not only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do;

xxx xxx

xxx

Be it therefore enacted by the General Assembly. That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burdened in his body or goods, nor shall otherwise suffer on account of his religious

opinions or beliefs, but **that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion,** and that the same shall in no wise diminish, enlarge or affect their civil capacities.[98] (*emphases supplied*)

This statute forbade any kind of taxation in support of religion and effectually ended any thought of a general or particular establishment in Virginia.[99] But the passage of this law was obtained not only because of the influence of the great leaders in Virginia but also because of substantial popular support coming mainly from the two great dissenting sects, namely the Presbyterians and the Baptists. The former were never established in Virginia and an underprivileged minority of the population. This made them anxious to pull down the existing state church as they realized that it was impossible for them to be elevated to that privileged position. Apart from these expediential considerations, however, many of the Presbyterians were sincere advocates of separation[100] grounded on rational, secular arguments and to the language of natural religion.[101] Influenced by Roger Williams, the Baptists, on the other hand, assumed that religion was essentially a matter of concern of the individual and his God, i.e., subjective, spiritual and supernatural, having no relation with the social order.[102] To them, the Holy Ghost was sufficient to maintain and direct the Church without governmental assistance and state-supported religion was contrary ti the spirit of the Gospel.[103] Thus, separation was necessary.[104] Jefferson's religious freedom statute was a **milestone** in the history of religious freedom. The United States Supreme Court has not just once acknowledged **that the provisions of the First Amendment of the U.S. Constitution had the same objectives and intended to afford the same protection against government interference with religious liberty as the Virginia Statute of Religious Liberty.**

Even in the absence of the religion clauses, the principle that government had no power to legislate in the area of religion by restricting its free exercise or establishing it was implicit in the Constitution of 1787. This could be deduced from the prohibition of any religious test for federal office in Article VI of the Constitution and the assumed lack of power of Congress to act on any subject not expressly mentioned in the Constitution.[105] However, omission of an express guaranty of religious freedom and other natural rights nearly prevented the ratification of the Constitution.[106] In the ratifying conventions of almost every state, some objection was expressed to the absence of a restriction on the Federal Government as regards legislation on religion.[107] Thus, in 1791, this restriction was made explicit with the adoption of the religion clauses in the First Amendment as they are worded to this day, with the first part usually referred to as the Establishment Clause and the second part, the Free Exercise Clause, *viz*:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

VI. Religion Clauses in the United States: Concept, Jurisprudence, Standards

With the widespread agreement regarding the value of the First Amendment religion clauses comes an equally broad disagreement as to what these clauses specifically require, permit and forbid. No agreement has been reached by those who have studied the religion clauses as regards its exact meaning and the paucity of records in Congress renders it difficult to ascertain its meaning.[108] Consequently, **the jurisprudence in this area is volatile and fraught with inconsistencies whether within a Court decision or across decisions.**

One source of difficulty is the difference in the context in which the First Amendment was adopted and in which it is applied today. In the 1780s, religion played a primary role in social life - i.e., family responsibilities, education, health care, poor relief, and other aspects of social life with significant moral dimension - while government played a supportive and indirect role by maintaining conditions in which these activities may be carried out by religious or religiously-motivated associations. Today, government plays this primary role and religion plays the supportive role.[109] Government runs even family planning, sex education, adoption and foster care programs.[110] Stated otherwise and with some exaggeration, "(w)hereas two centuries ago, in matters of social life which have a significant moral dimension, government was the handmaid of religion, today religion, in its social responsibilities, as contrasted with personal faith and collective worship, is the handmaid of government."[111] With government regulation of individual conduct having become more pervasive, inevitably some of those regulations would reach conduct that for some individuals are religious. As a result, increasingly, there may be inadvertent collisions between purely secular government actions and religion clause values.[112]

Parallel to this expansion of government has been the expansion of religious organizations in population, physical institutions, types of activities undertaken, and sheer variety of denominations, sects and cults. Churches run day-care centers, retirement homes, hospitals, schools at all levels, research centers, settlement houses, halfway houses for prisoners, sports facilities, theme parks, publishing houses and mass media programs. In these activities, religious organizations complement and compete with commercial enterprises, thus blurring the line between many types of activities undertaken by religious groups and secular activities. Churches have also concerned themselves with social and political issues as a necessary outgrowth of religious faith as witnessed in pastoral letters on war and peace, economic justice, and human life, or in ringing affirmations for racial equality on religious foundations. Inevitably, these developments have brought about substantial entanglement of religion and government. Likewise, the growth in population density, mobility and diversity has significantly changed the environment in which religious organizations and activities exist and the laws affecting them are made. It is no longer easy for individuals to live solely among their own kind or to shelter their children from

exposure to competing values. The result is disagreement over what laws should require, permit or prohibit;[113] and agreement that if the rights of believers as well as non-believers are all to be respected and given their just due, a rigid, wooden interpretation of the religion clauses that is blind to societal and political realities must be avoided.[114]

Religion cases arise from different circumstances. The more obvious ones arise from a government action which purposely aids or inhibits religion. These cases are easier to resolve as, in general, these actions are plainly unconstitutional. Still, this kind of cases poses difficulty in ascertaining proof of intent to aid or inhibit religion.[115] The more difficult religion clause cases involve government action with a secular purpose and general applicability which incidentally or inadvertently aids or burdens religious exercise. In Free Exercise Clause cases, these government actions are referred to as those with "burdensome effect" on religious exercise even if the government action is not religiously motivated.[116] Ideally, the legislature would recognize the religions and their practices and would consider them, when practical, in enacting laws of general application. But when the legislature fails to do so, religions that are threatened and burdened turn to the courts for protection.[117] Most of these free exercise claims brought to the Court are for exemption, not invalidation of the facially neutral law that has a "burdensome" effect.[118]

With the change in political and social context and the increasing inadvertent collisions between law and religious exercise, the definition of religion for purposes of interpreting the religion clauses has also been **modified to suit current realities.** Defining religion is a difficult task for even theologians, philosophers and moralists cannot agree on a comprehensive definition. Nevertheless, courts must define religion for constitutional and other legal purposes.[119] It was in the 1890 case of **Davis v. Beason**[120] that the United States Supreme Court**first had occasion to define religion**, *viz*:

> **The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.** It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.[121]

The **definition was clearly theistic** which was reflective of the popular attitudes in 1890.

In 1944, the Court stated in **United States v. Ballard**[122] that the free exercise of religion "embraces the right to maintain **theories of life and of death and of the hereafter** which are rank heresy to followers of the orthodox faiths."[123] By the 1960s, American pluralism in religion had flourished to include **non-theistic creeds** from Asia such as Buddhism and Taoism.[124]In 1961, the Court, in **Torcaso v. Watkins,**[125] expanded the term "religion" to non-theistic beliefs such as Buddhism, Taoism, Ethical Culture, and Secular Humanism. Four years later, the Court faced a definitional problem in **United States v. Seeger**[126] which involved four men who claimed "conscientious objector" status in refusing to serve in the Vietnam War. One of the four, Seeger, was not a member of any organized religion opposed to war, but when specifically asked about his belief in a Supreme Being, Seeger stated that "you could call (it) a belief in a Supreme Being or God. These just do not happen to be the words that I use." Forest Peter, another one of the four claimed that after considerable meditation and reflection "on values derived from the Western religious and philosophical tradition," he determined that it would be "a violation of his moral code to take human life and that he considered this belief superior to any obligation to the state." The Court avoided a constitutional question by broadly interpreting not the Free Exercise Clause, but the statutory definition of religion in the Universal Military Training and Service Act of 1940 which exempt from combat anyone "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Speaking for the Court, Justice Clark ruled, *viz*:

> Congress, in using the expression 'Supreme Being' rather than the designation 'God,' was merely clarifying the meaning of religious tradition and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views (and) **the test of belief 'in relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to the orthodox belief in God.** (*emphasis supplied*)

The Court was convinced that Seeger, Peter and the others were conscientious objectors possessed of such religious belief and training.

Federal and state courts have **expanded the definition of religion** in **Seeger** to include even non-theistic beliefs such as Taoism or Zen Buddhism. It has been proposed that basically, a creed must meet four criteria to qualify as religion under the First Amendment. **First**, there must be belief in God or some parallel belief that occupies a central place in the believer's life. **Second**, the religion must involve a moral code transcending individual belief, i.e., it cannot be purely subjective. **Third**, a demonstrable sincerity in belief is necessary, but the court must not inquire into the truth or reasonableness of

the belief.[127] **Fourth**, there must be some associational ties,[128] although there is also a view that religious beliefs held by a single person rather than being part of the teachings of any kind of group or sect are entitled to the protection of the Free Exercise Clause.[129]

Defining religion is only the beginning of the difficult task of deciding religion clause cases. **Having hurdled the issue of definition, the court then has to draw lines to determine what is or is not permissible under the religion clauses.** In this task, the **purpose** of the clauses is the yardstick. Their purpose is singular; they are two sides of the same coin.[130] In devoting two clauses to religion, the Founders were stating not two opposing thoughts that would cancel each other out, but two complementary thoughts that apply in different ways in different circumstances.[131] The purpose of the religion clauses - both in the restriction it imposes on the power of the government to interfere with the free exercise of religion and the limitation on the power of government to establish, aid, and support religion - is the **protection and promotion of religious liberty**.[132] The end, the goal, and the rationale of the religion clauses is this liberty.[133] Both clauses were adopted to prevent government imposition of religious orthodoxy; the great evil against which they are directed is government-induced homogeneity.[134] The **Free Exercise Clause** directly articulates the common objective of the two clauses and the **Establishment Clause** specifically addresses a form of interference with religious liberty with which the Framers were most familiar and for which government historically had demonstrated a propensity.[135] In other words, free exercise is the end, proscribing establishment is a necessary means to this end to protect the rights of those who might dissent from whatever religion is established.[136] It has even been suggested that the sense of the First Amendment is captured if it were to read as "Congress shall make no law respecting an establishment of religion or *otherwise* prohibiting the free exercise thereof" because the fundamental and single purpose of the two religious clauses is to "avoid any infringement on the free exercise of religions"[137] Thus, the Establishment Clause mandates separation of church and state to protect each from the other, in service of the larger goal of preserving religious liberty. The effect of the separation is to limit the opportunities for any religious group to capture the state apparatus to the disadvantage of those of other faiths, or of no faith at all[138] because history has shown that religious fervor conjoined with state power is likely to tolerate far less religious disagreement and disobedience from those who hold different beliefs than an enlightened secular state.[139] In the words of the U.S. Supreme Court, the two clauses are interrelated, *viz*: "(t)he structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."[140]

In upholding religious liberty as the end goal in religious clause cases, the line the court draws to ensure that government does not establish and instead remains neutral toward religion is not absolutely straight. Chief Justice Burger explains, *viz*:

The course of constitutional neutrality in this area **cannot be an absolutely straight line**; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded and none inhibited.[141] (*emphasis supplied*)

Consequently, U.S. jurisprudence has produced two identifiably different,[142] even opposing, strains of jurisprudence on the religion clauses: **separation (in the form of strict separation or the tamer version of strict neutrality or separation**) and **benevolent neutrality** or **accommodation**. A view of the landscape of U.S. religion clause cases would be useful in understanding these two strains, the scope of protection of each clause, and the tests used in religious clause cases. Most of these cases are cited as authorities in Philippine religion clause cases.

A. Free Exercise Clause

The Court first interpreted the Free Exercise Clause in the 1878 case of **Reynolds v. United States**.[143] This landmark case involved Reynolds, a Mormon who proved that it was his religious duty to have several wives and that the failure to practice polygamy by male members of his religion when circumstances would permit would be punished with damnation in the life to come. Reynolds' act of contracting a second marriage violated Section 5352, Revised Statutes prohibiting and penalizing bigamy, for which he was convicted. The Court affirmed Reynolds' conviction, using what in jurisprudence would be called the **belief-action test** which allows absolute protection to belief but not to action. It cited Jefferson's Bill Establishing Religious Freedom which, according to the Court, declares "the true distinction between what properly belongs to the Church and what to the State."[144] The bill, making a distinction between belief and action, states in relevant part, *viz*:

That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, **is a dangerous fallacy which at once destroys all religious liberty;**

that it is **time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order**.[145] (*emphasis supplied*)

The Court then held, *viz*:

Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order. . .

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifice were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[146]

The construct was thus simple: the state was absolutely prohibited by the Free Exercise Clause from regulating individual religious beliefs, but placed no restriction on the ability of the state to regulate religiously motivated conduct. It was logical for belief to be accorded absolute protection because any statute designed to prohibit a particular religious belief unaccompanied by any conduct would most certainly be motivated only by the legislature's preference of a competing religious belief. Thus, all cases of regulation of belief would amount to regulation of religion for religious reasons violative of the Free Exercise Clause. On the other hand, most state regulations of conduct are for public welfare purposes and have nothing to do with the legislature's religious preferences. Any burden on religion that results from state regulation of conduct arises only when particular individuals are engaging in the generally regulated conduct because of their particular religious beliefs. These burdens are thus usually inadvertent and did not figure in the **belief-action test**. As long as the Court found that regulation address action rather than belief, the Free Exercise Clause did not pose any problem.[147] The Free Exercise Clause thus gave no protection against the proscription of actions even if considered central to a religion unless the legislature formally outlawed the belief itself.[148]

This **belief-action** distinction was held by the Court for some years as shown by cases where the Court upheld other laws which burdened the practice of the

Mormon religion by imposing various penalties on polygamy such as the **Davis case** and **Church of Latter Day Saints v. United States**.[149] However, more than a century since **Reynolds** was decided, the Court has **expanded the scope of protection** from belief to speech and conduct. But while the **belief-action test** has been abandoned, the rulings in the earlier Free Exercise cases have gone unchallenged. The belief-action distinction is still of some importance though as there remains an absolute prohibition of governmental proscription of beliefs.[150]

The Free Exercise Clause accords absolute protection to individual religious convictions and beliefs[151] and proscribes government from questioning a person's beliefs or imposing penalties or disabilities based solely on those beliefs. **The Clause extends protection to both beliefs and unbelief**. Thus, in **Torcaso v. Watkins,**[152] a unanimous Court struck down a state law requiring as a qualification for public office an oath declaring belief in the existence of God. The protection also allows courts to look into the good faith of a person in his belief, but prohibits **inquiry into the truth of a person's religious beliefs.** As held in **United States v. Ballard**,[153] "(h)eresy trials are foreign to the Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."

Next to belief which enjoys virtually absolute protection, religious speech and expressive religious conduct are accorded the highest degree of protection. Thus, in the 1940 case of **Cantwell v. Connecticut,**[154] the Court struck down a state law prohibiting door-to-door solicitation for any religious or charitable cause without prior approval of a state agency. The law was challenged by Cantwell, a member of the Jehovah's Witnesses which is committed to active proselytizing. The Court invalidated the state statute as the prior approval necessary was held to be a censorship of religion prohibited by the Free Exercise Clause. The Court held, *viz*:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one may seem the rankest error to his neighbor. To persuade others to his point of view, the pleader, as we know, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy.[155]

Cantwell took a step forward from the protection afforded by the **Reynolds case** in that it not only affirmed protection of belief but also freedom to act for the propagation of that belief, *viz*:

Thus the Amendment embraces two concepts - freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the 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.** (*emphasis supplied*)[156]

The Court stated, however, that government had the power to regulate the times, places, and manner of solicitation on the streets and assure the peace and safety of the community.

Three years after **Cantwell**, the Court in **Douglas v. City of Jeanette**,[157] ruled that police could not prohibit members of the Jehovah's Witnesses from peaceably and orderly proselytizing on Sundays merely because other citizens complained. In another case likewise involving the Jehovah's Witnesses, **Niemotko v. Maryland**,[158] the Court unanimously held unconstitutional a city council's denial of a permit to the Jehovah's Witnesses to use the city park for a public meeting. The city council's refusal was because of the "unsatisfactory" answers of the Jehovah's Witnesses to questions about Catholicism, military service, and other issues. The denial of the public forum was considered blatant censorship. While protected, religious speech in the public forum is still subject to reasonable time, place and manner regulations similar to non-religious speech. Religious proselytizing in congested areas, for example, may be limited to certain areas to maintain the safe and orderly flow of pedestrians and vehicular traffic as held in the case of **Heffron v. International Society for Krishna Consciousness.**[159]

The least protected under the Free Exercise Clause is religious conduct, usually in the form of unconventional religious practices. Protection in this realm depends on the character of the action and the government rationale for regulating the action.[160] The Mormons' religious conduct of **polygamy** is an example of unconventional religious practice. As discussed in the **Reynolds case** above, the Court did not afford protection to the practice. **Reynolds** was reiterated in the 1890 case of **Davis** again involving Mormons, where the Court held, *viz*: "(c)rime is not the less odious because sanctioned by what any particular sect may designate as religion."[161]

The **belief-action test** in **Reynolds** and **Davis** proved unsatisfactory. Under this test, regulation of religiously dictated conduct would be upheld no matter how central the conduct was to the exercise of religion and no matter how insignificant was the government's non-religious regulatory interest so long as the government is proscribing action and not belief. Thus, the Court abandoned the simplistic **belief-action** distinction and instead recognized **the deliberate-inadvertent distinction**, i.e., the distinction between deliberate state interference of religious exercise for religious reasons which was plainly unconstitutional and government's inadvertent interference with religion in pursuing some secular objective.[162] In the 1940 case of **Minersville School**

District v. Gobitis,[163] the Court upheld a local school board requirement that all public school students participate in a daily flag salute program, including the Jehovah's Witnesses who were forced to salute the American flag in violation of their religious training, which considered flag salute to be worship of a "graven image." The Court recognized that the general requirement of compulsory flag salute inadvertently burdened the Jehovah Witnesses' practice of their religion, but justified the government regulation as an appropriate means of attaining national unity, which was the "basis of national security." Thus, although the Court was already aware of the deliberate-inadvertent distinction in government interference with religion, it continued to hold that the Free Exercise Clause presented no problem to interference with religion that was inadvertent no matter how serious the interference, no matter how trivial the state's non-religious objectives, and no matter how many alternative approaches were available to the state to pursue its objectives with less impact on religion, so long as government was acting in pursuit of a secular objective.

Three years later, the **Gobitis decision** was overturned in **West Virginia v. Barnette**[164] which involved a similar set of facts and issue. The Court recognized that saluting the flag, in connection with the pledges, was a form of utterance and the flag salute program was a compulsion of students to declare a belief. The Court ruled that "compulsory unification of opinions leads only to the unanimity of the graveyard" and exempt the students who were members of the Jehovah's Witnesses from saluting the flag. A close scrutiny of the case, however, would show that it was decided not on the issue of religious conduct as the Court said, "(n)or does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe **constitutional liberty of the individual."** (*emphasis supplied*)[165] The Court pronounced, however, that, "freedoms of speech and of press, of assembly, and of worship . . . are susceptible only of restriction only to prevent **grave and immediate danger to interests which the state may lawfully protect.**"[166] The Court seemed to recognize the extent to which its approach in **Gobitis** subordinated the religious liberty of political minorities - a specially protected constitutional value - to the common everyday economic and public welfare objectives of the majority in the legislature. This time, even inadvertent interference with religion must pass judicial scrutiny under the Free Exercise Clause with only grave and immediate danger sufficing to override religious liberty. But the seeds of this heightened scrutiny would only grow to a full flower in the 1960s.[167]

Nearly a century after **Reynolds** employed the **belief-action test**, the Warren Court began the modern free exercise jurisprudence.[168] A **two-part balancing test** was established in**Braunfeld v. Brown**[169] where the Court considered the constitutionality of applying Sunday closing laws to Orthodox Jews whose beliefs required them to observe another day as the Sabbath and abstain from commercial activity on Saturday. Chief Justice Warren, writing for

the Court, found that the law placed a severe burden on Sabattarian retailers. He noted, however, that since the burden was the indirect effect of a law with a secular purpose, it would violate the Free Exercise Clause **only if there were alternative ways of achieving the state's interest.** He employed **a two-part balancing test** of validity where the first step was for plaintiff to show that the regulation placed a real burden on his religious exercise. Next, the burden would be upheld only if the state showed that it was pursuing an overriding secular goal by the means which imposed the least burden on religious practices.[170] The Court found that the state had an overriding secular interest in setting aside a single day for rest, recreation and tranquility and there was no alternative means of pursuing this interest but to require Sunday as a uniform rest day.

Two years after came the stricter **compelling state interest test** in the 1963 case of **Sherbert v. Verner**.[171] This test was similar to the **two-part balancing test in Braunfeld,**[172]but this latter test stressed **that the state interest was not merely any colorable state interest, but must be paramount and compelling to override the free exercise claim.** In this case, Sherbert, a Seventh Day Adventist, claimed unemployment compensation under the law as her employment was terminated for refusal to work on Saturdays on religious grounds. Her claim was denied. She sought recourse in the Supreme Court. In laying down the standard for determining whether the denial of benefits could withstand constitutional scrutiny, the Court ruled, *viz*:

> Plainly enough, appellee's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be **either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . .**' NAACP v. Button, 371 US 415, 438 9 L ed 2d 405, 421, 83 S Ct 328.[173] (*emphasis supplied*)

The Court stressed that in the area of religious liberty, it is basic that it is not sufficient to merely show a rational relationship of the substantial infringement to the religious right and a colorable state interest. "(I)n this highly sensitive constitutional area, '**[o]nly** the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' Thomas v. Collins, 323 US 516, 530, 89 L ed 430, 440, 65 S Ct 315."[174] The Court found that there was no such compelling state interest to override Sherbert's religious liberty. It added that even if the state could show that Sherbert's exemption would pose

serious detrimental effects to the unemployment compensation fund and scheduling of work, it was incumbent upon the state to show that **no alternative means** of regulations would address such detrimental effects without infringing religious liberty. The state, however, did not discharge this burden. The Court thus carved out for Sherbert an exemption from the Saturday work requirement that caused her disqualification from claiming the unemployment benefits. The Court reasoned that upholding the denial of Sherbert's benefits would force her to choose between receiving benefits and following her religion. This choice placed "the same kind of burden upon the free exercise of religion as would a fine imposed against (her) for her Saturday worship." This germinal case of **Sherbert** firmly established the exemption doctrine,[175] *viz*:

> It is certain that not every conscience can be accommodated by all the laws of the land; **but when general laws conflict with scruples of conscience, exemptions ought to be granted unless some 'compelling state interest' intervenes.**

Thus, in a short period of twenty-three years from **Gobitis** to **Sherbert (or even as early as Braunfeld),** the Court moved from the doctrine that inadvertent or incidental interferences with religion raise no problem under the Free Exercise Clause to the doctrine that such interferences violate the Free Exercise Clause in the absence of a compelling state interest - the highest level of constitutional scrutiny short of a holding of a *per se* violation. Thus, the problem posed by the **belief-action test** and the **deliberate-inadvertent** distinction was addressed.[176]

Throughout the 1970s and 1980s under the Warren, and afterwards, the Burger Court, the rationale in **Sherbert** continued to be applied. In **Thomas v. Review Board**[177] and **Hobbie v. Unemployment Appeals Division,**[178] for example, the Court reiterated the exemption doctrine and held that in the absence of a compelling justification, a state could not withhold unemployment compensation from an employee who resigned or was discharged due to unwillingness to depart from religious practices and beliefs that conflicted with job requirements. But not every governmental refusal to allow an exemption from a regulation which burdens a sincerely held religious belief has been invalidated, even though strict or heightened scrutiny is applied. In **United States v. Lee,**[179] for instance, the Court using strict scrutiny and referring to **Thomas**, upheld the federal government's refusal to exempt Amish employers who requested for exemption from paying social security taxes on wages on the ground of religious beliefs. The Court held that "(b)ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[180] It reasoned that unlike in **Sherbert**, an exemption would significantly impair government's achievement of its objective - "the fiscal vitality of the social security system;" mandatory participation is indispensable to attain this objective. The Court noted that if an exemption were made, it would be hard to

justify not allowing a similar exemption from general federal taxes where the taxpayer argues that his religious beliefs require him to reduce or eliminate his payments so that he will not contribute to the government's war-related activities, for example.

The strict scrutiny and compelling state interest test significantly increased the degree of protection afforded to religiously motivated conduct. While not affording absolute immunity to religious activity, a compelling secular justification was necessary to uphold public policies that collided with religious practices. Although the members of the Court often disagreed over which governmental interests should be considered compelling, thereby producing dissenting and separate opinions in religious conduct cases, this **general test established a strong presumption in favor of the free exercise of religion.**[181]

Heightened scrutiny was also used in the 1972 case of **Wisconsin v. Yoder**[182] where the Court upheld the religious practice of the Old Order Amish faith over the state's compulsory high school attendance law. The Amish parents in this case did not permit secular education of their children beyond the eighth grade. Chief Justice Burger, writing for the majority, held, *viz*:

It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, **it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.** Long before there was general acknowledgement of the need for universal education, the Religion Clauses had specially and firmly fixed the right of free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. . .

The essence of all that has been said and written on the subject is that **only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.** . .

. . . our decisions have rejected the idea that that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their

undoubted power to promote the health, safety, and general welfare, or the Federal government in the exercise of its delegated powers . . . **But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability**. . . .This case, therefore, does not become easier because respondents were convicted for their "actions" in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments. . . [183]

The onset of the 1990s, however, saw a major setback in the protection afforded by the Free Exercise Clause. In **Employment Division, Oregon Department of Human Resources v. Smith**,[184] the sharply divided **Rehnquist Court** dramatically **departed** from the heightened scrutiny and compelling justification approach and imposed serious limits on the scope of protection of religious freedom afforded by the First Amendment. In this case, the well-established practice of the Native American Church, a sect outside the Judeo-Christian mainstream of American religion, came in conflict with the state's interest in prohibiting the use of illicit drugs. Oregon's controlled substances statute made the possession of peyote a criminal offense. Two members of the church, Smith and Black, worked as drug rehabilitation counselors for a private social service agency in Oregon. Along with other church members, Smith and Black ingested peyote, a hallucinogenic drug, at a sacramental ceremony practiced by Native Americans for hundreds of years. The social service agency fired Smith and Black citing their use of peyote as "job-related misconduct". They applied for unemployment compensation, but the Oregon Employment Appeals Board denied their application as they were discharged for job-related misconduct. Justice Scalia, writing for the majority, ruled that **"if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid law, the First Amendment has not been offended."** In other words, the Free Exercise Clause would be offended only if a particular religious practice were singled out for proscription. The majority opinion relied heavily on the **Reynolds case** and in effect, equated Oregon's drug prohibition law with the anti-polygamy statute in**Reynolds**. The relevant portion of the majority opinion held, *viz*:

We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation.

Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. . .

We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." . . .**To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs except where the State's interest is "compelling" - permitting him, by virtue of his beliefs, "to become a law unto himself," . . . - contradicts both constitutional tradition and common sense.**

Justice O'Connor wrote a concurring opinion pointing out that the majority's rejection of the compelling governmental interest test was the most controversial part of the decision. Although she concurred in the result that the Free Exercise Clause had not been offended, she sharply criticized the majority opinion as a dramatic departure "from well-settled First Amendment jurisprudence. . . and . . . (as) incompatible with our Nation's fundamental commitment to religious liberty." This portion of her concurring opinion was supported by Justices Brennan, Marshall and Blackmun who dissented from the Court's decision. Justice O'Connor asserted that **"(t)he compelling state interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling government interest 'of the highest order'.**" Justice Blackmun registered a separate dissenting opinion, joined by Justices Brennan and Marshall. He charged the majority with "mischaracterizing" precedents and "overturning. . . settled law concerning the Religion Clauses of our Constitution." He pointed out that the Native American Church restricted and supervised the sacramental use of peyote. Thus, the state had no significant health or safety justification for regulating the sacramental drug use. He also observed that Oregon had not attempted to prosecute Smith or Black, or any Native Americans, for that matter, for the sacramental use of peyote. In conclusion, he said that "Oregon's interest in enforcing its drug laws against religious use of peyote (was) not sufficiently compelling to outweigh respondents' right to the free exercise of their religion."

The Court went back to the **Reynolds** and **Gobitis** doctrine in **Smith**. The Court's standard in **Smith** virtually eliminated the requirement that the government justify with a compelling state interest the burdens on religious exercise imposed by laws neutral toward religion. The **Smith doctrine** is highly unsatisfactory in several respects and has been criticized as exhibiting a shallow understanding of free exercise jurisprudence.[185] First, the First amendment was intended to protect minority religions from the tyranny of the religious and political

majority. A deliberate regulatory interference with minority religious freedom is the worst form of this tyranny. But regulatory interference with a minority religion as a result of ignorance or sensitivity of the religious and political majority is no less an interference with the minority's religious freedom. If the regulation had instead restricted the majority's religious practice, the majoritarian legislative process would in all probability have modified or rejected the regulation. Thus, the imposition of the political majority's non-religious objectives at the expense of the minority's religious interests implements the majority's religious viewpoint at the expense of the minority's. Second, government impairment of religious liberty would most often be of the inadvertent kind as in **Smith** considering the political culture where direct and deliberate regulatory imposition of religious orthodoxy is nearly inconceivable. If the Free Exercise Clause could not afford protection to inadvertent interference, it would be left almost meaningless. Third, the **Reynolds-Gobitis-Smith** doctrine simply defies common sense. The state should not be allowed to interfere with the most deeply held fundamental religious convictions of an individual in order to pursue some trivial state economic or bureaucratic objective. This is especially true when there are alternative approaches for the state to effectively pursue its objective without serious inadvertent impact on religion.[186]

Thus, the **Smith decision** has been criticized not only for increasing the power of the state over religion but as discriminating in favor of mainstream religious groups against smaller, more peripheral groups who lack legislative clout,[187] contrary to the original theory of the First Amendment.[188] Undeniably, claims for judicial exemption emanate almost invariably from relatively politically powerless minority religions and **Smith** virtually wiped out their judicial recourse for exemption.[189] Thus, the **Smith** decision elicited much negative public reaction especially from the religious community, and commentaries insisted that the Court was allowing the Free Exercise Clause to disappear.[190] So much was the uproar that a majority in Congress was convinced to enact the Religious Freedom Restoration Act (RFRA) of 1993. The RFRA prohibited government at all levels from substantially burdening a person's free exercise of religion, even if such burden resulted from a generally applicable rule, unless the government could demonstrate a compelling state interest and the rule constituted the least restrictive means of furthering that interest.[191] RFRA, in effect, sought to overturn the substance of the **Smith ruling** and restore the *status quo* prior to Smith. Three years after the RFRA was enacted, however, the Court, dividing 6 to 3, declared the RFRA unconstitutional in **City of Boerne v. Flores**.[192] The Court ruled that "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." It emphasized the primacy of its role as interpreter of the Constitution and unequivocally rejected, on broad institutional grounds, a direct congressional challenge of final judicial authority on a question of constitutional interpretation.

After **Smith** came **Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah**[193] which was ruled consistent with the Smith doctrine. This case involved animal sacrifice of the Santeria, a blend of Roman Catholicism and

West African religions brought to the Carribean by East African slaves. An ordinance made it a crime to "unnecessarily kill, torment, torture, or mutilate an animal in public or private ritual or ceremony not for the primary purpose of food consumption." The ordinance came as a response to the local concern over the sacrificial practices of the Santeria. Justice Kennedy, writing for the majority, carefully pointed out that the questioned ordinance was not a generally applicable criminal prohibition, but instead singled out practitioners of the Santeria in that it forbade animal slaughter only insofar as it took place within the context of religious rituals.

It may be seen from the foregoing cases that under the Free Exercise Clause, religious belief is absolutely protected, religious speech and proselytizing are highly protected but subject to restraints applicable to non-religious speech, and unconventional religious practice receives less protection; nevertheless conduct, even if its violates a law, could be accorded protection as shown in **Wisconsin**.[194]

B. Establishment Clause

The Court's **first encounter** with the Establishment Clause was in the 1947 case of **Everson v. Board of Education.**[195] Prior cases had made passing reference to the Establishment Clause[196] and raised establishment questions but were decided on other grounds.[197] It was in the **Everson case** that the U.S. Supreme Court adopted Jefferson's metaphor of "a wall of separation between church and state" as encapsulating the meaning of the Establishment Clause. The often and loosely used phrase "separation of church and state" does not appear in the U.S. Constitution. It became part of U.S. jurisprudence when the Court in the 1878 case of **Reynolds v. United States**[198] quoted Jefferson's famous letter of 1802 to the Danbury Baptist Association in narrating the history of the religion clauses, *viz*:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building **a wall of separation between Church and State.**[199] (*emphasis supplied*)

Chief Justice Waite, speaking for the majority, then added, "(c)oming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."[200]

The interpretation of the Establishment Clause has in large part been in cases involving education, notably state aid to private religious schools and prayer in public schools.[201] In**Everson v. Board of Education,** for example, the issue was whether a New Jersey local school board could reimburse parents for expenses incurred in transporting their children to and from Catholic schools. The reimbursement was part of a general program under which all parents of children in public schools and nonprofit private schools, regardless of religion, were entitled to reimbursement for transportation costs. Justice Hugo Black, writing for a sharply divided Court, justified the reimbursements on the **child benefit theory**, i.e., that the school board was merely furthering the state's legitimate interest in getting children "regardless of their religion, safely and expeditiously to and from accredited schools." The Court, after narrating the history of the First Amendment in Virginia, interpreted the Establishment Clause, *viz*:

> 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 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 non-attendance. 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 organizations 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."**[202]

The Court then ended the opinion, *viz*:

> The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.[203]

By 1971, the Court integrated the different elements of the Court's Establishment Clause jurisprudence that evolved in the 1950s and 1960s and laid down a three-pronged test in**Lemon v. Kurtzman**[204] in determining the constitutionality of policies challenged under the Establishment Clause. This case involved a Pennsylvania statutory program providing publicly funded reimbursement for the cost of teachers' salaries, textbooks, and instructional

materials in secular subjects and a Rhode Island statute providing salary supplements to teachers in parochial schools. The **Lemon test** requires a challenged policy to meet the following criteria to pass scrutiny under the Establishment Clause. **"First, the statute must have a secular legislative purpose; second, its primary or principal effect must be one that neither advances nor inhibits religion (Board of Education v. Allen, 392 US 236, 243, 20 L Ed 2d 1060, 1065, 88 S Ct 1923 [1968]); finally, the statute must not foster 'an excessive entanglement with religion.' (Walz v.Tax Commission, 397 US 664, 668, 25 L Ed 2d 697, 701, 90 S Ct 1409 [1970])"** (*emphasis supplied*)[205] Using this test, the Court held that the Pennsylvania statutory program and Rhode Island statute were unconstitutional as fostering excessive entanglement between government and religion.

