The Sacred, the Profane, and the Religious Endorsement

Clarence Rommel C. Nanquil[*]

[T]he god and the society is one and the same.[1]

I. INTRODUCTION

It can be said that *freedom* is arguably the central animating concept behind every political order.[2] Since the existence of the State necessarily and *essentially* curtails the liberty of men, the concept of freedom should be the

* '05 J.D. cand., Ateneo de Manila University School of Law. Member, Board of Editors, *Ateneo Law Journal*. He was Lead Editor for Vol. 48, Second issue of the *Ateneo Law Journal*. He is author of *The Three-Term Limit Rule in Review and the Confusion between Term and Tenure*, 48 ATENEO L.J. 155 (2003) and co-author of *In Re Purisima: Competence and Character Requirement for Membership in the Bar*, 48 ATENEO L.J. 840 (2003) with Ms. Aimee Dabu et al.

Cite as 49 ATENEO L.J. 212 (2004).

1. EMILE DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE 208 (Karen E. Field trans. 1995) [hereinafter DURKHEIM].

2. *See* J. L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought*, 45 B.C. L. REV. 499 (2004) [hereinafter J. L. Hill].

core value that statesmen should always consider. Beneath every political and social structure lies a particular, sometimes inchoate, conception of freedom.[3]

According to Aristotle, the State exists for an end — the supreme good of man, his moral and intellectual life.[4] Aristotle believed that society is a natural creature because man is by nature a political being.[5] As such, the existence of society and its infringement on the freedom of man should be considered as a necessary evil. For this reason, freedom as an individual, might mean freedom to live as one may wish; and as an active participant in the political sphere, the freedom to take part in self-government.

Following the lead of Aristotle, a commentator noted that in order to understand the concept of freedom in a democratic society, one should first distinguish the different kinds of freedom: the *positive* freedom and the *negative* freedom. This is similar to Aristotle's view that freedom means freedom to live as one may wish and the freedom to take part in self-government. Positive freedom means the capacity of the individual to exercise his or her right to take part in the political process.[6] Negative freedom, on the other hand, "connects liberty to the idea of limited government and, more generally, to the philosophical conviction that *freedom is none other than the absence of constraint.*"[7]

These concepts of freedom can be seen to animate the Philippine constitutional system. In fact, to be more precise, it can be said that the philosophy by which the constitutional system has been written is a philosophy etched in these freedoms.

The individual's positive freedom to exercise his or her right to take part in the political process or the right to vote and be elected to public office, are sacredly protected by the Constitution since upon these rights hinge upon the manner of enjoying political and civil liberties.[8] Meanwhile, negative freedom is also seen as a philosophical foundation in the constitutional system since the Constitution provides a framework for a *limited government*. The Constitution considers certain inalienable rights — qualities inherent in man which the State has a duty to protect — which are higher than the government. These inalienable rights are generally considered to be beyond the scope of governmental power to control or the

3. *Id.* at 499.

4. 1 FREDERICK COPPLESTONE, S.J., A HISTORY OF PHILOSOPHY 351 (1993 ed.).

5. *Id.*

6. J. L. Hill, *supra* note 2, at 511.

7. *Id.* at 524 (emphasis supplied).

8. *See* Clarence Rommel Nanquil, Comment, *The Three-Term Limit Rule in Review and the Confusion between Term and Tenure*, 48 ATENEO L.J. 155, 157 (2003).

free human being to surrender.[9] Liberty and independence belong to man by his very nature, and cannot be taken away without his consent. These inalienable rights, which are more superior than the State itself and all forms of social and political control, became the foundation for the concept of the limited government, and are now enshrined in the Bill of Rights.[10]

> The perfection of humanity is not possible without freedom for the individual. Thus, the existence of social institutions and all political organizations and relationships are justified insofar as they have for their primary aim the defense and protection of freedom.[11]

However, it is important to remember that these rights, although inalienable, are not absolute. They may not be exercised arbitrarily to the point that it harms the rights of others. These rights are, therefore, *limitable rights.*

These principles of freedom are not something that conflict with, or cut across the constitutional philosophy. Rather, when the constitutional philosophy is seen in its entirety, this principle is part and parcel of it.[12] "Man is of such a nature and his situation is such that his proper end cannot be achieved without this freedom. To use the power of government to extend the rule of the constitutional philosophy...to all of life...would defeat the constitutional philosophy itself."[13]

The recent case of *Mike Velarde v. Social Justice Society*[14] has sought to re-examine the foundation of these principles of freedom enshrined in the Constitution. The case posed the question of whether or not the act of a religious leader in endorsing the candidacy of a candidate for an elective office or in urging or requiring the members of his flock to vote for a specified candidate, violates the letter or the spirit of the constitutional provisions.

Velarde arose from a *Petition for Declaratory Relief* filed before the Regional Trial Court of Manila by the Social Justice Society (SJS), a registered political party, against Mariano "Mike" Z. Velarde, Jaime Cardinal Sin, Eraño Manalo, Eddie Villanueva, and Eliseo F. Soriano as co-

9. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1309 (2d ed. 1988) [hereinafter TRIBE].

10. *See* PHIL CONST. art. III.

11. JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 94 (1996) [hereinafter BERNAS].

12. John Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847, 858 (1984) [hereinafter Mansfield].

13. *Id.*

14. Mike Velarde v. Social Justice Society, G.R. No. 159357, Apr. 28, 2004.

respondents. The petition prayed for the resolution of the question "whether or not the act of a religious leader like that of herein respondents, in endorsing the candidacy of a candidate for elective office or in urging or requiring the members of his flock to vote for a specified candidate, is violative of the letter or spirit of the constitutional provisions."

SJS sought the interpretation of several constitutional provisions, specifically on the separation of church and state. It likewise prayed for a declaratory judgment on the constitutionality of the acts of religious leaders endorsing a candidate for an elective office, or urging or requiring the members of their flock to vote for a specified candidate. The co-respondents all sought the dismissal of the petition. They claimed that the petition did not state a cause of action and neither was there a justiciable controversy. However, their respective motions to dismiss were denied. The motions for reconsideration were likewise denied.

The trial court said that it had jurisdiction over the case, and then proceeded to a lengthy discussion of the issue raised in the petition. The trial court ruled, without including a dispositive portion in its assailed decision, that the endorsement of specific candidates in an election to any public office is a clear violation of the separation clause. Thus, Velarde and Soriano filed separate Motions for Reconsideration which were both denied by the court. Thereafter, they filed a Petition for Review with the Supreme Court.

The Supreme Court ruled that the assailed decision is void. According to the Court, SJS premised its action on mere speculations, contingent events, and hypothetical issues that had not yet ripened into an actual controversy. Hence, the action was premature. There was no justiciable controversy to be decided. The election season had not yet started and SJS merely speculated that, as religious leaders, the co-respondents had endorsed or threatened to endorse a candidate or candidates for elective offices. Such premise is highly speculative and merely theoretical, to say the least. Clearly, it does not suffice to constitute a justiciable controversy and sheer speculation does not give rise to an actionable right.

The SJS petition merely sought an opinion of the trial court on whether the speculated acts of religious leaders endorsing elective candidates for political offices violated the constitutional principle on the separation of church and state. It did not ask for a declaration of its rights and duties. Neither did it pray for the restraint of any threatened violation of its declared rights. The petition thus was in violation of the rule that courts are proscribed from rendering an advisory opinion.

Moreover, the assailed decision contains no statement of facts or of the court's findings as to the probable facts. Failure to comply with the constitutional injunction is a grave abuse of discretion amounting to lack or excess of jurisdiction. Decisions or orders issued in careless disregard of the constitutional mandate are a patent nullity and must be struck down as void.

However, the Court did not rule upon the main issue of the case - whether or not the religious endorsement violated the Constitution - since there were not enough factual and legal bases to resolve it. There were no facts that supported the SJS Petition and the assailed Decision. Since it made no findings of facts and final disposition, it was therefore void and there was nothing for the Court to review, affirm, reverse or even modify. Thus, it was impossible for the Court to take up the paramount question involving a constitutional principle on the merits because the constitutionality of a statute or act will be passed upon only if there is a justiciable controversy and it is essential to the protection of the rights of the parties concerned. Regrettably, there was none in the case.

Sadly, the case failed to address the constitutional question because it resolved the case on procedural issues. Since the lower court made no findings of facts and final disposition in resolving the case, the Court held that it was void and deemed legally inexistent. Thus, there was nothing for the Court to review, affirm, reverse or even just modify.

Nonetheless, it is important to point out the intersection of the two concepts of freedom discussed in this case. On one hand, there is the religious leader's freedom to take part in the political process by endorsing the politician and his ideology. It likewise includes the right of the followers to espouse the creed of their faith. On the other hand, there is the freedom of the SJS petitioners who firmly believe that their freedom will be curtailed because of the feared establishment of a religion. An analysis of the case would thus pierce through this intersection.

This Note therefore endeavors to provide an answer to the constitutional question presented in the case: whether or not the act of a religious leader in endorsing the candidacy of a candidate for elective office or in urging or requiring the members of his flock to vote for a specified candidate, violates the Constitution. To answer this question, this Note will be presented in the following manner:

Part I will discuss the institutions of freedom in the Constitution, namely religious freedom and freedom of speech and how they are connected in the analysis of the case. Part II will discuss the metaphor of the wall separating the Church and the State and what this concept of separation means. Part III will discuss the jurisprudence on religious freedom and how they illustrate the wall of separation between the Church and the State. Part IV will attempt to define the meaning of religion as protected by the Constitution. Part V will present a constitutional framework for religious freedom issues. Finally, Part VI will attempt to explain the implications of religious endorsements on the doctrine of separation of the Church and the State.