The most controversial of the education cases involving the Establishment Clause are the school prayer decisions. "Few decisions of the modern Supreme Court have been criticized more intensely than the school prayer decisions of the early 1960s."[206] In the 1962 case of **Engel v. Vitale**,[207] the Court invalidated a New York Board of Regents policy that established the voluntary recitation of a brief generic prayer by children in the public schools at the start of each school day. The majority opinion written by Justice Black stated 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." In fact, history shows that this very practice of establishing governmentally composed prayers for religious services was one of the reasons that caused many of the early colonists to leave England and seek religious freedom in America. The Court called to mind that the first and most immediate purpose of the Establishment Clause rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The following year, the **Engel decision** was reinforced **in Abington School District v. Schempp**[208] and **Murray v. Curlett**[209] where the Court struck down the practice of Bible reading and the recitation of the Lord's prayer in the Pennsylvania and Maryland schools. The Court held that to withstand the strictures of the Establishment Clause, a statute must have a secular legislative purpose and a primary effect that neither advances nor inhibits religion. It reiterated, *viz*:

> The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State of Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every

person to freely choose his own course with reference thereto, free of any compulsion from the state.[210]

The school prayer decisions drew furious reactions. Religious leaders and conservative members of Congress and resolutions passed by several state legislatures condemned these decisions.[211] On several occasions, constitutional amendments have been introduced in Congress to overturn the school prayer decisions. Still, the Court has maintained its position and has in fact reinforced it in the 1985 case of **Wallace v. Jaffree**[212] where the Court struck down an Alabama law that required public school students to observe a moment of silence "for the purpose of meditation or voluntary prayer" at the start of each school day.

Religious instruction in public schools has also pressed the Court to interpret the Establishment Clause. Optional religious instruction within public school premises and instructional time were declared offensive of the Establishment Clause in the 1948 case of **McCollum v. Board of Education**,[213] decided just a year after the seminal **Everson case**. In this case, interested members of the Jewish, Roman Catholic and a few Protestant faiths obtained permission from the Board of Education to offer classes in religious instruction to public school students in grades four to nine. Religion classes were attended by pupils whose parents signed printed cards requesting that their children be permitted to attend. The classes were taught in three separate groups by Protestant teachers, Catholic priests and a Jewish rabbi and were held weekly from thirty to forty minutes during regular class hours in the regular classrooms of the school building. The religious teachers were employed at no expense to the school authorities but they were subject to the approval and supervision of the superintendent of schools. Students who did not choose to take religious instruction were required to leave their classrooms and go to some other place in the school building for their secular studies while those who were released from their secular study for religious instruction were required to attend the religious classes. 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 in promoting religious education amounted to a prohibited use of tax-established and tax-supported public school system to aid religious groups spread their faith. The Court rejected the claim that the Establishment Clause only prohibited government preference of one religion over another and not an impartial governmental assistance of all religions. In **Zorach v. Clauson,**[214] however, the Court upheld released time programs allowing students in public schools to leave campus upon parental permission to attend religious services while other students attended study hall. Justice Douglas, the writer of the opinion, stressed that "(t)he First Amendment does not require that in every and all respects there shall be a separation of Church and State." The Court distinguished **Zorach** from **McCollum**, *viz*:

In the McCollum case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. .

. We follow the McCollum case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.[215]

In the area of government displays or affirmations of belief, the Court has given leeway to religious beliefs and practices which have acquired a secular meaning and have become deeply entrenched in history. For instance, in **McGowan v. Maryland**,[216] the Court upheld laws that prohibited certain businesses from operating on Sunday despite the obvious religious underpinnings of the restrictions. Citing the secular purpose of the Sunday closing laws and treating as incidental the fact that this day of rest happened to be the day of worship for most Christians, the Court held, *viz*:

It is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for later sleeping, for passive and active entertainments, for dining out, and the like.[217]

In the 1983 case of **Marsh v. Chambers,**[218] the Court refused to invalidate Nebraska's policy of beginning legislative sessions with prayers offered by a Protestant chaplain retained at the taxpayers' expense. The majority opinion **did not rely on the Lemon test and instead drew heavily from history and the need for accommodation of popular religious beliefs,** *viz*:

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a **tolerable acknowledgement of beliefs widely held among the people of this country. As Justice Douglas observed, "(w)e are a religious people whose institutions presuppose a Supreme Being."** (Zorach c. Clauson, 343 US 306, 313 [1952])[219](*emphasis supplied*)

Some view the **Marsh ruling** as a mere aberration as the Court would "inevitably be embarrassed if it were to attempt to strike down a practice that occurs in nearly every legislature in the United States, including the U.S. Congress."[220] That **Marsh** was not an aberration is suggested by subsequent cases. In the 1984 case of **Lynch v. Donnelly**,[221] the Court upheld a city-

sponsored nativity scene in Rhode Island. By a 5-4 decision, the **majority opinion hardly employed the Lemon test and again relied on history and the fact that the creche had become a "neutral harbinger of the holiday season" for many, rather than a symbol of Christianity.**

The Establishment Clause has also been interpreted in the area of tax exemption. By tradition, church and charitable institutions have been exempt from local property taxes and their income exempt from federal and state income taxes. In the 1970 case of **Walz v. Tax Commission**,[222] the New York City Tax Commission's grant of property tax exemptions to churches as allowed by state law was challenged by Walz on the theory that this required him to subsidize those churches indirectly. The Court upheld the law stressing its neutrality, *viz*:

> It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemptions to all houses of religious worship within a broad class of property owned by non-profit, quasi-public corporations . . . The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest.[223]

The Court added that the exemption was not establishing religion but "sparing the exercise of religion from the burden of property taxation levied on private profit institutions"[224] and preventing excessive entanglement between state and religion. At the same time, the Court acknowledged the long-standing practice of religious tax exemption and the Court's traditional deference to legislative bodies with respect to the taxing power, *viz*:

> (f)ew concepts are more deeply embedded in the fabric of our national life, **beginning with pre-Revolutionary colonial times, than for the government to exercise . . . this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.**[225] (*emphasis supplied*)

C. Strict Neutrality v. Benevolent Neutrality

To be sure, the cases discussed above, while citing many landmark decisions in the religious clauses area, are but a small fraction of the hundreds of religion clauses cases that the U.S. Supreme Court has passed upon. Court rulings contrary to or making nuances of the above cases may be cited. Professor McConnell poignantly recognizes this, *viz*:

Thus, as of today, it is constitutional for a state to hire a Presbyterian minister to lead the legislature in daily prayers (Marsh v. Chambers, 463 US783, 792-93[1983]), but unconstitutional for a state to set aside a moment of silence in the schools for children to pray if they want to (Wallace v. Jaffree, 472 US 38, 56 [1985]). It is unconstitutional for a state to require employers to accommodate their employees' work schedules to their sabbath observances (Estate of Thornton v. Caldor, Inc., 472 US 703, 709-10 [1985]) but constitutionally mandatory for a state to require employers to pay workers compensation when the resulting inconsistency between work and sabbath leads to discharge (. . .Sherbert v. Verner, 374 US 398, 403-4 [1963]). It is constitutional for the government to give money to religiously-affiliated organizations to teach adolescents about proper sexual behavior (Bowen v. Kendrick, 487 US 589, 611 [1988]), but not to teach them science or history (Lemon v. Kurtzman, 403 US 602, 618-619 [1971]). It is constitutional for the government to provide religious school pupils with books (Board of Education v. Allen, 392 US 236, 238 [1968]), but not with maps (Wolman v. Walter, 433 US 229, 249-51 [1977]); with bus rides to religious schools (Everson v. Board of Education, 330 US 1, 17 [1947]), but not from school to a museum on a field trip (Wolman v. Walter, 433 US 229, 252-55 [1977]); with cash to pay for state-mandated standardized tests (Committee for Pub. Educ. and Religious Liberty v. Regan, 444 US 646, 653-54 [1980]), but not to pay for safety-related maintenance (Committee for Pub. Educ v. Nyquist, 413 US 756, 774-80 [1973]). It is a mess.[226]

But the purpose of the overview is not to review the entirety of the U.S. religion clause jurisprudence nor to extract the prevailing case law regarding particular religious beliefs or conduct colliding with particular government regulations. Rather, the cases discussed above suffice to show that, as legal scholars observe, this area of jurisprudence has **demonstrated two main standards** used by the Court in deciding religion clause cases: **separation (in the form of strict separation or the tamer version of strict neutrality or separation)** and **benevolent neutrality or accommodation**. The weight of current authority, judicial and in terms of sheer volume, appears to lie with the separationists, strict or tame.[227] But the accommodationists have also attracted a number of influential scholars and jurists.[228] The two standards producing two streams of jurisprudence branch out respectively from the history of the First Amendment in England and the American colonies and climaxing in Virginia as narrated in this opinion and officially acknowledged by the Court in **Everson**, and from American societal life which reveres religion and practices age-old religious traditions. Stated otherwise, **separation** - strict or tame - protects the principle of church-state separation with a rigid reading of the principle while **benevolent**

neutrality protects religious realities, tradition and established practice with a flexible reading of the principle.[229] The latter also appeals to history in support of its position, *viz*:

> The opposing school of thought argues that the First Congress intended to **allow government support of religion, at least as long as that support did not discriminate in favor of one particular religion**. . . the Supreme Court has overlooked many important pieces of history. Madison, for example, was on the congressional committee that appointed a chaplain, he declared several national days of prayer and fasting during his presidency, and he sponsored Jefferson's bill for punishing Sabbath breakers; moreover, while president, Jefferson allowed federal support of religious missions to the Indians. . . And so, concludes one recent book, 'there is no support in the Congressional records that either the First Congress, which framed the First Amendment, or its principal author and sponsor, James Madison, intended that Amendment to create a state of complete independence between religion and government. In fact, the evidence in the public documents goes the other way.[230] (*emphasis supplied*)

To succinctly and poignantly illustrate the historical basis of benevolent **neutrality** that gives room for **accommodation**, less than twenty-four hours after Congress adopted the First Amendment's prohibition on laws respecting an establishment of religion, Congress decided to express its thanks to God Almighty for the many blessings enjoyed by the nation with a resolution in favor of a presidential proclamation declaring a national day of Thanksgiving and Prayer. Only two members of Congress opposed the resolution, one on the ground that the move was a "mimicking of European customs, where they made a mere mockery of thanksgivings", the other on establishment clause concerns. Nevertheless, the salutary effect of thanksgivings throughout Western history was acknowledged and the motion was passed without further recorded discussion.[231] Thus, accommodationists also go back to the framers to ascertain the meaning of the First Amendment, but prefer to focus on acts rather than words. Contrary to the claim of separationists that rationalism pervaded America in the late 19thcentury and that America was less specifically Christian during those years than at any other time before or since,[232] accommodationaists claim that American citizens at the time of the Constitution's origins were a remarkably religious people in particularly Christian terms.[233]

The two streams of jurisprudence - separationist or accommodationist - are anchored on a different reading of the "wall of separation." The **strict separtionist** view holds that Jefferson meant the "wall of separation" to protect the state from the church. Jefferson was a man of the Enlightenment Era of the eighteenth century, characterized by the rationalism and anticlericalism of that philosophic bent.[234] He has often been regarded as espousing Deism or the

rationalistic belief in a natural religion and natural law divorced from its medieval connection with divine law, and instead adhering to a secular belief in a universal harmony.[235] Thus, according to this Jeffersonian view, the Establishment Clause being meant to protect the state from the church, the state's hostility towards religion allows no interaction between the two.[236] In fact, when Jefferson became President, he refused to proclaim fast or thanksgiving days on the ground that these are religious exercises and the Constitution prohibited the government from intermeddling with religion.[237] This approach erects an absolute barrier to formal interdependence of religion and state. Religious institutions could not receive aid, whether direct or indirect, from the state. Nor could the state adjust its secular programs to alleviate burdens the programs placed on believers.[238] Only the complete separation of religion from politics would eliminate the formal influence of religious institutions and provide for a free choice among political views thus a strict "wall of separation" is necessary.[239] Strict separation faces difficulties, however, as it is deeply embedded in history and contemporary practice that enormous amounts of aid, both direct and indirect, flow to religion from government in return for huge amounts of mostly indirect aid from religion. Thus, strict separationists are caught in an awkward position of claiming a constitutional principle that has never existed and is never likely to.[240]

A **tamer version** of the strict separationist view, the **strict neutrality** or **separationist view** is largely used by the Court, showing the Court's tendency to press relentlessly towards a more secular society.[241] It finds basis in the **Everson case** where the Court declared that Jefferson's "wall of separation" encapsulated the meaning of the First Amendment but at the same time held that the First Amendment "requires the state to be **neutral** in its relations with groups of religious believers and non-believers**; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.**" (*emphasis supplied*)[242] While the strict neutrality approach is not hostile to religion, it is strict in holding that religion may not be used as a basis for classification for purposes of governmental action, whether the action confers rights or privileges or imposes duties or obligations. Only secular criteria may be the basis of government action. It does not permit, much less require, accommodation of secular programs to religious belief.[243] Professor Kurland wrote, *viz*:

> The thesis proposed here as the proper construction of the religion clauses of the first amendment is that the freedom and separation clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden.[244]

The Court has repeatedly declared that religious freedom means government neutrality in religious matters and the Court has also repeatedly interpreted this

policy of neutrality to prohibit government from acting except for secular purposes and in ways that have primarily secular effects.[245]

Prayer in public schools is an area where the Court has applied strict neutrality and refused to allow any form of prayer, spoken or silent, in the public schools as in **Engel** and**Schempp**.[246] The **McCollum case** prohibiting optional religious instruction within public school premises during regular class hours also demonstrates strict neutrality. In these education cases, the Court refused to uphold the government action as they were based not on a secular but on a religious purpose. Strict neutrality was also used in **Reynolds** and **Smith** which both held that if government acts in pursuit of a generally applicable law with a secular purpose that merely incidentally burdens religious exercise, the First Amendment has not been offended. However, if the strict neutrality standard is applied in interpreting the Establishment Clause, it could *de facto* void religious expression in the Free Exercise Clause. As pointed out by Justice Goldberg in his concurring opinion in **Schempp**, strict neutrality could lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious" which is prohibited by the Constitution.[247] Professor Laurence Tribe commented in his authoritative treatise, *viz*:

> To most observers. . . strict neutrality has seemed incompatible with the very idea of a free exercise clause. The Framers, whatever specific applications they may have intended, clearly envisioned *religion* as something special; they enacted that vision into law by guaranteeing the free exercise of religion but not, say, of philosophy or science. The strict neutrality approach all but erases this distinction. Thus it is not surprising that the Supreme Court has rejected strict neutrality, permitting and sometimes mandating religious classifications.[248]

The **separationist** approach, whether strict or tame, is caught in a dilemma because while the Jeffersonian wall of separation "captures the spirit of the American ideal of church-state separation", in real life church and state are not and cannot be totally separate.[249] This is all the more true in contemporary times when both the government and religion are growing and expanding their spheres of involvement and activity, resulting in the intersection of government and religion at many points.[250]

Consequently, the Court has also decided cases employing **benevolent neutrality. Benevolent neutrality** which gives room for **accommodation** is buttressed by a different view of the "wall of separation" associated with Williams, founder of the Rhode Island colony. In Mark DeWolfe Howe's classic, *The Garden and the Wilderness*, he asserts that to the extent the Founders had a wall of separation in mind, it was unlike the Jeffersonian wall that is meant to protect the state from the church; instead, the wall is meant to protect the church from the state,[251] i.e., the "garden" of the church must be walled in for its own protection from the "wilderness" of the world[252] with its potential for corrupting

those values so necessary to religious commitment.[253] Howe called this the "theological" or "evangelical" rationale for church-state separation while the wall espoused by "enlightened" statesmen such as Jefferson and Madison, was a "political" rationale seeking to protect politics from intrusions by the church.[254] But it has been asserted that this contrast between the Williams and Jeffersonian positions is more accurately described as a difference in kinds or styles of religious thinking, not as a conflict between "religious" and "secular (political)"; the religious style was biblical and evangelical in character while the secular style was grounded in natural religion, more generic and philosophical in its religious orientation.[255]

The Williams wall is, however, breached for the church is in the state and so the remaining purpose of the wall is to safeguard religious liberty. Williams' view would therefore allow for interaction between church and state, but is strict with regard to state action which would threaten the integrity of religious commitment.[256] His conception of separation is not total such that it provides basis for certain interactions between church and state dictated by apparent necessity or practicality.[257] This "theological" view of separation is found in Williams' writings, *viz*:

> . . . when they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made his garden a wilderness, as this day. And that therefore if He will eer please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world. . .[258]

Chief Justice Burger spoke of **benevolent neutrality** in **Walz,** *viz*:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of **a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference**.[259] (*emphasis supplied*)

The **Zorach case** expressed the doctrine of **accommodation**,[260] *viz:*

> **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 or 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. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths- these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.

xxx xxx

xxx

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. . . **When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events, 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. . . 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 their effective scope of religious influence.[261] (*emphases supplied*)

Benevolent neutrality is congruent with the sociological proposition that religion serves a function essential to the survival of society itself, thus there is no human society without one or more ways of performing the essential function of religion. Although for some individuals there may be no felt need for religion and thus it is optional or even dispensable, for society it is not, which is why there is no human society without one or more ways of performing the essential function of religion. Even in ostensibly atheistic societies, there are vigorous underground religion(s) and surrogate religion(s) in their ideology.[262] As one sociologist wrote:

It is widely held by students of society that there are certain functional prerequisites without which society would not continue to exist. At first glance, this seems to be obvious - scarcely more than to say that an

automobile could not exist, as a going system, without a carburetor. . . Most writers list religion among the functional prerequisites.[263]

Another noted sociologist, Talcott Parsons, wrote: "There is no known human society without something which modern social scientists would classify as a religion…Religion is as much a human universal as language."[264]

Benevolent neutrality thus recognizes that religion plays an important role in the public life of the United States as shown by many traditional government practices which, to **strict neutrality**, pose Establishment Clause questions. Among these are the inscription of "In God We Trust" on American currency, the recognition of America as "one nation under God" in the official pledge of allegiance to the flag, the Supreme Court's time-honored practice of opening oral argument with the invocation "God save the United States and this honorable Court," and the practice of Congress and every state legislature of paying a chaplain, usually of a particular Protestant denomination to lead representatives in prayer.[265] These practices clearly show the preference for one theological viewpoint -the existence of and potential for intervention by a god - over the contrary theological viewpoint of atheism. Church and government agencies also cooperate in the building of low-cost housing and in other forms of poor relief, in the treatment of alcoholism and drug addiction, in foreign aid and other government activities with strong moral dimension.[266] The persistence of these *de facto* establishments are in large part explained by the fact that throughout history, the evangelical theory of separation, i.e., Williams' wall, has demanded respect for these *de facto* establishments.[267] But the separationists have a different explanation. To characterize these as *de jure* establishments according to the principle of the Jeffersonian wall, the U.S. Supreme Court, the many dissenting and concurring opinions explain some of these practices as "'*de minimis*' instances of government endorsement or as historic governmental practices that have largely lost their religious significance or at least have proven not to lead the government into further involvement with religion.[268]

With religion looked upon with benevolence and not hostility, **benevolent neutrality** allows **accommodation** of religion under certain circumstances. Accommodations are government policies that take religion specifically into account not to promote the government's favored form of religion, but to **allow individuals and groups to exercise their religion without hindrance.** Their purpose or effect therefore is to remove a burden on, or facilitate the exercise of, a person's or institution's religion. As Justice Brennan explained, the "government [may] take religion into account…**to exempt, when possible, from generally applicable governmental regulation** individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish."[269] (*emphasis supplied*) Accommodation is forbearance and not alliance. it does not reflect *agreement* with the minority, but *respect* for the conflict between the temporal and spiritual authority in which the minority finds itself.[270]

Accommodation is distinguished from strict neutrality in that the latter holds that government should base public policy solely on secular considerations, without regard to the religious consequences of its actions. The debate between accommodation and strict neutrality is at base a question of means: "Is the freedom of religion best achieved when the government is conscious of the effects of its action on the various religious practices of its people, and seeks to minimize interferences with those practices? Or is it best advanced through a policy of 'religious blindness' - keeping government aloof from religious practices and issues?" An accommodationist holds that it is good public policy, and sometimes constitutionally required, for the state to make conscious and deliberate efforts to avoid interference with religious freedom. On the other hand, the strict neutrality adherent believes that it is good public policy, and also constitutionally required, for the government to avoid religion-specific policy even at the cost of inhibiting religious exercise.[271]

There are strong and compelling reasons, however, to take the **accommodationist** position rather than the strict neutrality position. **First, the accommodationist interpretation is most consistent with the language of the First Amendment.** The religion clauses contain two parallel provisions, both specifically directed at "religion." The government may not "establish" religion and neither may government "prohibit" it. Taken together, the religion clauses can be read most plausibly as warding off two equal and opposite threats to religious freedom - government action that promotes the (political) majority's favored brand of religion and government action that impedes religious practices not favored by the majority. The**substantive end** in view is the preservation of the autonomy of religious life and not just the **formal process value** of ensuring that government does not act on the basis of religious bias. On the other hand, strict neutrality interprets the religion clauses as allowing government to do whatever it desires to or for religion, as long as it does the same to or for comparable secular entities. Thus, for example, if government prohibits all alcoholic consumption by minors, it can prohibit minors from taking part in communion. Paradoxically, this view would make the religion clauses violate the religion clauses, so to speak, since the religion clauses single out religion by name for special protection. **Second, the accommodationist position best achieves the purposes of the First Amendment.** The principle underlying the First Amendment is that **freedom to carry out one's duties to a Supreme Being is an inalienable right, not one dependent on the grace of legislature.** Although inalienable, it is necessarily limited by the rights of others, including the public right of peace and good order. Nevertheless it is a substantive right and not merely a privilege against discriminatory legislation. The accomplishment of the purpose of the First Amendment requires more than the "religion blindness" of strict neutrality. With the pervasiveness of government regulation, conflicts with religious practices become frequent and intense. Laws that are suitable for secular entities are sometimes inappropriate for religious entities, thus the government must make special provisions to preserve a degree of independence for religious entities for them to carry out

their religious missions according to their religious beliefs. Otherwise, religion will become just like other secular entities subject to pervasive regulation by majoritarian institutions. **Third, the accommodationist interpretation is particularly necessary to protect adherents of minority religions from the inevitable effects of majoritarianism,** which include ignorance and indifference and overt hostility to the minority. In a democratic republic, laws are inevitably based on the presuppositions of the majority, thus not infrequently, they come into conflict with the religious scruples of those holding different world views, even in the absence of a deliberate intent to interfere with religious practice. At times, this effect is unavoidable as a practical matter because some laws are so necessary to the common good that exceptions are intolerable. But in other instances, the injury to religious conscience is so great and the advancement of public purposes so small or incomparable that only indifference or hostility could explain a refusal to make exemptions. Because of plural traditions, legislators and executive officials are frequently willing to make such exemptions when the need is brought to their attention, but this may not always be the case when the religious practice is either unknown at the time of enactment or is for some reason unpopular. **In these cases, a constitutional interpretation that *allows* accommodations prevents needless injury to the religious consciences of those who can have an influence in the legislature; while a constitutional interpretation that *requires* accommodations extends this treatment to religious faiths that are less able to protect themselves in the political arena. Fourth,** the accommodationist position is practical as it is a commonsensical way to deal with the various needs and beliefs of different faiths in a pluralistic nation. Without accommodation, many otherwise beneficial laws would interfere severely with religious freedom. Aside from laws against serving alcoholic beverages to minors conflicting with celebration of communion, regulations requiring hard hats in construction areas can effectively exclude Amish and Sikhs from the workplace, or employment anti-discrimination laws can conflict with the Roman Catholic male priesthood, among others. Exemptions from such laws are easy to craft and administer and contribute much to promoting religious freedom at little cost to public policy. **Without exemptions, legislature would be frequently forced to choose between violating religious conscience of a segment of the population or dispensing with legislation it considers beneficial to society as a whole. Exemption seems manifestly more reasonable than either of the alternative: no exemption or no law.**[272]

Benevolent neutrality gives room for different kinds of **accommodation:** those which are constitutionally compelled, i.e., required by the Free Exercise Clause; and those which are discretionary or legislative, i.e., and those not required by the Free Exercise Clause but nonetheless permitted by the Establishment Clause.[273] Some Justices of the Supreme Court have also used the term **accommodation** to describe government actions that acknowledge or express prevailing religious sentiments of the community such as display of a religious symbol on public property or the delivery of a prayer at public ceremonial events.[274] Stated otherwise, using **benevolent neutrality** as a

standard could result to three situations of **accommodation:**those where **accommodation** is *required*, those where it is *permissible*, and those where it is *prohibited*. In the first situation, accommodation is *required* to preserve free exercise protections and not unconstitutionally infringe on religious liberty or create penalties for religious freedom. Contrary to the **Smith** declaration that free exercise exemptions are "intentional government advancement", these exemptions merely relieve the prohibition on the free exercise thus allowing the burdened religious adherent to be left alone. The state must create exceptions to laws of general applicability when these laws threaten religious convictions or practices in the absence of a compelling state interest.[275] By allowing such exemptions, the Free Exercise Clause does not give believers the right or privilege to choose for themselves to override socially-prescribed decision; it allows them to obey spiritual rather than temporal authority[276] for those who seriously invoke the Free Exercise Clause claim to be fulfilling a solemn duty. Religious freedom is a matter less of rights than duties; more precisely, it is a matter of rights derived from duties. To deny a person or a community the right to act upon such a duty can be justified only by appeal to a yet more compelling duty. Of course, those denied will usually not find the reason for the denial compelling. "Because they may turn out to be right about the duty in question, and because, even if they are wrong, religion bears witness to that which transcends the political order, such denials should be rare and painfully reluctant."[277]

The **Yoder case** is an example where the Court held that the state must accommodate the religious beliefs of the Amish who objected to enrolling their children in high school as required by law. The **Sherbert case** is another example where the Court held that the state unemployment compensation plan must accommodate the religious convictions of Sherbert.[278]In these cases of "burdensome effect", the modern approach of the Court has been to apply strict scrutiny, i.e., to declare the burden as permissible, the Court requires the state to demonstrate that the regulation which burdens the religious exercise pursues a particularly important or compelling government goal through the least restrictive means. If the state's objective could be served as well or almost as well by granting an exemption to those whose religious beliefs are burdened by the regulation, such an exemption must be given.[279] This approach of the Court on "burdensome effect" was only applied since the 1960s. Prior to this time, the Court took the separationist view that as long as the state was acting in pursuit of non-religious ends and regulating conduct rather than pure religious beliefs, the Free Exercise Clause did not pose a hindrance such as in **Reynolds**.[280] In the second situation where accommodation is *permissible*, the state may, but is not required to, accommodate religious interests. The **Walz case** illustrates this situation where the Court upheld the constitutionality of tax exemption given by New York to church properties, but did not rule that the state was required to provide tax exemptions. The Court declared that "(t)he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause."[281] The Court held that New York could have an interest in encouraging religious values and avoiding

threats to those values through the burden of property taxes. Other examples are the **Zorach case** allowing released time in public schools and**Marsh** allowing payment of legislative chaplains from public funds. Finally, in the situation where accommodation is *prohibited*, establishment concerns prevail over potential accommodation interests. To say that there are valid exemptions buttressed by the Free Exercise Clause does not mean that all claims for free exercise exemptions are valid.[282] An example where accommodation was prohibited is **McCollum** where the Court ruled against optional religious instruction in the public school premises.[283] In effect, the last situation would arrive at a strict neutrality conclusion.

In the first situation where accommodation is *required*, the approach follows this basic framework:

> If the plaintiff can show that a law or government practice inhibits the free exercise of his religious beliefs, the burden shifts to the government to demonstrate that the law or practice is necessary to the accomplishment of some important (or 'compelling') secular objective and that it is the least restrictive means of achieving that objective. If the plaintiff meets this burden and the government does not, the plaintiff is entitled to exemption from the law or practice at issue. In order to be protected, the claimant's beliefs must be 'sincere', but they need not necessarily be consistent, coherent, clearly articulated, or congruent with those of the claimant's religious denomination. 'Only beliefs rooted in religion are protected by the Free Exercise Clause'; secular beliefs, however sincere and conscientious, do not suffice.[284]

In other words, a **three-step process (also referred to as the "two-step balancing process" *supra* when the second and third steps are combined)** as in **Sherbert** is followed in weighing the state's interest and religious freedom when these collide. Three questions are answered in this process. **First**, "(h)as the statute or government action created a burden on the free exercise of religion?" The courts often look into the **sincerity** of the religious belief, but without inquiring into the truth of the belief because the Free Exercise Clause prohibits inquiring about its truth as held in **Ballard** and **Cantwell**. The sincerity of the claimant's belief is ascertained to avoid the mere claim of religious beliefs to escape a mandatory regulation. As evidence of sincerity, the U.S. Supreme Court has considered historical evidence as in **Wisconsin** where the Amish people had held a long-standing objection to enrolling their children in ninth and tenth grades in public high schools. In another case**, Dobkin v. District of Columbia,**[285] the Court denied the claim of a party who refused to appear in court on Saturday alleging he was a Sabbatarian, but the Court noted that he regularly conducted business on Saturday. Although it is true that the Court might erroneously deny some claims because of a misjudgment of sincerity, this is not as argument to reject all claims by not allowing

accommodation as a rule. There might be injury to the particular claimant or to his religious community, but for the most part, the injustice is done only in the particular case.[286] Aside from the sincerity, the court may look into the centrality of those beliefs, assessing them not on an objective basis but in terms of the opinion and belief of the person seeking exemption. In Wisconsin, for example, the Court noted that the Amish people's convictions against becoming involved in public high schools were central to their way of life and faith. Similarly, in Sherbert, the Court concluded that the prohibition against Saturday work was a "cardinal principle."[287] Professor Lupu puts to task the person claiming exemption, *viz*:

> On the claimant's side, the meaning and significance of the relevant religious practice must be demonstrated. Religious command should outweigh custom, individual conscience should count for more than personal convenience, and theological principle should be of greater significance than institutional ease. Sincerity matters, (footnote omitted) and longevity of practice - both by the individual and within the individual's religious tradition - reinforces sincerity. Most importantly, the law of free exercise must be inclusive and expansive, recognizing non-Christian religions - eastern, Western, aboriginal and otherwise - as constitutionally equal to their Christian counterparts, and accepting of the intensity and scope of fundamentalist creed.[288]

Second, the court asks: "(i)s there a sufficiently compelling state interest to justify this infringement of religious liberty?" In this step, **the government has to establish that its purposes are legitimate for the state and that they are compelling.** Government must do more than assert the objectives at risk if exemption is given; it must precisely show how and to what extent those objectives will be undermined if exemptions are granted.[289] The person claiming religious freedom, on the other hand, will endeavor to show that the interest is not legitimate or that the purpose, although legitimate, is not compelling compared to infringement of religious liberty. This **step involves balancing**, i.e., weighing the interest of the state against religious liberty to determine which is more compelling under the particular set of facts. The greater the state's interests, the more central the religious belief would have to be to overcome it. In assessing the state interest, the court will have to determine the importance of the secular interest and the extent to which that interest will be impaired by an exemption for the religious practice. Should the court find the interest truly compelling, there will be no requirement that the state diminish the effectiveness of its regulation by granting the exemption.[290]

Third, the court asks: "(h)as the state in achieving its legitimate purposes used the least intrusive means possible so that the free exercise is not infringed any more than necessary to achieve the legitimate goal of the state?"[291] The analysis requires the state to show that the means in which it is achieving its legitimate state objective is the **least intrusive means,** i.e., it has chosen a way

to achieve its legitimate state end that imposes as little as possible on religious liberties. In **Cantwell**, for example, the Court invalidated the license requirement for the door-to-door solicitation as it was a forbidden burden on religious liberty, noting that less drastic means of insuring peace and tranquility existed. As a whole, in carrying out the **compelling state interest test**, the Court should give careful attention to context, both religious and regulatory, to achieve refined judgment.[292]

In sum, as shown by U.S. jurisprudence on religion clause cases, the competing values of secular government and religious freedom create tensions that make constitutional law on the subject of religious liberty unsettled, mirroring the evolving views of a dynamic society.[293]

VII. Religion Clauses in the Philippines

A. History

Before our country fell under American rule, the blanket of Catholicism covered the archipelago. There was a union of church and state and Catholicism was the state religion under the**Spanish Constitution of 1876**. Civil authorities exercised religious functions and the friars exercised civil powers.[294] Catholics alone enjoyed the right of engaging in public ceremonies of worship.[295] Although the Spanish Constitution itself was not extended to the Philippines, Catholicism was also the established church in our country under the Spanish rule. Catholicism was in fact protected by the Spanish Penal Code of 1884 which was in effect in the Philippines. Some of the offenses in chapter six of the Penal Code entitled “Crimes against Religion and Worship” referred to crimes against the state religion.[296] The coming of the Americans to our country, however, changed this state-church scheme for with the advent of this regime, the unique American experiment of “separation of church and state” was transported to Philippine soil.

Even as early as the conclusion of the **Treaty of Paris** between the United States and Spain on December 10, 1898, the American guarantee of religious freedom had been extended to the Philippines. The Treaty provided that “the inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of religion.”[297]Even the Filipinos themselves guaranteed religious freedom a month later or on January 22, 1899 upon the adoption of the **Malolos Constitution** of the Philippine Republic under General Emilio Aguinaldo. It provided that “the State recognizes the liberty and equality of all religion (*de todos los cultos*) in the same manner as the separation of the Church and State.” But the Malolos Constitution and government was short-lived as the Americans took over the reigns of government.[298]

With the Philippines under the American regime, President McKinley issued *Instructions* to the Second Philippine Commission, the body created to

take over the civil government in the Philippines in 1900. The *Instructions* guaranteed religious freedom, *viz*:

> That no law shall be made respecting the 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 ... that no form of religion and no minister of religion shall be forced upon the community or upon any citizen of the Islands, that, on the other hand, no minister of religion shall be interfered with or molested in following his calling.[299]

This provision was based on the First Amendment of the United States Constitution. Likewise, the *Instructions* declared that "(t)he separation between State and Church shall be real, entire and absolute."[300]

Thereafter, every organic act of the Philippines contained a provision on freedom of religion. Similar to the religious freedom clause in the *Instructions*, the Philippine Bill of 1902 provided that:

> No law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that free exercise and enjoyment of religious worship, without discrimination or preference, shall forever be allowed.

In **U.S. v. Balcorta,**[301] the Court stated that the Philippine Bill of 1902 "caused the complete separation of church and state, and the abolition of all special privileges and all restrictions theretofor conferred or imposed upon any particular religious sect."[302]

The **Jones Law of 1916** carried the same provision, but expanded it with a restriction against using public money or property for religious purposes, *viz*:

> 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 teachers or dignitary as such.

This was followed by the **Philippine Independence Law or Tydings-McDuffie Law of 1934** which guaranteed independence to the Philippines and authorized

the drafting of a Philippine constitution. It enjoined Filipinos to include freedom of religion in drafting their constitution preparatory to the grant of independence. The law prescribed that "(a)bsolute toleration of religious sentiment shall be secured and no inhabitant or religious organization shall be molested in person or property on account of religious belief or mode of worship."[303]

The Constitutional Convention then began working on the **1935 Constitution**. In their proceedings, Delegate Jose P. Laurel as Chairman of the Committee on Bill of Rights acknowledged that "(i)t was the Treaty of Paris of December 10, 1898, which first introduced religious toleration in our country. President McKinley's *Instructions* to the Second Philippine Commission reasserted this right which later was incorporated into the Philippine Bill of 1902 and in the Jones Law."[304] In accordance with the Tydings-McDuffie Law, the 1935 Constitution provided in the Bill of Rights, Article IV, Section 7, *viz*:

> Sec. 7. 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.

This provision, borrowed from the Jones Law, was readily approved by the Convention.[305] In his speech as Chairman of the Committee on Bill of Rights, Delegate Laurel said that modifications in phraseology of the Bill of Rights in the Jones Law were avoided whenever possible because "the principles must remain couched in a language expressive of their historical background, nature, extent and limitations as construed and interpreted by the great statesmen and jurists that vitalized them."[306]

The **1973 Constitution** which superseded the 1935 Constitution contained an almost identical provision on religious freedom in the Bill of Rights in Article IV, Section 8, *viz*:

> Sec. 8. 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.

This time, however, the General Provisions in Article XV added in Section 15 that "(t)he separation of church and state shall be inviolable."

Without discussion by the 1986 Constitutional Commission, the 1973 religious clauses were reproduced in the **1987 Constitution** under the Bill of Rights in Article III, Section 5.[307] Likewise, the provision on separation of church and state was included verbatim in the 1987 Constitution, but this time as a

principle in Section 6, Article II entitled Declaration of Principles and State Policies.

Considering the American origin of the Philippine religion clauses and the intent to adopt the historical background, nature, extent and limitations of the First Amendment of the U.S. Constitution when it was included in the 1935 Bill of Rights, it is not surprising that nearly all the major Philippine cases involving the religion clauses turn to U.S. jurisprudence in explaining the nature, extent and limitations of these clauses. However, a close scrutiny of these cases would also reveal that while U.S. jurisprudence on religion clauses flows into two main streams of interpretation - **separation and benevolent neutrality - the well-spring of Philippine jurisprudence on this subject is for the most part, benevolent neutrality which gives room for accommodation.**

B. Jurisprudence

In revisiting the landscape of Philippine jurisprudence on the religion clauses, **we begin with the definition of "religion".** "Religion" is derived from the Middle English *religioun*, from Old French *religion*, from Latin *religio*, vaguely referring to a "bond between man and the gods."[308] This pre-Christian term for the cult and rituals of pagan Rome was first Christianized in the Latin translation of the Bible.[309] While the U.S. Supreme Court has had to take up the challenge of defining the parameters and contours of "religion" to determine whether a non-theistic belief or act is covered by the religion clauses, this Court has not been confronted with the same issue. In Philippine jurisprudence, religion, for purposes of the religion clauses, has thus far been interpreted as theistic. In 1937, the Philippine case of **Aglipay v. Ruiz**[310] involving the Establishment Clause, defined "religion" as a "profession of faith to an active power that binds and elevates man to his Creator." Twenty years later, the Court cited the **Aglipay** definition in **American Bible Society v. City of Manila,**[311] a case involving the Free Exercise clause. The latter also cited the American case of Davis in defining religion, *viz*: "(i)t has reference to one's views of his relations to His Creator and to the obligations they impose of reverence to His being and character and obedience to His Will." The **Beason** definition, however, has been expanded in U.S. jurisprudence to include non-theistic beliefs.

1. Free Exercise Clause

Freedom of choice guarantees the liberty of the religious conscience and prohibits any degree of compulsion or burden, whether direct or indirect, in the practice of one's religion. The Free Exercise Clause principally guarantees voluntarism, although the Establishment Clause also assures voluntarism by placing the burden of the advancement of religious groups on their intrinsic merits and not on the support of the state.[312]

In interpreting the Free Exercise Clause, the **realm of belief** poses no difficulty. The early case of **Gerona v. Secretary of Education**[313] is instructive on the matter, *viz*:

> **The realm of belief and creed is infinite and limitless bounded only by one's imagination and thought. So is the freedom of belief, including religious belief, limitless and without bounds.** One may believe in most anything, however strange, bizarre and unreasonable the same may appear to others, even heretical when weighed in the scales of orthodoxy or doctrinal standards. But between the freedom of belief and the exercise of said belief, there is quite a stretch of road to travel.[314]

The **difficulty** in interpretation sets in when belief is externalized into speech and action.

Religious speech comes within the pale of the Free Exercise Clause as illustrated in the **American Bible Society case.** In that case, plaintiff American Bible Society was a foreign, non-stock, non-profit, religious missionary corporation which sold bibles and gospel portions of the bible in the course of its ministry. The defendant City of Manila required plaintiff to secure a mayor's permit and a municipal license as ordinarily required of those engaged in the business of general merchandise under the city's ordinances. Plaintiff argued that this amounted to "religious censorship and restrained the free exercise and enjoyment of religious profession, to wit: the distribution and sale of bibles and other religious literature to the people of the Philippines."

After defining religion, the Court, citing Tanada and Fernando, made this statement, *viz*:

> 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 restraints of freedom of expression** on the grounds that there is a **clear and present danger of any substantive evil which the State has the right to prevent.** (Tanada and Fernando on the Constitution of the Philippines, vol. 1, 4th ed., p. 297) (*emphasis supplied*)

This was the Court's maiden unequivocal affirmation of the "clear and present danger" rule in the religious freedom area, and in Philippine jurisprudence, for that matter.[315] The case did not clearly show, however, whether the Court proceeded to apply the test to the facts and issues of the case, i.e., it did not identify the secular value the government regulation sought to protect, whether the religious speech posed a clear and present danger to this or

other secular value protected by government, or whether there was danger but it could not be characterized as clear and present. It is one thing to apply the test and find that there is no clear and present danger, and quite another not to apply the test altogether.

Instead, the Court categorically held that the questioned ordinances were not applicable to plaintiff as it was not engaged in the business or occupation of selling said "merchandise" for profit. To add, the Court, citing **Murdock v. Pennsylvania,**[316] ruled that applying the ordinance requiring it to secure a license and pay a license fee or tax would impair its free exercise of religious profession and worship and its right of dissemination of religious beliefs "as the power to tax the exercise of a privilege is the power to control or suppress its enjoyment." Thus, in **American Bible Society**, the "clear and present danger" rule was laid down but it was not clearly applied.

In the much later case of **Tolentino v. Secretary of Finance,**[317] also involving the sale of religious books, the Court distinguished the **American Bible Society case** from the facts and issues in **Tolentino** and did not apply the **American Bible Society ruling**. In **Tolentino**, the Philippine Bible Society challenged the validity of the registration provisions of the Value Added Tax (VAT) Law as a prior restraint. The Court held, however, that the fixed amount of registration fee was not imposed for the exercise of a privilege like a license tax which**American Bible Society** ruled was violative of religious freedom. Rather, the registration fee was merely an administrative fee to defray part of the cost of registration which was a central feature of the VAT system. Citing **Jimmy Swaggart Ministries v. Board of Equalization,**[318] the Court also declared prefatorily that "the Free Exercise of Religion Clause does not prohibit imposing a generally applicable sales and use tax on the sale of religious materials by a religious organization." In the Court's resolution of the motion for reconsideration of the**Tolentino decision,** the Court noted that the burden on religious freedom caused by the tax was just similar to any other economic imposition that might make the right to disseminate religious doctrines costly.

Two years after **American Bible Society** came the 1959 case **of Gerona v. Secretary of Education,**[319] this time involving **conduct** expressive of religious belief colliding with a rule prescribed in accordance with law. In this case, petitioners were members of the Jehovah's Witnesses. They challenged a Department Order issued by the Secretary of Education implementing Republic Act No. 1265 which prescribed compulsory flag ceremonies in all public schools. In violation of the Order, petitioner's children refused to salute the Philippine flag, sing the national anthem, or recite the patriotic pledge, hence they were expelled from school. Seeking protection under the Free Exercise Clause, petitioners claimed that their refusal was on account of their religious belief that the Philippine flag is an image and saluting the same is contrary to their religious belief. The Court stated, *viz*:

> . . . If the exercise of religious belief clashes with the established institutions of society and with the law, then the former must yield to the

latter. The Government steps in and either restrains said exercise or even prosecutes the one exercising it. (*emphasis supplied*)[320]

The Court then proceeded to determine if the acts involved constituted a religious ceremony in conflict with the beliefs of the petitioners with the following justification:

After all, the determination of whether a certain ritual is or is not a religious ceremony must rest with the courts. It cannot be left to a religious group or sect, much less to a follower of said group or sect; otherwise, there would be confusion and misunderstanding for there might be as many interpretations and meaning to be given to a certain ritual or ceremony as there are religious groups or sects or followers, all depending upon the meaning which they, though in all sincerity and good faith, may want to give to such ritual or ceremony.[321]

It was held that the flag was not an image, the flag salute was not a religious ceremony, and there was nothing objectionable about the singing of the national anthem as it speaks only of love of country, patriotism, liberty and the glory of suffering and dying for it. The Court upheld the questioned Order and the expulsion of petitioner's children, stressing that:

Men may differ and do differ on religious beliefs and creeds, government policies, the wisdom and legality of laws, even the correctness of judicial decisions and decrees; but in the field of love of country, reverence for the flag, national unity and patriotism, they can hardly afford to differ, for these are matters in which they are mutually and vitally interested, for to them, they mean national existence and survival as a nation or national extinction.[322]

In support of its ruling, the Court cited Justice Frankfurter's dissent in the **Barnette case,** *viz*:

The constitutional protection of religious freedom x x x gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.[323]

It stated in categorical terms, *viz*:

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.[324]

Thus, the religious freedom doctrines one can derive from **Gerona** are: (1) it is incumbent upon the Court to determine whether a certain ritual is religious or not; (2) **religious freedom will not be upheld if it clashes with the established institutions of society and with the law such that when a law of general applicability (in this case the Department Order) incidentally burdens the exercise of one's religion, one's right to religious freedom cannot justify exemption from compliance with the law.** The **Gerona ruling** was reiterated in **Balbuna, et al. v. Secretary of Education, et al.**[325]

Fifteen years after **Gerona** came the 1974 case **of Victoriano v. Elizalde Rope Workers Union.**[326] In this unanimously decided *en banc* case, Victoriano was a member of the Iglesia ni Cristo which prohibits the affiliation of its members with any labor organization. He worked in the Elizalde Rope Factory, Inc. and was a member of the Elizalde Rope Workers Union which had with the company a closed shop provision pursuant to Republic Act No. 875 allowing closed shop arrangements. Subsequently, Republic Act No. 3350 was enacted exempting from the application and coverage of a closed shop agreement employees belonging to any religious sect which prohibits affiliation of their members with any labor organization. Victoriano resigned from the union after Republic Act No. 3350 took effect. The union notified the company of Victoriano's resignation, which in turn notified Victoriano that unless he could make a satisfactory arrangement with the union, the company would be constrained to dismiss him from the service. Victoriano sought to enjoin the company and the union from dismissing him. The court having granted the injunction, the union came to this Court on questions of law, among which was whether Republic Act No. 3350 was unconstitutional for impairing the obligation of contracts and for granting an exemption offensive of the Establishment Clause. With respect to the first issue, the Court ruled, *viz*:

> Religious freedom, although not unlimited, is a fundamental personal right and liberty (Schneider v. Irgington, 308 U.S. 147, 161, 84 L.ed.155, 164, 60 S.Ct. 146) and has a preferred position in the hierarchy of values. Contractual rights, therefore, must yield to freedom of religion. **It is only where unavoidably necessary to prevent an immediate and grave danger to the security and welfare of the community that infringement of religious freedom may be justified, and only to the smallest extent necessary.**[327] (*emphasis supplied*)

As regards the Establishment Clause issue, the Court after citing the constitutional provision on establishment and free exercise of religion, declared, *viz*:

The constitutional provisions not only prohibits legislation for the support of any religious tenets or the modes of worship of any sect, thus forestalling compulsion by law of the acceptance of any creed or the practice of any form of worship (U.S. Ballard, 322 U.S. 78, 88 L. ed. 1148, 1153), but also assures the free exercise of one's chosen form of religion within limits of utmost amplitude. **It has been said that the religion clauses of the Constitution are all designed to protect the broadest possible liberty of conscience, to allow each man to believe as his conscience directs, to profess his beliefs, and to live as he believes he ought to live, consistent with the liberty of others and with the common good.** (footnote omitted). **Any legislation whose effect or purpose is to impede the observance of one or all religions, or to discriminate invidiously between the religions, is invalid, even though the burden may be characterized as being only indirect. (Sherbert v. Verner, 374 U.S. 398, 10 L.ed.2d 965, 83 S. Ct. 1970) But if the state regulates conduct by enacting, within its power, a general law which has for its purpose and effect to advance the state's secular goals, the statute is valid despite its indirect burden on religious observance, unless the state can accomplish its purpose without imposing such burden. (Braunfeld v. Brown, 366 U.S. 599, 6 L ed. 2d. 563, 81 S. Ct. 144; McGowan v. Maryland, 366 U.S. 420, 444-5 and 449)**[328] (*emphasis supplied*)

Quoting **Aglipay v. Ruiz,**[329] the Court held that "government is not precluded from pursuing valid objectives secular in character even if the incidental result would be favorable to a religion or sect." It also cited **Board of Education v. Allen,**[330] which held that in order to withstand the strictures of constitutional prohibition, a statute must have a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Using these criteria in upholding Republic Act No. 3350, the Court pointed out, *viz*:

(Republic Act No. 3350) was intended to serve the secular purpose of advancing the constitutional right to the free exercise of religion, by averting that certain persons be refused work, or be dismissed from work, or be dispossessed of their right to work and of being impeded to pursue a modest means of livelihood, by reason of union security agreements. . . . The primary effects of the exemption from closed shop agreements in favor of members of religious sects that prohibit their members from affiliating with a labor organization, is the protection of said employees against the aggregate force of the collective bargaining agreement, and relieving certain citizens of a burden on their religious

beliefs, and . . . eliminating to a certain extent economic insecurity due to unemployment.[331]

The Court stressed that "(a)lthough the exemption may benefit those who are members of religious sects that prohibit their members from joining labor unions, the benefit upon the religious sects is merely incidental and indirect."[332] **In enacting Republic Act No. 3350, Congress merely relieved the exercise of religion by certain persons of a burden imposed by union security agreements which Congress itself also imposed through the Industrial Peace Act.** The Court concluded the issue of exemption by citing **Sherbert** which laid down the rule that when general laws conflict with scruples of conscience, exemptions ought to be granted unless some "compelling state interest" intervenes. The Court then abruptly added that "(i)n the instant case, We see no compelling state interest to withhold exemption."[333]

A close look at **Victoriano** would show that the Court mentioned several tests in determining when religious freedom may be validly limited. **First,** the Court mentioned the test of "immediate and grave danger to the security and welfare of the community" and "infringement of religious freedom only to the smallest extent necessary" to justify limitation of religious freedom. **Second,** religious exercise may be indirectly burdened by a general law which has for its purpose and effect the advancement of the state's secular goals, provided that there is no other means by which the state can accomplish this purpose without imposing such burden. **Third,** the Court referred to the "compelling state interest" test which grants exemptions when general laws conflict with religious exercise, unless a compelling state interest intervenes.

It is worth noting, however, that the first two tests were mentioned only for the purpose of highlighting the importance of the protection of religious freedom as the secular purpose of Republic Act No. 3350. Upholding religious freedom was a secular purpose insofar as it relieved the burden on religious freedom caused by another law, i.e, the Industrial Peace Act providing for union shop agreements. The first two tests were only mentioned in **Victoriano** but were not applied by the Court to the facts and issues of the case. The third, the "compelling state interest" test was employed by the Court to determine whether the exemption provided by Republic Act No. 3350 was not unconstitutional. It upheld the exemption, stating that there was no "compelling state interest" to strike it down. However, after careful consideration of the **Sherbert case** from which **Victoriano** borrowed this test, the inevitable conclusion is that the "compelling state interest" test was not appropriate and could not find application in the **Victoriano case.** In **Sherbert,** appellant Sherbert invoked religious freedom in seeking exemption from the provisions of the South Carolina Unemployment Compensation Act which disqualified her from claiming unemployment benefits. It was the appellees, members of the South Carolina Employment Commission, a government agency, who propounded the state interest to justify overriding Sherbert's claim of religious freedom. The U.S. Supreme Court, considering Sherbert's and the Commission's arguments, found

that the state interest was not sufficiently compelling to prevail over Sherbert's free exercise claim. This situation did not obtain in the **Victoriano case** where it was the government itself, through Congress, which provided the exemption in Republic Act No. 3350 to allow Victoriano's exercise of religion. Thus, the government could not argue against the exemption on the basis of a compelling state interest as it would be arguing against itself; while Victoriano would not seek exemption from the questioned law to allow the free exercose of religion as the law in fact provides such an exemption. In sum, although **Victoriano** involved a religious belief and conduct, it did not involve a free exercise issue where the Free Exercise Clause is invoked to exempt him from the burden imposed by a law on his religious freedom.

Victoriano was reiterated in several cases involving the Iglesia ni Cristo, namely **Basa, et al. v. Federacion Obrera de la Industria Tabaquera y Otros Trabajadores de Filipinas**,[334] **Anucension v. National Labor Union, et al.**,[335] and **Gonzales, et al. v. Central Azucarera de Tarlac Labor Union**.[336]

Then came **German v. Barangan** in 1985 at the height of the anti-administration rallies. Petitioners were walking to St. Jude Church within the Malacanang security area to pray for "an end to violence" when they were barred by the police. Invoking their constitutional freedom of religious worship and locomotion, they came to the Court on a petition for mandamus to allow them to enter and pray inside the St. Jude Chapel. The Court was divided on the issue. The slim majority of six recognized their freedom of religion but noted their absence of good faith and concluded that they were using their religious liberty to express their opposition to the government. Citing **Cantwell**, the Court distinguished between freedom to believe and freedom to act on matters of religion, *viz*:

> . . . Thus the (First) amendment embraces two concepts - freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be.[337]

The Court reiterated the **Gerona ruling**, *viz*:

> In the case at bar, petitioners are not denied or restrained of their freedom of belief or choice of their religion, but only **in the manner by which they had attempted to translate the same to action.** This curtailment is in accord with the pronouncement of this Court in Gerona v. Secretary of Education (106 Phil. 2), thus:
>
> . . . But between the freedom of belief and the exercise of said belief, there is quite a stretch of road to travel. *If the exercise of said religious belief clashes with the established institutions of society* and with the law, then the former must yield and give way to the latter. The

government steps in and either restrains said exercise or even prosecutes the one exercising it. (*italics supplied*)

The majority found that the restriction imposed upon petitioners was "necessary to maintain the smooth functioning of the executive branch of the government, which petitioners' mass action would certainly disrupt"[338] and denied the petition. Thus, without considering the tests mentioned in **Victoriano, German went back to the Gerona rule that religious freedom will not be upheld if it clashes with the established institutions of society and the law.**

Then Associate Justice Teehankee registered a dissent which in subsequent jurisprudence would be cited as a test in religious freedom cases. His dissent stated in relevant part, *viz*:

A brief restatement of the applicable constitutional principles as set forth in the landmark case of **J.B.L. Reyes v. Bagatsing** (125 SCRA 553[1983]) should guide us in resolving the issues.

1. The right to freely exercise one's religion is guaranteed in Section 8 of our Bill of Rights. (footnote omitted) **Freedom of worship, alongside with freedom of expression and speech and peaceable assembly "along with the other intellectual freedoms, are highly ranked in our scheme of constitutional values.** It cannot be too strongly stressed that on the judiciary - even more so than on the other departments - rests the grave and delicate responsibility of assuring respect for and deference to such preferred rights. No verbal formula, no sanctifying phrase can, of course, dispense with what has been so felicitously termed by Justice Holmes 'as the sovereign prerogative of judgment.' **Nonetheless, the presumption must be to incline the weight of the scales of justice on the side of such rights, enjoying as they do precedence and primacy.'** (J.B.L. Reyes, 125 SCRA at pp. 569-570)

2. In the free exercise of such preferred rights, there is to be no prior restraint although there may be subsequent punishment of any illegal acts committed during the exercise of such basic rights. **The sole justification for a prior restraint or limitation on the exercise of these basic rights 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 (and duty) to prevent** (Idem, at pp. 560-561).[339] (*emphasis supplied*)

The **J.B.L. Reyes v. Bagatsing case** from which this portion of Justice Teehankee's dissent was taken involved the rights to free speech and assembly, and not the exercise of religious freedom. At issue in that case was a permit sought by retired Justice J.B.L. Reyes, on behalf of the Anti-Bases Coalition, from the City of Manila to hold a peaceful march and rally from the Luneta to the gates of the U.S. Embassy. Nevertheless **Bagatsing** was used by Justice Teehankee in his dissent which had overtones of petitioner German and his companions' right to assemble and petition the government for redress of grievances.[340]

In 1993, the issue on the Jehovah's Witnesses' participation in the flag ceremony again came before the Court in **Ebralinag v. The Division Superintendent of Schools.**[341] A unanimous Court overturned the Gerona ruling after three decades. Similar to **Gerona**, this case involved several Jehovah's Witnesses who were expelled from school for refusing to salute the flag, sing the national anthem and recite the patriotic pledge, in violation of the Administrative Code of 1987. In resolving the same religious freedom issue as in **Gerona**, the Court this time transported the "grave and imminent danger" test laid down in Justice Teehankee's dissent in **German**, *viz*:

> The sole justification for a **prior restraint or limitation** on the exercise of religious freedom (according to the late Chief Justice Claudio Teehankee in his dissenting opinion in German v. Barangan, 135 SCRA 514, 517) 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 (and duty) to prevent. Absent such a threat to public safety, the expulsion of the petitioners from the schools is not justified.[342] (*emphasis supplied*)

The Court added, *viz*:

> We are not persuaded that by exempting the Jehovah's Witnesses from saluting the flag, singing the national anthem and reciting the patriotic pledge, this religious group which admittedly comprises a 'small portion of the school population' will shake up our part of the globe and suddenly produce a nation 'untaught and uninculcated in and unimbued with reverence for the flag, patriotism, love of country and admiration for national heroes' (Gerona v. Secretary of Education, 106 Phil. 224). After all, what the petitioners seek only is exemption from the flag ceremony, not exclusion from the public schools where they may study the Constitution, the democratic way of life and form of government, and learn not only the arts, sciences, Philippine history and culture but also receive training for a vocation or profession and be taught the virtues of

'patriotism, respect for human rights, appreciation of national heroes, the rights and duties of citizenship, and moral and spiritual values' (Sec. 3[2], Art. XIV, 1987 Constitution) as part of the curricula. Expelling or banning the petitioners from Philippine schools will bring about the very situation that this Court has feared in Gerona. Forcing a small religious group, through the iron hand of the law, to participate in a ceremony that violates their religious beliefs, will hardly be conducive to love of country or respect for duly constituted authorities.[343]

Barnette also found its way to the opinion, *viz*:

Furthermore, let it be noted that coerced unity and loyalty even to the country, x x x- assuming that such unity and loyalty can be attained through coercion- is not a goal that is constitutionally obtainable at the expense of religious liberty. A desirable end cannot be promoted by prohibited means. (Meyer vs. Nebraska, 262 U.S. 390, 67 L. ed. 1042, 1046).[344]

Towards the end of the decision, the Court also cited the **Victoriano case** and its use of the "compelling state interest" test in according exemption to the Jehovah's Witnesses, *viz*:

In Victoriano vs. Elizalde Rope Workers' Union, 59 SCRA 54, 72-75, we upheld the exemption of members of the Iglesia ni Cristo, from the coverage of a closed shop agreement between their employer and a union because it would violate the teaching of their church not to join any group:

'x x x It is certain that not every conscience can be accommodated by all the laws of the land; but when general laws conflict with scruples of conscience, exemptions ought to be granted unless some 'compelling state interest' intervenes.' (Sherbert vs. Verner, 374 U.S. 398, 10 L. Ed. 2d 965, 970, 83 S.Ct. 1790)'

We hold that a similar exemption may be accorded to the Jehovah's Witnesses with regard to the observance of the flag ceremony out of respect for their religious beliefs, however 'bizarre' those beliefs may seem to others.[345]

The Court annulled the orders expelling petitioners from school.

Thus, the "grave and imminent danger" test laid down in a dissenting opinion in **German** which involved prior restraint of religious worship with overtones of

the right to free speech and assembly, was transported to **Ebralinag** which did not involve prior restraint of religious worship, speech or assembly. Although, it might be observed that the Court faintly implied that**Ebralinag** also involved the right to free speech when in its preliminary remarks, the Court stated that compelling petitioners to participate in the flag ceremony "is alien to the conscience of the present generation of Filipinos who cut their teeth on the Bill of Rights which guarantees their rights to free speech and the free exercise of religious profession and worship;" the Court then stated in a footnote that the "flag salute, singing the national anthem and reciting the patriotic pledge are all forms of utterances."[346]

The "compelling state interest" test was not fully applied by the Court in **Ebralinag**. In the Solicitor General's consolidated comment, one of the grounds cited to defend the expulsion orders issued by the public respondents was that "(t)he State's compelling interests being pursued by the DEC's lawful regulations in question do not warrant exemption of the school children of the Jehovah's Witnesses from the flag salute ceremonies on the basis of their own self-perceived religious convictions."[347] The Court, however, referred to the test only towards the end of the decision and did not even mention what the Solicitor General argued as the compelling state interest, much less did the Court explain why the interest was not sufficiently compelling to override petitioners' religious freedom.

Three years after **Ebralinag**, the Court decided the 1996 case of **Iglesia ni Cristo v. Court of Appeals, et al.**[348] Although there was a dissent with respect to the applicability of the "clear and present danger" test in this case, the majority opinion in unequivocal terms applied the "clear and present danger" test to religious speech. This case involved the television program, "Ang Iglesia ni Cristo," regularly aired over the television. Upon petitioner Iglesia ni Cristo's submission of the VTR tapes of some of its episodes, respondent Board of Review for Motion Pictures and Television classified these as "X" or not for public viewing on the ground that they "offend and constitute an attack against other religions which is expressly prohibited by law." Invoking religious freedom, petitioner alleged that the Board acted without jurisdiction or with grave abuse of discretion in requiring it to submit the VTR tapes of its television program and x-rating them. While upholding the Board's power to review the Iglesia television show, the **Court was emphatic about the preferred status of religious freedom.** Quoting Justice Cruz' commentary on the constitution, the Court held that freedom to believe is absolute but freedom to act on one's belief, where it affects the public, is subject to the authority of the state. The commentary quoted Justice Frankfurter's dissent in **Barnette** which was quoted in **Gerona**, *viz*: "(t)he constitutional provision on religious freedom terminated disabilities, it did not create new privileges. It gave religious liberty, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma."[349] Nevertheless, the Court was quick to add the criteria by which the state can regulate the exercise of religious freedom, that is, when the exercise will bring about the "clear and

present danger of some substantive evil which the State is duty bound to prevent, i.e., serious detriment to the more overriding interest of public health, public morals, or public welfare."[350]

In annulling the x-rating of the shows, the Court stressed that the Constitution is hostile to all prior restraints on speech, including religious speech and the x-rating was a suppression of petitioner's freedom of speech as much as it was an interference with its right to free exercise of religion. Citing **Cantwell**, the Court recognized that the different religions may criticize one another and their tenets may collide, but the Establishment Clause prohibits the state from protecting any religion from this kind of attack.

The Court then called to mind the "clear and present danger" test first laid down in the **American Bible Society** case and the test of "immediate and grave danger" with "infringement only to the smallest extent necessary to avoid danger" in **Victoriano** and pointed out that the reviewing board failed to apply the "clear and present danger" test. Applying the test, the Court noted, *viz*:

> The records show that the decision of the respondent Board, affirmed by the respondent appellate court, is completely *bereft of findings of facts* to justify the conclusion that the subject video tapes constitute impermissible attacks against another religion. There is no showing whatsoever of the *type of harm* the tapes will bring about especially the gravity and imminence of the threatened harm. *Prior restraint on speech, including religious speech, cannot be justified by hypothetical fears but only by the showing of a substantive and imminent evil which has taken the life of a reality already on ground.*

Replying to the challenge on the applicability of the "clear and present danger" test to the case, the Court acknowledged the permutations that the test has undergone, but stressed that the test is still applied to four types of speech: "speech that advocates dangerous ideas, speech that provokes a hostile audience reaction, out of court contempt and release of information that endangers a fair trial"[351] and ruled, *viz*:

> . . . even allowing the drift of American jurisprudence, there is reason to apply the clear and present danger test to the case at bar which concerns speech that attacks other religions and could readily provoke hostile audience reaction. *It cannot be doubted that religious truths disturb and disturb terribly*.[352]

In **Iglesia** therefore, the Court went back to **Gerona** insofar as holding that religious freedom cannot be invoked to seek exemption from compliance with a law that burdens one's religious exercise. It also reiterated the "clear and present danger" test in **American Bible Society** and the "grave and imminent

danger" in **Victoriano**, but this time clearly justifying its applicability and showing how the test was applied to the case.

In sum, the Philippine Supreme Court has adopted a posture of not invalidating a law offensive to religious freedom, but carving out an exception or upholding an exception to accommodate religious exercise where it is justified.[353]

2. Establishment Clause

In Philippine jurisdiction, there is substantial agreement on the values sought to be protected by the Establishment Clause, namely, voluntarism and insulation of the political process from interfaith dissension. The **first**, voluntarism, has both a personal and a social dimension. As a **personal value**, it refers to the inviolability of the human conscience which, as discussed above, is also protected by the free exercise clause. From the religious perspective, religion requires voluntarism because compulsory faith lacks religious efficacy. Compelled religion is a contradiction in terms.[354] As a **social value**, it means that the "growth of a religious sect as a social force must come from the voluntary support of its members because of the belief that both spiritual and secular society will benefit if religions are allowed to compete on their own intrinsic merit without benefit of official patronage. Such voluntarism cannot be achieved unless the political process is insulated from religion and unless religion is insulated from politics**."**[355] **Non-establishment thus calls for government neutrality in religious matters to uphold voluntarism and avoid breeding interfaith dissension.**[356]

The **neutrality principle** was applied in the first significant non-establishment case under the 1935 Constitution. In the 1937 case of **Aglipay v. Ruiz,**[357] the Philippine Independent Church challenged the issuance and sale of postage stamps commemorating the Thirty-Third International Eucharistic Congress of the Catholic Church on the ground that the constitutional prohibition against the use of public money for religious purposes has been violated. It appears that the Director of Posts issued the questioned stamps under the provisions of Act No. 4052[358] which appropriated a sum for the cost of plates and printing of postage stamps with new designs and authorized the Director of Posts to dispose of the sum in a manner and frequency "advantageous to the Government." The printing and issuance of the postage stamps in question appears to have been approved by authority of the President. Justice Laurel, speaking for the Court, took pains explaining religious freedom and the role of religion in society, and in conclusion, found no constitutional infirmity in the issuance and sale of the stamps,*viz*:

> 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 toleration.