II. THE INSTITUTIONS OF FREEDOM

"The operations of the mind are continuous and inchoate, extending well beyond an individual's conscious control."[15] It is for this reason that the Court has usually "insisted that the activities going in within the head are absolutely beyond the power of government to control."[16] As candidly explained by the United States Supreme Court in one case, "[t]he fantasies of a drug addict are his own and beyond the reach of government."[17] Nonetheless, the Court has, at times deviated from this "insular view... choosing to approve regulations constricting mental intake or output, or invading the zones in which the values and convictions that define each individual are formed."[18] This should only be allowed if there is a compelling state interest that would justify the invasion of the individual's freedom of thought.

The Constitution has enumerated specific categories of thought and conscience for special treatment: religion and speech.[19] The reason for this is too obvious to understate: it strikes at the very core of democracy. The freedoms of speech, expression, and religion are the institutions of freedom enshrined in the Constitution. As stated by the U.S. Supreme Court in one case, "[i]f there is any fixed star in our constitutional constellation, *it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.*"[20]

---

15. TRIBE, *supra* note 9, at 1314 ("The operations of the mind are continuous and inchoate, extending well beyond an individual's conscious control. Although the ongoing experiences of thought and feeling may theoretically be fragmented into discrete processes, constitutional no less than common sense quickly reveals the difficulty and disingenuousness of ignoring their inevitable interdependence.").

16. *Id.* at 1315.

17. Paris Adult Theater I v. Slaton, 413 U.S. 49, 67 (1973).

18. TRIBE, *supra* note 9, at 1315.

19. *Id.* ("Courts have at times properly generalized from these protections, together with the guarantees of liberty in the due process clause to derive a capacious realm of individual conscience, and to define a sphere of intellect and spirit constitutionally secure from the machinations and manipulations of government.").

20. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641 (1943) (emphasis supplied).

A. Freedom of Speech and Expression

The freedoms of speech, expression, or of the press are important rights protected by the Constitution. Unknown to Filipinos, prior to 1900, it was transplanted to the Philippines by President McKinley's Instruction to the second Philippine Commission.[21] The Constitution provides that "[n]o 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 grievances."[22]

One of the prohibitions to this guarantee is the prohibition on *prior restraint*, which means "official governmental restrictions on the press or other forms of expression in advance of actual publication and dissemination."[23] Simply put, it is a prohibition against censorship. Nonetheless, the "prohibition of government interference *before* words are spoken or published would be an inadequate protection of the freedom of expression if the government could punish without restraint *after* publication."[24] Thus, the guarantee likewise prohibits subsequent punishment.

However, this does not mean that the guarantee of speech and press freedom is absolute. The constitutional guarantee is not "intended to give immunity for every use of the language."[25] Speech may be curtailed under the *clear and present danger rule* or the *balancing of interests test*. These tests are applicable to other preferred freedoms such as freedom of association, right of assembly, and freedom of religion.[26] Moreover, the freedom of speech guarantee cannot be used in cases of seditious speech,[27] libel,[28] and obscenity,[29] which can be dealt with by subsequent punishment.

21. BERNAS, *supra* note 11, at 204.

22. PHIL. CONST. art. III, § 4.

23. BERNAS, *supra* note 11, at 205.

24. *Id.*

25. *Id.* at 218.

26. *Id.* at 221.

27. People v. Perez, 45 Phil. 599 (1923).

28. *See* REVISED PENAL CODE, art. 353 ("A libel is public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead.").

29. BERNAS, *supra* note 11, at 259.

B. Freedom of Religion

Another institution of freedom in the Constitution is religious freedom. A freedom ushered into the country during American colonial occupation, this freedom establishes the concept of separation of Church and State.[30] This was an alien concept during the Hispanic colonial period since during that time, there was an established religion: the Catholic Church. Nonetheless, in the Philippine Bill of 1902, the religious freedoms were established, which caused "the complete separation between church and state, and the abolition of all special privileges and all restrictions therefore conferred or imposed upon any religious sect."[31] This is now an enshrined constitutional concept which is stated as follows:

> 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.[32]

There are two clauses that safeguard the religious guarantee. These are the non-establishment and free exercise clauses. These twin clauses "express an underlying relational concept of separation between religion and secular government."[33] However, this *wall of separation* is not an absolute bar. "Modern society is faced with the phenomenon of expanding government reaching out its regulatory arm to an ever growing variety of human action and the phenomenon of a growing articulation and acceptance."[34] The inevitable clash, therefore, between the state and civil religion, necessitates that a literal interpretation of the Constitution would not suffice. The interpretation "must be based not solely on the phraseology but especially on the societal values [they] intend to protect."[35]

The basis of the free exercise clause is to "respect . . . the inviolability of the human conscience."[36] The free exercise clause "completely insulated the realm of belief from state action, leaving, however, religiously motivated action, including expression, [is] subject to police power."[37] As

30. PHIL. CONST. art. II, § 6 ("The separation of Church and State shall be inviolable.").

31. BERNAS, *supra* note 11, at 284.

32. PHIL. CONST. art. III, § 5.

33. BERNAS, *supra* note 11, at 288.

34. *Id.*

35. *Id.* at 289.

36. *Id.* at 290.

37. *Id.*

conceptualized in *Ebralinag v. The Division Superintendent of Schools of Cebu*,[38] religious freedom has a two-fold aspect: freedom to believe and freedom to act on one's belief. "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."[39] The absoluteness of the freedom to believe carries with it the corollary that the government, while it may look into the good faith of a person, cannot inquire into a person's religious pretensions.[40] On the other hand, the non-establishment clause means "[i]n its minimal sense is that the State cannot establish or sponsor an official religion."[41] It prohibits the State from enacting laws that "aid one religion, aid all religions, or prefer one religion over another."[42] It can thus be seen that there are two values that this provision seeks to protect. These are voluntarism and the insulation of the political process from interfaith dissention.[43] Thus, the non-establishment clause calls for "government neutrality in religious matters."[44]

C. *Intersection between Speech and Religion*

It is important to point out that there is an intersection between the freedoms of speech and religion. Because of the nature of the rights they protect, it can be seen that the protection of religion can sometimes be merely a subset of the protection of expression and speech. In the course of the profession of religious beliefs, the right of expression or uttering or even of spreading them offers a unique problem.[45] The problem here is whether issues of belief and expression can be disregarded on the ground that religious freedom claims can be collapsed into free speech claims. The Court might treat claims of religious speech and ordinary speech interchangeably and in a great many cases, courts need not decide if expressive activities are religious.[46] The reason for this is that a religious expression can also be a speech in the ears of an uninitiated listener. In fact, for this kind of a listener,

38. Ebralinag v. The Division Superintendent of Schools of Cebu, 219 SCRA 256 (1993).

39. *Id.* at 270.

40. BERNAS, *supra* note 11, at 291.

41. *Id.* at 303.

42. *Id.* (citing Everson v. Board of Education, 330 U.S. 1, 39 (1947)).

43. *Id.*

44. *Id.*

45. JORGE R. COQUIA, CHURCH & STATE LAW IN THE PHILIPPINES 94 (1959).

46. *See* Kent Greenwalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 757 (1984) [hereinafter Greenwalt].

a strange religious expression can simply be regarded as a *simple speech* without regard to its religious evocations.

However, plausible speech and free exercise claims may not always be of exactly equal strength. "Any easy assumption that a concept of religion is never required for claims of belief and expression is mistaken."[47] Thus, religion should be considered as a special form of speech which should be *singled out* by the Constitution. However, before religious freedom may be invoked, the claim must first be religious in nature. As stated in *Wisconsin v. Yoder*,[48] "[a] way of life, however virtuous and admirable... [in order] to have the protection of the Religion Clauses... *must be rooted in religious belief*."[49] A personal philosophical belief, rather than a religious belief, does not rise to the level of the protection of the Religion Clauses.

The next problem, however, is how can one determine whether or not the claim is rooted in religious belief? In order to understand this concept, one must turn to the history and principles behind the animating principle of religious freedom — the metaphor of the Church and State separation.

III. THE WALL OF SEPARATION BETWEEN CHURCH AND STATE

The problem in conceptualizing religious freedom emanates from its very core. Religion is a realm in which "faculties beyond reason and experience often removed from the public sphere prove central to most conceptions of the values at stake."[50] The values protected by religious freedom are often internal and cannot be placed on an objective scale free from any preconceived notions by the perceiver. Moreover, this problem likewise stems from the fact that the purpose of the constitutional protection was to "state an *objective*, and *not to write a statute*."[51] Since it is merely an objective desired, the rationale behind this concept develops through time.

In addition, an even greater problem lies from the fact that in determining religious freedom questions, the question should be received from the perspective of the believer and no one else. "[T]he resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit... protection."[52]

47. *Id.*

48. Wisconsin v. Yoder, 406 U.S. 205 (1972)

49. *Id.* at 215 (emphasis supplied).

50. TRIBE, *supra* note 9, at 1154.

51. *Id.* at 1155 (emphasis supplied).

52. Thomas v. Review Board, 450 U.S. 707, 714 (1981).

The government may not make judgments about the value or disvalue of religions, religious practices, or theological tenets.[53] It is not for the Court to determine the *wisdom of the belief.* It can only determine the *legality of the act derived from the belief.* Nonetheless, even if religious freedom is only an objective and not a statute, the Constitution has laid down a State principle geared towards understanding the philosophy of this concept: "The separation of Church and State shall be inviolable."[54]

A. Separation in Philippine Context

As stated earlier, the concept of religious freedom is a fairly recent concept in Philippine law; only as recent as more or less a hundred years ago. Prior to the American colonial period there existed a state religion: the Catholic Church.