Religious freedom, however, as a constitutional mandate is not an 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. In fact, certain general concessions are indiscriminately accorded to religious sects and denominations. . .[359]

xxx xxx

xxx

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. (*Vide* Bradfield vs. Roberts, 175 U.S. 295; 20 Sup. Ct. Rep., 121; 44 Law. ed., 168)[360] (*emphases supplied*)

In so deciding the case, the Court, citing U.S. jurisprudence, laid down the doctrine that **a law or government action with a legitimate secular purpose does not offend the Establishment Clause even if it incidentally aids a particular religion.**

Almost forty-five years after **Aglipay** came **Garces v. Estenzo.**[361] Although the Court found that the separation of church and state was not at issue as the controversy was over who should have custody of a saint's image, it nevertheless made pronouncements on the separation of church and state along the same line as the **Aglipay ruling**. The Court held that there was nothing unconstitutional or illegal in holding a *fiesta* and having a patron saint for the *barrio*. It adhered to the *barrio* resolutions of the *barangay* involved in the case stating that the*barrio fiesta* is a socio-religious affair, the celebration of which is an "ingrained tradition in rural communities" that "relieves the monotony and drudgery of the lives of the masses." Corollarily, the Court found nothing illegal about any activity intended to facilitate the worship of the patron saint such as the acquisition and display of his image bought with funds obtained through solicitation from the *barrio* residents. The Court pointed out that the image of the patron saint was "purchased in connection with the celebration of the barrio fiesta honoring the patron saint, San Vicente Ferrer, and not for the purpose of favoring any religion nor interfering with religious matters or the religious beliefs of the barrio residents." Citing the **Aglipay ruling**, the Court declared, *viz*:

Not every governmental activity which involves the expenditure of public funds and which has some religious tint is violative of the constitutional provisions regarding separation of church and state, freedom of worship and banning the use of public money or property.

Then came the 1978 case of **Pamil v. Teleron, et al.**[362] which presented a novel issue involving the religion clauses. In this case, Section 2175 of the Revised Administrative Code of 1917 disqualifying ecclesiastics from appointment or election as municipal officer was challenged. After protracted deliberation, the Court was sharply divided on the issue. Seven members of the Court, one short of the number necessary to declare a law unconstitutional, approached the problem from a free exercise perspective and considered the law a religious test offensive of the constitution. They were Justices Fernando, Teehankee, Muñoz-Palma, Concepcion, Jr., Santos, Fernandez, and Guerrero. Then Associate Justice Fernando, the*ponente*, stated, *viz*: "The challenged Administrative Code provision, certainly insofar as it declares

ineligible ecclesiastics to any elective or appointive office, is, on its face, inconsistent with the religious freedom guaranteed by the Constitution." Citing **Torcaso v. Watkins**,[363] the *ponencia* held, *viz*:

> Torcaso v. Watkins, an American Supreme Court decision, has persuasive weight. What was there involved was the validity of a provision in the Maryland Constitution prescribing that 'no religious test ought ever to be required as a disqualification for any office or profit or trust in this State, other than a declaration of belief in the existence of God ***.' Such a constitutional requirement was assailed as contrary to the First Amendment of the United States Constitution by an appointee to the office of notary public in Maryland, who was refused a commission as he would not declare a belief in God. He failed in the Maryland Court of Appeals but prevailed in the United States Supreme Court, which reversed the state court decision. It could not have been otherwise. As emphatically declared by Justice Black: 'this Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him.
>
> The analogy appears to be obvious. In that case, it was lack of belief in God that was a disqualification. Here being an ecclesiastic and therefore professing a religious faith suffices to disqualify for a public office. There is thus an incompatibility between the Administrative Code provision relied upon by petitioner and an express constitutional mandate.[364]

On the other hand, the prevailing five other members of the Court - Chief Justice Castro, Justices Barredo, Makasiar, Antonio and Aquino - approached the case from a non-establishment perspective and upheld the law as a safeguard against the constant threat of union of church and state that has marked Philippine history. Justice Makasiar stated: "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 open the floodgates for the violation of the cherished liberty of religion which the constitutional provision seeks to enforce and protect." Consequently, the Court upheld the validity of Section 2175 of the Revised Administrative Code and declared respondent priest ineligible for the office of municipal mayor.

Another type of cases interpreting the establishment clause deals with intramural religious disputes. **Fonacier v. Court of Appeals**[365] is the leading case. The issue therein was the right of control over certain properties of the Philippine Independent Church, the resolution of which necessitated the

determination of who was the legitimate bishop of the church. The Court cited American Jurisprudence,[366] *viz*:

> Where, however, a decision of an ecclesiastical court plainly violates the law it professes to administer, or is in conflict with the law of the land, it will not be followed by the civil courts. . . In some instances, not only have the civil courts the right to inquire into the jurisdiction of the religious tribunals and the regularity of their procedure, but they have subjected their decisions to the test of fairness or to the test furnished by the constitution and the law of the church. . .[367]

The Court then ruled that petitioner Fonacier was legitimately ousted and respondent de los Reyes was the duly elected head of the Church, based on their internal laws. To finally dispose of the property issue, the Court, citing **Watson v. Jones**,[368] declared that the rule in property controversies within religious congregations strictly independent of any other superior ecclesiastical association (such as the Philippine Independent Church) is that the rules for resolving such controversies should be those of any voluntary association. If the congregation adopts the majority rule then the majority should prevail; if it adopts adherence to duly constituted authorities within the congregation, then that should be followed. Applying these rules, Fonacier lost the case. While the Court exercised jurisdiction over the case, it nevertheless refused to touch doctrinal and disciplinary differences raised, *viz*:

> The amendments of the constitution, restatement of articles of religion and abandonment of faith or abjuration alleged by appellant, having to do with faith, practice, doctrine, form of worship, ecclesiastical law, custom and rule of a church and having reference to the power of excluding from the church those allegedly unworthy of membership, are unquestionably ecclesiastical matters which are outside the province of the civil courts.[369]

VIII. Free Exercise Clause vis-à-vis Establishment Clause

In both Philippine and U.S. jurisdiction, **it is recognized that there is a tension between the Free Exercise Clause and the Establishment Clause in their application.** There is a natural antagonism between a command not to establish religion and a command not to inhibit its practice; this tension between the religion clauses often leaves the courts with a choice between competing values in religion cases.[370]

One set of facts, for instance, can be differently viewed from the Establishment Clause perspective and the Free Exercise Clause point of view,

and decided in opposite directions. In**Pamil**, the majority gave more weight to the religious liberty of the priest in holding that the prohibition of ecclesiastics to assume elective or appointive government positions was violative of the Free Exercise Clause. On the other hand, the prevailing five justices gave importance to the Establishment Clause in stating that the principle of separation of church and state justified the prohibition.

Tension is also apparent when a case is decided to uphold the Free Exercise Clause and consequently exemptions from a law of general applicability are afforded by the Court to the person claiming religious freedom; the question arises whether the exemption does not amount to support of the religion in violation of the Establishment Clause. This was the case in the Free Exercise Clause case of **Sherbert** where the U.S. Supreme Court ruled, *viz*:

> In holding as we do, plainly **we are not fostering the "establishment"** of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects **nothing more than the governmental obligation of neutrality in the face of religious differences**, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.[371] (*emphasis supplied*)

Tension also exists when a law of general application provides exemption in order to uphold free exercise as in the **Walz case** where the appellant argued that the exemption granted to religious organizations, in effect, required him to contribute to religious bodies in violation of the Establishment Clause. But the Court held that the exemption was not a case of establishing religion but merely upholding the Free Exercise Clause by "sparing the exercise of religion from the burden of property taxation levied on private profit institutions." Justice Burger wrote, *viz*:

> (t)he Court has struggled to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.[372]

Similarly, the Philippine Supreme Court in the **Victoriano case** held that the exemption afforded by law to religious sects who prohibit their members from joining unions did not offend the Establishment Clause. We ruled, *viz*:

> We believe that in enacting Republic Act No. 3350, Congress acted consistently with the spirit of the constitutional provision. It acted merely to **relieve the exercise of religion,** by certain persons, of a burden that is imposed by union security agreements.[373] (*emphasis supplied*)

Finally, in some cases, a practice is obviously violative of the Establishment Clause but the Court nevertheless upholds it. In **Schempp**, Justice Brennan stated: "(t)here 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."

How the tension between the Establishment Clause and the Free Exercise Clause will be resolved is a question for determination in the actual cases that come to the Court. In cases involving both the Establishment Clause and the Free Exercise Clause, the two clauses should be balanced against each other. The courts must review all the relevant facts and determine whether there is a sufficiently strong free exercise right that should prevail over the Establishment Clause problem. In the United States, it has been proposed that in balancing, the free exercise claim must be given an edge not only because of abundant historical evidence in the colonial and early national period of the United States that the free exercise principle long antedated any broad-based support of disestablishment, but also because an Establishment Clause concern raised by merely accommodating a citizen's free exercise of religion seems far less dangerous to the republic than pure establishment cases. Each time the courts side with the Establishment Clause in cases involving tension between the two religion clauses, the courts convey a message of hostility to the religion that in that case cannot be freely exercised.[374] American professor of constitutional law, Laurence Tribe, similarly suggests that the free exercise principle "should be dominant in any conflict with the anti-establishment principle." This dominance would be the result of commitment to religious tolerance instead of "thwarting at all costs even the faintest appearance of establishment."[375] In our jurisdiction, Fr. Joaquin Bernas, S.J. asserts that a literal interpretation of the religion clauses does not suffice. Modern society is characterized by the expanding regulatory arm of government that reaches a variety of areas of human conduct and an expanding concept of religion. To adequately meet the demands of this modern society, the societal values the religion clauses are intended to protect must be considered in their interpretation and resolution of the tension. This, in fact, has been the approach followed by the Philippine Court.[376]

IX. Philippine Religion Clauses: Nature, Purpose, Tests Based on Philippine and American Religion Clause History, Law and Jurisprudence

The history of the religion clauses in the 1987 Constitution shows that these clauses were largely adopted from the First Amendment of the U.S. Constitution. The religion clauses in the First Amendment were contained in every organic Act of the Philippines under the American regime. When the delegates of the 1934 Constitutional Convention adopted a Bill of Rights in the 1935 Constitution, they purposely retained the phraseology of the religion clauses in the First Amendment as contained in the Jones Law in order to adopt

its historical background, nature, extent and limitations. At that time, there were not too many religion clause cases in the United States as the U.S. Supreme Court decided an Establishment Clause issue only in the 1947 **Everson case**. The Free Exercise Clause cases were also scarce then. Over the years, however, with the expanding reach of government regulation to a whole gamut of human actions and the growing plurality and activities of religions, the number of religion clause cases in the U.S. exponentially increased. With this increase came an expansion of the interpretation of the religion clauses, at times reinforcing prevailing case law, at other times modifying it, and still at other times creating contradictions so that two main streams of jurisprudence had become identifiable. The first stream employs **separation** while the second employs **benevolent neutrality** in interpreting the religious clauses. Alongside this change in the landscape of U.S. religion clause jurisprudence, the Philippines continued to adopt the 1935 Constitution religion clauses in the 1973 Constitution and later, the 1987 Constitution. **Philippine jurisprudence and commentaries on the religious clauses also continued to borrow authorities from U.S. jurisprudence without articulating the stark distinction between the two streams of U.S. jurisprudence.** One might simply conclude that the Philippine Constitutions and jurisprudence also inherited the disarray of U.S. religion clause jurisprudence and the two identifiable streams; thus, when a religion clause case comes before the Court, a **separationist** approach or a **benevolent neutrality** approach might be adopted and each will have U.S. authorities to support it. Or, one might conclude that as the history of the First Amendment as narrated by the Court in **Everson** supports the **separationist**approach, Philippine jurisprudence should also follow this approach in light of the Philippine religion clauses' history. As a result, in a case where the party claims religious liberty in the face of a general law that inadvertently burdens his religious exercise, he faces an almost insurmountable wall in convincing the Court that the wall of separation would not be breached if the Court grants him an exemption. **These conclusions, however, are not and were never warranted by the 1987, 1973 and 1935 Constitutions as shown by other provisions on religion in all three constitutions.** It is a cardinal rule in constitutional construction that the constitution must be interpreted as a whole and apparently conflicting provisions should be reconciled and harmonized in a manner that will give to all of them full force and effect.[377] **From this construction, it will be ascertained that the intent of the framers was to adopt a benevolent neutrality approach in interpreting the religious clauses in the Philippine constitutions,** and the enforcement of this intent is the goal of construing the constitution.[378]

We first apply the **hermeneutical** scalpel to dissect the 1935 Constitution. At the same time that the 1935 Constitution provided for an Establishment Clause, it also provided for tax exemption of church property in Article VI, Section 22, par. 3(b), *viz*:

(3) 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.

Before the advent of the 1935 Constitution, Section 344 of the Administrative Code provided for a similar exemption. To the same effect, the Tydings-McDuffie Law contained a limitation on the taxing power of the Philippine government during the Commonwealth period.[379] The original draft of the Constitution placed this provision in an ordinance to be appended to the Constitution because this was among the provisions prescribed by the Tydings-McDuffie Law. However, in order to have a constitutional guarantee for such an exemption even beyond the Commonwealth period, the provision was introduced in the body of the Constitution on the rationale that "if churches, convents [rectories or parsonages] and their accessories are always necessary for facilitating the exercise of such [religious] freedom, it would also be natural that their existence be also guaranteed by exempting them from taxation."[380] The amendment was readily approved with 83 affirmative votes against 15 negative votes.[381]

The Philippine constitutional provision on tax exemption is not found in the U.S. Constitution. In the U.S. case of **Walz**, the Court struggled to justify this kind of exemption to withstand Establishment Clause scrutiny by stating that church property was not singled out but was exempt along with property owned by non-profit, quasi-public corporations because the state upheld the secular policy "that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest." The Court also stated that the exemption was meant to relieve the burden on free exercise imposed by property taxation. At the same time, however, the Court acknowledged that the exemption was an exercise of **benevolent neutrality** to accommodate a long-standing tradition of exemption. With the inclusion of the church property tax exemption in the body of the 1935 Constitution and not merely as an ordinance appended to the Constitution, the **benevolent neutrality** referred to in the **Walz case** was given constitutional imprimatur under the regime of the 1935 Constitution. The provision, as stated in the deliberations, was an acknowledgment of the necessity of the exempt institutions to the exercise of religious liberty, thereby evincing benevolence towards religious exercise.

Similarly, the 1935 Constitution provides in Article VI, Section 23(3), *viz*:

(3) No public money, or property shall ever be appropriated, applied, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution or system of religion, for the use, benefit or support of any priest, preacher, ministers 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, orphanage, or leprosarium.** (*emphasis supplied*)

The original draft of this provision was a reproduction of a portion of section 3 of the Jones Law which did not contain the above exception, *viz*:

> No public money or property shall ever be appropriated, applied, 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 dignitary as such…[382]

In the deliberations of this draft provision, an amendment was proposed to strike down everything after "church denomination."[383] The proposal intended to imitate the silence of the U.S. Constitution on the subject of support for priests and ministers. It was also an imitation of the silence of the Malolos Constitution to restore the situation under the Malolos Constitution and prior to the Jones Law, when chaplains of the revolutionary army received pay from public funds with no doubt about its legality. It was pointed out, however, that even with the prohibition under the Jones Law, appropriations were made to chaplains of the national penitentiary and the Auditor General upheld its validity on the basis of a similar United States practice. But it was also pointed out that the U.S. Constitution did not contain a prohibition on appropriations similar to the Jones Law.[384] To settle the question on the constitutionality of payment of salaries of religious officers in certain government institutions and to avoid the feared situation where the enumerated government institutions could not employ religious officials with compensation, the exception in the 1935 provision was introduced and approved. The provision garnered 74 affirmative votes against 34 negative votes.[385] As pointed out in the deliberations, the U.S. Constitution does not provide for this exemption. However, the U.S. Supreme Court in **Cruz v. Beto,** apparently taking a benevolent neutrality approach, implicitly approved the state of Texas' payment of prison chaplains' salaries as reasonably necessary to permit inmates to practice their religion. Also, in the **Marsh case**, the U.S. Supreme Court upheld the long-standing tradition of beginning legislative sessions with prayers offered by legislative chaplains retained at taxpayers' expense. The constitutional provision exempting religious officers in government institutions affirms the departure of the Philippine Constitution from the U.S. Constitution in its adoption of benevolent neutrality in Philippine jurisdiction. While the provision prohibiting aid to religion protects the wall of separation between church and state, the provision at the same time gives constitutional sanction to a breach in the wall.

To further buttress the thesis that benevolent neutrality is contemplated in the Philippine Establishment Clause, the 1935 Constitution provides for optional religious instruction in public schools in Article XIII, Section 5, *viz*:

> . . . Optional religious instruction shall be maintained in the public schools as now authorized by law. . .

The law then applicable was Section 928 of the Administrative Code, *viz*:

> It shall be lawful, however, for the priest or minister of any church established 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 of the school . . .

During the debates of the Constitutional Convention, there were three positions on the issue of religious instruction in public schools. The first held that the teaching of religion in public schools should be prohibited as this was a violation of the principle of separation of church and state and the prohibition against the use of public funds for religious purposes. The second favored the proposed optional religious instruction as authorized by the Administrative Code and recognized that the actual practice of allowing religious instruction in the public schools was sufficient proof that religious instruction was not and would not be a source of religious discord in the schools.[386] The third wanted religion to be included as a course in the curriculum of the public schools but would only be taken by pupils at the option of their parents or guardians. After several rounds of debate, the second camp prevailed, thus raising to constitutional stature the optional teaching of religion in public schools, despite the opposition to the provision on the ground of separation of church and state.[387] As in the provisions on church property tax exemption and compensation of religious officers in government institutions, the U.S. Constitution does not provide for optional religious instruction in public schools. In fact, in the**McCollum case,** the Court, using **strict neutrality,** prohibited this kind of religious instruction where the religion teachers would conduct class within the school premises. The constitutional provision on optional religious instruction shows that Philippine jurisdiction rejects the strict neutrality approach which does not allow such accommodation of religion.

Finally, to make certain the Constitution's benevolence to religion, the Filipino people "implored (ing) 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, (in) ordain(ing) and promulgat(ing) this Constitution." A preamble is a "key to open the mind of the authors of the constitution as to the evil sought to be prevented and the objects sought to be accomplished by the provisions thereof."[388] There was no debate on the inclusion of a "Divine Providence" in the preamble. In **Aglipay,**Justice Laurel noted that when the Filipino people implored the aid of Divine Providence, "(t)hey thereby manifested their intense religious nature and placed unfaltering reliance upon Him who guides the destinies of men and nations."[389] The 1935 Constitution's religion clauses,

understood alongside the other provisions on religion in the Constitution, indubitably shows not hostility, but benevolence, to religion.[390]

The 1973 Constitution contained in Article VI, Section 22(3) a provision similar to Article VI, Section 22, par. 3(b) of the 1935 Constitution on exemption of church property from taxation, with the modification that the property should not only be used directly, but also actually and exclusively for religious or charitable purposes. Parallel to Article VI, Section 23(3) of the 1935 Constitution, the 1973 Constitution also contained a similar provision on salaries of religious officials employed in the enumerated government institutions. Article XIII, Section 5 of the 1935 Constitution on optional religious instruction was also carried to the 1973 Constitution in Article XV, Section 8(8) with the modification that optional religious instruction shall be conducted "as may be provided by law" and not "as now authorized by law" as stated in the 1935 Constitution. The 1973 counterpart, however, made explicit in the constitution that the religious instruction in public elementary and high schools shall be done "(a)t the option expressed in writing by the parents or guardians, and without cost to them and the government." With the adoption of these provisions in the 1973 Constitution, the benevolent neutrality approach continued to enjoy constitutional sanction. In Article XV, Section 15 of the General Provisions of the 1973 Constitution this provision made its maiden appearance: "(t)he separation of church and state shall be inviolable." The 1973 Constitution retained the portion of the preamble "imploring the aid of Divine Providence."

In the Report of the Ad Hoc Sub-Committee on Goals, Principles and Problems of the Committee on Church and State of the 1971 Constitutional Convention, the question arose as to whether the "absolute" separation of Church and State as enunciated in the **Everson case** and reiterated in **Schempp** - i.e., neutrality not only as between one religion and another but even as between religion and non-religion - is embodied in the Philippine Constitution. The sub-committee's answer was that it did not seem so. Citing the **Aglipay case** where Justice Laurel recognized the "elevating influence of religion in human society" and the Filipinos' imploring of Divine Providence in the 1935 Constitution, the sub-committee asserted that the state may not prefer or aid one religion over another, but may aid all religions equally or the cause of religion in general.[391] Among the position papers submitted to the Committee on Church on State was a background paper for reconsideration of the religion provisions of the constitution by Fr. Bernas, S.J. He stated therein that the Philippine Constitution is not hostile to religion and in fact recognizes the value of religion and accommodates religious values.[392] Stated otherwise, the Establishment Clause contemplates not a strict neutrality but benevolent neutrality. While the Committee introduced the provision on separation of church and state in the General Provisions of the 1973 Constitution, this was nothing new as according to it, this principle was implied in the 1935 Constitution even in the absence of a similar provision.[393]

Then came the 1987 Constitution. The 1973 Constitutional provision on tax exemption of church property was retained with minor modification in Article VI,

Section 28(3) of the 1987 Constitution. The same is true with respect to the prohibition on the use of public money and property for religious purposes and the salaries of religious officers serving in the enumerated government institutions, now contained in Article VI, Section 29(2). Commissioner Bacani, however, probed into the possibility of allowing the government to spend public money for purposes which might have religious connections but which would benefit the public generally. Citing the **Aglipay case,** Commissioner Rodrigo explained that if a public expenditure would benefit the government directly, such expense would be constitutional even if it results to an incidental benefit to religion. With that explanation, Commissioner Bacani no longer pursued his proposal.[394]

The provision on optional religious instruction was also adopted in the 1987 Constitution in Article XIV, Section 3(3) with the modification that it was expressly provided that optional instruction shall be conducted "within the regular class hours" and "without additional cost to the government". There were protracted debates on what additional cost meant, i.e., cost over and above what is needed for normal operations such as wear and tear, electricity, janitorial services,[395] and when during the day instruction would be conducted.[396] In deliberating on the phrase "within the regular class hours," Commissioner Aquino expressed her reservations to this proposal as this would violate the time-honored principle of separation of church and state. She cited the **McCullom case** where religious instruction during regular school hours was stricken down as unconstitutional and also cited what she considered the most liberal interpretation of separation of church and state in **Surach v. Clauson** where the U.S. Supreme Court allowed only release time for religious instruction. Fr. Bernas replied, *viz*:

> . . . the whole purpose of the provision was to provide for an **exception to the rule on non-establishment of religion,** because if it were not necessary to make this exception for purposes of allowing religious instruction, then we could just drop the amendment. But, as a matter of fact, this is necessary because **we are trying to introduce something here which is contrary to American practices**.[397] (*emphasis supplied*)

"(W)ithin regular class hours" was approved.

The provision on the separation of church and state was retained but placed under the Principles in the Declaration of Principles and State Policies in Article II, Section 6. In opting to retain the wording of the provision, Fr. Bernas stated, *viz*:

> . . . It is true, I maintain, that as a legal statement the sentence 'The separation of Church and State is inviolable,' is almost a useless statement; but at the same time it is a harmless statement. Hence, I am willing to tolerate it there, because, in the end, if we look at the jurisprudence on Church and State, arguments are based not on the

statement of separation of church and state but on the non-establishment clause in the Bill of Rights.[398]

The preamble changed "Divine Providence" in the 1935 and 1973 Constitutions to "Almighty God." There was considerable debate on whether to use "Almighty God" which Commissioner Bacani said was more reflective of Filipino religiosity, but Commissioner Rodrigo recalled that a number of atheistic delegates in the 1971 Constitutional Convention objected to reference to a personal God.[399] "God of History", "Lord of History" and "God" were also proposed, but the phrase "Almighty God" prevailed. Similar to the 1935 and 1971 Constitutions, it is obvious that the 1987 Constitution is not hostile nor indifferent to religion;[400] its wall of separation is not a wall of hostility or indifference.[401]

The provisions of the 1935, 1973 and 1987 constitutions on tax exemption of church property, salary of religious officers in government institutions, optional religious instruction and the preamble all reveal without doubt that the Filipino people, in adopting these constitutions, did not intend to erect a high and impregnable wall of separation between the church and state.[402]The strict neutrality approach which examines only whether government action is for a secular purpose and does not consider inadvertent burden on religious exercise protects such a rigid barrier. By adopting the above constitutional provisions on religion, the Filipinos manifested their adherence to the **benevolent neutrality** approach in interpreting the religion clauses, an approach that looks further than the secular purposes of government action and examines the effect of these actions on religious exercise. **Benevolent neutrality** recognizes the religious nature of the Filipino people and the elevating influence of religion in society; at the same time, it acknowledges that government must pursue its secular goals. In pursuing these goals, however, government might adopt laws or actions of general applicability which inadvertently burden religious exercise. **Benevolent neutrality** gives room for **accommodation** of these religious exercises as *required* by the Free Exercise Clause. It allows these breaches in the wall of separation to uphold religious liberty, which after all is the integral purpose of the religion clauses. The case at bar involves this first type of **accommodation** where an exemption is sought from a law of general applicability that inadvertently burdens religious exercise.

Although our constitutional history and interpretation mandate **benevolent neutrality, benevolent neutrality does not mean that the Court ought to grant exemptions every time a free exercise claim comes before it. But it does mean that the Court will not look with hostility or act indifferently towards religious beliefs and practices and that it will strive to accommodate them when it can within flexible constitutional limits; it does mean that the Court will not simply dismiss a claim under the Free Exercise Clause because the conduct in question offends a law or the orthodox view for this precisely is the protection afforded by the religion clauses of the Constitution, i.e., that in the absence of legislation granting exemption from**

a law of general applicability, the Court can carve out an exception when the religion clauses justify it. While the Court cannot adopt a doctrinal formulation that can eliminate the difficult questions of judgment in determining the degree of burden on religious practice or importance of the state interest or the sufficiency of the means adopted by the state to pursue its interest, the Court can set a doctrine on the ideal towards which religious clause jurisprudence should be directed.[403] **We here lay down the doctrine that in Philippine jurisdiction, we adopt the benevolent neutrality approach not only because of its merits as discussed above, but more importantly, because our constitutional history and interpretation indubitably show that benevolent neutrality is the launching pad from which the Court should take off in interpreting religion clause cases. The ideal towards which this approach is directed is the protection of religious liberty "not only for a minority, however small- not only for a majority, however large- but for each of us" to the greatest extent possible within flexible constitutional limits.**

Benevolent neutrality is manifest not only in the Constitution but has also been recognized in Philippine jurisprudence, albeit not expressly called "benevolent neutrality" or "accommodation". In **Aglipay**, the Court not only stressed the "elevating influence of religion in human society" but acknowledged the Constitutional provisions on exemption from tax of church property, salary of religious officers in government institutions, and optional religious instruction as well as the provisions of the Administrative Code making Thursday and Friday of the Holy Week, Christmas Day and Sundays legal holidays. In **Garces,** the Court not only recognized the Constitutional provisions indiscriminately granting concessions to religious sects and denominations, but also acknowledged that government participation in long-standing traditions which have acquired a social character - "the barrio fiesta is a socio-religious affair" - does not offend the Establishment Clause. In **Victoriano,** the Court upheld the exemption from closed shop provisions of members of religious sects who prohibited their members from joining unions upon the justification that the exemption was not a violation of the Establishment Clause but was only meant to relieve the burden on free exercise of religion. In **Ebralinag,**members of the Jehovah's Witnesses were exempt from saluting the flag as required by law, on the basis not of a statute granting exemption but of the Free Exercise Clause without offending the Establishment Clause.

While the U.S. and Philippine religion clauses are similar in form and origin, Philippine constitutional law has departed from the U.S. jurisprudence of employing a separationist or strict neutrality approach. The Philippine religion clauses have taken a life of their own, breathing the air of **benevolent neutrality** and **accommodation.** Thus, the wall of separation in Philippine jurisdiction is not as high and impregnable as the wall created by the U.S. Supreme Court in **Everson.**[404] While the religion clauses are a unique American experiment which understandably came about as a result of America's English background and colonization, the life that these clauses have taken in this jurisdiction is the Philippines' own experiment, reflective of the

Filipinos' own national soul, history and tradition. After all, "the life of the law. . . has been experience."

But while history, constitutional construction, and earlier jurisprudence unmistakably show that **benevolent neutrality** is the lens with which the Court ought to view religion clause cases, **it must be stressed that the interest of the state should also be afforded utmost protection.** To do this, a **test** must be applied to draw the line between permissible and forbidden religious exercise. It is quite paradoxical that in order for the members of a society to exercise their freedoms, including their religious liberty, the law must set a limit when their exercise offends the higher interest of the state. To do otherwise is self-defeating for unlimited freedom would erode order in the state and foment anarchy, eventually destroying the very state its members established to protect their freedoms. The very purpose of the social contract by which people establish the state is for the state to protect their liberties; for this purpose, they give up a portion of these freedoms - including the natural right to free exercise - to the state. It was certainly not the intention of the authors of the constitution that free exercise could be used to countenance actions that would undo the constitutional order that guarantees free exercise.[405]

The all important question then is the test that should be used in ascertaining the limits of the exercise of religious freedom. Philippine jurisprudence articulates several tests to determine these limits. Beginning with the first case on the Free Exercise Clause, **American Bible Society,** the Court mentioned the "clear and present danger" test but did not employ it. Nevertheless, this test continued to be cited in subsequent cases on religious liberty. The **Gerona case** then pronounced that the test of permissibility of religious freedom is whether it violates the established institutions of society and law. The **Victoriano case** mentioned the "immediate and grave danger" test as well as the doctrine that a law of general applicability may burden religious exercise provided the law is the least restrictive means to accomplish the goal of the law. The case also used, albeit inappropriately, the "compelling state interest" test. After **Victoriano, German** went back to the Gerona rule. **Ebralinag** then employed the "grave and immediate danger" test and overruled the **Gerona** test. The fairly recent case of **Iglesia ni Cristo** went back to the "clear and present danger" test in the maiden case of **American Bible Society. Not surprisingly, all the cases which employed the "clear and present danger" or "grave and immediate danger" test involved, in one form or another, religious speech as this test is often used in cases on freedom of expression.** On the other hand, the **Gerona** and **German** cases set the rule that religious freedom will not prevail over established institutions of society and law. **Gerona**, however, which was the authority cited by**German** has been overruled by **Ebralinag** which employed the "grave and immediate danger" test. **Victoriano** was the only case that employed the "compelling state interest" test, but as explained previously, the use of the test was inappropriate to the facts of the case.

The **case at bar** does not involve speech as in **American Bible Society, Ebralinag** and **Iglesia ni Cristo** where the "clear and present danger" and

"grave and immediate danger" tests were appropriate as speech has easily discernible or immediate effects. The **Gerona** and **German doctrine,** aside from having been overruled, is not congruent with the **benevolent neutrality** approach, thus not appropriate in this jurisdiction. Similar to **Victoriano,** the **present case involves purely conduct** arising from religious belief. **The "compelling state interest" test is proper where conduct is involved for the whole gamut of human conduct has different effects on the state's interests: some effects may be immediate and short-term while others delayed and far-reaching.** A test that would protect the interests of the state in preventing a substantive evil, whether immediate or delayed, is therefore necessary. However, not any interest of the state would suffice to prevail over the right to religious freedom as this is a fundamental right that enjoys a preferred position in the hierarchy of rights - "the most inalienable and sacred of all human rights", in the words of Jefferson.[406] This right is sacred for an invocation of the Free Exercise Clause is an appeal to a higher sovereignty. The entire constitutional order of limited government is premised upon an acknowledgment of such higher sovereignty,[407] thus the Filipinos implore the "aid of Almighty God in order to build a just and humane society and establish a government." As held in **Sherbert**, only the gravest abuses, endangering **paramount interests** can limit this fundamental right. A mere balancing of interests which balances a right with just a colorable state interest is therefore not appropriate. Instead, only a compelling interest of the state can prevail over the fundamental right to religious liberty. The test requires the state to carry a heavy burden, a compelling one, for to do otherwise would allow the state to batter religion, especially the less powerful ones until they are destroyed.[408] In determining which shall prevail between the state's interest and religious liberty, reasonableness shall be the guide.[409] The "compelling state interest" serves the purpose of revering religious liberty while at the same time affording protection to the paramount interests of the state. This was the test used in **Sherbert** which involved conduct, i.e. refusal to work on Saturdays. In the end, the "compelling state interest" test, by upholding the paramount interests of the state, seeks to protect the very state, without which, religious liberty will not be preserved.

X. Application of the Religion Clauses to the Case at Bar

A. The Religion Clauses and Morality

In a catena of cases, the Court has ruled that government employees engaged in illicit relations are guilty of "disgraceful and immoral conduct" for which he/she may be held administratively liable.[410] In these cases, there was not one dissent to the majority's ruling that their conduct was immoral. The respondents themselves did not foist the defense that their conduct was not immoral, but instead sought to prove that they did not commit the alleged act or have abated from committing the act. The facts of the 1975 case of **De Dios v.**

Alejo[411] and the 1999 case of **Maguad v. De Guzman**,[412] are similar to the case at bar - i.e., the complainant is a mere stranger and the legal wife has not registered any objection to the illicit relation, there is no proof of scandal or offense to the moral sensibilities of the community in which the respondent and the partner live and work, and the government employee is capacitated to marry while the partner is not capacitated but has long been separated in fact. Still, the Court found the government employees administratively liable for "disgraceful and immoral conduct" and only considered the foregoing circumstances to mitigate the penalty. Respondent Escritor does not claim that there is error in the settled jurisprudence that an illicit relation constitutes disgraceful and immoral conduct for which a government employee is held liable. Nor is there an allegation that the norms of morality with respect to illicit relations have shifted towards leniency from the time these precedent cases were decided. The Court finds that there is no such error or shift, thus we find no reason to deviate from these rulings that such illicit relationship constitutes "disgraceful and immoral conduct" punishable under the Civil Service Law. Respondent having admitted the alleged immoral conduct, she, like the respondents in the above-cited cases, could be held administratively liable. However, there is a distinguishing factor that sets the case at bar apart from the cited precedents, i.e., as a defense, respondent invokes religious freedom since her religion, the Jehovah's Witnesses, has, after thorough investigation, allowed her conjugal arrangement with Quilapio based on the church's religious beliefs and practices. This distinguishing factor compels the Court to apply the religious clauses to the case at bar.

Without holding that religious freedom is not in issue in the case at bar, both the dissenting opinion of Mme. Justice Ynares-Santiago and the separate opinion of Mr. Justice Vitug dwell more on the standards of morality than on the religion clauses in deciding the instant case. A discussion on morality is in order.

At base, morality refers to, in Socrates' words, "how we ought to live" and why. Any definition of morality beyond Socrates' simple formulation is bound to offend one or another of the many rival theories regarding what it means to live morally.[413] The answer to the question of how we ought to live necessarily considers that man does not live in isolation, but in society. Devlin posits that a society is held together by a community of ideas, made up not only of political ideas but also of ideas about the manner its members should behave and govern their lives. The latter are their morals; they constitute the public morality. Each member of society has ideas about what is good and what is evil. If people try to create a society wherein there is no fundamental agreement about good and evil, they will fail; if having established the society on common agreement, the agreement collapses, the society will disintegrate. Society is kept together by the invisible bonds of common thought so that if the bonds are too loose, the members would drift apart. A common morality is part of the bondage and the bondage is part of the price of society; and mankind, which needs society, must pay its price.[414] This design is parallel with the social contract in the realm of politics: people give up a portion of their liberties to the state to allow the state to

protect their liberties. In a constitutional order, people make a fundamental agreement about the powers of government and their liberties and embody this agreement in a constitution, hence referred to as the fundamental law of the land. A complete break of this fundamental agreement such as by revolution destroys the old order and creates a new one.[415] Similarly, in the realm of morality, the breakdown of the fundamental agreement about the manner a society's members should behave and govern their lives would disintegrate society. Thus, society is justified in taking steps to preserve its moral code by law as it does to preserve its government and other essential institutions.[416] From these propositions of Devlin, one cannot conclude that Devlin negates diversity in society for he is merely saying that in the midst of this diversity, there should nevertheless be a "fundamental agreement about good and evil" that will govern how people in a society ought to live. His propositions, in fact, presuppose diversity hence the need to come to an agreement; his position also allows for change of morality from time to time which may be brought about by this diversity. In the same vein, a pluralistic society lays down fundamental rights and principles in their constitution in establishing and maintaining their society, and these fundamental values and principles are translated into legislation that governs the order of society, laws that may be amended from time to time. Hart's argument propounded in Mr. Justice Vitug's separate opinion that, "Devlin's view of people living in a single society as having common moral foundation (is) overly simplistic" because "societies have always been diverse" fails to recognize the necessity of Devlin's proposition in a democracy. Without fundamental agreement on political and moral ideas, society will fall into anarchy; the agreement is necessary to the existence and progress of society.

In a democracy, this common agreement on political and moral ideas is distilled in the public square. Where citizens are free, every opinion, every prejudice, every aspiration, and every moral discernment has access to the public square where people deliberate the order of their life together. Citizens are the bearers of opinion, including opinion shaped by, or espousing religious belief, and these citizens have equal access to the public square. In this representative democracy, the state is prohibited from determining which convictions and moral judgments may be proposed for public deliberation. Through a constitutionally designed process, the people deliberate and decide. Majority rule is a necessary principle in this democratic governance.[417] Thus, when public deliberation on moral judgments is finally crystallized into law, the laws will largely reflect the beliefs and preferences of the majority, i.e., the mainstream or median groups.[418] Nevertheless, in the very act of adopting and accepting a constitution and the limits it specifies -- including protection of religious freedom "not only for a minority, however small- not only for a majority, however large- but for each of us" -- the majority imposes upon itself a self-denying ordinance. It promises not to do what it otherwise could do: to ride roughshod over the dissenting minorities.[419] In the realm of religious exercise, **benevolent neutrality** that gives room for **accommodation** carries out this promise, provided the compelling interests of the state are not eroded for the preservation of the state is necessary to the preservation of religious

liberty. That is why **benevolent neutrality** is necessary in a pluralistic society such as the United States and the Philippines to accommodate those minority religions which are politically powerless. It is not surprising that **Smith** is much criticized for it blocks the judicial recourse of the minority for religious accommodations.

The laws enacted become expressions of public morality. As Justice Holmes put it, "(t)he law is the witness and deposit of our moral life."[420] "In a liberal democracy, the law reflects social morality over a period of time."[421] Occasionally though, a disproportionate political influence might cause a law to be enacted at odds with public morality or legislature might fail to repeal laws embodying outdated traditional moral views.[422] Law has also been defined as "something men create in their best moments to protect themselves in their worst moments."[423]Even then, laws are subject to amendment or repeal just as judicial pronouncements are subject to modification and reversal to better reflect the public morals of a society at a given time. After all, "the life of the law...has been experience," in the words of Justice Holmes. This is not to say though that law is all of morality. Law deals with the minimum standards of human conduct while morality is concerned with the maximum. A person who regulates his conduct with the sole object of avoiding punishment under the law does not meet the higher moral standards set by society for him to be called a morally upright person.[424] Law also serves as "a helpful starting point for thinking about a proper or ideal public morality for a society"[425] in pursuit of moral progress.

In **Magno v. Court of Appeals, et al.,**[426] we articulated the relationship between law and public morality. We held that under the utilitarian theory, the "protective theory" in criminal law, "criminal law is founded upon the **moral disapprobation x x x of actions which are immoral,** i.e., which are **detrimental (or dangerous) to those conditions upon which depend the existence and progress of human society.** This disapprobation is inevitable to the extent that **morality is generally founded and built upon a certain concurrence in the moral opinions of all**. x x x That which we call punishment is only an external means of emphasizing moral disapprobation: the method of punishment is in reality the amount of punishment."[427] Stated otherwise, there are certain standards of behavior or moral principles which society requires to be observed and these form the bases of criminal law. Their breach is an offense not only against the person injured but against society as a whole.[428] Thus, even if all involved in the misdeed are consenting parties, such as in the case at bar, the injury done is to the public morals and the public interest in the moral order.[429] Mr. Justice Vitug expresses concern on this point in his separate opinion. He observes that certain immoral acts which appear private and not harmful to society such as sexual congress "between a man and a prostitute, though consensual and private, and with no injured third party, remains illegal in this country." His opinion asks whether these laws on private morality are justified or they constitute impingement on one's freedom of belief. Discussion on private morality, however, is not material to the case at bar for whether respondent's conduct, which constitutes concubinage,[430] is private in the sense that there is no

injured party or the offended spouse consents to the concubinage, the inescapable fact is that the legislature has taken concubinage out of the sphere of private morals. The legislature included concubinage as a crime under the Revised Penal Code and the constitutionality of this law is not being raised in the case at bar. In the definition of the crime of concubinage, consent of the injured party, i.e., the legal spouse, does not alter or negate the crime unlike in rape[431] where consent of the supposed victim negates the crime. If at all, the consent or pardon of the offended spouse in concubinage negates the prosecution of the action,[432] but does not alter the legislature's characterization of the act as a moral disapprobation punishable by law. The separate opinion states that, "(t)he *ponencia*has taken pains to distinguish between secular and private morality, and reached the conclusion that the law, as an instrument of the secular State should only concern itself with secular morality." The Court does not draw this distinction in the case at bar. The distinction relevant to the case is not, as averred and discussed by the separate opinion, "between secular and private morality," but between public and secular morality on the one hand, and religious morality on the other, which will be subsequently discussed.

Not every moral wrong is foreseen and punished by law, criminal or otherwise. We recognized this reality in **Velayo, et al. v. Shell Co. of the Philippine Islands, et al.,** where we explained that for those wrongs which are not punishable by law, Articles 19 and 21 in Chapter 2 of the Preliminary Title of the New Civil Code, dealing with Human Relations, provide for the recognition of the wrong and the concomitant punishment in the form of damages. Articles 19 and 21 provide, *viz*:

> Art. 19. Any person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due and observe honesty and good faith.
>
> xxx xxx
>
> xxx
>
> Art. 21. Any person who willfully causes loss or injury to another in a manner that is contrary to **morals**, good customs or public policy shall compensate the latter for the damage. (*emphasis supplied*)

We then cited in **Velayo** the Code Commission's comment on Article 21:

> Thus at one stroke, the legislator, if the foregoing rule is approved (as it was approved), would vouchsafe adequate legal remedy for that **untold numbers of moral wrongs which is impossible for human foresight to provide for specifically in the statutes.**

But, it may be asked, would this proposed article obliterate the boundary line between morality and law? The answer is that, in the last analysis**, every good law draws its breath of life from morals,** from those principles which are written with words of fire in the conscience of man. If this premise is admitted, then the proposed rule is a prudent earnest of justice in the face of the impossibility of enumerating, one by one, all wrongs which cause damages. When it is reflected that while codes of law and statutes have changed from age to age, the conscience of man has remained fixed to its ancient moorings, **one can not but feel that it is safe and salutary to transmute, as far as may be, moral norms into legal rules,** thus imparting to every legal system that enduring quality which ought to be one of its superlative attributes.

Furthermore, there is no belief of more baneful consequence upon the social order than that a person may with impunity cause damage to his fellow-men so long as he does not break any law of the State, though he may be defying the most sacred postulates of morality. What is more, the victim loses faith in the ability of the government to afford him protection or relief.

A provision similar to the one under consideration is embodied in article 826 of the German Civil Code.[433] (*emphases supplied*)

The public morality expressed in the law is necessarily secular for in our constitutional order, the religion clauses prohibit the state from establishing a religion, including the morality it sanctions. Religious morality proceeds from a person's "views of his relations to His Creator and to the obligations they impose of reverence to His being and character and obedience to His Will," in accordance with this Court's definition of religion in **American Bible Society** citing **Davis**. Religion also dictates "how we ought to live" for the nature of religion is not just to know, but often, to act in accordance with man's "views of his relations to His Creator."[434] But the Establishment Clause puts a negative bar against establishment of this morality arising from one religion or the other, and implies the affirmative "establishment" of a civil order for the resolution of public moral disputes. This agreement on a secular mechanism is the price of ending the "war of all sects against all"; the establishment of a secular public moral order is the social contract produced by religious truce.[435]

Thus, when the law speaks of "immorality" in the Civil Service Law or "immoral" in the Code of Professional Responsibility for lawyers[436], or "public morals" in the Revised Penal Code,[437] or "morals" in the New Civil Code,[438] or "moral character" in the Constitution,[439] the distinction between public and secular morality on the one hand, and religious morality, on the other, should be kept in mind.[440] The morality referred to in the law is public and necessarily secular, not

religious as the dissent of Mr. Justice Carpio holds. “Religious teachings as expressed in public debate may influence the civil public order but public moral disputes may be resolved only on grounds articulable in secular terms.”[441] Otherwise, if government relies upon religious beliefs in formulating public policies and morals, the resulting policies and morals would require conformity to what some might regard as religious programs or agenda. The non-believers would therefore be compelled to conform to a standard of conduct buttressed by a religious belief, i.e., to a “compelled religion,” anathema to religious freedom. Likewise, if government based its actions upon religious beliefs, it would tacitly approve or endorse that belief and thereby also tacitly disapprove contrary religious or non-religious views that would not support the policy. As a result, government will not provide full religious freedom for all its citizens, or even make it appear that those whose beliefs are disapproved are second-class citizens. Expansive religious freedom therefore requires that government be neutral in matters of religion; governmental reliance upon religious justification is inconsistent with this policy of neutrality.[442]

In other words, government action, including its proscription of immorality as expressed in criminal law like concubinage, must have a secular purpose. That is, the government proscribes this conduct because it is “detrimental (or dangerous) to those conditions upon which depend the existence and progress of human society” and not because the conduct is proscribed by the beliefs of one religion or the other. Although admittedly, moral judgments based on religion might have a compelling influence on those engaged in public deliberations over what actions would be considered a moral disapprobation punishable by law. After all, they might also be adherents of a religion and thus have religious opinions and moral codes with a compelling influence on them; the human mind endeavors to regulate the temporal and spiritual institutions of society in a uniform manner, harmonizing earth with heaven.[443] Succinctly put, a law could be religious or Kantian or Aquinian or utilitarian in its deepest roots, but it must have an articulable and discernible secular purpose and justification to pass scrutiny of the religion clauses. Otherwise, if a law has an apparent secular purpose but upon closer examination shows a discriminatory and prohibitory religious purpose, the law will be struck down for being offensive of the religion clauses as in **Church of the Lukumi Babalu Aye, Inc.** where the U.S. Supreme Court invalidated an ordinance prohibiting animal sacrifice of the Santeria. Recognizing the religious nature of the Filipinos and the elevating influence of religion in society, however, the Philippine constitution’s religion clauses prescribe not a strict but a**benevolent neutrality. Benevolent neutrality** recognizes that government must pursue its secular goals and interests but at the same time strives to uphold religious liberty to the greatest extent possible within flexible constitutional limits. Thus, although the morality contemplated by laws is secular, **benevolent neutrality** could allow for **accommodation** of morality based on religion, provided it does not offend compelling state interests.

Mr. Justice Vitug's separate opinion embraces the **benevolent neutrality** approach when it states that in deciding the case at bar, the approach should consider that, "(a)s a rule . . . moral laws are justified only to the extent that they directly or indirectly serve to protect the interests of the larger society. It is only where their rigid application would serve to obliterate the value which society seeks to uphold, or defeat the purpose for which they are enacted would, a departure be justified." In religion clause parlance, the separate opinion holds that laws of general applicability governing morals should have a secular purpose of directly or indirectly protecting the interests of the state. If the strict application of these laws (which are the Civil Service Law and the laws on marriage) would erode the secular purposes of the law (which the separate opinion identifies as upholding the sanctity of marriage and the family), then in a**benevolent neutrality** framework, an **accommodation** of the unconventional religious belief and practice (which the separate opinion holds should be respected on the ground of freedom of belief) that would promote the very same secular purpose of upholding the sanctity of marriage and family through the Declaration Pledging Faithfulness that makes the union binding and honorable before God and men, is required by the Free Exercise Clause. The separate opinion then makes a preliminary discussion of the values society seeks to protect in adhering to monogamous marriage, but concludes that these values and the purposes of the applicable laws should be thoroughly examined and evidence in relation thereto presented in the OCA. The**accommodation** approach in the case at bar would also require a similar discussion of these values and presentation of evidence before the OCA by the state that seeks to protect its interest on marriage and opposes the **accommodation** of the unconventional religious belief and practice regarding marriage.

The distinction between public and secular morality as expressed - albeit not exclusively - in the law, on the one hand, and religious morality, on the other, is important **because the jurisdiction of the Court extends only to public and secular morality.** Whatever pronouncement the Court makes in the case at bar should be understood only in this realm where it has authority. More concretely, should the Court declare respondent's conduct as immoral and hold her administratively liable, the Court will be holding that in the realm of public morality, her conduct is reprehensible or there are state interests overriding her religious freedom. For as long as her conduct is being judged within this realm, she will be accountable to the state. But in so ruling, the Court does not and cannot say that her conduct should be made reprehensible in the realm of her church where it is presently sanctioned and that she is answerable for her immorality to her Jehovah God nor that other religions prohibiting her conduct are correct. On the other hand, should the Court declare her conduct permissible, the Court will be holding that under her unique circumstances, public morality is not offended or that upholding her religious freedom is an interest higher than upholding public morality thus her conduct should not be penalized. But the Court is not ruling that the tenets and practice of her religion are correct nor that other churches which do not allow respondent's conjugal arrangement should likewise allow such conjugal arrangement or should not find anything immoral

about it and therefore members of these churches are not answerable for immorality to their Supreme Being. The Court cannot speak more than what it has authority to say. In **Ballard**, the U.S. Supreme Court held that courts cannot inquire about the truth of religious beliefs. Similarly, in **Fonacier**, this Court declared that matters dealing with "faith, practice, doctrine, form of worship, ecclesiastical law, custom and rule of a church…are unquestionably ecclesiastical matters which are outside the province of the civil courts."[444] But while the state, including the Court, accords such deference to religious belief and exercise which enjoy protection under the religious clauses, the social contract and the constitutional order are designed in such a way that when religious belief flows into speech and conduct that step out of the religious sphere and overlap with the secular and public realm, the state has the power to regulate, prohibit and penalize these expressions and embodiments of belief insofar as they affect the interests of the state. The state's inroad on religion exercise in excess of this constitutional design is prohibited by the religion clauses; the Old World, European and American history narrated above bears out the wisdom of this proscription.

Having distinguished between public and secular morality and religious morality, the more difficult task is determining which immoral acts under this public and secular morality fall under the phrase "disgraceful and immoral conduct" for which a government employee may be held administratively liable. The line is not easy to draw for it is like "a line that divides land and sea, a coastline of irregularities and indentations."[445] But the case at bar does not require us to comprehensively delineate between those immoral acts for which one may be held administratively liable and those to which administrative liability does not attach. We need not concern ourselves in this case therefore whether "laziness, gluttony, vanity, selfishness, avarice and cowardice" are immoral acts which constitute grounds for administrative liability. Nor need we expend too much energy grappling with the propositions that not all immoral acts are illegal or not all illegal acts are immoral, or different jurisdictions have different standards of morality as discussed by the dissents and separate opinions, although these observations and propositions are true and correct. It is certainly a fallacious argument that because there are exceptions to the general rule that the "law is the witness and deposit of our moral life," then the rule is not true; in fact, that there are exceptions only affirms the truth of the rule. Likewise, the observation that morality is relative in different jurisdictions only affirms the truth that there is morality in a particular jurisdiction; without, however, discounting the truth that underneath the moral relativism are certain moral absolutes such as respect for life and truth-telling, without which no society will survive. Only one conduct is in question before this Court, i.e., the conjugal arrangement of a government employee whose partner is legally married to another which Philippine law and jurisprudence consider both immoral and illegal. Lest the Court inappropriately engage in the impossible task of prescribing comprehensively how one ought to live, the Court must focus its attention upon the sole conduct in question before us.

In interpreting "disgraceful and immoral conduct," the dissenting opinion of Mme. Justice Ynares-Santiago groped for standards of morality and stated that the "ascertainment of what is moral or immoral calls for the discovery of contemporary community standards" but did not articulate how these standards are to be ascertained. Instead, it held that, "(f)or those in the service of the Government, provisions of law and court precedents . . . have to be considered." It identified the Civil Service Law and the laws on adultery and concubinage as laws which respondent's conduct has offended and cited a string of precedents where a government employee was found guilty of committing a "disgraceful and immoral conduct" for maintaining illicit relations and was thereby penalized. As stated above, there is no dispute that under settled jurisprudence, respondent's conduct constitutes "disgraceful and immoral conduct." However, the cases cited by the dissent do not involve the defense of religious freedom which respondent in the case at bar invokes. Those cited cases cannot therefore serve as precedents in settling the issue in the case at bar.

Mme. Justice Ynares-Santiago's dissent also cites **Cleveland v. United States**[446] in laying down the standard of morality, *viz*: "(w)hether an act is immoral within the meaning of the statute is not to be determined by respondent's concept of morality. The law provides the standard; the offense is complete if respondent intended to perform, and did in fact perform, the act which it condemns." The Mann Act under consideration in the **Cleveland case** declares as an offense the transportation in interstate commerce of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[447] The resolution of that case hinged on the interpretation of the phrase "immoral purpose." The U.S. Supreme Court held that the petitioner Mormons' act of transporting at least one plural wife whether for the purpose of cohabiting with her, or for the purpose of aiding another member of their Mormon church in such a project, was covered by the phrase "immoral purpose." In so ruling, the Court relied on **Reynolds** which held that the Mormons' practice of polygamy, in spite of their defense of religious freedom, was "odious among the northern and western nations of Europe,"[448] "a return to barbarism,"[449] "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world,"[450] and thus punishable by law.

The **Cleveland** standard, however, does not throw light to the issue in the case at bar. The pronouncements of the U.S. Supreme Court that polygamy is intrinsically "odious" or "barbaric" do not apply in the Philippines where Muslims, by law, are allowed to practice polygamy. Unlike in **Cleveland**, there is no jurisprudence in Philippine jurisdiction holding that the defense of religious freedom of a member of the Jehovah's Witnesses under the same circumstances as respondent will not prevail over the laws on adultery, concubinage or some other law. We cannot summarily conclude therefore that her conduct is likewise so "odious" and "barbaric" as to be immoral and punishable by law.

While positing the view that the resolution of the case at bar lies more on determining the applicable moral standards and less on religious freedom, Mme. Justice Ynares-Santiago's dissent nevertheless discussed respondent's plea of

religious freedom and disposed of this defense by stating that "(a) clear and present danger of a substantive evil, destructive to public morals, is a ground for the reasonable regulation of the free exercise and enjoyment of religious profession. (American Bible Society v. City of Manila, 101 Phil. 386 [1957]). In addition to the destruction of public morals, the substantive evil in this case is the tearing down of morality, good order, and discipline in the judiciary." However, the foregoing discussion has shown that the "clear and present danger" test that is usually employed in cases involving freedom of expression is not appropriate to the case at bar which involves purely religious conduct. The dissent also cites **Reynolds** in supporting its conclusion that respondent is guilty of "disgraceful and immoral conduct." The **Reynolds ruling,** however, was reached with a strict neutrality approach, which is not the approach contemplated by the Philippine constitution. As discussed above, Philippine jurisdiction adopts **benevolent neutrality** in interpreting the religion clauses.

In the same vein, Mr. Justice Carpio's dissent which employs strict neutrality does not reflect the constitutional intent of employing **benevolent neutrality** in interpreting the Philippine religion clauses. His dissent avers that respondent should be held administratively liable not for "disgraceful and immoral conduct" but "conduct prejudicial to the best interest of the service" as she is a necessary co-accused of her partner in concubinage. The dissent stresses that being a court employee, her open violation of the law is prejudicial to the administration of justice. Firstly, the dissent offends due process as respondent was not given an opportunity to defend herself against the charge of "conduct prejudicial to the best interest of the service." In addition, there is no evidence of the alleged prejudice to the best interest of the service. Most importantly, the dissent concludes that respondent's plea of religious freedom cannot prevail without so much as employing a test that would balance respondent's religious freedom and the state's interest at stake in the case at bar. The foregoing discussion on the doctrine of religious freedom, however, shows that with **benevolent neutrality** as a framework, the Court cannot simply reject respondent's plea of religious freedom without even subjecting it to the "compelling state interest" test that would balance her freedom with the paramount interests of the state. The strict neutrality employed in the cases the dissent cites -**Reynolds, Smith and People v. Bitdu decided before the 1935 Constitution which unmistakably shows adherence to benevolent neutrality** - is not contemplated by our constitution.

Neither is **Sulu Islamic Association of Masjid Lambayong v. Judge Nabdar J. Malik**[451] cited in Mr. Justice Carpio's dissent decisive of the immorality issue in the case at bar. In that case, the Court dismissed the charge of immorality against a Tausug judge for engaging in an adulterous relationship with another woman with whom he had three children because "it (was) not 'immoral' by Muslim standards for Judge Malik to marry a second time while his first marriage (existed)." Putting the quoted portion in its proper context would readily show that the **Sulu Islamic case** does not provide a precedent to the case at bar. Immediately prior to the portion quoted by the dissent, the Court

stressed, *viz*: "(s)ince Art. 180 of P.D. No. 1083, otherwise known as the Code of Muslim Personal Laws of the Philippines, provides that the penal laws relative to the crime of bigamy '*shall not apply to a person married* x x x under Muslim Law,' it is not 'immoral' by Muslim standards for Judge Malik to marry a second time while his first marriage exists."[452] It was by law, therefore, that the Muslim conduct in question was classified as an exception to the crime of bigamy and thus an exception to the general standards of morality. The constitutionality of P.D. No. 1083 when measured against the Establishment Clause was not raised as an issue in the **Sulu Islamic case.** Thus, the Court did not determine whether P.D. No. 1083 suffered from a constitutional infirmity and instead relied on the provision excepting the challenged Muslim conduct from the crime of bigamy in holding that the challenged act is not immoral by Muslim standards. In contradistinction, in the case at bar, there is no similar law which the Court can apply as basis for treating respondent's conduct as an exception to the prevailing jurisprudence on illicit relations of civil servants. Instead, the Free Exercise Clause is being invoked to justify exemption.

B. Application of Benevolent Neutrality and the Compelling State Interest Test to the Case at Bar

The case at bar being one of first impression, we now subject the respondent's claim of religious freedom to the **"compelling state interest" test from a benevolent neutrality stance** - i.e. entertaining the possibility that respondent's claim to religious freedom would warrant carving out an exception from the Civil Service Law; necessarily, her defense of religious freedom will be unavailing should the government succeed in demonstrating a more compelling state interest.

In applying the test, the first inquiry is whether respondent's right to religious freedom has been burdened. There is no doubt that choosing between keeping her employment and abandoning her religious belief and practice and family on the one hand, and giving up her employment and keeping her religious practice and family on the other hand, puts a burden on her free exercise of religion. In **Sherbert,** the Court found that Sherbert's religious exercise was burdened as the denial of unemployment benefits "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." The burden on respondent in the case at bar is even greater as the price she has to pay for her employment is not only her religious precept but also her family which, by the Declaration Pledging Faithfulness, stands "honorable before God and men."

The second step is to ascertain respondent's sincerity in her religious belief. Respondent appears to be sincere in her religious belief and practice and is not merely using the "Declaration of Pledging Faithfulness" to avoid punishment for immorality. She did not secure the Declaration only after entering

the judiciary where the moral standards are strict and defined, much less only after an administrative case for immorality was filed against her. The Declaration was issued to her by her congregation after ten years of living together with her partner, Quilapio, and ten years before she entered the judiciary. Ministers from her congregation testified on the authenticity of the Jehovah's Witnesses' practice of securing a Declaration and their doctrinal or scriptural basis for such a practice. As the ministers testified, the Declaration is not whimsically issued to avoid legal punishment for illicit conduct but to make the "union" of their members under respondent's circumstances "honorable before God and men." It is also worthy of notice that the Report and Recommendation of the investigating judge annexed letters[453] of the OCA to the respondent regarding her request to be exempt from attending the flag ceremony after Circular No. 62-2001 was issued requiring attendance in the flag ceremony. The OCA's letters were not submitted by respondent as evidence but annexed by the investigating judge in explaining that he was caught in a dilemma whether to find respondent guilty of immorality because the Court Administrator and Deputy Court Administrator had different positions regarding respondent's request for exemption from the flag ceremony on the ground of the Jehovah's Witnesses' contrary belief and practice. Respondent's request for exemption from the flag ceremony shows her sincerity in practicing the Jehovah's Witnesses' beliefs and not using them merely to escape punishment. She is a practicing member of the Jehovah's Witnesses and the Jehovah ministers testified that she is a member in good standing. Nevertheless, should the government, thru the Solicitor General, want to further question the respondent's sincerity and the centrality of her practice in her faith, it should be given the opportunity to do so. The government has not been represented in the case at bar from its incipience until this point.

In any event, even if the Court deems sufficient respondent's evidence on the sincerity of her religious belief and its centrality in her faith, the case at bar cannot still be decided using the "compelling state interest" test. The case at bar is one of **first impression,** thus the parties were not aware of the burdens of proof they should discharge in the Court's use of the "compelling state interest" test. We note that the OCA found respondent's defense of religious freedom unavailing in the face of the Court's ruling in **Dicdican v. Fernan, et al.,** *viz*:

> It bears emphasis that the image of a court of justice is mirrored in the conduct, official and otherwise, of the personnel who work thereat, from the judge to the lowest of its personnel. Court personnel have been enjoined to adhere to the exacting standards of morality and decency in their professional and private conduct in order to preserve the good name and integrity of the courts of justice.

It is apparent from the OCA's reliance upon this ruling that the state interest it upholds is the preservation of the integrity of the judiciary by maintaining among its ranks a high standard of morality and decency. However, there is nothing in

the OCA's memorandum to the Court that demonstrates how this interest is so compelling that it should override respondent's plea of religious freedom nor is it shown that the means employed by the government in pursuing its interest is the least restrictive to respondent's religious exercise.

Indeed, it is inappropriate for the complainant, a private person, to present evidence on the compelling interest of the state. The burden of evidence should be discharged by the proper agency of the government which is the Office of the Solicitor General. To properly settle the issue in the case at bar, the government should be given the opportunity to demonstrate the compelling state interest it seeks to uphold in opposing the respondent's stance that her conjugal arrangement is not immoral and punishable as it comes within the scope of free exercise protection. **Should the Court prohibit and punish her conduct where it is protected by the Free Exercise Clause, the Court's action would be an unconstitutional encroachment of her right to religious freedom.**[454] We cannot therefore simply take a passing look at respondent's claim of religious freedom, but must instead apply the "compelling state interest" test. The government must be heard on the issue as it has not been given an opportunity to discharge its burden of demonstrating the state's compelling interest which can override respondent's religious belief and practice. To repeat, this is a case of first impression where we are applying the "compelling state interest" test in a case involving purely religious conduct. The careful application of the test is indispensable as how we will decide the case will make a decisive difference in the life of the respondent who stands not only before the Court but before her Jehovah God.

IN VIEW WHEREOF, the case is **REMANDED** to the Office of the Court Administrator. The Solicitor General is ordered to intervene in the case where it will be given the opportunity (a) to examine the sincerity and centrality of respondent's claimed religious belief and practice; (b) to present evidence on the state's "compelling interest" to override respondent's religious belief and practice; and (c) to show that the means the state adopts in pursuing its interest is the least restrictive to respondent's religious freedom. The rehearing should be concluded thirty (30) days from the Office of the Court Administrator's receipt of this Decision.

SO ORDERED.

Davide, Jr., C.J., Austria-Martinez, Corona, Azcuna, and *Tinga, JJ.,* concur.
Bellosillo and *Vitug, JJ.,* please see separate opinion.
Ynares-Santiago, and *Carpio, JJ.,* see dissenting opinion.
Panganiban, Carpio-Morales, and *Callejo, Sr., JJ.,* joins the dissenting opinion of *J. Carpio.*
Quisumbing, and *Sandoval-Gutierrez, JJ.,* on official leave.

[1] Kelley, D. "'Strict Neutrality' and the Free Exercise of Religion" in Weber, P., Equal Separation (1990), p. 17.
[2] Walz *v*. Tax Commission of the City of New York, 397 U.S. 664 (1970), p. 668.
[3] Smith, S., "The Rise and Fall of Religious Freedom in Constitutional Discourse," University of Pennsylvania Law Review, vol. 140(1), November 1991, pp. 149-150.
[4] Concurring Opinion of Justice Stewart, Sherbert *v*. Verner, 374 U.S. 398, p. 416 (1963).
[5] *Rollo*, pp. 5-6.
[6] *Id.* at 8.
[7] *Id.* at 19-26; TSN, October 12, 2000, pp. 3-10.
[8] *Id.* at 101.
[9] *Id.* at 100; Exhibit 3, Certificate of Death.
[10] *Id.* at 10; Exhibit 1.
[11] *Id.* at 11; Exhibit 2.
[12] *Id.* at 27-33.
[13] *Id.* at 37.
[14] *Id.* at 191-194; TSN, Soledad Escritor, March 8, 2002, pp. 7-10.
[15] *Id.* at 156-160, TSN, May 29, 2002, pp. 5-9.
[16] Citing biblical passages, this article addresses the question, "Does the validity of a marriage depend entirely upon its recognition by civil authorities and does their validation determine how Jehovah God, the author of marriage, views the union?" It traces the origins of marriage to the time of the Hebrews when marriage was a family or tribal affair. With the forming of Israel as a nation, God gave a law containing provisions on marriage, but there was no requirement for a license to be obtained from the priesthood nor that a priest or a representative from government be present in the marriage to validate it. Instead, as long as God's law was adhered to, the marriage was valid and honorable within the community where the couple lived. In later Bible times, marriages came to be registered, but only after the marriage had been officiated, thereby making the government only a record-keeper of the fact of marriage and not a judge of its morality.

In the early centuries of the Christian congregation, marriage was likewise chiefly a family affair and there was no requirement of license from the religious or civil authority to make it valid and honorable. It was conformity to God's law that was necessary for the marriage to be viewed as honorable within the congregation. Later, however, the civil authorities came to have more prominence in determining the validity of a marriage while the role of the congregation waned. Christians cannot turn their back on this reality in desiring to make their marriage honorable "among all", i.e., in the sight of God and men. However, the view of civil authorities regarding the validity of marriage is relative and sometimes even contradictory to the standards set by the Bible. For example, in some lands, polygamy is approved while the Bible says that a man should only have one wife. Likewise, some countries allow divorce for the slightest reasons while others do not allow divorce. The Bible, on the other hand, states that there is only one ground for divorce, namely, fornication, and those divorcing for this reason become free to marry.

To obtain a balanced view of civil authority (or Caesars' authority in Biblical terms) regarding marriage, it is well to understand the interest of civil governments in marriage. The government is concerned with the practical aspects of marriage such as property rights and weakening genetic effects on children born to blood relatives, and not with the religious or moral aspects of marriage. Caesar's authority is to provide legal recognition and accompanying protection of marital rights in court systems, thus a Christian desiring this recognition and rights must adhere to Caesar's requirements. However, God is not bound by Caesar's decisions and the Christian "should rightly give conscientious consideration to Caesar's marriage and divorce provisions but will always give greatest consideration to the Supreme Authority, Jehovah God (Acts 4:19; Rom. 13:105). . . Thus the Christian appreciates that, even though Caesar's rulings of themselves are not what finally determine the validity of his marriage in God's eyes, this does not thereby exempt him from the Scriptural injunction: 'Let marriage be honorable among all.' (Heb. 13:4) He is obligated to do conscientiously whatever is within the power to see that his marriage is

accorded such honor by all." Those who wish to be baptized members of the Christian congregation but do not have legal recognition of their marital union should do all that is possible to obtain such recognition, thereby removing any doubt as to the honorableness of their union in the eyes of people.