During the Hispanic colonial period, the Catholic Church was the state religion and only its faithful enjoyed the right to engage in public ceremonies of worship.[55] As the established state religion, it received protection from the law. The amalgamation of Church and State was so intense that the Church can meddle with civil government and press censorship.[56] The Spanish friars ruled supreme, not only on the realm of faith, but even on government matters.[57] They were not only spiritual guides but were also rulers of municipalities. The control and influence of the Catholic Church as the state religion was explained by Marcelo H. Del Pilar as follows:

> The friars control all the fundamental forces of society in the Philippines. They control the educational system... and are the local inspectors of every primary school. They control the minds of the people because in a dominantly Catholic country, the parish rectors can utilize the pulpit and confessionals to publicly or secretly influence the people; they control all the municipal and local authorities and the medium of communication; and they execute all the orders of the central government.[58]

The state religion enjoyed such a lofty perch during the Spanish regime since it was used by the Spanish authorities as *a tool of colonial oppression.* The inculcation of religion was "both an objective and a colonial tool in every

53. MICHAEL S. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 9 (1997).

54. PHIL. CONST. art. II, § 5.

55. BERNAS, *supra* note 11, at 284.

56. *See* TEODORO V. AGONCILLO III, HISTORY OF THE FILIPINO PEOPLE 78 (8d ed. 1981) [hereinafter AGONCILLO].

57. *Id.* at 79.

58. *Id.*

part of the Philippines."[59] The theocratic nature of Spanish colonial administration greatly shaped the early course of Philippine economic and cultural development.[60]

> Spanish colonialism was effectively in the hands of the friar orders. Although there were frequent conflicts between the colonial bureaucracy and the religious, the former had to defer time and again to the wishes of the friars. The pacification of the country had been due in large measure to acceptance of the new religion by the native population... In effect, it was the friars who really administered the colony.[61]

Thus, given the union of Church and State and the fact that religion was used as a tool of domination, the religious orders "used their tremendous influence on the population to shape not only Catholics but good colonials as well."[62] *Instead of religion becoming a tool of liberation, it became a tool of oppression.* The Filipinos were taught that instead of developing and improving their conditions, they should regard "suffering as a sign of God's love and to rely on heavenly intercession rather than on their own efforts."[63]

Religion during the Spanish regime was a perfect example of Karl Marx's vision of *religion as alienation*: "Religion is the sigh of the oppressed creature, the heart of the heartless world, just as it is the spirit of a spiritless situation. *It is the opium of the people.*"[64] Through religion, the pain people suffer in a world of cruel exploitation is ceased by the fantasy of a supernatural world where all sorrows and oppressions disappear.[65] Religion during the Spanish period provided the Filipinos an ideology perfect for colonial oppression; it reminded them that all social arrangements should stay as they are since the reward of the afterlife is what they should aspire for. The salvation projected was not just an illusion; it was an illusion that paralyzed and imprisoned them.[66]

Nonetheless, since the history of the Filipino people is primarily a "history of their struggles against colonial oppression,"[67] the fall of the Spanish regime marked the fall of the Church and State union. The Filipinos

59. RENATO CONSTANTINO, NEOCOLONIAL IDENTITY AND COUNTER CONSCIOUSNESS 214 (1978) [hereinafter CONSTANTINO].

60. *Id.*

61. *Id.*

62. *Id.* at 215.

63. *Id.*

64. DANIEL L. PALS, SEVEN THEORIES OF RELIGION 141 (1996) (emphasis supplied) [hereinafter PALS].

65. *Id.*

66. *Id.* at 143.

67. *Id.* at 37.

have learned of the oppressive nature of a unified Church and State and vowed never to return to such an oppressive situation.

During the framing of the Malolos Constitution, it was envisioned that the Church and the State should be separated. The draft bill contained a provision on Church and State separation worded as follows: "The State recognizes the freedom of equality of all religions, as well as *the separation of Church and State*." [68] The voting for this provision was, however, controversial. Some members of the then Congress framing the Malolos Constitution still wanted Catholicism as the State religion.[69] After much heated debate, they voted on the subject. The result was a tie. It was only during the second voting that resulted to the triumph of the partisans of the separation — they won by only one vote.[70] The decision was a cornerstone of Philippine democracy since it not only showed their nationalism but also their keen sense of history.[71]

When Spain *ceded*[72] the Philippines to the Americans during the onset of the American colonial regime, President McKinley introduced the recognition of individual freedoms, which included the freedom of religion.[73] However, it is a mistake to believe that it was the Americans who taught Filipinos the meaning of freedom. Filipinos already knew the meaning of freedom prior to the American colonial regime. As the historian Teodoro V. Agoncillo III noted:

> The Filipinos knew the meaning of freedom before the Americans came for they enjoyed its blessings under the Revolutionary Government and the Republic.... They practiced it in the Tejeros Convention, in the election to the Malolos Congress, and in the framing of the Malolos Constitution. What the Americans did was to broaden the democratic base, that is to say, they made the principles of democracy apply to all — even to the poor and illiterate.[74]

Nonetheless, what is the meaning of the separation of the Church and State introduced by the Americans, which is now carried under the present Constitution? Only President McKinley's Instruction spoke of *real, entire, and absolute* separation between Church and State.[75] The phrase *real, entire, and*

68. AGONCILLO, *supra* note 56, at 207 (emphasis supplied).

69. *Id.* at 206.

70. *Id.* at 206-07.

71. *Id.* at 207.

72. Actually, *sold* is the more appropriate term since the United States bought the Philippines from Spain for a price of $20,000,000 during the Treaty of Paris.

73. AGONCILLO, *supra* note 56, at 378.

74. *Id.*

75. BERNAS, *supra* note 11, at 287.

absolute did not appear in either the Philippine Bill or the Autonomy Act. In fact, under the American Constitution, the phrase *real, entire, and absolute* likewise does not appear but such concept has always been affirmed.

When the phrase "separation of church and state shall be inviolable" was borrowed by the 1973 Constitution,[76] it was viewed that it merely "preserved earlier church and state doctrine which revolved around the free exercise and non-establishment clauses."[77] This exact phrase is likewise carried under the present Constitution.[78] For this reason, the free exercise and non-establishment clauses are the express provisions to be relied upon in order to understand the concept of separation between Church and State. The problem of this approach, however, is as stated above, the Constitution aimed to express an objective and not a statute. It is the principle of Church and State separation that animates the free exercise and non-establishment clauses. Thus, to fully comprehend its meaning, one should rely on the manner how this concept has been understood in the American constitution from where the Philippines has copied the same.

B. *Separation in American Context*

It has been said that "[n]o word or phrase is associated more closely by Americans with the topic of church-state relations than the 'wall of separation between church and state.'"[79] To effectuate this vision, the American Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[80]

However, the problem confronted by American courts in implementing these provisions stems from the fact that it was, as stated earlier, to state an objective and not a statute. They were "left with the task of developing these rules to realize the goal of the religion clauses without freezing them into an overly rigid mold."[81] The Court, as well as various commentators, have explored the historical background of the religion clauses in order to guide the development of jurisprudential interpretation. However, as warned by one case, a "too literal quest for the advice of the Founding Fathers upon

76. 1973 PHIL. CONST. art. XV, § 15 (superceded 1987).

77. BERNAS, *supra* note 11, at 288.

78. PHIL. CONST. art. II, § 6.

79. Daniel L. Dreisbach and John D. Whaley, *What the Wall Separates*, 16 CONST. COMMENT. 627 (1999) [hereinafter Dreisbach and Whaley].

80. U.S. CONST. amend. I.

81. TRIBE, *supra* note 9, at 1155-56.

the issues of these cases seems... futile and misdirected.... [T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition."[82]

An examination of the historical background of the religion clauses will reveal that it was shaped by three distinct schools of thought. These are evangelical views primarily enunciated by Roger Williams, the separatist view of Thomas Jefferson, and that of James Madison.[83]

According to Roger Williams, there is a need to separate the Church from the State since "worldly corruptions... might consume the churches if sturdy fences against the wilderness were not maintained."[84] For him, it is the Church that must be protected from state interference. To have an efficient separation, there must be cooperation — positive toleration — whereby imposing upon the state "the burden of fostering a climate conducive to all religion."[85]

On the other hand, Thomas Jefferson saw that, contrary to Williams' assertion, it is the State that must be protected from the Church. Jefferson's famous dictum was that there must be a wall of separation between Church and State. To quote Jefferson:

> 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 legitimate powers of 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 & State*.[86]

This metaphor has been embraced by the judiciary, adopting it not only as an organizing theme of church-state analysis, but also as a virtual rule of constitutional law.[87] Early jurisprudence accepted the *strict separation theory* which was derived from the Jeffersonian metaphor.[88]

82. Abington School District v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring).

83. TRIBE, *supra* note 9, at 1158.

84. *Id.*

85. *Id.* at 1559.

86. Dreisbach and Whaley, *supra* note 79, at 627-28 *quoting* Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist Association in the state of Connecticut (Jan. 1, 1802).

87. *Id.*

88. *See* Everson v. Board of Education, 330 U.S. 1 (1947).

Meanwhile, James Madison believed that "both religion and the government could best achieve their high purposes if each were left free from the other within its respective sphere."[89] For Madison, there is a tendency to usurp on one side or the other or to a corrupting alliance if there is a union between the two. Thus, the best safeguard is an "abstinence of the Government from interference in any way whatever, beyond the necessity of preserving public order and protecting each sect against trespass on its legal rights by others."[90]

As can be seen, these three views are in some aspects complementary and in others, conflicting. In using these views as guides, the American Supreme Court has occasionally "assumed the role of constitutional historian to seek guidance in the origins and original meanings of the religion clauses."[91] Even if the results in using these historical framework conflicts, there are three common views regarding the historiography. *First*, the meaning of the religion clauses should be viewed in the historical milieu by which they were adopted; *second*, the consensus view is that the opinions of Jefferson and Madison are the direct antecedents of these clauses and are relevant in the interpretation; and *third*, it is likewise a consensus view that there will be chaos and disorder if there is a union between Church and State.[92]

However, what has not been explained is the reason why there is a need to separate the affairs of the Church from the State. Historical analysis of the First Amendment will reveal that, similar to Philippine context, it was a freedom written out of historical necessity. As recounted in one case:

> A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, 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

89. TRIBE, *supra* note 9, at 1159.

90. *Id.*

91. *Id.*

92. *See id.* at 1160.

> speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them....
>
> The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance received strong support throughout Virginia, and the Assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous 'Virginia Bill for Religious Liberty' originally written by Thomas Jefferson.[93]

Subsequent judicial developments have revealed that there are two principles behind the religious freedom clauses of the First Amendment. These are *voluntarism* and *separatism*.[94] *Voluntarism* is the mandate by which the free-exercise clause has been interpreted. It was interpreted to guarantee the freedom of conscience by preventing any degree of compulsion in matters of faith. "It prohibited not only direct compulsion but also any indirect coercion which might result from subtle discrimination; hence, it was offended by any burden based specifically on one's religion."[95] Meanwhile, *separatism* reflected the Madisonian and Jeffersonian views of insulating the realm of the State from the matters of faith. "Both religion and government function best if each remains independent of the other."[96] For this reason, it calls out for:

> [m]uch more than institutional separation of church and state; it means that the state should not become involved in religious affairs or derive its claim to authority from religious sources, that religious bodies should not be granted governmental powers, and -- perhaps — that sectarian differences should not be allowed to unduly fragment the body politic.[97]

This is how post-adoption developments viewed religious freedom and it has become popular to see both the free exercise clause and the non-establishment clause as expression of voluntarism and separatism.[98] Any analysis regarding the relationship between the Church and State filtered through twentieth century eyes will inevitably revert to its historical evolution.[99] However, the problem of subsequent jurisprudence is their failure to come to grips with the fundamental philosophical questions that these clauses inescapably present.[100] "More often than not the necessity of confronting these questions is obscured by the incantation of verbal formulae devoid of explanatory value."[101] They failed to conceptualize the meaning of *religion* in the religious freedom clauses, thus resulting in an overlapping between the non-establishment clause and the free exercise clause.

93. Everson v. Board of Education, 330 U.S. 1, 9-12 (1947) (citations omitted).
94. TRIBE, *supra* note 9, at 1160.
95. *Id.*
96. *Id.* at 1161.
97. *Id.*

In most cases arising under the religious freedom clauses, the religiousness of an activity or organization will be obvious. "However, when the presence of religion is seriously controverted, the threshold question, 'defining religion,' becomes important."[102] The concept of *religion* sought to be protected is thus diluted, resulting in a tendency on the part of the Court and commentators to see cases as either free exercise clause cases or establishment clause cases. However, it is "necessary to see the religion clauses as working together to create a *single standard* that dictates the proper relation between government and religion."[103] The next part of this Note shall elaborate on this sentiment.

III. RELIGIOUS FREEDOM AND THE WALL OF SEPARATION

A. Jurisprudence and the Wall of Separation

It has been said that the most difficult area of constitutional law is the area of religious freedom since that is the area "where [a] man stands accountable to an authority higher than the state."[104] It involves the difficult task of balancing authority and liberty because to the person invoking religious freedom, the consequences 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*."[105] Hence, there are marked inconsistencies in jurisprudence.

98. *Id.*
99. *See* Dreisbach and Whaley, *supra* note 79, at 636.
100. Mansfield, *supra* note 12, at 848.
101. *Id.*
102. Greenwalt, *supra* note 46, at 753.
103. Mansfield, *supra* note 12, at 848 (emphasis supplied).
104. Estrada v. Escritor, 408 SCRA 1, 49 (2003).
105. *Id.* (emphasis supplied).

The line-drawing in the area of religious freedom is pre-eminently delicate and emotional. "Religion, like love, is so personal and irrational that no one has either the capacity or justification to sit in judgment. Any attempt by society to find and draw a line here is bound to be frustrating."[106]

Nevertheless, jurisprudence has produced two identifiably different, even opposing, strains of jurisprudence on the religion clauses.[107] These are *separation* (in the form of strict separation or the tamer version of strict neutrality or separation) and *benevolent neutrality* or accommodation.[108] This Part will present selected jurisprudence, both from American jurisprudence — most of which are cited as authorities in Philippine religion clause cases, and Philippine jurisprudence, in order to understand if there is indeed a distinction between the two strains, regarding the scope of protection of each clause, and how they are applied. In the end, the examination will reveal that the problem requires more than a factual analysis of the cases but will revert to its philosophical core — the meaning of protected *religion* in the Constitution.

The Court might have described, following the Jeffersonian model, that the religious freedom clauses aims at erecting a *wall* of separation between Church and State; a useful metaphor that served as a reminder forbidding an established church or anything approaching it. However, "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[109]

1. Religion in Public Schools and State Colleges and Universities

Perhaps the most fundamental of cases exemplifying the wall of separation are those concerning religious activities in state-owned institutions of learning. The reason for this is simple: it is here where the future leaders of the country are shaped. The important state principle of Church and State separation might be eradicated in the minds of the country's future leaders if this is not engrained in their minds while they were still young. In these cases, the doctrine is consistent: "Prayer as an established part of the official school day is always forbidden. It violates one of the establishment clause's most fundamental tenets: Government power cannot be turned over to religion or religious bodies."[110] As explained by Professor Tribe:

106. HENRY JULIAN ABRAHAM, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 206 (2d ed. 1972) [hereinafter ABRAHAM].

107. *Estrada*, 408 SCRA at 89.

108. *Id.*

109. Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

110. TRIBE, *supra* note 9, at 1169-70.

> When schools conduct official religious exercises, an audience gathered by state power is lent, however briefly, to a religious cause. Even where dissenting students are entirely free to leave the room, state power remains at issue. The choice presented to students — either to take part in a particular religious exercise or to wait passively elsewhere — implies that the exercise is a valid element of a legally required education; the norm is religion and dissenters must opt out. In addition, the combination of official ceremony and peer pressure is likely to make any such religious session inherently coercive. *Such programs not only turn state power to religion: they also turn fundamentally religious power over to the state.*[111]

Arguably, the first case that espoused this idea was *West Virginia State Board of Education v. Barnette*.[112] In this case, the Court ruled that a regulation requiring children in public schools to salute the American flag is invalid as applied to children of Jehovah Witnesses. This is because it denies *freedom of speech* and *freedom of worship* since it transcends constitutional limitations on the State Board's power and invades the spheres of intellect and spirit which is the purpose of the Constitution to reserve from official control. The freedom to be intellectually and spiritually diverse or even contrary will not disintegrate the social organization.[113] The belief that patriotism "will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."[114] As further rationalized by the Court:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. *Those who begin coercive elimination of dissent soon find*

111. *Id.* at 1170 (emphasis supplied).

112. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

113. *Id.* at 641.

114. *Id.*

themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.[115]

In *McCollum v. Board of Education*,[116] it was held that religious instruction in public schools was unconstitutional because it violated the non-establishment clause. In this case, there was a patent violation of the religious freedom clause since by incorporating religious education as part of school curriculum, religious dissenters have no choice but to comply even if contrary to their beliefs. However, what if it is not the *teaching* of religion but the *practice* of religion that is sanctioned? The result is the same — it is unconstitutional.

In *Engel v. Vitale*,[117] New York's program of daily classroom invocation of God's blessings as prescribed in prayer promulgated by its Board of Regents was a *religious activity*, and the use of the public school system to encourage recitation of such prayer was a practice wholly inconsistent with the non-establishment clause even if the pupils were not required to participate over their own or their parents' objections. Meanwhile, in *Abington School District v. Schemmp*,[118] it was held that mandated Bible reading done through the school intercommunication system, even if there were no prefatory statements, questions, comments or explanations and interpretations given at or during the exercises, and even if the student may elect not to join the exercise and leave the classroom was unconstitutional. As stated by the Court: "[w]hile the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs."[119] The bar on prayer in state-owned educational institutions was extended to prayers during graduation ceremonies in the case of *Lee v. Weisman*.[120] In said case, a public school student and her father brought suit seeking permanent injunction to prevent inclusion of invocations and benedictions in the form of prayer in graduation ceremonies of city public schools. It was held that the religious invocations during graduation ceremonies were unconstitutional for violating the non-establishment clause. Moreover, a law which merely mandated moments of silence for meditation and prayers was declared unconstitutional in the case of *Wallace v. Jaffree*.[121]

115. *Id.* at 640-41 (emphasis supplied); *See* Ebranilag v. Superintendent of Schools of Cebu, 219 SCRA 256 (1993) which applied the same doctrine in this jurisdiction.

116. McCollum v. Board of Education, 333 U.S. 203 (1948).

117. Engel v. Vitale, 370 U.S. 421 (1962).

118. Abington Schoo! District v. Schemmp, 374 U.S. 203 (1963).

119. *Id.* at 226.

120. Lee v. Weisman, 505 U.S. 577 (1992).

121. Wallace v. Jaffreem, 472 U.S. 38 (1985).

A law authorizing a daily period of silence in public schools for meditation or voluntary prayer was an endorsement of religion lacking any clearly secular purpose and hence, was in contravention of the non-establishment clause.

A law motivated by a purpose to advance religion is unconstitutional. Thus, there is strict separation between Church and State in the area of religious teaching and practice. In fact, the mere act of posting the Ten Commandments in public schools is already unconstitutional.[122]

If the teaching and the practice of a religion in a public school is invalid for violating the non-establishment clause, how about a bar against the teaching of ideas that are contrary to religious beliefs? This was settled in the case of *Epperson v. Arkansas*.[123] In the said case, an Arkansas law made it unlawful for a teacher in any state-supported school or university to teach the theory or doctrine that mankind ascended or descended from a lower order of animals, or to adopt or use in any such institution a textbook that teaches this theory. Violation was considered a misdemeanor and subjected the violator to dismissal from his position. A teacher in an Arkansas school brought an action for a declaration that Arkansas anti-evolution statutes were void. The Court ruled that the anti-evolution statute was unconstitutional for violating the First Amendment. As opined by the Court:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.[124]

For this reason, the State's right to prescribe the curriculum for its public schools does not include the right to prohibit, under pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.