In some cases, however, it is not possible to secure this recognition. For instance, in countries where divorce is not allowed even on the Scriptural ground of fornication, either because of the dominance of one religion or other reasons, a man might have left his unfaithful wife and lives with another woman with whom he has a family. He may later learn the truth of God's Word and desire to be baptized as a disciple of God's Son, but he cannot obtain divorce and remarry as the national laws do not allow these. He might go to a land which permits divorce and remarry under the laws of that land and add honor to his union, but upon returning to his homeland, the law therein might not recognize the union. If this option is not available to that man, he should obtain a legal separation from his estranged mate or resort to other legal remedies, then "make a written statement to the local congregation pledging faithfulness to his present mate and declaring his agreement to obtain a legal marriage certificate if the estranged legal wife should die or if other circumstances should make possible the obtaining of such registration. If his present mate likewise seeks baptism, she would also make such a signed statement." (p. 182) In some cases, a person might have initiated the process of divorce where the law allows it, but it may take a long period to finally obtain it. If upon learning Bible truth, the person wants to be baptized, his baptism should not be delayed by the pending divorce proceedings that would make his present union honorable for "Bible examples indicate that unnecessary delay in taking the step of baptism is not advisable (Acts 2:37-41; 8:34-38; 16:30-34; 22:16)." Such person should then provide the congregation with a statement pledging faithfulness, thereby establishing his determination to maintain his current union in honor while he exerts effort to obtain legal recognition of the union. Similarly, in the case of an already baptized Christian whose spouse proves unfaithful and whose national laws do not recognize the God-given right to divorce an adulterous mate and remarry, he should submit clear evidence to the elders of the congregation of the mate's infidelity. If in the future he decides to take another mate, he can do this in an honorable way by signing declarations pledging faithfulness where they also promise to seek legal recognition of their union where it is feasible. This declaration will be viewed by the congregation as "a putting of oneself on record before God and man that the signer will be just as faithful to his or her existing marital relationship as he or she would be if the union were one validated by civil authorities. Such declaration is viewed as no less binding than one made before a marriage officer representing a 'Caesar' government of the world. . . It could contain a statement such as the following:

I, _____, do here declare that I have accepted _____ as my mate in marital relationship; that I have done all within my ability to obtain legal recognition of this relationship by the proper public authorities and that it is because of having been unable to do so that I therefore make this declaration pledging faithfulness in this marital relationship. I recognize this relationship as a binding tie before Jehovah God and before all persons, to be held to and honored in full accord with the principles of God's Word. I will continue to seek the means to obtain legal recognition of this relationship by the civil authorities and if at any future time a change in circumstances makes this possible I promise to legalize this union."

The declaration is signed by the declarant and by two others as witnesses and the date of declaration is indicated therein. A copy of the declaration is kept by the persons involved, by the congregation to which they belong, and by the branch office of the Watch Tower Society in that area. It is also beneficial to announce to the congregation that a declaration was made for their awareness that conscientious steps are being undertaken to uphold the honorableness of the marriage relationship. It must be realized, however, that if the declarant is unable to obtain recognition from the civil authorities, even if he makes that declaration, "whatever consequences result to him as far as the world outside is concerned are his sole responsibility and must be faced by him." (p. 184) For instance,

should there be inheritance or property issues arising from an earlier marriage, he cannot seek legal protection with regard to his new, unrecognized union.

[17] *Rollo*, pp. 163-183; TSN, Minister Gregorio Salazar, May 29, 2002, pp. 12-32.
[18] *Rollo*, pp. 111, 217-222; TSN, Minister Salvador Reyes, pp. 3-8; Exhibit 6.
[19] *Rollo*, pp. 235-238; Memorandum for Complainant, pp. 1-4.
[20] Rollo, pp. 239-240; Respondent's Memorandum, pp. 1-2; Rollo, pp. 109-110, "Maintaining Marriage Before God and Men", pp. 184-185.
[21] *Rollo*, p, 240; Respondent's Memorandum, p. 2.
[22] Report and Recommendation of Executive Judge Bonifacio Sanz Maceda, p. 3.
[23] *Id.* at 4.
[24] Memorandum by Deputy Court Administrator Christopher Lock dated August 28, 2002, p. 6.
[25] A.M. No. P-96-1231, February 12, 1997.
[26] Memorandum by Deputy Court Administrator Christopher Lock dated August 28, 2002, p. 7.
[27] Noonan, J., Jr. and Gaffney, Jr., Religious Freedom (2001), p. xvii.
[28] Pfeffer, L., Church, State, and Freedom (1967), p. 3., citing Wieman, Henry Nelson, and Horton, Walter M., The Growth of Religion (1938), p. 22.
[29] Pfeffer, L., Church, State, and Freedom (1967), p. 3., citing Wieman, Henry Nelson, and Horton, Walter M., The Growth of Religion (1938), p. 29.
[30] Pfeffer, L., *supra*, p. 3, citing Hopkins, E. Washburn, Origin and Evolution of Religion (1923), pp. 68, 206.
[31] Pfeffer, L., *supra*, p. 4, citing Cambridge Ancient History (1928), pp. 512-528.
[32] Pfeffer, L., *supra*, p. 4, citing Clemen, C., Religions of the World (1931), p. 47.
[33] Pfeffer, L., *supra*, p. 4.
[34] Pfeffer, L., *supra*, p. 5, citing Against Apion, Book II, paragraph 17, in Complete Works of Josephus, p. 500.
[35] Pfeffer, L., *supra*, p. 5, citing Clemen, p. 46-47.
[36] It may also be said that Moses actually used the concept of a single all-powerful God as a means of unifying the Hebrews and establishing them as a nation, rather than vice versa. What is important to note, however, is that the monotheism which served as foundation of Christianity of western civilization with its consequences in church-state relations was established by Moses of the Bible, not the Moses of history. Pfeffer, L.,*supra*, p. 5.
[37] Pfeffer, L., *supra*, pp. 5-6, citing Northcott, C., Religious Liberty (1949), p. 24.
[38] Pfeffer, L., *supra*, p. 7, citing 1 Kings 2:35.
[39] Pfeffer, L., *supra*, p. 7.
[40] Pfeffer, L., *supra*, p. 10, citing Kellett, E.E., A Short History of Religions (1934), p. 108.
[41] Pfeffer, L., *supra*, p. 12, citing History of Christianity, p. 168.
[42] Pfeffer, L., *supra*, p. 13.
[43] Pfeffer, L., *supra*, p. 13, citing Walker, W., A History of the Christian Church (1940), p. 108.
[44] Pfeffer, L., *supra*, p. 13, citing History of Christianity, p. 481.
[45] Pfeffer, L., *supra*, p. 16, citing Encyclopedia Britannica, "Charles the Great," 14th ed., V, p. 258.
[46] Pfeffer, L., *supra*, p. 22.
[47] Pfeffer, L., *supra*, p. 23.
[48] Greene, E., Religion and the State (1941), p. 8.
[49] Pfeffer, L., *supra*, p. 23, citing Wace, Henry, and Bucheim, C.A., Luther's Primary Works (1885), pp. 194-185.
[50] Pfeffer, L., *supra*, p. 23, citing Acton, "History of Freedom in Chrisitianity," in Essays on Freedom and Power (1949), p. 103.
[51] Pfeffer, L., *supra*, pp. 24-25.
[52] Pfeffer, L., *supra*, p. 26, citing Stokes, I, p. 100.
[53] Greene, E., *supra*, p. 9.
[54] Pfeffer, L., *supra*, p. 26, citing Stokes, I, p. 113.
[55] Pfeffer, L., *supra*, p. 26.
[56] Pfeffer, L., *supra*, p. 27, citing Garbett, C. (Archbishop of York), Church and State in England (1950), p. 93.

[57] Pfeffer, L., *supra*, p. 27, citing Noss, J.B., Man's Religions (1949), pp. 674-675 and Garbett, C., pp. 61-62.
[58] Greene, E., *supra*, p. 10, citing Tanner, Tudor Constitutional Documents, 130-135.
[59] Pfeffer, L., *supra*, p. 28, citing Encyclopedia of Social Sciences, XIII, p. 243.
[60] Pfeffer, L., *supra*, p. 28, citing Stokes, I, p. 132.
[61] Everson *v.*Board of Education of the Township of Ewing, et al., 330 U.S. 1 (1947), pp. 8-9.
[62] Pfeffer, L., *supra*, p. 30, citing Religious News Service, October 31, 1950.
[63] Pfeffer, L., *supra*, p. 30.
[64] Beth, L., American Theory of Church and State (1958), p. 3.
[65] Everson v. Board of Education, 330 US 1(1946), pp. 8-10.
[66] Witt, E. (ed.), The Supreme Court and Individual Rights (1980), p. 79.
[67] Pfeffer, L., *supra*, pp. 92-93.
[68] Pfeffer, L., *supra*, p. 96.
[69] Pfeffer, L., *supra*, p. 95
[70] Another estimate of church membership in 1775 is that in none of the colonies was membership in excess of 35 percent of the population. (Beth, L., American Theory of Church and State [1958], p. 73.)
[71] Grossman, J.B. and Wells, R.S., Constitutional Law & Judicial Policy Making, Second Edition (1980), p. 1276.
[72] Pfeffer, L., *supra*, pp. 96.
[73] Pfeffer, L., *supra*, p. 93, citing Mecklin, J. M., The Story of American Dissent (1934), p. 202.
[74] Pfeffer, L., *supra*, p. 93.
[75] Greene, E., *supra*, pp. 65-66 and Pfeffer, L., *supra*, p. 103, citing Cobb, S.H., The Rise of Religious Liberty in America (1902), p. 485.
[76] Pfeffer, L., *supra*, p. 85.
[77] Blau, J., Cornerstones of Religious Freedom in America (1950), p. 36.
[78] Pfeffer, L., *supra*, p. 87.
[79] Pfeffer, L., *supra*, p. 86.
[80] Pfeffer, L., *supra*, pp. 88-89.
[81] Pfeffer, L., *supra*, p. 101.
[82] Pfeffer, L., *supra*, p. 99.
[83] Pfeffer, L., *supra*, p. 97. *See als*o Locke, J., Second Treatise of Government (edited by C.B: Macpherson), pp. 8-10.
[84] Pfeffer, L., *supra*, p. 102, citing Humphrey, E.F., Nationalism and Religion in America, 1774-1789 (1924), pp. 368-369.
[85] Pfeffer, L., *supra*, p. 103.
[86] Drakeman, D., Church-State Constitutional Issues (1991), p. 55.
[87] Pfeffer, L., *supra*, p. 104, citing Beard, C. and Mary R., The Rise of American Civilization, I (1947), p. 449.
[88] Drakeman, D., *supra*, p. 55.
[89] Pfeffer, L., *supra*, p. 104, citing Laski, H.J., The Ameican Democracy (1948), p. 267.
[90] Pfeffer, L., *supra*, p. 105, citing Henry, M., The Part Taken by Virginia in Establishing Religious Liberty as a Foundation of the American Government, Papers of the American Historical Association, II, p. 26.
[91] Beth, L., American Theory of Church and State (1958), pp. 61-62.
[92] Pfeffer, L., *supra*, p. 107, citing Butts, R. Freeman, The American Tradition in Religion and Education (1950), pp. 46-47.
[93] Pfeffer, L., *supra*, p. 108, citing Humphrey, E. F., Nationalism and Religion in America, 1774-1789 (1924), p. 379.
[94] Pfeffer, L., *supra*, p. 109, citing Butts, supra, pp. 53-56.
[95] Drakeman, D., *supra*, p. 3; Pfeffer, L., *supra*, p. 109, citing Eckenrode, N.J., The Separation of Church and State in Virginia (1910), p. 86.
[96] Beth, L., *supra*, p. 63.
[97] *Id.* at 81-82.
[98] *Id.* at 74-75.
[99] Beth, L., *supra*, p. 63.

[100] *Id* at 63-65.
[101] Smith, S., "The Rise and Fall of Religious Freedom in Constitutional Discourse", University of Pennsylvania Law Review, vol. 140(1), November 1991, p. 149, 160.
[102] *Id.* at 63-65.
[103] Smith, S., "The Rise and Fall of Religious Freedom in Constitutional Discourse", University of Pennsylvania Law Review, vol. 140(1), November 1991, p. 149, 160.
[104] Beth, L., *supra*, pp. 63-65.
[105] *Id.* at 69.
[106] Drakeman, D., *supra*, p. 59.
[107] Reynolds *v*. United States, 98 U.S. 145 (1878), pp. 163-164; Pfeffer, L., *supra*, p. 92, 125, citing Kohler, M.J., "The Fathers of the Republic and Constitutional Establishment of Religious Liberty" (1930), pp. 692-693.
[108] Beth, L., *supra*, p. 71.
[109] Berman, H., "Religious Freedom and the Challenge of the Modern State," Emory Law Journal, vol. 39, Winter 1990-Fall 1990, pp. 151-152.
[110] Monsma, S., "The Neutrality Principle and a Pluralist Concept of Accommodation" in Weber, P., Equal Separation (1990), p. 74.
[111] Berman, H., *supra*, pp. 151-152.
[112] McCoy, T., "A Coherent Methodology for First Amendment Speech and Religion Clause Cases," Vanderbilt Law Review, vol. 48(5), October 1995, p. 1335, 1340.
[113] Weber, P., "Neutrality and first Amendment Interpretation" in Equal Separation (1990), pp. 5-7. *See also* Kauper, P., Religion and the Constitution (1964), p. 99.
[114] Monsma, S., *supra*, p. 73.
[115] *See* Carter, S., "The Resurrection of Religious Freedom," Harvard Law Review (1993), vol. 107(1), p. 118, 128-129.
[116] Emanuel, S., Constitutional Law (1992), p. 633.
[117] Carter, S., *supra*, p. 118, 140.
[118] Sullivan, K., "Religion and Liberal Democracy," The University of Chicago Law Review (1992), vol. 59(1), p. 195, 214-215.
[119] Kauper, P., Religion and the Constitution (1964), pp, 24-25.
[120] 133 U.S. 333 (1890).
[121] 133 U.S. 333 (1890), p. 342.
[122] 322 U.S. 78 (1944).
[123] United States *v*. Ballard, 322 U.S. 78 (1944), p. 86.
[124] Stephens, Jr., O.H. and Scheb, II J.M., American Constitutional Law, Second Edition (1999), pp. 522-523.
[125] 367 U.S. 488 (1961).
[126] 380 U.S. 163 (1965).
[127] Stephens, Jr., *supra*, p. 645.
[128] *Id.* at 524.
[129] Emanuel, S., *supra*, p. 645, citing Frazee *v*. Illinois Department of Employment Security, 489 U.S. 829 (1989).
[130] McCoy, T., "A Coherent Methodology for First Amendment Speech and Religion Clause Cases," Vanderbilt Law Review, vol. 48(5), October 1995, p. 1335, 1336-1337.
[131] Kelley, D. "'Strict Neutrality' and the Free Exercise of Religion" in Weber, P., Equal Separation (1990), p. 20.
[132] Kauper, P., *supra*, p, 13.
[133] Neuhaus, R., "A New Order of Religious Freedom," The George Washington Law Review (1992), vol. 60 (2), p. 620, 626-627.
[134] McConnell, M., "Religious Freedom at a Crossroads," The University of Chicago Law Review (1992), vol. 59(1), p. 115, 168.
[135] McCoy, T., *supra*, p. 1335, 1336-1337.
[136] Neuhaus, R., "A New Order of Religious Freedom," The George Washington Law Review (1992), vol. 60 (2), p. 620, 626-627.

[137] Monsma, S., *supra*, p. 88, citing Neuhaus, R., "Contending for the Future: Overcoming the Pfefferian Inversion," in The First Amendment Religion Liberty Clauses and American Public Life, p. 183.
[138] Carter, S., *supra*, p. 118, 134-135.
[139] Lupu, I., "The Religion Clauses and Justice Brennan in Full," California Law Review (1999), vol. 87(5), p. 1105, 1114.
[140] Everson *v*. Board of Education, 330 US 1 (1946), p. 15.
[141] Walz *v*. Tax Commission, 397 U.S. 664 (1970), p. 669.
[142] *See* McCoy, T., *supra*, p. 1335, 1336.
[143] 98 U.S. 145 (1878); Buzzard, L., Ericsson, S., The Battle for Religious Liberty (1980), p. 49; Drakeman, Church-State Constitutional Issues (1991), p. 2.
[144] Reynolds *v*. United States, 98 U.S. 164 (1878), p. 163.
[145] *Id*. at 163.
[146] 98 U.S. 145, 166.
[147] McCoy, T., *supra*, p. 1335, 1344-45.
[148] Nowak, J., Rotunda, R., and Young, J., Constitutional Law, 3rd ed. (1986), p. 1069.
[149] 136 U.S. 1 (1890).
[150] Nowak, J., Rotunda, R., and Young, J., *supra*, pp. 1069-1072.
[151] Witt, E. (ed.), The Supreme Court and Individual Rights (1980), p. 79.
[152] 367 U.S. 488 (1961).
[153] 322 U.S. 78, 86 (1944).
[154] 310 U.S. 296 (1940).
[155] *Id.* at 310.
[156] *Id* at 303-304.
[157] 319 U.S. 157 (1943).
[158] 340 U.S. 268 (1951).
[159] 452 U.S. 640 (1981).
[160] Stephens, Jr., O.H. and Scheb, II J.M., *supra*, p. 524.
[161] 133 U.S. 333, 345.
[162] McCoy, T., *supra*, p. 1335, 1344-45.
[163] 310 U.S. 586 (1940).
[164] 319 U.S. 624 (1943).
[165] *Id.* at 634.
[166] *Id.* at 639.
[167] McCoy, T., *supra*, p. 1335, 1345-46.
[168] *See* Bloostein, M., "The 'Core'-'Periphery' Dichotomy in First Amendment Free Exercise Clause Doctrine: Goldman *v*. Weinberger, Bowen *v*. Roy, and O'Lone *v*. Estate of Shabbaz,z" Cornell Law Review, vol. 72 (4), p. 827, 828.
[169] 366 U.S. 599 (1961).
[170] Nowak, J., Rotunda, R., and Young, J., *supra*, pp. 1072-1073.
[171] 374 U.S. 398 (1963).
[172] Nowak, J., Rotunda, R., and Young, J., *supra*, pp. 1072-1073.
[173] Sherbert *v*. Verner, 374 U.S. 398 (1963), p. 403.
[174] *Id.* at 406.
[175] Lupu, I., *supra*, p. 1105, 1110.
[176] McCoy, T., *supra*, p. 1335, 1346-1347.
[177] 450 U.S. 707 (1981).
[178] 480 U.S. 136 (1987).
[179] 455 U.S. 252 (1982).
[180] United States *v*. Lee, 455 U.S. 252 (1982), p. 260.
[181] Stephens, Jr., O.H. and Scheb, II J.M., *supra*, p. 526.
[182] 406 U.S. 205 (1972).
[183] *Id.* at 214-215, 219-220.
[184] 494 U.S. 872 (1990).
[185] McConnell, M., *supra*, p. 685, 726.

[186] McCoy, T., *supra*, p. 1335, 1350-1351.
[187] Ducat, C., Constitutional Interpretation, vol. II (2000), pp. 1180 and 1191. See also Sullivan, K., "Religion and Liberal Democracy", The University of Chicago Law Review (1992), vol. 59(1), p. 195, 216.
[188] McConnell, M., "Religious Freedom at a Crossroads", The University of Chicago Law Review (1992), vol. 59(1), p. 115, 139.
[189] Sullivan, K., "Religion and Liberal Democracy," The University of Chicago Law Review (1992), vol. 59(1), p. 195, 216.
[190] Carter, S., *supra*, p. 118.
[191] Rosenzweig, S., "Restoring Religious Freedom to the Workplace: Title VII, RFRA and Religious Accommodation," University of Pennsylvania Law Review (1996), vol. 144(6), p. 2513, 2516.
[192] 138 L.Ed. 2d 624 (1994).
[193] 508 U.S. 520 (1993).
[194] Stephens, Jr., O.H. and Scheb, II J.M., *supra*, p. 529.
[195] 330 U.S. 1 (1946).
[196] Drakeman, D., *supra*, p. 4-6.
[197] Buzzard, L., Ericsson, S., The Battle for Religious Liberty (1980), p. 53.
[198] 98 U.S. 164 (1878).
[199] Reynolds *v*. United States, 98 U.S. 164 (1878), p. 164.
[200] *Id.* at 164.
[201] Stephens, Jr., O.H. and Scheb, II J.M., *supra*, p. 532.
[202] Everson *v*. Board of Education, 330 U.S. 1 (1946), pp. 15-16.
[203] *Id.* at 18.
[204] 403 U.S. 602 (1971).
[205] Lemon *v*. Kurtzman, 403 U.S. 602 (1971), pp. 612-613.
[206] Stephens, Jr., O.H. and Scheb, II J.M., *supra*, pp. 536, 540.
[207] 370 U.S. 421 (1962).
[208] 374 U.S. 203 (1963).
[209] *Id*.
[210] *Id.* at 222.
[211] Witt, E. (ed.), *supra*, p. 93.
[212] 472 U.S. 38 (1985).
[213] 333 U.S. 203 (1948).
[214] 343 U.S. 306 (1952).
[215] Zorach *v*. McCollum, 343 U.S. 306 (1952), p. 315.
[216] 366 U.S. 420 (1961).
[217] *Id.* at 451-452.
[218] 463 U.S. 783 (1983).
[219] Marsh *v*. Chambers, 463 US 783 (1983).
[220] Stephens, Jr., O.H. and Scheb, II J.M., *supra*, pp. 540-541.
[221] 465 U.S. 668 (1984).
[222] 397 U.S. 664 (1970).
[223] *Id.* at 673.
[224] *Id*.
[225] *Id.* at 676.
[226] McConnell, M., "Religious Freedom at a Crossroads", The University of Chicago Law Review (1992), vol. 59(1), p. 115, 119-120.
[227] Drakeman, D., *supra*, p. 51.
[228] *Id.* at 53.
[229] Stephens, Jr., O.H. and Scheb, II J.M., *supra*, p. 541.
[230] Drakeman, *supra*, p. 52, citing Cord, R., Separation of Church and State: Historical Fact and Current Fiction. p. 50.
[231] Drakeman, *supra*, pp. 52 and 82, citing Gales, J. and Seaton, W., eds., The Debates and Proceedings in the Congress of the United States, Compiled from Authentic Materials (Annala), vol. 1, pp. 949-950.

[232] Beth, L., *supra*, p. 74.
[233] Drakeman, *supra*, pp. 57, 82.
[234] Buzzard, L., Ericsson, S., *supra*, p. 46.
[235] Beth, L., *supra*, p. 72.
[236] Grossman, J.B. and Wells, R.S., *supra*, pp. 1276-1277.
[237] Beth, L., *supra*, p. 71.
[238] The Constitution and Religion, p. 1541.
[239] *Id.* at 1539.
[240] Weber, P., "Neutrality and First Amendment Interpretation" in Equal Separation (1990), p. 3.
[241] McConnell, M., "Religious Freedom at a Crossroads", The University of Chicago Law Review (1992), vol. 59(1), p. 115, 120.
[242] Everson *v*. Board of Education, 330 U.S. 1 (1947), p. 18.
[243] The Constitution and Religion, p. 1541, citing Kurland, Of Church and State and the Supreme Court, 29 U.Chi.L.Rev. 1, 5 (1961).
[244] Weber, P., Equal Separation (1990), p. 8, citing Kurland, P., Religion and the Law (1962), p. 18.
[245] Smith, S., "The Rise and Fall of Religious Freedom in Constitutional Discourse," University of Pennsylvania Law Review, vol. 140(1), November 1991, p. 149, 186.
[246] Stephens, Jr., O.H. and Scheb, II J.M., *supra*, pp. 536, 540.
[247] Buzzard, L., Ericsson, S., *supra*, p. 60.
[248] Kelley, D., *supra*, p. 1189.
[249] Monsma, S., *supra*, p. 74.
[250] *Id.* at *75*.
[251] Smith, S., *supra*, p. 149, 159.
[252] Drakeman, *supra*, p. 54.
[253] Grossman, J.B. and Wells, R.S., *supra*, p. 1276.
[254] Smith, S., *supra*, p. 149, 159.
[255] *Id.* at 149, 159-160.
[256] Grossman, J.B. and Wells, R.S., *supra*, pp. 1276-1277.
[257] *Id.* at 1276-1277, citing Kirby, Jr., J., "Everson to Meek and Roemer: From Separation to Détente in Church-State Relations", 55 North Carolina Law Review (April 1977), 563-75.
[258] Buzzard, L., Ericsson, S., *supra*, p. 51.
[259] Walz *v*. Tax Commission, 397 U.S. 664 (1970), p. 669.
[260] Buzzard, L., Ericsson, S., *supra*, p. 61.
[261] Zorach *v*. Clauson, 343 U.S. 306 (1951), pp. 312-314.
[262] Kelley, D., *supra*, p. 34.
[263] *Id.* at 34, citing Milton Yinger, J., The Scientific Study of Religion (1970), p. 21.
[264] *Id.*, citing Talcott Parsons, Introduction, Max Weber, Sociology of Religion (1963), pp. xxvii, xxviii.
[265] Stephens, Jr., O.H. and Scheb, II J.M., *supra*, p. 533.
[266] Berman, H., *supra*, p. 162.
[267] The Constitution and Religion, p. 1569.
[268] McCoy, T., *supra*, p. 1335, 1338-1339.
[269] McConnell, M., "Accommodation of Religion: An Update and a Response to the Critics", The George Washington Law Review (1992), vol. 60 (3), p. 685, 688.
[270] *Id.*
[271] *Id.* at 689.
[272] *Id.* at 690-694, 715.
[273] *Id.* at 686.
[274] *Id.* at 687, citing County of Allegheny v. ACLU, 492 U.S. 573, 659, 663, 679 (1989) (Kennedy, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 673 (1984); Marsh v. Chambers, 463 U.S. 783, 792 (1983).
[275] McConnell, M., "Religious Freedom at a Crossroads," The University of Chicago Law Review (1992), vol. 59(1), p. 115, 139, 184.
[276] *Id.* at 174.

[277] Neuhaus, R., "A New Order of Religious Freedom," The George Washington Law Review (1992), vol. 60 (2), p. 620, 631.
[278] Buzzard, L., Ericsson, S., *supra*, pp. 61-62.
[279] Emanuel, S., *supra*, pp. 633-634, citing Tribe, L., American Constitutional Law, 2nd ed. (1988), p. 1251. *See also* Nowak, J., Rotunda, R., and Young, J., Constitutional Law, 3rd ed. (1986), pp. 1067-1069.
[280] *Id.* at 633.
[281] Walz *v*. Tax Commission, 397 U.S. 664 (1969), p. 673.
[282] McConnell, M., "Accommodation of Religion: An Update and a Response to the Critics", The George Washington Law Review (1992), vol. 60 (3), p. 685, 715.
[283] Buzzard, L., Ericsson, S., *supra*, pp. 61-63.
[284] McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," Harvard Law Review , vol. 103 (1990), p. 1410, 1416-7.
[285] Buzzard, L., Ericsson, S., *supra*, p. 70.
[286] McConnell, M., "Accommodation of Religion: An Update and a Response to the Critics," The George Washington Law Review (1992), vol. 60 (3), p. 685, 735.
[287] Buzzard, L., Ericsson, S., *supra*, pp. 68-71.
[288] Lupu, I., *supra*, p. 743, 775.
[289] *Id.* at 775.
[290] Nowak, J., Rotunda, R., and Young, J., *supra*, p. 1069.
[291] Buzzard, L., Ericsson, S., *supra*, p. 68.
[292] Lupu, I., *supra*, p. 743, 776.
[293] Stephens, Jr., O.H. and Scheb, II J.M., *supra*, p. 544.
[294] Martinez, H., "The High and Impregnable Wall of Separation Between Church and State", Philippine Law Journal (1962), vol. 37(5), p. 748, 766.
[295] Article II.
[296] Bernas, J., The 1987 Constitution of the Republic of the Philippines: A Commentary (1995), p. 284.
[297] Coquia, J., Church and State Law and Relations, p. 52, citing Article X of the Treaty of Paris. The territories referred to were Cuba, Puerto Rico, Guam, the West Indies and the Philippine Islands.
[298] Coquia, J., *supra*, p. 52, citing Article 5, Constitucion Politica de la Republica Filipina promulgada el dia 22 de Enero de 1899 (Edicion oficial, Islas Filipinas, Barazoain, Bul., 1899), p. 9.
[299] Bernas, J., A Historical and Juridical Study of the Philippine Bill of Rights (1971), pp. 13, 148.
[300] Coquia, J., *supra*, p. 77, citing Acts of the Philippine Commission, With Philippine Organic Laws 10.
[301] 25 Phil. 273 (1913).
[302] *Id.* at 276.
[303] Coquia, J., *supra*, p. 53, citing Public Law No. 127, sec. 2(a), 73rd Congress (1934).
[304] Laurel, S., Proceedings of the Philippine Constitutional Convention, vol. III (1966), pp. 654-655.
[305] Aruego, J., The Framing of the Philippine Constitution, vol. I (1949), p. 164.
[306] *Id.* at 150.
[307] Bernas, J., The Intent of the 1986 Constitution Writers (1995), p. 182.
[308] Baddiri, E., "Islam and the 1987 Constitution: An Issue on the Practice of Religion," 45 Ateneo Law Journal 161 (2001), p. 208, citing Syed Muhammad Al-Naquib Al-Attas, Islam and Secularism 46 (1978).
[309] *Id.* at 208, citing Lewis, B., Islam and the West 3 (1993).
[310] 64 Phil 201 (1937).
[311] 101 Phil. 386 (1957).
[312] Bernas, Constitutional Rights and Social Demands, Part II, p. 268.
[313] 106 Phil. 2 (1959).
[314] *Id.* at 9-10.
[315] Bernas, J., The Constitution of the Republic of the Philippines: A Commentary (1987), p. 225, Footnote 38.

[316] 319 U.S. 103.
[317] 234 SCRA 630 (1994).
[318] 493 U.S. 378 (1990).
[319] 106 Phil. 2 (1959).
[320] 106 Phil. 2 (1959), p. 10.
[321] *Id.* at 11-12.
[322] *Id.* at 14.
[323] *Id.* at 25.
[324] *Id.* at 24-25.
[325] 110 Phil 150.
[326] 59 SCRA 54 (1974). *See also* Basa *v*. Federacion Obrera, 61 SCRA 93 (1974); Gonzalez v. Central Azucarera de Tarlac Labor Union, 139 SCRA (1985).
[327] Victoriano *v*. Elizalde Rope Workers Union, Inc., et al., 59 SCRA 54 (1974), p. 72.
[328] *Id.* at 73.
[329] 64 Phil 201.
[330] 392 US 236.
[331] Victoriano *v*. Elizalde Rope Workers Union, Inc., et al., *supra*, p. 74.
[332] *Id.* at 75.
[333] *Id*.
[334] 61 SCRA 93 (1974).
[335] 80 SCRA 350 (1977).
[336] 139 SCRA 30 (1985).
[337] German, *et al. v.* Barangan, *et al*., 135 SCRA 514 (1985), p. 525, citing Cantwell *v*. Connecticut, 310 U.S. 296.
[338] German, *et al. v*. Barangan, *et al*., 135 SCRA 514 (1985), pp. 524-525.
[339] German, *et al. v*. Barangan, *et al*., 135 SCRA 514 (1985).
[340] German, *et al. v*. Barangan, *et al.*, 135 SCRA 514 (1985), Dissenting Opinion of Justice Teehankee.
[341] 219 SCRA 256 (1993), March 1, 1993.
[342] *Id.* at 270-271.
[343] *Id.* at 271-272.
[344] *Id.* at 272.
[345] *Id.* at 272-273.
[346] *Id.* at 270.
[347] *Id.* at 269.
[348] 259 SCRA 529 (1996).
[349] *Id.* at 543; citing Cruz, I., Constitutional Law (1991), p. 178.
[350] *Id.*, citing Cruz, I., Constitutional Law (1991), p. 544.
[351] *Id.*, citing Cruz, I., Constitutional Law (1991), p. 551, citing Hentoff, Speech, Harm and Self-Government: Understanding the Ambit of the Clear and Present Danger Test, 91 Col. Law Rev. No. 6, p. 1453 (1991).
[352] *Id*.
[353] Bernas, Constitutional Rights and Social Demands, Part II, p. 314.
[354] This argument was a central theme in John Locke's A Letter Concerning Toleration, which strongly influenced the thinking of many Americans, including Jefferson and Madison. (Smith, S., "The Rise and Fall of Religious Freedom in Constitutional Discourse", University of Pennsylvania Law Review, vol. 140[1], November 1991, p. 149, 155).
[355] Bernas, J., The Constitution of the Republic of the Philippines: A Commentary (1987), p. 233.
[356] *Id.* at 234.
[357] 64 Phil. 201 (1937); Bernas, J., The Constitution of the Republic of the Philippines: A Commentary (1987), p. 234.
[358] An Act Appropriating the Sum of Sixty Thousand Pesos and Making the Same Available out of any Funds in the Insular Treasury not otherwise Appropriated for the Cost of Plates and Printing of Postage Stamps with New Designs, and for other Purposes.
[359] Aglipay *v*. Ruiz, 64 Phil. 201 (1937), pp. 205-206.
[360] *Id.* at. 209-210, citing Bradfield v. Roberts, 175 U.S. 291 (1899).

[361] 104 SCRA 510 (1981).
[362] 86 SCRA 413 (1978).
[363] 367 U.S. 488 (1961).
[364] Pamil *v*. Teleron, 86 SCRA 413 (1978), pp. 428-429.
[365] 96 Phil. 417 (1955).
[366] 45 Am. Jur. 77.
[367] 96 Phil 417 (1955), p. 426.
[368] *Id.* at 441, citing American authorities.
[369] 96 Phil. 417 (1955), p. 444, quoting 45 Am. Jur. 743-52 and 755.
[370] Nowak, J., Rotunda, R., and Young, J., *supra*, p. 1031.
[371] Sherbert *v*. Verner, 374 U.S. 398 (1963), p. 409.
[372] Walz *v*. Tax Commission, *supra*, p. 668.
[373] Victoriano *v*. Elizalde Rope Workers Union, Inc., et al., *supra*, p. 75.
[374] Drakeman, D., *supra*, p. 127.
[375] Buzzard, L. and Ericsson, S., *supra*, p. 75.
[376] Bernas, J., The 1987 Constitution of the Republic of the Philippines: A Commentary (1995), pp. 288-289.
[377] Ang-Angco *v*. Castillo, 9 SCRA 619 (1963).
[378] Martin, Statutory Construction (1979), p. 210.
[379] Aruego, J., *supra*, pp. 331-337.
[380] Bernas, J., A Historical and Juridical Study of the Philippine Bill of Rights (1971), pp. 154-155, citing Francisco (ed.), Journal of the Constitutional Convention of the Philippines, vol. 4, pp. 1550, 1552.
[381] Aruego, J., *supra*, p. 337.
[382] Bernas, J., A Historical and Juridical Study of the Philippine Bill of Rights (1971), p. 153.
[383] *Id.* at 153, citing Francisco (ed.), Journal of the Constitutional Convention of the Philippines, vol. 4, p. 1539.
[384] *Id.* at 153-154, citing Francisco (ed.), Journal of the Constitutional Convention of the Philippines, vol. 4, pp. 1541-1543.
[385] Aruego, J., *supra*, pp. 340-345.
[386] Bernas, J., A Historical and Juridical Study of the Philippine Bill of Rights (1971), pp. 156-157, citing Escareal (ed.), Constitutional Convention Record, vol. 10 (1967), p. 29.
[387] Aruego, J., The Framing of the Philippine Constitution, vol. 2 (1949), pp. 627-629.
[388] Martin, *supra*, p. 218.
[389] Aglipay *v*. Ruiz, *supra*, p. 206.
[390] Tanada, L. and Fernando, E., Constitution of the Philippines, vol. 1 (1952), pp. 269-270.
[391] Report of the Ad Hoc Sub-Committee on Goals, Principles and Problems of the Committee on Church and State of the 1971 Constitutional Convention, p. 18.
[392] Bernas, J., Background paper for reconsideration of the religion provisions of the constitution (1971), pp. 41-43.
[393] Tingson, J., Report of the Committee on Church and State of the 1971 Constitutional Convention Report, p. 5.
[394] Bernas, J., The Intent of the 1986 Constitution Writers (1995), p. 406, citing Records of the Constitutional Commission, vol. II, pp. 193-194.
[395] Records of the Constitutional Commission, vol. 4, p. 362.
[396] *Id.* at 358.
[397] *Id.* at 359.
[398] *Id.* at 973.
[399] Records of the Constitutional Commission, vol. 1, p. 102.
[400] Bernas, Constitutional Rights and Social Demands, Part II (1991), p. 268.
[401] Cruz, I., Constitutional Law (1995), p. 167.
[402] Martinez, H., *supra*, p. 768-772.
[403] McConnell, M., “Religious Freedom at a Crossroads”, The University of Chicago Law Review (1992), vol. 59(1), p. 115, 169.
[404] Martinez, H., *supra*, p. 773.
[405] Neuhaus, R., *supra*, p. 630.

[406] Smith, S., *supra*, p. 153, citing Jefferson, T., Freedom of Religion at the University of Virginia, in The Complete Jefferson (Saul K. Padover ed., 1969), p. 957, 958.
[407] Neuhaus, R., *supra*, p. 630.
[408] Carter, S., *supra*, pp. 140-142.
[409] Cruz, I., Constitutional Law (1995), p. 178.
[410] Liguid *v*. Camano, A.M., No. RTJ-99-1509, August 8, 2002; Bucatcat v. Bucatcat, 380 Phil. 555 (2000); Navarro *v*. Navarro, 339 SCRA 709 (2000); Ecube-Badel *v*. Badel, 339 Phil. 510 (1997); Nalupta *v*. Tapec, 220 SCRA 505 (1993); Aquino *v*. Navarro, 220 Phil. 49 (1985).
[411] 68 SCRA 354 (1975).
[412] 305 SCRA 469 (1999).
[413] Rachels, J., The Elements of Moral Philosophy (1986), p. 1.
[414] Devlin, P., The Enforcement of Morals (1965), p. 10.
[415] Letter of Associate Justice Reynato S. Puno, 210 SCRA 589 (1992).
[416] Devlin, P., *supra*, 13.
[417] Neuhaus, R., *supra*, pp. 621, 624-625.
[418] McConnell, M., "Religious Freedom at a Crossroads", The University of Chicago Law Review (1992), vol. 59(1), p. 115, 139.
[419] Neuhaus, R., *supra*, pp. 624-625.
[420] Greenwalt, K., Conflicts of Law and Morality, p. 247, citing Holmes, The Path of the Law, 10 Harv. L. Rev., 457, 459 (1897).
[421] *Id.* at 247.
[422] Greenwalt, K., *supra*, p. 272.
[423] Buzzard, L. and Ericsson, S., *supra*, p. 31.
[424] Devlin, P., *supra*, pp. 19-20.
[425] *Id.* at 247.
[426] 210 SCRA 471 (1992).
[427] Magno *v*. Court of Appeals, et al., 210 SCRA 471 (1992), p. 478, citing Aquino, The Revised Penal Code, 1987 Edition, Vol. I, pp. 11-12, citing People *v*. Roldan Zaballero, CA 54 O.G. 6904. Note also Justice Pablo's view in People *v*. Piosca and Peremne, 86 Phil. 31.
[428] Devlin, P., *supra*, pp. 6-7.
[429] *Id.* at 19.
[430] Article 334 of the Revised Penal Code provides, *viz*:
"Art. 334. Concubinage. – Any husband who shall keep a mistress in the conjugal dwelling, or shall have sexual intercourse, under scandalous circumstances, with a woman who is not his wife, or shall cohabit with her in any other place, shall be punished by *prision correccional* in its minimum and medium period.
The concubine shall suffer the penalty of destierro."
[431] Article 266-A of the Revised Penal Code.
[432] Rule 110 of the Revised Rules of Criminal Procedure, as amended provides in relevant part, *viz*:
"The crime of adultery and concubinage shall not be prosecuted except upon a complaint filed by the offended spouse. The offended party cannot institute criminal prosecution without including the guilty parties, if both are alive, nor, in any case, if the offended party has consented to the offense or pardoned the offenders."
[433] Velayo, et al. *v*. Shell Co. of the Philippine Islands, et al., 100 Phil. 186 (1956), pp. 202-203, citing Report of the Code Commission on the Proposed Civil Code of the Philippines, pp. 40-41.
[434] Carter, S., *supra*, p. 138.
[435] Sullivan, K., *supra*, pp. 197-198.
[436] Rule 1.01 of the Code of Professional Responsibility provides that, "(a) lawyer shall not engage in unlawful, dishonest, **immoral** or deceitful conduct. (*emphasis supplied*)
[437] Title Six of the Revised Penal Code is entitled Crimes against **Public Morals** and includes therein provisions on gambling and betting. (*emphasis supplied*)
[438] The New Civil Code provides, *viz*:

"Article 6. Rights may be waived, unless the waiver is contrary to law, public order, public policy, **morals**, or good customs or prejudicial to a third person with a right recognized by law.

Article 21. Any person who wilfully causes loss or injury to another in a manner that is contrary to **morals**, good customs or public policy shall compensate the latter for the damage.

Article 1306. The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided that are not contrary to law, **morals**, good customs, public order, or public policy.

Article 1409. The following contracts are inexistent and void from the beginning:

(1) Those whose cause, object or purpose is contrary to law, **morals**, good customs, public order or public policy; x x x" (*emphasis supplied)*

[439] Article XIV, Section 3 provides in relevant part, viz:

All educational institutions shall include the study of the Constitution as part of the curricula.

They shall inculcate patriotism and nationalism, foster love of 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. (*emphasis supplied*)

[440] To illustrate the distinction between public or secular morality and religious morality, we take the example of a judge. If the public morality of a society deems that the death penalty is necessary to keep society together and thus crystallizes this morality into law, a judge might find himself in a conflict between public morality and his religious morality. He might discern that after weighing all considerations, his religious beliefs compel him not to impose the death penalty as to do so would be immoral. If the judge refuses to impose the death penalty where the crime warrants it, he will be made accountable to the state which is the authority in the realm of public morality and be held administratively liable for failing to perform his duty to the state. If he refuses to act according to the public morality because he finds more compelling his religious morality where he is answerable to an authority he deems higher than the state, then his choice is to get out of the public morality realm where he has the duty to enforce the public morality or continue to face the sanctions of the state for his failure to perform his duty. *See* Griffin, L., "The Relevance of Religion to a Lawyer's Work: Legal Ethics", Fordham Law Review (1998), vol. 66(4), p. 1253 for a discussion of a similar dilemma involving lawyers.

[441] Sullivan, K., *supra*, p. 196.

[442] Smith, S., *supra*, pp. 184-185. For a defense of this view, see William P. Marshall, We Know It When We See It": The Supreme Court and Establishment, 59 S.Cal. L. Rev. 495 (1986). For an extended criticism of this position, *see* Steven D. Smith, "Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Establishment' Test", 86 Mich. L. Rev. 266 (1987).

[443] Ostrom, V., "Religion and the Constitution of the American Political System", Emory Law Journal, vol. 39(1), p. 165, citing 1 A. Tocqueville, Democracy in America (1945), p. 305.

[444] 96 Phil. 417 (1955), p. 444, quoting 45 Am. Jur. 743-52 and 755.

[445] Devlin, P., *supra*, p. 22.

[446] 329 U.S. 14 (1946).

[447] Cleveland *v*. United States, 329 U.S. 14, p. 16.

[448] Reynolds *v*. United States, *supra*, p. 164.

[449] Church of Jesus Christ of L.D.S. *v*. United States, 136 U.S. 1.

[450] *Id.*

[451] 226 SCRA 193 (1993).

[452] *Id.* at 199.

[453] Annexes "A" and "B" of the Report and Recommendation of Executive Judge Bonifacio Sanz Maceda.

[454] Cruz, I., *supra*, p. 176.

ELISEO F. SORIANO, Petitioner

- versus -

MA. CONSOLIZA P. LAGUARDIA, in her capacity as Chairperson of the Movie and Television Review and Classification Board, MOVIE AND TELEVISION REVIEW AND CLASSIFICATION BOARD, JESSIE L. GALAPON, ANABEL M. DELA CRUZ, MANUEL M. HERNANDEZ, JOSE L. LOPEZ, CRISANTO SORIANO, BERNABE S. YARIA, JR., MICHAEL M. SANDOVAL, and ROLDAN A. GAVINO, Respondents.

x----------x

ELISEO F. **SORIANO,** Petitioner,

- versus -

MOVIE AND TELEVISION REVIEW AND CLASSIFICATION BOARD, ZOSIMO G. ALEGRE, JACKIE AQUINO-GAVINO, NOEL R. DEL PRADO, EMMANUEL BORLAZA, JOSE E. ROMERO IV, and FLORIMONDO C. ROUS, in their capacity as members of the Hearing and Adjudication Committee of the MTRCB, JESSIE L. GALAPON, ANABEL M. DELA CRUZ, MANUEL M. HERNANDEZ, JOSE L. LOPEZ, CRISANTO SORIANO, BERNABE S. YARIA, JR., MICHAEL M. SANDOVAL, and ROLDAN A. GAVINO, in their capacity as complainants before the MTRCB,

Respondents.

G.R. No. 164785

Present:

PUNO, *C.J.*,

QUISUMBING,

YNARES-SANTIAGO,

CARPIO,

AUSTRIA-MARTINEZ,

CORONA,

CARPIO MORALES,

TINGA,

CHICO-NAZARIO,

VELASCO, JR.,

NACHURA,

LEONARDO-DE CASTRO,

BRION,

PERALTA, and

BERSAMIN, *JJ*.

G.R. No. 165636

April 29, 2009

VELASCO, JR., *J.*:

In these two petitions for certiorari and prohibition under Rule 65, petitioner Eliseo F. Soriano seeks to nullify and set aside an order and a decision of the Movie and Television Review and Classification Board (MTRCB) in connection with certain utterances he made in his television show, *Ang Dating Daan*.

Facts of the Case

On August 10, 2004, at around 10:00 p.m., petitioner, as host of the program *Ang Dating Daan*, aired on UNTV 37, made the following remarks:

> *Lehitimong anak ng demonyo; sinungaling;*
>
> *Gago ka talaga Michael, masahol ka pa sa putang babae o di ba. Yung putang babae ang gumagana lang doon yung ibaba, [dito] kay Michael ang gumagana ang itaas, o di ba! O, masahol pa sa putang babae yan. Sabi ng lola ko masahol pa sa putang babae yan. Sobra ang kasinungalingan ng mga demonyong ito*. x x x

Two days after, before the MTRCB, separate but almost identical affidavit-complaints were lodged by Jessie L. Galapon and seven other private respondents, all members of the Iglesia ni Cristo (INC), against petitioner in connection with the above broadcast. Respondent Michael M. Sandoval, who felt directly alluded to in petitioner's remark, was then a minister of INC and a regular host of the TV program *Ang Tamang Daan*. Forthwith, the MTRCB sent petitioner a notice of the hearing on August 16, 2004 in relation to the alleged use of some cuss words in the August 10, 2004 episode of *Ang Dating Daan*.

After a preliminary conference in which petitioner appeared, the MTRCB, by Order of August 16, 2004, preventively suspended the showing of *Ang Dating Daan* program for 20 days, in accordance with Section 3(d) of Presidential Decree No. (PD) 1986, creating the MTRCB, in relation to Sec. 3, Chapter XIII of the 2004 Implementing Rules and Regulations (IRR) of PD 1986 and Sec. 7, Rule VII of the MTRCB Rules of Procedure. The same order also set the case for preliminary investigation.

The following day, petitioner sought reconsideration of the preventive suspension order, praying that Chairperson Consoliza P. Laguardia and two other members of the adjudication board recuse themselves from hearing the case. Two days after, however, petitioner sought to withdraw his motion for reconsideration, followed by the filing with this Court of a petition for certiorari and prohibition, docketed as G.R. No. 164785, to nullify the preventive suspension order thus issued.

On September 27, 2004, in Adm. Case No. 01-04, the MTRCB issued a decision, disposing as follows:

> WHEREFORE, in view of all the foregoing, a Decision is hereby rendered, finding respondent Soriano liable for his utterances and thereby imposing on him a penalty of three (3) months suspension from his program, "Ang Dating Daan".
>
> Co-respondents Joselito Mallari, Luzviminda Cruz and UNTV Channel 37 and its owner, PBC, are hereby exonerated for lack of evidence.
>
> SO ORDERED.

Petitioner then filed this petition for certiorari and prohibition with prayer for injunctive relief, docketed as G.R. No. 165636.

In a Resolution dated April 4, 2005, the Court consolidated G.R. No. 164785 with G.R. No. 165636.

In G.R.No. 164785, petitioner raises the following issues:

> THE ORDER OF PREVENTIVE SUSPENSION PROMULGATED BY RESPONDENT [MTRCB] DATED 16 AUGUST 2004 AGAINST THE TELEVISION PROGRAM *ANG DATING DAAN* x x x IS NULL AND VOID FOR BEING ISSUED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION
>
> (A) BY REASON THAT THE [IRR] IS INVALID INSOFAR AS IT PROVIDES FOR THE ISSUANCE OF PREVENTIVE SUSPENSION ORDERS;
> (B) BY REASON OF LACK OF DUE HEARING IN THE CASE AT BENCH;
> (C) FOR BEING VIOLATIVE OF EQUAL PROTECTION UNDER THE LAW;
> (D) FOR BEING VIOLATIVE OF FREEDOM OF RELIGION; AND
> (E) FOR BEING VIOLATIVE OF FREEDOM OF SPEECH AND EXPRESSION.

In G.R. No. 165636, petitioner relies on the following grounds:

SECTION 3(C) OF [PD] 1986, IS PATENTLY UNCONSTITUTIONAL AND ENACTED WITHOUT OR IN EXCESS OF JURISDICTION x x x CONSIDERING THAT:

I

SECTION 3(C) OF [PD] 1986, AS APPLIED TO PETITIONER, UNDULY INFRINGES ON THE CONSTITUTIONAL GUARANTEE OF FREEDOM OF RELIGION, SPEECH, AND EXPRESSION AS IT PARTAKES OF THE NATURE OF A SUBSEQUENT PUNISHMENT CURTAILING THE SAME; CONSEQUENTLY, THE IMPLEMENTING RULES AND REGULATIONS, RULES OF PROCEDURE, AND OFFICIAL ACTS OF THE MTRCB PURSUANT THERETO, I.E. DECISION DATED 27 SEPTEMBER 2004 AND ORDER DATED 19 OCTOBER 2004, ARE LIKEWISE CONSTITUTIONALLY INFIRM AS APPLIED IN THE CASE AT BENCH;

II

SECTION 3(C) OF [PD] 1986, AS APPLIED TO PETITIONER, UNDULY INFRINGES ON THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS OF LAW AND EQUAL PROTECTION UNDER THE LAW; CONSEQUENTLY, THE [IRR], RULES OF PROCEDURE, AND OFFICIAL ACTS OF THE MTRCB PURSUANT THERETO, I.E., DECISION DATED 27 SEPTEMBER 2004 AND ORDER DATED 19 OCTOBER 2004, ARE LIKEWISE CONSTITUTIONALLY INFIRM AS APPLIED IN THE CASE AT BENCH; AND

III

[PD] 1986 IS NOT COMPLETE IN ITSELF AND DOES NOT PROVIDE FOR A SUFFICIENT STANDARD FOR ITS IMPLEMENTATION THEREBY RESULTING IN AN UNDUE DELEGATION OF LEGISLATIVE POWER BY REASON THAT IT DOES NOT PROVIDE FOR THE PENALTIES FOR VIOLATIONS OF ITS PROVISIONS. CONSEQUENTLY, THE [IRR], RULES OF PROCEDURE, AND OFFICIAL ACTS OF THE MTRCB PURSUANT THERETO, I.E. DECISION DATED 27 SEPTEMBER 2004 AND ORDER DATED 19 OCTOBER 2004, ARE LIKEWISE CONSTITUTIONALLY INFIRM AS APPLIED IN THE CASE AT BENCH

G.R. No. 164785

We shall first dispose of the issues in G.R. No. 164785, regarding the assailed order of preventive suspension, although its implementability had already been overtaken and veritably been rendered moot by the equally assailed September 27, 2004 decision.

It is petitioner's threshold posture that the preventive suspension imposed against him and the relevant IRR provision authorizing it are invalid inasmuch as PD 1986 does not expressly authorize the MTRCB to issue preventive suspension.

Petitioner's contention is untenable.

Administrative agencies have powers and functions which may be administrative, investigatory, regulatory, quasi-legislative, or quasi-judicial, or a mix of the five, as may be conferred by the Constitution or by statute. They have in fine only such powers or authority as are granted or delegated, expressly or impliedly, by law. And in determining whether an agency has certain powers, the inquiry should be from the law itself. But once ascertained as existing, the authority given should be liberally construed.

A perusal of the MTRCB's basic mandate under PD 1986 reveals the possession by the agency of the authority, albeit impliedly, to issue the challenged order of preventive suspension. And this authority stems naturally from, and is necessary for the exercise of, its power of regulation and supervision.

Sec. 3 of PD 1986 pertinently provides the following:

> Section 3. Powers and Functions.—The BOARD shall have the following functions, powers and duties: x x x x
>
> c) To approve or disapprove, delete objectionable portions from and/or prohibit the x x x production, x x x exhibition and/or television broadcast of the motion pictures, television programs and publicity materials subject of the preceding paragraph, which, in the judgment of the board applying contemporary Filipino cultural values as standard, are objectionable for being immoral, indecent, contrary to law and/or good customs, injurious to the prestige of the Republic of the Philippines or its people, or with a dangerous tendency to encourage the commission of violence or of wrong or crime such as but not limited to: x x x x

> vi) Those which are libelous or defamatory to the good name and reputation of any person, whether living or dead; x x x x
>
> (d) To **supervise, regulate**, and grant, deny or cancel, permits for the x x x production, copying, distribution, sale, lease, **exhibition, and/or television broadcast** of all motion pictures, television programs and publicity materials, **to the end that no such pictures, programs and materials** as are determined by the BOARD to be objectionable in accordance with paragraph (c) hereof shall be x x x produced, copied, reproduced, distributed, sold, leased, **exhibited and/or broadcast by television**;
> x x x x
>
> k) To exercise such powers and functions as may be necessary or incidental to the attainment of the purposes and objectives of this Act x x x. (Emphasis added.)

The issuance of a preventive suspension comes well within the scope of the MTRCB's authority and functions expressly set forth in PD 1986, more particularly under its Sec. 3(d), as quoted above, which empowers the MTRCB to "supervise, regulate, and grant, deny or cancel, permits for the x x x exhibition, and/or television broadcast of all motion pictures, television programs and publicity materials, to the end that no such pictures, programs and materials as are determined by the BOARD to be objectionable in accordance with paragraph (c) hereof shall be x x x exhibited and/or broadcast by television."

Surely, the power to issue preventive suspension forms part of the MTRCB's express regulatory and supervisory statutory mandate and its investigatory and disciplinary authority subsumed in or implied from such mandate. Any other construal would render its power to regulate, supervise, or discipline illusory.

Preventive suspension, it ought to be noted, is not a penalty by itself, being merely a preliminary step in an administrative investigation. And the power to discipline and impose penalties, if granted, carries with it the power to investigate administrative complaints and, during such investigation, to preventively suspend the person subject of the complaint.

To reiterate, preventive suspension authority of the MTRCB springs from its powers conferred under PD 1986. The MTRCB did not, as petitioner insinuates, empower itself to impose preventive suspension through the medium of the IRR of PD 1986. It is true that the matter of imposing preventive suspension is embodied only in the IRR of PD 1986. Sec. 3, Chapter XIII of the IRR provides:

> Sec. 3. PREVENTION SUSPENSION ORDER.—Any time during the pendency of the case, and in order to prevent or stop further violations or for the interest and welfare of the public, the Chairman of the Board may issue a Preventive Suspension Order mandating the preventive x x x suspension of the permit/permits involved, and/or closure of the x x x television network, cable TV station x x x provided that the temporary/preventive order thus issued shall have a life of not more than twenty (20) days from the date of issuance.

But the mere absence of a provision on preventive suspension in PD 1986, without more, would not work to deprive the MTRCB a basic disciplinary tool, such as preventive suspension. Recall that the MTRCB is expressly empowered by statute to regulate and supervise television programs to obviate the exhibition or broadcast of, among others, indecent or immoral materials and to impose sanctions for violations and, corollarily, to prevent further violations as it investigates. Contrary to petitioner's assertion, the aforequoted Sec. 3 of the IRR neither amended PD 1986 nor extended the effect of the law. Neither did the MTRCB, by imposing the assailed preventive suspension, outrun its authority under the law. Far from it. The preventive suspension was actually done in furtherance of the law, imposed pursuant, to repeat, to the MTRCB's duty of regulating or supervising television programs, pending a determination of whether or not there has actually been a violation. In the final analysis, Sec. 3, Chapter XIII of the 2004 IRR merely formalized a power which PD 1986 bestowed, albeit impliedly, on MTRCB.

Sec. 3(c) and (d) of PD 1986 finds application to the present case, sufficient to authorize the MTRCB's assailed action. Petitioner's restrictive reading of PD 1986, limiting the MTRCB to functions within the literal confines of the law, would give the agency little leeway to operate, stifling and rendering it inutile, when Sec. 3(k) of PD 1986 clearly intends to grant the MTRCB a wide room for flexibility in its operation. Sec. 3(k), we reiterate, provides, "To exercise such powers and functions as may be necessary or incidental to the attainment of the purposes and objectives of this Act x x x." Indeed, the power to impose preventive suspension is one of the implied powers of MTRCB. As distinguished from express powers, implied powers are those that can be inferred or are implicit in the wordings or conferred by necessary or fair implication of the enabling act. As we held in *Angara v. Electoral Commission*, when a general grant of power is conferred or a duty enjoined, every particular power necessary for the exercise of one or the performance of the other is also conferred by necessary implication. Clearly, the power to impose preventive suspension pending investigation is one of the implied or inherent powers of MTRCB.

We cannot agree with petitioner's assertion that the aforequoted IRR provision on preventive suspension is applicable only to motion pictures and publicity materials. The scope of the MTRCB's authority extends beyond motion

pictures. What the acronym MTRCB stands for would suggest as much. And while the law makes specific reference to the closure of a television network, the suspension of a television program is a far less punitive measure that can be undertaken, with the purpose of stopping further violations of PD 1986. Again, the MTRCB would regretfully be rendered ineffective should it be subject to the restrictions petitioner envisages.

Just as untenable is petitioner's argument on the nullity of the preventive suspension order on the ground of lack of hearing. As it were, the MTRCB handed out the assailed order after petitioner, in response to a written notice, appeared before that Board for a hearing on private respondents' complaint. No less than petitioner admitted that the order was issued after the adjournment of the hearing, proving that he had already appeared before the MTRCB. Under Sec. 3, Chapter XIII of the IRR of PD 1986, preventive suspension shall issue "[a]ny time during the pendency of the case." In this particular case, it was done after MTRCB duly apprised petitioner of his having possibly violated PD 1986 and of administrative complaints that had been filed against him for such violation.

At any event, that preventive suspension can validly be meted out even without a hearing.

Petitioner next faults the MTRCB for denying him his right to the equal protection of the law, arguing that, owing to the preventive suspension order, he was unable to answer the criticisms coming from the INC ministers.

Petitioner's position does not persuade. The equal protection clause demands that "all persons subject to legislation should be treated alike, under like circumstances and conditions both in the privileges conferred and liabilities imposed." It guards against undue favor and individual privilege as well as hostile discrimination. Surely, petitioner cannot, under the premises, place himself in the same shoes as the INC ministers, who, for one, are not facing administrative complaints before the MTRCB. For another, he offers no proof that the said ministers, in their TV programs, use language similar to that which he used in his own, necessitating the MTRCB's disciplinary action. If the immediate result of the preventive suspension order is that petitioner remains temporarily gagged and is unable to answer his critics, this does not become a deprivation of the equal protection guarantee. The Court need not belabor the fact that the circumstances of petitioner, as host of *Ang Dating Daan*, on one hand, and the INC ministers, as hosts of *Ang Tamang Daan*, on the other, are, within the purview of this case, simply too different to even consider whether or not there is a *prima facie* indication of oppressive inequality.

Petitioner next injects the notion of religious freedom, submitting that what he uttered was religious speech, adding that words like "*putang babae*" were said in exercise of his religious freedom.

The argument has no merit.

The Court is at a loss to understand how petitioner's utterances in question can come within the pale of Sec. 5, Article III of the 1987 Constitution on religious freedom. The section reads as follows:

> No law shall be made respecting the establishment of a 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.

There is nothing in petitioner's statements subject of the complaints expressing any particular religious belief, nothing furthering his avowed evangelical mission. The fact that he came out with his statements in a televised bible exposition program does not automatically accord them the character of a religious discourse. Plain and simple insults directed at another person cannot be elevated to the status of religious speech. Even petitioner's attempts to place his words in context show that he was moved by anger and the need to seek retribution, not by any religious conviction. His claim, assuming its veracity, that some INC ministers distorted his statements respecting amounts *Ang Dating Daan* owed to a TV station does not convert the foul language used in retaliation as religious speech. We cannot accept that petitioner made his statements in defense of his reputation and religion, as they constitute no intelligible defense or refutation of the alleged lies being spread by a rival religious group. They simply illustrate that petitioner had descended to the level of name-calling and foul-language discourse. Petitioner could have chosen to contradict and disprove his detractors, but opted for the low road.

Petitioner, as a final point in G.R. No. 164785, would have the Court nullify the 20-day preventive suspension order, being, as insisted, an unconstitutional abridgement of the freedom of speech and expression and an impermissible prior restraint. The main issue tendered respecting the adverted violation and the arguments holding such issue dovetails with those challenging the three-month suspension imposed under the assailed September 27, 2004 MTRCB decision subject of review under G.R. No. 165636. Both overlapping issues and arguments shall be jointly addressed.

G.R. No. 165636

Petitioner urges the striking down of the decision suspending him from hosting *Ang Dating Daan* for three months on the main ground that the decision violates, apart from his religious freedom, his freedom of speech and expression guaranteed under Sec. 4, Art. III of the Constitution, which reads:

> No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievance.

He would also have the Court declare PD 1986, its Sec. 3(c) in particular, unconstitutional for reasons articulated in this petition.

We are not persuaded as shall be explained shortly. But first, we restate certain general concepts and principles underlying the freedom of speech and expression.

It is settled that expressions by means of newspapers, radio, television, and motion pictures come within the broad protection of the free speech and expression clause. Each method though, because of its dissimilar presence in the lives of people and accessibility to children, tends to present its own problems in the area of free speech protection, with broadcast media, of all forms of communication, enjoying a lesser degree of protection. Just as settled is the rule that restrictions, be it in the form of prior restraint, e.g., judicial injunction against publication or threat of cancellation of license/franchise, or subsequent liability, whether in libel and damage suits, prosecution for sedition, or contempt proceedings, are anathema to the freedom of expression. **Prior restraint** means official government restrictions on the press or other forms of expression in advance of actual publication or dissemination. The freedom of expression, as with the other freedoms encased in the Bill of Rights, is, however, not absolute. It may be regulated to some extent to serve important public interests, some forms of speech not being protected. As has been held, the limits of the freedom of expression are reached when the expression touches upon matters of essentially private concern. In the oft-quoted expression of Justice Holmes, the constitutional guarantee "obviously was not intended to give immunity for every possible use of language." From *Lucas v. Royo* comes this line: "[T]he freedom to express one's sentiments and belief does not grant one the license to vilify in public the honor and integrity of another. Any sentiments must be expressed within the proper forum and with proper regard for the rights of others."

Indeed, as noted in *Chaplinsky v. State of New Hampshire*, "there are certain well-defined and narrowly limited classes of speech that are harmful, the prevention and punishment of which has never been thought to raise any Constitutional problems." In net effect, some forms of speech are not protected by the Constitution, meaning that restrictions on unprotected speech may be decreed without running afoul of the freedom of speech clause. A speech would fall under the unprotected type if the utterances involved are "no essential part of any exposition of ideas, and are of such slight social value as a step of truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Being of little or no value, there is, in dealing with or regulating them, no imperative call for the application of the clear and present

danger rule or the balancing-of-interest test, they being essentially modes of weighing competing values, or, with like effect, determining which of the clashing interests should be advanced.

Petitioner asserts that his utterance in question is a protected form of speech.

The Court rules otherwise. It has been established in this jurisdiction that unprotected speech or low-value expression refers to libelous statements, obscenity or pornography, false or misleading advertisement, insulting or "fighting words", i.e., those which by their very utterance inflict injury or tend to incite an immediate breach of peace and expression endangering national security.

The Court finds that petitioner's statement can be treated as obscene, at least with respect to the average child. Hence, it is, in that context, unprotected speech. In *Fernando v. Court of Appeals*, the Court expressed difficulty in formulating a definition of **obscenity** that would apply to all cases, but nonetheless stated the ensuing observations on the matter:

> There is no perfect definition of "obscenity" but the latest word is that of *Miller v. California* which established basic guidelines, to wit: (a) whether to the average person, applying contemporary standards would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. But, it would be a serious misreading of *Miller* to conclude that the trier of facts has the unbridled discretion in determining what is "patently offensive." x x x What remains clear is that obscenity is an issue proper for judicial determination and should be treated on a case to case basis and on the judge's sound discretion.

Following the contextual lessons of the cited case of *Miller v. California*, a patently offensive utterance would come within the pale of the term *obscenity* should it appeal to the prurient interest of an average listener applying contemporary standards.

A cursory examination of the utterances complained of and the circumstances of the case reveal that to an average adult, the utterances "*Gago ka talaga x x x, masahol ka pa sa putang babae x x x. Yung putang babae ang gumagana lang doon yung ibaba, [dito] kay Michael ang gumagana ang itaas, o di ba!*" may not constitute obscene but merely indecent utterances. They can be viewed as figures of speech or merely a play on words. In the context they were used, they may not appeal to the prurient interests of an adult. The problem with

the challenged statements is that they were uttered in a TV program that is rated "G" or for general viewership, and in a time slot that would likely reach even the eyes and ears of children.

While adults may have understood that the terms thus used were not to be taken literally, children could hardly be expected to have the same discernment. Without parental guidance, the unbridled use of such language as that of petitioner in a television broadcast could corrupt impressionable young minds. The term "*putang babae*" means "a female prostitute," a term wholly inappropriate for children, who could look it up in a dictionary and just get the literal meaning, missing the context within which it was used. Petitioner further used the terms, "*ang gumagana lang doon yung ibaba*," making reference to the female sexual organ and how a female prostitute uses it in her trade, then stating that Sandoval was worse than that by using his mouth in a similar manner. Children could be motivated by curiosity and ask the meaning of what petitioner said, also without placing the phrase in context. They may be inquisitive as to why Sandoval is different from a female prostitute and the reasons for the dissimilarity. And upon learning the meanings of the words used, young minds, without the guidance of an adult, may, from their end, view this kind of indecent speech as obscene, if they take these words literally and use them in their own speech or form their own ideas on the matter. In this particular case, where children had the opportunity to hear petitioner's words, when speaking of the average person in the test for obscenity, we are speaking of the average child, not the average adult. The average child may not have the adult's grasp of figures of speech, and may lack the understanding that language may be colorful, and words may convey more than the literal meaning. Undeniably the subject speech is very suggestive of a female sexual organ and its function as such. In this sense, we find petitioner's utterances obscene and not entitled to protection under the umbrella of freedom of speech.

Even if we concede that petitioner's remarks are not obscene but merely indecent speech, still the Court rules that petitioner cannot avail himself of the constitutional protection of free speech. Said statements were made in a medium easily accessible to children. With respect to the young minds, said utterances are to be treated as unprotected speech.