Nonetheless, a law requiring equal treatment for creationism was declared unconstitutional in the case of *Edwards v. Aguillard*.[125] The Court ruled that the law served no identifiable secular purpose. It did not enhance the freedom of teachers to teach what they choose and failed to further the goal of education. Moreover, requiring the teaching of creation science with evolution did not give schoolteachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of

122. Stone v. Graham, 449 U.S. 39 (1980).

123. Epperson v. Arkansas, 393 U.S. 97 (1968).

124. *Id.* at 105.

125. Edwards v. Aguillard, 482 U.S. 578 (1987).

theories, besides evolution, about the origin of life. Indeed, it gave an unduly discriminatory preference for the teaching of creation science and against the teaching of evolution. Moreover, it had for its primary purpose the promotion of a particular religious belief. It impermissibly endorsed religion by advancing the religious belief that a supernatural being created humankind. The law's primary purpose was to change the public school science curriculum to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety. For these reasons, it was declared unconstitutional.

These cases thus reveal strict separation in the area of religious indoctrination. The State cannot bar the teaching of ideas contrary to religious creed. Moreover, it cannot grant special favor to the teaching of a religious creed. However, if religion was neither preached nor enshrined by the public school but merely *allowed the use* of the school for religious activities, will this be valid? The next cases are illustrative.

In *Zorach v. Clauson*,[126] New York City had a program which permitted its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student was released on written request of his parents. Those not released stay in the classrooms. The churches made weekly reports to the schools, sending a list of children who had been released from public school but who had not reported for religious instruction. This program was assailed for violating the First Amendment. In this case, the Court ruled that the program was valid. According to the Court, the constitutional philosophy that Church and State should be separated must be complete and unequivocal, permitting no exception. Its prohibition is absolute. *However, it does not provide that, in all respects, there shall be separation of Church and State.*

Similar to this line, the Court ruled in *Widmar v. Vicent*[127] that a state university cannot refuse to grant a student religious group equal access to facilities that are open to other student groups. Moreover, in *Lamb's Chapel v. Center Moriches Union Free School District*,[128] it was held that school districts cannot deny to churches access to school premises after school hours if the district allowed the use of its buildings to other groups.

What can be deduced from these cases is that the *wall of separation* is not absolute. The law permits allowable intrusions. The law recognizes the inherent religiosity of its citizens. It is permissible to allow the use of public

126. Zorach v. Clauson, 343 U.S. 306 (1952).

127. Widmar v. Vicent, 454 U.S. 263 (1981).

128. Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).

schools for religious activities for as long as it is done after school hours or after establishing that it is not a school-sponsored activity but is rather an extra-curricular activity. The activities do not confer any imprimatur of state approval to the religious practices since it is open to both the religious and the irreligious. As stated in *Zorach*:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction.[129]

2. Support to Religious Schools

The above cases have shown that there is strict separation between Church and State in the area of religion in public educational institutions. The only exception is if the activity is done after school hours and is open to both religious and non-religious groups. The reason for this is that on-campus, school-time exercises are particularly offensive to the non-establishment clause. The school is the basic forum through which the basic norms are transmitted to the young. "When government permits a religion to take over part of a public school's facilities during the school day, it strongly implies official endorsement of the particular religion."[130] The next line of cases will determine the validity of state support to religious schools.

129. *Zorach*, 343 U.S. at 313-14.

130. TRIBE, *supra* note 9, at 1174-75.

In *Everson v. Board of Education,*[131] what was assailed was the resolution of the Board of Education, which provided for the transportation of pupils to both public and parochial schools. The resolution was assailed for violating the non-establishment clause since it extended the privilege of the bus fare reimbursement to students going to Catholic schools. The Court ruled that the assailed resolution was valid, based on the test of *neutrality*. It was valid since the Constitution only requires that "the state [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."[132] To be valid, the law must have a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Meanwhile, in *Board of Education v. Allen,*[133] what was assailed was the State's lending of textbooks to private and religious schools. Here, a New York statute required local public school authorities to lend textbooks free of charge to all students in grades seven through twelve, including students attending private schools. It was alleged that the authorization of the loan of textbooks to students attending parochial schools amount to an establishment of state-religion and therefore, unconstitutional. The Supreme Court ruled otherwise. Applying the *Everson* test, the assailed law was valid because it was religiously neutral since it had a secular legislative purpose, which neither aided nor prohibited religion.

As can be seen, there are two requirements to determine the validity of an act using the *Everson* test: (1) it must have a secular legislative purpose; and (2) it should neither aid nor prohibit religion. However, the case of *Lemon v. Kurtzman*[134] added a third requirement: the support to religious schools must not result in an excessive entanglement between the government and the religious schools.

In *Lemon*, the constitutionality of two laws, one in Rhode Island and another in Pennsylvania, were assailed. The Rhode Island law provided for a 15% salary supplement to be paid to teachers in nonpublic schools at which the average per pupil expenditure on secular education was below the average in public schools. Eligible teachers must teach only courses offered in the public schools, using only materials used in the public schools, and must agree not to teach courses in religion. Meanwhile, the Pennsylvania law authorized the State Superintendent of Public Instruction to "purchase" certain "secular educational services" from nonpublic schools, directly reimbursing those schools solely for teachers' salaries, textbooks, and

131. Everson v. Board of Education, 330 U.S. 1 (1947).

132. *Id.* at 18.

133. Board of Education v. Allen, 392 U.S. 236 (1968).

134. Lemon v. Kurtzman, 403 U.S. 602 (1971).

instructional materials. Reimbursement was restricted to courses in specific secular subjects, the textbooks and materials had to be approved by the Superintendent, and no payment was to be made for any course containing "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." Contracts were made with schools that have more than 20% of all the students in the State, most of which were affiliated with the Roman Catholic Church.

In this case, the Supreme Court ruled that both statutes were unconstitutional under the religious freedom clauses of the First Amendment, since the cumulative impact of the entire relationship arising under both laws amounted to an *excessive entanglement* between government and religion. According to the Court, jurisprudence concerning entanglement must recognize that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[135] In order to determine whether the government entanglement with religion is excessive, "we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[136] Thus, the three-fold test provides: (1) it must have a secular legislative purpose; (2) it should neither aid nor prohibit religion; and (3) it must not result to an excessive entanglement between the government and the religious authority.

Applying the above-mentioned test, the Rhode Island program was unconstitutional because the religious activity, the purpose of the church-affiliated schools — especially with respect to children of impressionable age in the primary grades — and the dangers that a teacher under religious control and discipline poses to the separation of religious from purely secular aspect of elementary education in such schools resulted into an excessive entanglement since it would require a continuing state surveillance to ensure that the statutory restrictions are obeyed and the First Amendment otherwise respected. Furthermore, the government must inspect school records to determine what part of the expenditures is attributable to secular education as opposed to religious activity, in the event a nonpublic school's expenditures per pupil exceed the comparable figures for public schools.

Meanwhile, the Pennsylvania program also resulted in an excessive entanglement. This entanglement stemmed from the restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role and the state supervision of nonpublic school accounting procedures required to establish the cost of secular as distinguished from religious

135. *Id.* at 614.

136. *Id.* at 615.

education. In addition, the Pennsylvania law was likewise defective since it provided for a continuing financial aid directly to the church-related schools.

Based on the same analysis, it was held in *Tilton v. Richardson*[137] that federal funding to private, religious, and public colleges to build classrooms was constitutional. In said case, the assailed law provided federal construction grants for college and university facilities. However, it excluded "any facility used or to be used for sectarian instruction or as a place for religious worship, or...primarily in connection with any part of the program of a school or department of divinity." The government retained a 20-year interest in any facility constructed with funds under the Act, and if, during this period, the recipient violated the statutory conditions, it would be entitled to recovery of funds.

The U.S. Supreme Court ruled that there was no excessive entanglement in this case. According to the Court, there was a distinction between colleges and universities on one hand, and primary and secondary schools on the other hand. The "affirmative if not dominant policy of the instruction in pre-college church schools is to assure future adherents to a particular faith by having control of their total education at an early age. There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination."[138]

None of these institutions required its students to attend religious services. Although they required their students to take theology courses, the parties stipulated that these courses are taught according to the academic requirements of the subject matter and the teacher's concept of professional standards. Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood compared to primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities.

Moreover, the entanglement between church and state is likewise lessened by the non-ideological character of the aid that the Government provides. Here, the government provides facilities that are themselves religiously neutral. The risks of Government aid to religion and the corresponding need for surveillance are therefore reduced. Finally, government entanglements with religion are reduced by the circumstance that, unlike in *Lemon*, the government aid in *Tilton* is a one-time, single-purpose construction grant. "There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities.

137. Tilton v. Richardson, 403 U.S. 671 (1971).

138. *Id.* at 685-86.

Inspection as to use is a minimal contact."[139] Thus, except for the provision providing for a 20-year limitation on the religious use restrictions, the assailed law was valid.

As can be seen in these cases, the general rule is that there must be a separation between Church and State. In these cases, however, the separation is not absolute since a greater state-interest is to be achieved. Nonetheless, the aid to religion should be merely incidental. Thus, using the three-fold test, there must be no excessive entanglement between the government and the religious group benefited. The government should not intrude in the affairs of faith.

3. Permissible Accommodation

The next line of jurisprudence revolves around the central theme on the existence of accommodation by the State on religion. If the previous cases focused on a strict separation between Church and State without regard to the consequences to religion, accommodation regards the role of religion in society by allowing religious exercise to exist provided that the accommodation is *religiously neutral*. It is congruent with the sociological proposition that religion serves a function to the survival of society.[140]

For example, in *Cantwell v. Connecticut*,[141] the conviction for violating a Connecticut statute prohibiting the solicitation of money for alleged religious, charitable, or philanthropic causes without approval of the Secretary of Public Welfare was held to be unconstitutional since it amounted to compulsion by law of the acceptance of a creed and prohibited the free exercise of the chosen form of religion.

Similarly, in *United States v. Ballard*,[142] the Court ruled that propagators of religious teachings cannot be prosecuted for mail fraud since it would amount to a violation of the free-exercise clause. The beliefs of one person may seem preposterous to another but religious freedom mandates a toleration of conflicting views. As opined by the Court:

> Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law.[143]

139. *Id.* at 688.

140. Estrada v. Escritor, 408 SCRA 1, 119 (2003).

141. Cantwell v. Connecticut, 310 U.S. 296 (1940).

142. United States v. Ballard, 322 U.S. 78 (1944).

143. *Id.* at 86-87.

Following this line, *Wisconsin v. Yoder*[144] held that Wisconsin's compulsory school attendance law, which required a child's school attendance until age 16, was unconstitutional as applied to those belonging to the Amish Order who declined to send their children to public or private school after they had graduated from the eighth grade. The State's claim that it is empowered, as *parens patriae*, to extend the benefit of secondary education to children regardless of the wishes of their parents cannot be sustained against a free exercise claim of the nature in this case.

However, the case of *Employment Division v. Smith*[145] provided a new rule: religious exercises may not violate the law but if the law was aimed specifically at religions or a particular religious practice, it would be unconstitutional. In short, the law must be *religiously neutral* in order to be valid. This was similarly followed in the case of *Church of Lukumi Babalu Aye v. City of Hialeah*.[146]

In this case, the petitioner Church and its congregants practice the Santeria religion, which employs animal sacrifice as one of its principal forms of devotion. After the church leased a parcel of land in respondent city and announced their plan to establish a house of worship there, the city council held an emergency public session and passed a resolution which noted city residents' concern over religious practices inconsistent with public morals, peace, or safety, and declared the city's commitment to prohibiting such practices. Subsequently, it passed a series of ordinances aimed at specifically enjoining the ritual slaughter of animals.

The Supreme Court ruled that the assailed ordinances are invalid for not being religiously neutral. Under the free exercise clause, a law that burdens religious practice need not be justified by a compelling governmental interest if it is neutral and of general applicability. However, where such a law is not neutral or not of general application, it must undergo the most rigorous of scrutiny. It must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. Neutrality and general applicability are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied. In this case, the ordinances' texts and operation demonstrated that they were not neutral, but have as their object the suppression of Santeria's central element, animal sacrifice. Each of the ordinances pursued the city's governmental interests only against conduct motivated by religious belief and thereby violated the requirement that laws burdening religious practice must be of general applicability.

144. Wisconsin v. Yoder, 406 U.S. 205 (1972).

145. Employment Division v. Smith, 494 U.S. 872 (1990).

146. Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

Nonetheless, it is not only laws that prohibit religion that must pass the neutrality test; laws that tend to benefit a particular religion must likewise pass the neutrality test. The case of *County of Allegheny v. American Civil Liberties Union*[147] concerns the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh. The first, a crèche depicting the Christian Nativity scene, was placed on the Grand Staircase of the Allegheny County Courthouse.

The second of the holiday displays in question was an 18-foot Chanukah menorah or candelabrum, which was placed just outside the City-County Building next to the city's 45-foot decorated Christmas tree. The respondents filed suit seeking to permanently enjoin the county from displaying the crèche and the city from displaying the menorah on the ground that the displays violated the non-establishment clause of the First Amendment.

The Supreme Court ruled that a practice which touches upon religion, if it is to be permissible under the non-establishment clause, must not advance or prohibit religion as its principal or primary effect. The Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community.

Thus, based on its over-all context, the crèche was invalid since it amounted to endorsing the religious message of that organization, rather than communicating a message of its own. Indeed, the very concept of endorsement conveys the sense of promoting someone else's message. Thus, by prohibiting government endorsement of religion, the Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message. However, the display of the menorah next to the Christmas tree did not have unconstitutional effect of endorsing Christian and Jewish faiths. Confining the government's own Christmas celebration to the holiday's secular aspects does *not* favor the religious beliefs of non-Christians over those of Christians, but simply permits the government to acknowledge the holiday without expressing an impermissible allegiance to Christian beliefs.

The sponsorship or endorsement of a religious speech was likewise at issue in *Capitol Square Review and Advisory Board v. Pinnette*.[148] Here, an Ohio law made Capitol Square, the statehouse plaza in Columbus, a forum for discussion of public questions and for public activities, and gave the Capitol Square Review and Advisory Board responsibility for regulating access to the square. To use the square, a group must simply fill out an official application form and meet several speech-neutral criteria. After the Board denied the

147. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

148. Capitol Square Review and Advisory Board v. Pinnette, 515 U.S. 753 (1995).

application of respondent Ku Klux Klan to place an unattended cross on the square during the 1993 Christmas season, based on the non-establishment clause. The Klan filed suit to enjoin the issuance of the requested permit and be permitted to erect its cross.

The Supreme Court ruled that placing a cross in a place meant for public forum was constitutional. The display was private religious speech that is as fully protected as secular private expression. Because Capitol Square is a traditional public forum, the Board may regulate the content of the Klan's expression there only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest. *There is a difference between forbidden government speech that endorses religion and protected private speech that endorses religion.* The distinction does not disappear when the private speech is conducted close to the symbols of government. Given a traditional or designated public forum, publicly announced and open to all on equal terms, as well as purely private sponsorship of religious expression, erroneous conclusions of state endorsement do not count. Nothing prevented Ohio from requiring all private displays in the square to be identified as such, but it may not, on the claim of misperception of official endorsement, ban all private religious speech from the square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship.

Thus, as can be seen from these two cases, it will only be unconstitutional if it is the government that *speaks the language of the religion.* If it is the religion itself that speaks, even if done through the channel of the government, it would still be valid as a permissible accommodation. However, what happens when, on surface level, it appears that it is the government who speaks on behalf of the religion but, upon closer examination, would reveal that the government action does not revolve around the religion *per se* but rather upon the *religion's social significance*? The next series of cases will be illustrative.

In *Aglipay v. Ruiz*,[149] the Director of Posts announced in the dailies of Manila that he would order the issuance of postage stamps commemorating the celebration of the 33rd International Eucharistic Congress, organized by the Roman Catholic Church. The petitioner protested the matter but to no avail since the designs had already been sent to the United States for printing. The petitioner sought to prevent the further sale of the stamps. According to petitioner, the postage stamps were unconstitutional since it violated the constitutional mandate of Church and State separation. According to the Philippine Supreme Court, "[r]eligious freedom is not inhibition of profound reverence for religion and is not a denial of its influence in human affairs. Religion as a profession of faith to an active power that binds and elevates man to his Creator is recognized. And, in so far as it instills into the

149. Aglipay v. Ruiz, 64 Phil. 201 (1937).

minds the purest principles of morality, its influence is deeply felt and highly appreciated."[150] In fact, the Court noted that scattered in various provisions of law and the Constitution are laws recognizing the importance of religion to the Filipinos. For this reason, the Court held that the issuance of the postage stamps was valid. It contemplated no religious purpose in view. It did not authorize the appropriation, use or application of public money or property for the use, benefit or support of a particular sect or church. The issuance of the postage stamps was not inspired by any sectarian feeling to favor a particular church or religious denominations but only to advertise the Philippines and attract more tourists to this country. The officials concerned merely took advantage of an event considered of international importance. What was emphasized was not the religious act but the venue. The government should not be embarrassed in its activities simply because of incidental results, more or less religious in character, if the purpose it 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."[151]

Meanwhile, in *Garces v. Estenzo*,[152] what was assailed were four resolutions of the *barangay* council regarding the acquisition of the wooden icon of San Vicente Ferrer to be used in its feast day celebrations. The icon was acquired by the *barangay* council with funds raised by means of solicitations and cash donations, thus reviving the traditional socio-religious celebration of the feast day of the saint. The image was brought to the Catholic parish church during the saint's feast day. After the feast day, however, the parish priest refused to return the custody of the image to the council until after the latter, by resolution, filed a *replevin* case against the priest. The parish priest and his co-petitioners thereafter filed an action for annulment of the council's resolutions contending that they contravened the constitutional provisions on separation of church and state, freedom of religion, and the prohibition of the use of public money to favor any sect or church. The Supreme Court ruled that the assailed resolutions were constitutional. The icon was purchased using private funds and not tax money. It 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 or interfering with religious matters or the religious beliefs of the barrio residents. Thus, there was nothing illegal in the resolutions.

150. *Id.* at 206.

151. *Id.* at 210.

152. Garces v. Estenzo, 104 SCRA 511 (1981).

Following the same line of theory, the more recent case of *Manosca v. Court of Appeals*[153] ruled that the expropriation of a piece of land ascertained by the National Historical Institute as the birth site of *Iglesia ni Cristo* founder Felix Manalo was constitutional. The assailed expropriation had no religious perspective. The purpose in setting up the marker was essentially to recognize the distinctive contribution of the late Felix Manalo to Philippine culture rather than his religious affiliation. The fact that greater benefit may be derived by members of the *Iglesia ni Cristo* than by others could well be true, but such a peculiar advantage still remains to be merely incidental and secondary in nature. Even if only a few would actually benefit from the expropriation of property, it does not necessarily diminish the essence and character of public use.

These cases illustrate that the constitutional mandate of separation of Church and State is not violated when the government's act is not to facilitate the endorsement of a religion *per se* but rather the historical, social, and cultural importance religion has in Philippine society. The incidental benefit to a particular religion is insufficient to invalidate it. In the case, it is a permissible accommodation.

4. Religious Intrusion on Government

Jurisprudential analysis is not controversial when it is the State that intrudes upon the domain of faith. Government may sometimes accommodate religion in certain exceptional instances. What is controversial, however, is the question of validity when it is the Church that takes the role of government. When the wall between Church and State prevents religion from entering politics, it proves too formidable a barrier.[154] In properly distancing religion from government power, the Court has sometimes made the troubling suggestion that religion may be kept away from politics as well.[155] The two cases of *Larkin v. Grendel's Den*[156] and *McDaniel v. Paty*[157] are illustrative of the validity of religious intrusion on government.