No doubt what petitioner said constitutes indecent or offensive utterances. But while a jurisprudential pattern involving certain offensive utterances conveyed in different mediums has emerged, this case is veritably one of first impression, it being the first time that indecent speech communicated via television and the applicable norm for its regulation are, in this jurisdiction, made the focal point. *Federal Communications Commission* (*FCC*) *v. Pacifica Foundation*, a 1978 American landmark case cited in *Eastern Broadcasting Corporation v. Dans, Jr.* and *Chavez v. Gonzales*, is a rich source of persuasive lessons. Foremost of these relates to indecent speech without prurient appeal component coming under the category of protected speech depending on the

context within which it was made, irresistibly suggesting that, within a particular context, such indecent speech may validly be categorized as unprotected, *ergo*, susceptible to restriction.

In *FCC*, seven of what were considered "filthy" words earlier recorded in a monologue by a satiric humorist later aired in the afternoon over a radio station owned by Pacifica Foundation. Upon the complaint of a man who heard the pre-recorded monologue while driving with his son, FCC declared the language used as "**patently offensive**" and "**indecent**" under a prohibiting law, though not necessarily obscene. FCC added, however, that its declaratory order was issued in a "special factual context," referring, in gist, to an afternoon radio broadcast when children were undoubtedly in the audience. Acting on the question of whether the FCC could regulate the subject utterance, the US Supreme Court ruled in the affirmative, owing to two special features of the broadcast medium, to wit: (1) radio is a pervasive medium and (2) broadcasting is uniquely accessible to children. The US Court, however, hastened to add that the monologue would be protected speech in other contexts, albeit it did not expound and identify a compelling state interest in putting FCC's content-based regulatory action under scrutiny.

The Court in *Chavez* elucidated on the distinction between regulation or restriction of protected speech that is content-based and that which is content-neutral. A content-based restraint is aimed at the contents or idea of the expression, whereas a content-neutral restraint intends to regulate the time, place, and manner of the expression under well-defined standards tailored to serve a compelling state interest, without restraint on the message of the expression. Courts subject content-based restraint to strict scrutiny.

With the view we take of the case, the suspension MTRCB imposed under the premises was, in one perspective, permissible restriction. We make this disposition against the backdrop of the following interplaying factors: *First*, the indecent speech was made via television, a pervasive medium that, to borrow from *Gonzales v. Kalaw Katigbak*, easily "reaches every home where there is a set [and where] [c]hildren will likely be among the avid viewers of the programs therein shown"; *second*, the broadcast was aired at the time of the day when there was a reasonable risk that children might be in the audience; and *third*, petitioner uttered his speech on a "G" or "for general patronage" rated program. Under Sec. 2(A) of Chapter IV of the IRR of the MTRCB, a show for general patronage is "[s]uitable for all ages," meaning that the "material for television x x x in the judgment of the BOARD, does not contain anything unsuitable for children and minors, and may be viewed without adult guidance or supervision." The words petitioner used were, by any civilized norm, clearly not suitable for children. Where a language is categorized as indecent, as in petitioner's utterances on a general-patronage rated TV program, it may be readily proscribed as unprotected speech.

A view has been advanced that unprotected speech refers only to pornography, false or misleading advertisement, advocacy of imminent lawless action, and expression endangering national security. But this list is not, as some members of the Court would submit, exclusive or carved in stone. Without going into specifics, it may be stated without fear of contradiction that US decisional law goes beyond the aforesaid general exceptions. As the Court has been impelled to recognize exceptions to the rule against censorship in the past, this particular case constitutes yet another exception, another instance of unprotected speech, created by the necessity of protecting the welfare of our children. As unprotected speech, petitioner's utterances can be subjected to restraint or regulation.

Despite the settled ruling in *FCC* which has remained undisturbed since 1978, petitioner asserts that his utterances must present a clear and present danger of bringing about a substantive evil the State has a right and duty to prevent and such danger must be grave and imminent.

Petitioner's invocation of the clear and present danger doctrine, arguably the most permissive of speech tests, would not avail him any relief, for the application of said test is uncalled for under the premises. The doctrine, first formulated by Justice Holmes, accords protection for utterances so that the printed or spoken words may not be subject to prior restraint or subsequent punishment unless its expression creates a clear and present danger of bringing about a substantial evil which the government has the power to prohibit. Under the doctrine, freedom of speech and of press is susceptible of restriction when and only when necessary to prevent grave and immediate danger to interests which the government may lawfully protect. As it were, said doctrine evolved in the context of prosecutions for rebellion and other crimes involving the overthrow of government. It was originally designed to determine the latitude which should be given to speech that espouses anti-government action, or to have serious and substantial deleterious consequences on the security and public order of the community. The clear and present danger rule has been applied to this jurisdiction. As a standard of limitation on free speech and press, however, the clear and present danger test is not a magic incantation that wipes out all problems and does away with analysis and judgment in the testing of the legitimacy of claims to free speech and which compels a court to release a defendant from liability the moment the doctrine is invoked, absent proof of imminent catastrophic disaster. As we observed in *Eastern Broadcasting Corporation*, the clear and present danger test "does not lend itself to a simplistic and all embracing interpretation applicable to all utterances in all forums."

To be sure, the clear and present danger doctrine is not the only test which has been applied by the courts. Generally, said doctrine is applied to cases involving the overthrow of the government and even other evils which do not clearly undermine national security. Since not all evils can be measured in terms of "proximity and degree" the Court, however, in several cases—*Ayer*

Productions v. Capulong and *Gonzales v. COMELEC*, applied the balancing of interests test. Former Chief Justice Fred Ruiz Castro, in *Gonzales v. COMELEC*, elucidated in his Separate Opinion that "where the legislation under constitutional attack interferes with the freedom of speech and assembly in a more generalized way and where the effect of the speech and assembly in terms of the probability of realization of a specific danger is not susceptible even of impressionistic calculation," then the "balancing of interests" test can be applied.

The Court explained also in *Gonzales v. COMELEC* the "balancing of interests" test:

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of the two conflicting interests demands the greater protection under the particular circumstances presented. x x x We must, therefore, undertake the "delicate and difficult task x x x to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of rights x x x.
>
> In enunciating standard premised on a judicial balancing of the conflicting social values and individual interests competing for ascendancy in legislation which restricts expression, the court in *Douds* laid the basis for what has been called the "balancing-of-interests" test which has found application in more recent decisions of the U.S. Supreme Court. Briefly stated, the "balancing" test requires a court to take conscious and detailed consideration of the interplay of interests observable in a given situation or type of situation. x x
>
> Although the urgency of the public interest sought to be secured by Congressional power restricting the individual's freedom, and the social importance and value of the freedom so restricted, "are to be judged in the concrete, not on the basis of abstractions," a wide range of factors are necessarily relevant in ascertaining the point or line of equilibrium. Among these are (a) the social value and importance of the specific aspect of the particular freedom restricted by the legislation; (b) the specific thrust of the restriction, *i.e.*, whether the restriction is direct or indirect, whether or not the persons affected are few; (c) the value and importance of the public interest sought to be secured by the legislation—the reference here is to the nature and gravity of the evil which Congress seeks to prevent; (d) whether the specific restriction decreed by Congress is reasonably appropriate and necessary for the protection of such public

> interest; and (e) whether the necessary safeguarding of the public interest involved may be achieved by some other measure less restrictive of the protected freedom.

This balancing of interest test, to borrow from Professor Kauper, rests on the theory that it is the court's function in a case before it when it finds public interests served by legislation, on the one hand, and the free expression clause affected by it, on the other, to balance one against the other and arrive at a judgment where the greater weight shall be placed. If, on balance, it appears that the public interest served by restrictive legislation is of such nature that it outweighs the abridgment of freedom, then the court will find the legislation valid. In short, the balance-of-interests theory rests on the basis that constitutional freedoms are not absolute, not even those stated in the free speech and expression clause, and that they may be abridged to some extent to serve appropriate and important interests. To the mind of the Court, the balancing of interest doctrine is the more appropriate test to follow.

In the case at bar, petitioner used indecent and obscene language and a three (3)-month suspension was slapped on him for breach of MTRCB rules. In this setting, the assertion by petitioner of his enjoyment of his freedom of speech is ranged against the duty of the government to protect and promote the development and welfare of the youth.

After a careful examination of the factual milieu and the arguments raised by petitioner in support of his claim to free speech, the Court rules that the government's interest to protect and promote the interests and welfare of the children adequately buttresses the reasonable curtailment and valid restraint on petitioner's prayer to continue as program host of *Ang Dating Daan* during the suspension period.

No doubt, one of the fundamental and most vital rights granted to citizens of a State is the freedom of speech or expression, for without the enjoyment of such right, a free, stable, effective, and progressive democratic state would be difficult to attain. Arrayed against the freedom of speech is the right of the youth to their moral, spiritual, intellectual, and social being which the State is constitutionally tasked to promote and protect. Moreover, the State is also mandated to recognize and support the vital role of the youth in nation building as laid down in Sec. 13, Art. II of the 1987 Constitution.

The Constitution has, therefore, imposed the sacred obligation and responsibility on the State to provide protection to the youth against illegal or improper activities which may prejudice their general well-being. The Article on youth, approved on second reading by the Constitutional Commission, explained that the State shall "extend social protection to minors against all forms of neglect, cruelty, exploitation, **immorality**, and practices which may foster racial, religious or other forms of discrimination."

Indisputably, the State has a compelling interest in extending social protection to minors against all forms of neglect, exploitation, and immorality which may pollute innocent minds. It has a compelling interest in helping parents, through regulatory mechanisms, protect their children's minds from exposure to undesirable materials and corrupting experiences. The Constitution, no less, in fact enjoins the State, as earlier indicated, to promote and protect the physical, moral, spiritual, intellectual, and social well-being of the youth to better prepare them fulfill their role in the field of nation-building. In the same way, the State is mandated to support parents in the rearing of the youth for civic efficiency and the development of moral character.

Petitioner's offensive and obscene language uttered in a television broadcast, without doubt, was easily accessible to the children. His statements could have exposed children to a language that is unacceptable in everyday use. As such, the welfare of children and the State's mandate to protect and care for them, as *parens patriae*, constitute a substantial and compelling government interest in regulating petitioner's utterances in TV broadcast as provided in PD 1986.

FCC explains the duty of the government to act as *parens patriae* to protect the children who, because of age or interest capacity, are susceptible of being corrupted or prejudiced by offensive language, thus:

> [B]roadcasting is uniquely accessible to children, even those too young to read. Although Cohen's written message, ["Fuck the Draft"], might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant. Other forms of offensive expression may be withheld from the young without restricting the expression at its source. Bookstores and motion picture theaters, for example, may be prohibited from making indecent material available to children. We held in *Ginsberg v. New York* that the government's interest in the "well-being of its youth" and in supporting "parents' claim to authority in their own household" justified the regulation of otherwise protected expression. The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting.

Moreover, *Gonzales v. Kalaw Katigbak* likewise stressed the duty of the State to attend to the welfare of the young:

> x x x It is the consensus of this Court that where television is concerned, a less liberal approach calls for observance. This is so because unlike motion pictures where the patrons have to pay their way, television reaches every home where there is a set. Children

> then will likely will be among the avid viewers of the programs therein shown. As was observed by Circuit Court of Appeals Judge Jerome Frank, it is hardly the concern of the law to deal with the sexual fantasies of the adult population. It cannot be denied though that the State as *parens patriae* is called upon to manifest an attitude of caring for the welfare of the young.

The compelling need to protect the young impels us to sustain the regulatory action MTRCB took in the narrow confines of the case. To reiterate, *FCC* justified the restraint on the TV broadcast grounded on the following considerations: (1) the use of television with its unique accessibility to children, as a medium of broadcast of a patently offensive speech; (2) the time of broadcast; and (3) the "G" rating of the *Ang Dating Daan* program. And in agreeing with MTRCB, the court takes stock of and cites with approval the following excerpts from *FCC*:

> It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction. x x x The [FFC's] decision rested entirely on a nuisance rationale under which context is all important. The concept requires consideration of a host of variables. The time of day was emphasized by the [FFC]. The content of the program in which the language is used will affect the composition of the audience x x x. As Mr. Justice Sutherland wrote a 'nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.' We simply hold that when the [FCC] finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene. (Citation omitted.)

There can be no quibbling that the remarks in question petitioner uttered on prime-time television are blatantly indecent if not outright obscene. It is the kind of speech that PD 1986 proscribes necessitating the exercise by MTRCB of statutory disciplinary powers. It is the kind of speech that the State has the inherent prerogative, nay duty, to regulate and prevent should such action served and further compelling state interests. One who utters indecent, insulting, or offensive words on television when unsuspecting children are in the audience is, in the graphic language of *FCC*, a "pig in the parlor." Public interest would be served if the "pig" is reasonably restrained or even removed from the "parlor."

Ergo, petitioner's offensive and indecent language can be subjected to prior restraint.

Petitioner theorizes that the three (3)-month suspension is either prior restraint or subsequent punishment that, however, includes prior restraint, albeit indirectly.

After a review of the facts, the Court finds that what MTRCB imposed on petitioner is an administrative sanction or subsequent punishment for his offensive and obscene language in *Ang Dating Daan*.

To clarify, statutes imposing prior restraints on speech are generally illegal and presumed unconstitutional breaches of the freedom of speech. The exceptions to prior restraint are movies, television, and radio broadcast censorship in view of its access to numerous people, including the young who must be insulated from the prejudicial effects of unprotected speech. PD 1986 was passed creating the Board of Review for Motion Pictures and Television (now MTRCB) and which requires prior permit or license before showing a motion picture or broadcasting a TV program. The Board can classify movies and television programs and can cancel permits for exhibition of films or television broadcast.

The power of MTRCB to regulate and even impose some prior restraint on radio and television shows, even religious programs, was upheld in *Iglesia Ni Cristo v. Court of Appeals.* Speaking through Chief Justice Reynato S. Puno, the Court wrote:

> We thus reject petitioner's postulate that its religious program is *per se* beyond review by the respondent Board. Its public broadcast on TV of its religious program brings it out of the bosom of internal belief. Television is a medium that reaches even the eyes and ears of children. The Court iterates the rule that the exercise of religious freedom can be regulated by the State when it will bring about the clear and present danger of some substantive evil which the State is duty bound to prevent, i.e., serious detriment to the more overriding interest of public health, public morals, or public welfare. x x x
>
> While the thesis has a lot to commend itself, we are not ready to hold that [PD 1986] is unconstitutional for Congress to grant an administrative body quasi-judicial power to preview and classify TV programs and enforce its decision subject to review by our courts. As far back as 1921, we upheld this setup in *Sotto vs. Ruiz*, viz:
>
> > "The use of the mails by private persons is in the nature of a privilege which can be regulated in order to avoid its abuse. Persons possess no absolute right to put into the mail anything they please, regardless of its character."

Bernas adds:

> Under the decree a movie classification board is made the arbiter of what movies and television programs or parts of either are fit for public consumption**. It decides what movies are "immoral, indecent, contrary to law and/or good customs**, injurious to the prestige of the Republic of the Philippines or its people," and what "tend to incite subversion, insurrection, rebellion or sedition," or "tend to undermine the faith and confidence of the people in their government and/or duly constituted authorities," etc. Moreover, its decisions are executory unless stopped by a court.

Moreover, in *MTRCB v. ABS-CBN Broadcasting Corporation*, it was held that the power of review and prior approval of MTRCB extends to all television programs and is valid despite the freedom of speech guaranteed by the Constitution. Thus, all broadcast networks are regulated by the MTRCB since they are required to get a permit before they air their television programs. Consequently, their right to enjoy their freedom of speech is subject to that requirement. As lucidly explained by Justice Dante O. Tinga, government regulations through the MTRCB became "a necessary evil" with the government taking the role of assigning bandwidth to individual broadcasters. The stations explicitly agreed to this regulatory scheme; otherwise, chaos would result in the television broadcast industry as competing broadcasters will interfere or co-opt each other's signals.

In this scheme, station owners and broadcasters in effect waived their right to the full enjoyment of their right to freedom of speech in radio and television programs and impliedly agreed that said right may be subject to prior restraint—denial of permit or subsequent punishment, like suspension or cancellation of permit, among others.

The three (3) months suspension in this case is not a prior restraint on the right of petitioner to continue with the broadcast of *Ang Dating Daan* as a permit was already issued to him by MTRCB for such broadcast. Rather, the suspension is in the form of permissible administrative sanction or subsequent punishment for the offensive and obscene remarks he uttered on the evening of August 10, 2004 in his television program, *Ang Dating Daan*. It is a sanction that the MTRCB may validly impose under its charter without running afoul of the free speech clause. And the imposition is separate and distinct from the criminal action the Board may take pursuant to Sec. 3(i) of PD 1986 and the remedies that may be availed of by the aggrieved private party under the provisions on libel or tort, if applicable. As *FCC* teaches, the imposition of sanctions on broadcasters who indulge in profane or indecent broadcasting does not constitute forbidden censorship. Lest it be overlooked, the sanction imposed is not *per se* for petitioner's exercise of his freedom of speech via television, but for the indecent contents of his utterances in a "G" rated TV program.

More importantly, petitioner is deemed to have yielded his right to his full enjoyment of his freedom of speech to regulation under PD 1986 and its IRR as television station owners, program producers, and hosts have impliedly accepted the power of MTRCB to regulate the broadcast industry.

Neither can petitioner's virtual inability to speak in his program during the period of suspension be plausibly treated as prior restraint on future speech. For viewed in its proper perspective, the suspension is in the nature of an intermediate penalty for uttering an unprotected form of speech. It is definitely a lesser punishment than the permissible cancellation of exhibition or broadcast permit or license. In fine, the suspension meted was simply part of the duties of the MTRCB in the enforcement and administration of the law which it is tasked to implement. Viewed in its proper context, the suspension sought to penalize past speech made on prime-time "G" rated TV program; it does not bar future speech of petitioner in other television programs; it is a permissible subsequent administrative sanction; it should not be confused with a prior restraint on speech. While not on all fours, the Court, in *MTRCB*, sustained the power of the MTRCB to penalize a broadcast company for exhibiting/airing a pre-taped TV episode without Board authorization in violation of Sec. 7 of PD 1986.

Any simplistic suggestion, however, that the MTRCB would be crossing the limits of its authority were it to regulate and even restrain the prime-time television broadcast of indecent or obscene speech in a "G" rated program is not acceptable. As made clear in *Eastern Broadcasting Corporation*, "the freedom of television and radio broadcasting is somewhat lesser in scope than the freedom accorded to newspaper and print media." The MTRCB, as a regulatory agency, must have the wherewithal to enforce its mandate, which would not be effective if its punitive actions would be limited to mere fines. Television broadcasts should be subject to some form of regulation, considering the ease with which they can be accessed, and violations of the regulations must be met with appropriate and proportional disciplinary action. The suspension of a violating television program would be a sufficient punishment and serve as a deterrent for those responsible. The prevention of the broadcast of petitioner's television program is justified, and does not constitute prohibited prior restraint. It behooves the Court to respond to the needs of the changing times, and craft jurisprudence to reflect these times.

Petitioner, in questioning the three-month suspension, also tags as unconstitutional the very law creating the MTRCB, arguing that PD 1986, as applied to him, infringes also upon his freedom of religion. The Court has earlier adequately explained why petitioner's undue reliance on the religious freedom cannot lend justification, let alone an exempting dimension to his licentious utterances in his program. The Court sees no need to address anew the repetitive arguments on religious freedom. As earlier discussed in the disposition of the petition in G.R. No. 164785, what was uttered was in no way a religious speech. Parenthetically, petitioner's attempt to characterize his speech as a legitimate defense of his religion fails miserably. He tries to place his words in

perspective, arguing evidently as an afterthought that this was his method of refuting the alleged distortion of his statements by the INC hosts of *Ang Tamang Daan*. But on the night he uttered them in his television program, the word simply came out as profane language, without any warning or guidance for undiscerning ears.

As to petitioner's other argument about having been denied due process and equal protection of the law, suffice it to state that we have at length debunked similar arguments in G.R. No. 164785. There is no need to further delve into the fact that petitioner was afforded due process when he attended the hearing of the MTRCB, and that he was unable to demonstrate that he was unjustly discriminated against in the MTRCB proceedings.

Finally, petitioner argues that there has been undue delegation of legislative power, as PD 1986 does not provide for the range of imposable penalties that may be applied with respect to violations of the provisions of the law.

The argument is without merit.

In *Edu v. Ericta*, the Court discussed the matter of undue delegation of legislative power in the following wise:

> It is a fundamental principle flowing from the doctrine of separation of powers that Congress may not delegate its legislative power to the two other branches of the government, subject to the exception that local governments may over local affairs participate in its exercise. What cannot be delegated is the authority under the Constitution to make laws and to alter and repeal them; the test is the completeness of the statute in all its term and provisions when it leaves the hands of the legislature. To determine whether or not there is an undue delegation of legislative power, the inquiry must be directed to the scope and definiteness of the measure enacted. The legislature does not abdicate its functions when it describes what job must be done, who is to do it, and what is the scope of his authority. For a complex economy, that may indeed be the only way in which the legislative process can go forward. A distinction has rightfully been made between delegation of power to make laws which necessarily involves a discretion as to what it shall be, which constitutionally may not be done, and delegation of authority or discretion as to its execution to be exercised under and in pursuance of the law, to which no valid objection can be made. The Constitution is thus not to be regarded as denying the legislature the necessary resources of flexibility and practicability.

> To avoid the taint of unlawful delegation, there must be a standard, which implies at the very least that the legislature itself determines matters of principle and lays down fundamental policy. Otherwise, the charge of complete abdication may be hard to repel. A standard thus defines legislative policy, marks its limits, maps out its boundaries and specifies the public agency to apply it. It indicates the circumstances under which the legislative command is to be effected. It is the criterion by which legislative purpose may be carried out. Thereafter, the executive or administrative office designated may in pursuance of the above guidelines promulgate supplemental rules and regulations.

Based on the foregoing pronouncements and analyzing the law in question, petitioner's protestation about undue delegation of legislative power for the sole reason that PD 1986 does not provide for a range of penalties for violation of the law is untenable. His thesis is that MTRCB, in promulgating the IRR of PD 1986, prescribing a schedule of penalties for violation of the provisions of the decree, went beyond the terms of the law.

Petitioner's posture is flawed by the erroneous assumptions holding it together, the first assumption being that PD 1986 does not prescribe the imposition of, or authorize the MTRCB to impose, penalties for violators of PD 1986. As earlier indicated, however, the MTRCB, by express and direct conferment of power and functions, is charged with supervising and regulating, granting, denying, or canceling permits for the exhibition and/or television broadcast of all motion pictures, television programs, and publicity materials to the end that no such objectionable pictures, programs, and materials shall be exhibited and/or broadcast by television. Complementing this provision is Sec. 3(k) of the decree authorizing the MTRCB "to exercise such powers and functions as may be necessary or incidental to the attainment of the purpose and objectives of [the law]." As earlier explained, the investiture of supervisory, regulatory, and disciplinary power would surely be a meaningless grant if it did not carry with it the power to penalize the supervised or the regulated as may be proportionate to the offense committed, charged, and proved. As the Court said in *Chavez v. National Housing Authority*:

> x x x [W]hen a general grant of power is conferred or duty enjoined, every particular power necessary for the exercise of the one or the performance of the other is also conferred. x x x [W]hen the statute does not specify the particular method to be followed or used by a government agency in the exercise of the power vested in it by law, said agency has the authority to adopt any reasonable method to carry out its function.

Given the foregoing perspective, it stands to reason that the power of the MTRCB to regulate and supervise the exhibition of TV programs carries with it or

necessarily implies the authority to take effective punitive action for violation of the law sought to be enforced. And would it not be logical too to say that the power to deny or cancel a permit for the exhibition of a TV program or broadcast necessarily includes the lesser power to suspend?

The MTRCB promulgated the IRR of PD 1986 in accordance with Sec. 3(a) which, for reference, provides that agency with the power "[to] promulgate such rules and regulations as are necessary or proper for the implementation of this Act, and the accomplishment of its purposes and objectives x x x." And Chapter XIII, Sec. 1 of the IRR providing:

> Section 1. VIOLATIONS AND ADMINISTRATIVE SANCTIONS.—Without prejudice to the immediate filing of the appropriate criminal action and the immediate seizure of the pertinent articles pursuant to Section 13, **any violation of PD 1986 and its Implementing Rules and Regulations governing motion pictures, television programs, and related promotional materials shall be penalized with suspension or cancellation of permits and/or licenses issued by the Board** and/or with the imposition of fines and other administrative penalty/penalties. The Board recognizes the existing Table of Administrative Penalties attached without prejudice to the power of the Board to amend it when the need arises. In the meantime the existing revised Table of Administrative Penalties shall be enforced. (Emphasis added.)

This is, in the final analysis, no more than a measure to specifically implement the aforequoted provisions of Sec. 3(d) and (k). Contrary to what petitioner implies, the IRR does not expand the mandate of the MTRCB under the law or partake of the nature of an unauthorized administrative legislation. The MTRCB cannot shirk its responsibility to regulate the public airwaves and employ such means as it can as a guardian of the public.

In Sec. 3(c), one can already find the permissible actions of the MTRCB, along with the standards to be applied to determine whether there have been statutory breaches. The MTRCB may evaluate motion pictures, television programs, and publicity materials "applying contemporary Filipino cultural values as standard," and, from there, determine whether these audio and video materials "are objectionable for being immoral, indecent, contrary to law and/or good customs, [etc.] x x x" and apply the sanctions it deems proper. The lawmaking body cannot possibly provide for all the details in the enforcement of a particular statute. The grant of the rule-making power to administrative agencies is a relaxation of the principle of separation of powers and is an exception to the non-delegation of legislative powers. Administrative regulations or "subordinate legislation" calculated to promote the public interest are necessary because of "the growing complexity of modern life, the multiplication of the subjects of governmental regulations, and the increased difficulty of administering the law."

Allowing the MTRCB some reasonable elbow-room in its operations and, in the exercise of its statutory disciplinary functions, according it ample latitude in fixing, by way of an appropriate issuance, administrative penalties with due regard for the severity of the offense and attending mitigating or aggravating circumstances, as the case may be, would be consistent with its mandate to effectively and efficiently regulate the movie and television industry.

But even as we uphold the power of the MTRCB to review and impose sanctions for violations of PD 1986, its decision to suspend petitioner must be modified, for nowhere in that issuance, particularly the power-defining Sec. 3 nor in the MTRCB Schedule of Administrative Penalties effective January 1, 1999 is the Board empowered to suspend the program host or even to prevent certain people from appearing in television programs. The MTRCB, to be sure, may prohibit the broadcast of such television programs or cancel permits for exhibition, but it may not suspend television personalities, for such would be beyond its jurisdiction. The MTRCB cannot extend its exercise of regulation beyond what the law provides. Only persons, offenses, and penalties clearly falling clearly within the letter and spirit of PD 1986 will be considered to be within the decree's penal or disciplinary operation. And when it exists, the reasonable doubt must be resolved in favor of the person charged with violating the statute and for whom the penalty is sought. Thus, the MTRCB's decision in Administrative Case No. 01-04 dated September 27, 2004 and the subsequent order issued pursuant to said decision must be modified. The suspension should cover only the television program on which petitioner appeared and uttered the offensive and obscene language, which sanction is what the law and the facts obtaining call for.

In ending, what petitioner obviously advocates is an unrestricted speech paradigm in which absolute permissiveness is the norm. Petitioner's flawed belief that he may simply utter gutter profanity on television without adverse consequences, under the guise of free speech, does not lend itself to acceptance in this jurisdiction. We repeat: freedoms of speech and expression are not absolute freedoms. To say "any act that restrains speech should be greeted with furrowed brows" is not to say that any act that restrains or regulates speech or expression is *per se* invalid. This only recognizes the importance of freedoms of speech and expression, and indicates the necessity to carefully scrutinize acts that may restrain or regulate speech.

WHEREFORE, the decision of the MTRCB in Adm. Case No. 01-04 dated September 27, 2004 is hereby **AFFIRMED** with the **MODIFICATION** of limiting the suspension to the program *Ang Dating Daan*. As thus modified, the *fallo* of the MTRCB shall read as follows:

> WHEREFORE, in view of all the foregoing, a Decision is hereby rendered, imposing a penalty of **THREE (3) MONTHS**

SUSPENSION on the television program, *Ang Dating Daan*, subject of the instant petition.

Co-respondents Joselito Mallari, Luzviminda Cruz, and UNTV Channel 37 and its owner, PBC, are hereby exonerated for lack of evidence.

Costs against petitioner.

SO ORDERED.

Rollo (G.R. No. 165636), p. 375.
Id. at 923.
Id. at 924, Private Respondents' Memorandum.
Id. at 110.
Id. at 112-113, Rules of Procedure in the Conduct of Hearing for Violations of PD 1986 and the IRR.
Id. at 141-151.
Id. at 152-154.
Id. at 166-252.
Id. at 378.
Id. at 182.
Id. at 46.
Azarcon v. Sandiganbayan, G.R. No. 116033, February 26, 1997, 268 SCRA 747.
Pimentel v. COMELEC, Nos. L-53581-83, December 19, 1980, 101 SCRA 769.
Agpalo, ADMINISTRATIVE LAW (2005); citing *Matienzon v. Abellera*, G.R. No. 77632, June 8, 1988, 162 SCRA 1.
Lastimoso v. Vasquez, G.R. No. 116801, April 6, 1995, 243 SCRA 497.
Alonzo v. Capulong, G.R. No. 110590, May 10, 1995, 244 SCRA 80; *Beja v. Court of Appeals*, G.R. No. 97149, March 31, 1992, 207 SCRA 689.
Chavez v. National Housing Authority, G.R. No. 164527, August 15, 2007, 530 SCRA 235, 295-296; citing *Azarcon*, supra note 12, at 761; *Radio Communications of the Philippines, Inc. v. Santiago*, Nos. L-29236 & 29247, August 21, 1974, 58 SCRA 493, 497.
63 Phil. 139, 177 (1936).
Rollo (G.R. No. 164785), p. 12.
Id. at 94.
Id. at 95.
Beja, supra note 16; *Espiritu v. Melgar*, G.R. No. 100874, February 13, 1992, 206 SCRA 256.
1 De Leon, PHILIPPINE CONSTITUTIONAL LAW 274 (2003).
Tiu v. Guingona, G.R. No. 127410, January 20, 1999, 301 SCRA 278; citing *Ichong v. Hernandez*, 101 Phil. 1155 (1957) and other cases.
US v. Paramount Pictures, 334 U.S. 131; *Eastern Broadcasting Corporation v. Dans*, *Jr*., No. L-59329, July 19, 1985, 137 SCRA 628.
Eastern Broadcasting Corporation v. Dans, Jr., supra note 25; citing *FCC v. Pacifica Foundation*, 438 U.S. 726; *Gonzales v. Kalaw Katigbak*, No. L-69500, July 22, 1985, 137 SCRA 717.
J.G. Bernas, S.J., THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 205 (1996).
Lagunsad v. Soto vda. De Gonzales, No. L-32066, August 6, 1979, 92 SCRA 476.
Trohwerk v. United States, 249 U.S. 204 (1919); cited in Bernas, supra at 218.
G.R. No. 136185, October 30, 2000, 344 SCRA 481, 490.

315 U.S. 568 (1942).
Agpalo, PHILIPPINE CONSTITUTIONAL LAW 358 (2006).
Chaplinsky, supra note 31; cited in Bernas, supra note 27, at 248.
Bernas, supra note 27, at 248.
G.R. No. 159751, December 6, 2006, 510 SCRA 351, 360-361.
413 U.S. 15.
438 U.S. 726.
Supra note 25.
G.R. No. 168338, February 15, 2008, 545 SCRA 441.
"Shit, piss, fuck, tits, etc."
Supra note 39.
Supra note 26.
Gonzales v. Kalaw Katigbak, supra.
Pharmaceutical and Health Care Association of the Philippines v. Health Secretary Francisco T. Duque III, G.R. No. 173034, October 9, 2007, 535 SCRA 265.
Bayan v. Ermita, G.R. No. 169838, April 25, 2006, 488 SCRA 226.
16A Am Jur. 2d Constitutional Law Sec. 493; *Schenck v. United States*, 249 U.S. 47.
Bernas, supra note 27, at 219-220.
Gonzales v. COMELEC, No. L-27833, April 18, 1969, 27 SCRA 835.
ABS-CBN Broadcasting Corp. v. COMELEC, G.R. No. 133486, January 28, 2000, 323 SCRA 811; *Adiong v. COMELEC*, G.R. No. 103956, March 31, 1992, 207 SCRA 712.
Zaldivar v. Sandiganbayan, G.R. Nos. 79690-707 & 80578, February 1, 1989, 170 SCRA 1.
Supra note 25, at 635.
No. L-82380, April 29, 1988, 160 SCRA 861.
Supra note 48.
Supra at 898.
Supra at 899-900.
Kauper, CIVIL LIBERTIES AND THE CONSTITUTION 113 (1966); cited in *Gonzales v. COMELEC*, supra note 48; also cited in J.G. Bernas, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY (2003).
Id.
Bernas, supra note 27, at 81.
CONSTITUTION, Art. II, Sec. 13.
Id., id., Sec. 12.
Id.
Supra note 26, at 729.
G.R. No. 119673, July 26, 1996, 259 SCRA 529, 544, 552.
Supra note 56, at 235.
G.R. No. 155282, January 17, 2005, 448 SCRA 575.
Supra note 65.
No. L-32096, October 24, 1970, 35 SCRA 481, 496-497.
Supra note 17; citing *Angara v. Electoral Commission*, 63 Phil. 139 (1936); *Provident Tree Farms, Inc. v. Batario, Jr.*, G.R. No. 92285, March 28, 1994, 231 SCRA 463.
People v. Maceren, No. L-32166, October 18, 1977, 79 SCRA 450, 458.
Id.
Id.