In *Larkin*, a Massachusetts law vested in the governing bodies of schools and churches the power to veto issuance of liquor licenses for premises within a 500-foot radius of the church or school by objecting to the license applications. Appellee restaurant operator's application for a liquor license was denied when a church located 10 feet from the restaurant objected to

153. Manosca v. Court of Appeals, 252 SCRA 412 (1996).

154. TRIBE, *supra* note 9, at 1276.

155. *Id.*

156. Larkin v. Grendel's Den, 459 U.S. 116 (1982).

157. McDaniel v. Paty, 435 U.S. 618 (1978).

the application. Appellee filed suit claiming that the law is unconstitutional since it violated the non-establishment clause.

The U.S. Supreme Court held that the law was invalid. Schools and churches have a valid interest in being insulated from certain kinds of commercial establishments, including those dispensing liquor. Zoning laws have long been employed to this end, and there can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals and the like, through the exercise of reasonable zoning laws. However, in this case, it was not simply a legislative exercise of zoning power; rather it delegated to private, nongovernmental entities the power to veto certain liquor license applications. The constitutional proscription on Church and State separation has two-fold aspects: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion. Religion and government, each insulated from the other, could then co-exist. However, the *wall* that separates the Church and the State is "substantially breached by vesting discretionary *governmental powers* in religious bodies."[158] The law, by delegating a governmental power to religious institutions, inescapably implicates the non-establishment clause. The churches' power under the law is "standardless, calling for no reasons, findings, or reasoned conclusions. That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors; it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith."[159] Thus, the potential for conflict inheres in this situation.

In *McDaniel*, what was assailed was not the transfer of government power to the Church but rather the intrusion of a priest to the government itself. In said case, a candidate for delegate to a Tennessee constitutional convention, sued for a declaratory judgment. He claimed that an opponent in the election, who was a Baptist minister, was disqualified from serving as delegate because a Tennessee law barred ministers of the Gospel, or priests of any denomination whatever from becoming a delegate.

The Supreme Court held that the law was unconstitutional for violating the free exercise clause. It amounted to "punishing a religious profession with the privation of a civil right."[160] To condition the availability of benefits, including access to the ballot, upon the willingness to violate a cardinal principle of religious faith effectively penalizes the free exercise of constitutional liberties. As stated by the Court: "If the Tennessee disqualification provision were viewed as depriving the clergy of a civil right

158. *Larkin*, 459 U.S. at 123.

159. *Id.* at 125.

160. *McDaniel*, 435 U.S. at 626.

solely because of their religious beliefs, our inquiry would be at an end. The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such."[161] Thus, *McDaniel* completely obliterates from the annals of constitutional law literature Jefferson's view that the clergy should be barred from joining politics.

On superficial analysis, both *Larkin* and *McDaniel* appear to contradict each other. If *Larkin* prohibited the transfer of government power to a particular sect, much more so should the prohibition be when it is a clergyman himself who will assume government power, as what happened in *McDaniel*. However, a deeper analysis will reveal a difference that matters. In *Larkin*, the transfer of government power was not caused by the Church, but rather by the State since it was through legislation that the government power has been ceded to the Church. The cause of the breach was the State. On the other hand, in *McDaniel* there was no actual transfer of power in favor of the Church. The minister and his ministry were distinct and separable. By "walling religious organizations off from politics could alienate religious believers, creating new 'political ruptures'"[162] sought to be prevented by the non-establishment clause. The non-secular motive should be examined by the Court and not the possible intrusion of secular motives in the government, which is rather hard to prove. When the latter happens, Justice Brennan has a solution:

> Our decisions under the Establishment Clause prevent government from supporting or involving itself in religion or from becoming drawn into ecclesiastical disputes. These prohibitions naturally tend, as they were designed to, to avoid channeling political activity along religious lines and to reduce any tendency toward religious divisiveness in society. Beyond enforcing these prohibitions, however, government may not go. *The antidote which the Constitution provides against zealots who would inject sectarianism into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls.* With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously divisive lines, and, with judicial enforcement of the Establishment Clause, any measure of success they achieve must be short-lived, at best.[163]

Thus, the answer is not to bar the ministers from joining politics all-together. It is only when they introduce religiously induced ideologies to government that the question of *motives* would be raised. When this happens, the remedy is to reject their ideologies and platforms during election day and not to proscribe their candidacy. This way, the dichotomy between the minister and his congregation is thereby preserved.

161. *Id.*

162. TRIBE, *supra* note 9, at 1281.

163. *McDaniel*, 435 U.S. at 642 (Brennan, J., concurring) (emphasis supplied).

B. The Enigma of the Wall of Separation

The examination of the jurisprudence mentioned above would reveal that the wall that separates the Church and the State is not as inviolable as originally perceived. Jefferson's metaphorical *wall* is not an accurate description. The concept allows, and in certain instances, must allow interaction between the Church and the State. As stated in one case:

> The concept of a 'wall' of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.[164]

In another case, this Jeffersonian myth of the wall has been described as follows: "Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society but the concept of a 'wall' of separation is a useful signpost."[165]

However, there are certain peculiar things in the line of jurisprudence concerning the separation between Church and State.

First, the jurisprudence on religious freedom appears to have conceptualized *religion* in two aspects: religion as the *institution* (the Church) and religion as the *ceremony* (belief and practice). Religion as the institution is what is being protected by the non-establishment clause. Meanwhile, religion as the ceremony is what is being protected by the free-exercise clause. *Secondly*, in case of the inevitable clash between religion as the institution and religion as the ceremony, the latter prevails as seen in *McDaniel*. "The free exercise principle should be dominant when it conflicts with the anti-establishment principle. Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all cost even the faintest appearance of establishment."[166] *Thirdly*, when it pertains to the separation between Church and State, there appears to be a distinction. When it is the State that intrudes upon the realm of faith, save in certain instances, the general rule is that it is invalid since the principle of separation is to be upheld. However, when it is the Church that intrudes upon the realm of government, such as when a clergy joins popular politics, the intrusion is valid. *Finally*, there are certain instances when religion loses its characteristic as *religion* such as when the religion becomes an important historical, social, or cultural figure in society. In these instances, the religious

164. Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

165. Larkin v. Grendel's Den, 459 U.S. 116, 123 (1982).

166. TRIBE, *supra* note 9, at 1201.

aspect of the question is not considered but rather focuses on religion as a figure in history, culture, and society.

As can be seen, the apparent conflict in jurisprudence stems from how the Court has treated the concept of protected *religion* under the Constitution. Religion portrays several *personalities* in society and these distinct personalities are the ones under scrutiny in jurisprudence. Thus, to remedy this problem, there must be a sound definition of *religion* that can be applied consistently in the different areas of religious freedom under the Constitution. This way, there can be a *common standard* in understanding the religion clauses of the Constitution since the constitutional philosophy is the separation of religion and government.

IV. DEFINING RELIGION

A. Attempts to Define Religion

To state the problem is to see its complications. Yet, under a rule of law, whatever an individual's personal idea of religion might be, definitions have to be ventured, if for no other reason than to protect the right of the minority.[167] Earlier, it has been said that constitutional religion focuses on the perspective of the faithful and no one else for the simple reason that it is not for the government to determine the wisdom of their creed. One man's hell can be another man's salvation. Moreover, religion must be broadly defined; broad enough to accommodate the increasing number of diverse faiths. In addition, excessive judicial inquiry into religious beliefs may, in itself, constrain religious liberty.[168] These are the guidelines that should be remembered in attempting to define religion.

The most common approach in defining religion is to draw analogies to generally accepted religions.[169] However, since religion is an innate and abstract concept, only the external manifestations of religion can be analyzed. The problem with this approach, however, as warned by Laurence Tribe, is that "[w]hen such analogies focus on the externalities of a belief system or organization, they unduly constrain the concept of religion."[170]

Early attempts to define religion have been narrowly drawn in terms of theistic notions concerning divinity, morality, and worship. "In order to be considered legitimate, religion had to be viewed as 'civilized' by Western standards. Courts... were considered competent forums for making such

167. ABRAHAM, *supra* note 106, at 211.

168. TRIBE, *supra* note 9, at 1181.

169. *Id.*

170. *Id.*

determinations."[171] The early case of *Reynolds v. United States*[172] followed this lead when it said that *religion* is not defined in the Constitution and in order to ascertain its meaning, the historical circumstances when the provision was adopted should be the basis.[173] However, if this will be the basis certainly religion as a concept will be theistic in nature and to be precise, Christianity will be the standard for determination. Nonetheless, subsequent historical development has rendered this paradigm *archaic.* Historical developments in religion ushered *religious pluralism*, moreso during the turn of the twentieth century. Because of religious pluralism, some religions are to be considered dominant and some, minority. The notion that religion *must* be theistic should be *abandoned.*

However, subsequent jurisprudence still maintained the view that religion is always *theistic. Africa v. Pennsylvania*[174] held that the questioned organization is not a religion within the purview and definition of the constitution since it was merely a quasi-back-to-nature social movement of limited proportion and with an admittedly revolutionary design. It was concerned solely with concepts of health and a return to simplistic living and is thus more akin to a *social philosophy* than to a religion.

In *Church of the Chosen People v. United States,*[175] it was held that the organization claiming tax-exemption as a religious organization was not a religious organization since it possessed no outward characteristics that are analogous to other religions. *United States v. Sun Myung Moon*[176] meanwhile said that religion pertains to the "*the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine.* [It referred] to an individual's relation to what he considers the divine."[177] *Founding Church of Scientology v. United States*[178] meanwhile said that "[n]ot every enterprise cloaking itself in the name of religion can claim the constitutional protection conferred by that

171. *Id.* at 1179.

172. Reynolds v. United States, 98 U.S. 145 (1878).

173. *Id.* at 162.

174. Africa v. Pennsylvania, 662 F.2d 1025 (3d Cir. 1981).

175. Church of the Chosen People v. United States, 548 F.Supp. 1247 (D.Minn. 1982)

176. United States v. Sun Myung Moon, 718 F.2d 1210 (2d Cir. 1983).

177. *Id.* at 1227 (emphasis in the original).

178. Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969).

status."[179] It should have "underlying theories of man's nature or his place in the Universe which characterize recognized religions."[180]

As can be seen, jurisprudence still clings to the very narrow view of theistic religion. However, "religious liberty... demands a definition of 'religion' that goes beyond the closely bounded limits of theism, and accounts for the multiplying forms of recognizably legitimate religious exercise."[181] Add to this fact the problem of looking at the external manifestations of religion in comparison to established religions. It appears that jurisprudence is going away from the established framework that the analysis should look at the believer's perspective. However, such is not the case in jurisprudence defining religion. Thus, one should turn to the social sciences in order to define religion. The definition of religion must consider the view that there can be a salvation even without a savior.

B. *Religion as the Dichotomy between the Sacred and the Profane*

1. Emile Durkheim: Society is Sacred

Arguably, the most important leap in the science of religion was penned by Emile Durkheim. In contrast to the speculative analysis by theorists before him, Durkheim embarked on an empirical investigation on the phenomenon of religion. His starting point was arguably the most important since it involved the most fundamental presumption of religious freedom — religion is to be perceived through the eyes of the faithful. According to Durkheim, no religion is false. "All are true after their own fashion: all fulfill given conditions of human existence, though in different ways."[182]

Contrary to the usual standard of looking at the individual phenomenon in religion, Durkheim focused on the social *function* of religion. Thus, "the preacher's success can be traced not to the number of sinners brought to conversion but to something wholly unnoticed by those who are kneeling in prayer: the event as a whole has restored a sense of community, of shared identity, to a neighborhood of otherwise poor, isolated, even disillusioned individuals."[183] To quote Durkheim:

> Religion is an eminently social thing. Religious representations are collective representations that express collective realities; rites are ways of acting that are born only in the midst of assembled groups and whose purpose is to evoke, maintain, or recreate certain mental states of those groups.[184]

179. *Id.* at 1160.

180. *Id.*

181. TRIBE, *supra* note 9, at 1180.

182. DURKHEIM, *supra* note 1, at 2.

183. PALS, *supra* note 64, at 96-97.

In his most important work in the field of religious science, *The Elementary Forms of Religious Life*, Durkheim contends that there are fundamental elements out of which all religion had been formed. For him, elementary religion does not conceive of two different worlds, the natural and supernatural — since it basically views all as of the same kind. To illustrate, in the Christian ceremony of Consecration of the Eucharist, the unleavened bread raised by the priest does not have two distinct kinds — a natural and supernatural — but rather a unified *transformation*. Thus, for Durkheim, the thing that is characteristic of religion is "not the element of the supernatural but the concept of the *sacred*."[185] Religious people divide the world, not as natural and supernatural, but rather as *sacred and profane*.

> Whether simple or complex, all known religious beliefs display a common feature: They suppose a classification of the real or ideal things that men conceive of in two classes — two opposite genera — that are widely designated by two distinct terms, which the terms profane and sacred translate fairly well. The division of the world in two domains, one containing all that is sacred and the other all that is profane — such is the distinctive trait of religious thought.[186]

The sacred is viewed as superior, powerful, forbidden to normal contact and deserving of normal contact and deserving of great respect. Meanwhile, the profane is the opposite, since it belongs to the ordinary, uneventful, and the practical routine of everyday life.[187] The sacred thing is, par excellence, that which the profane must not and cannot touch with impunity.[188]

> Sacred things are things protected and isolated by prohibitions; profane things are those things to which the prohibitions are applied and that must keep at a distance from what is sacred. Religious beliefs are those representations that express the nature of sacred things and the relation that they have with other sacred things or with profane things. Finally, rites are rules of conduct that prescribe how man must conduct himself with sacred things.[189]

From this dichotomy, Durkheim defined religion as "a unified system of beliefs and practices relative to sacred things... beliefs and practices which unite into one single moral community called a Church, all those who

184. DURKHEIM, *supra* note 1, at 9.

185. PALS, *supra* note 64, at 99.

186. DURKHEIM, *supra* note 1, at 34.

187. PALS, *supra* note 64, at 99.

188. DURKHEIM, *supra* note 1, at 38.

189. *Id.*

adhere to them."[190] Thus, religion is inseparable from the idea of a Church since it conveys a notion that "religion must be an eminently collective thing."[191]

One can deduce from Durkheim that the sacred arises especially in connection with whatever concerns the community; the profane is more naturally the realm of private and personal concerns.[192] The sacred is always social while the profane is not. Therefore, the transformation of the profane into the sacred happens during *ceremonies*. In such ceremonies, the profanity of everyday life is left behind and moves in turn to the solemn sphere of the sacred. The rituals and beliefs are symbolic expressions of social realities. For Durkheim, therefore, religion's true purpose is not intellectual but social. It serves as the carrier of social sentiments, providing symbols and rituals that enable people to express the deep emotions which anchor them to their community. When it does so, religion or any of its equivalent, preserves and protects the "very soul of society."[193]

2. Mircea Eliade: Religion as the Reality of the Sacred

Following the dichotomy originally conceived by Durkheim, Mircea Eliade propounded that there are two dichotomies in the analysis of religion: the sacred and the profane.[194] For him, the *profane* is the realm of everyday business — ordinary, random, and largely.[195] On the other had, *sacred* is the opposite. "It is the sphere of the supernatural, of things extraordinary, memorable, and momentary."[196] The profane, therefore, is the realm of human affairs while the sacred is the realm of the divine. It is this fundamental distinction that is the starting point of religion.

From here, one can deduce that the theories of Durkheim and Eliade are similar. However, their main distinction lies on their *focus*. For Durkheim, when he speaks of the sacred and the profane, he looks at the perspective of society and its needs. For Durkheim, sacred symbols and rituals seem to speak of the supernatural but all of that is just the surface appearance of things.[197] Such is not true for Eliade. "Though he uses Durkheim's

190. *Id.* at 44.

191. *Id.*

192. PALS, *supra* note 64, at 99.

193. *Id.* at 111.

194. *See generally* MIRCEA ELIADE, THE SACRED AND THE PROFANE (1957).

195. PALS, *supra* note 64, at 164.

196. *Id.*

197. *Id.*

language... Eliade's view of religion... [is] first and foremost a belief in the supernatural."[198]

Eliade's view of religion lies in *human experience*. In an encounter with the sacred, people feel in touch with something supernatural in character. "They feel they have brushed against a reality unlike all others they know, a dimension of existence that is alarmingly powerful, strangely different, surpassingly real, and enduring."[199] It is important to remember that for Eliade, the sacred is not limited to a monotheistic religion. It is wider than that since it could mean the realm of polytheistic religion, spirits, or even ancestor worship. For Eliade, the language of the sacred is in symbols and in myth. Symbols are rooted in likeness or analogy that gives a clue to the supernatural. Meanwhile, myths are also symbols but in a more complicated way. "A myth is not just one image or sign; it is a sequence of images put into the shape of a story."[200]

Thus, the transformation of the profane into the sacred happens in the course of symbols and myths. Most things in ordinary life are profane but at the right moment, anything profane can be "transformed into something more than itself – a marker or sign of that which is not profane, but sacred."[201] Once it acquires such, the symbolic objects acquire a double character: "though they remain what they always were, they also become something new, something other than themselves."[202]

To illustrate, going back to the example of the Christian ceremony of Consecration of the Eucharist mentioned earlier, the unleavened bread raised by the priest remains as is: just unleavened bread. However, due to the ceremony of consecration, the faithful sees it as something touched by the sacred and the profane object is transformed. It is no longer merely unleavened bread but becomes a holy object – the body of the Savior. Eliade calls this infusion of the supernatural into natural objects the *dialectic of the sacred* – the core of religious beliefs.

V. TOWARDS A CONSTITUTIONAL FRAMEWORK FOR RELIGION

It is hereby submitted that the theories concerning the dichotomy between the sacred and the profane is the most useful tool in defining religion under the Constitution. The definition fits well within the constitutional framework that the religious exercise should be viewed from the perspective of the faithful and it is not for the Court to determine otherwise.

198. *Id.*

199. *Id.* at 165.

200. *Id.* at 169.

201. PALS, *supra* note 64, at 169.

202. *Id.* at 170.

In addition, the enigma in jurisprudence concerning the wall of separation is answered using this framework. *First*, the conception of *religion* in two aspects as the *institution* and as the *ceremony* is explained. Religion as the institution is a concern of the profane whereas religion as the ceremony is a concern of the sacred. *Secondly*, the reason why in case of the inevitable clash between religion as the institution and religion as the ceremony, the latter prevails is because the sacred is always superior than the profane. *Thirdly*, the distinction as to the intrusion by the State into the Church, and vice-versa is hereby explained. When it is the State that intrudes upon the realm of faith, it is invalid since it enters into the sphere of the sacred. On the other hand, when it is the Church that intrudes upon the realm of government, it is valid since it is simply an intrusion on the domain of the profane. *Finally*, religion loses its characteristic as "religion" such when the religion becomes an important historical, social, or cultural figure in Philippine society since in these instances the question involved is limited to the question of the profane and not the sacred.

Moreover, the dichotomy between the sacred and the profane likewise explains the constitutional clauses on religious freedom. The non-establishment clause prohibits the establishment of a State religion because, by establishing such, there is a proscription on the exercise of faith on the part of the minority. By violating the principle of neutrality, the concept of the sacred is likewise violated. When the State establishes a religion, it amounts to the creation of only one sacred and all else profane which does not need to be protected.

Meanwhile, the free exercise clause prohibits the compulsion as to creed since it likewise violates the concept of the sacred. When a religious activity is prohibited, or when a faithful is compelled to do something contrary to his religious belief, the proscription amounts to an intrusion on the realm of the sacred, and is thus unconstitutional. An earnest believer usually regards it as his duty to propagate his opinions and to bring them to others. To deprive him of his right is to take from him the power to perform what he considers *a most sacred obligation*. Using this definition of a religion, one can see that it is the idea of the sacred that the constitution protects and not the profane. The constitution protects the *ceremonies* of religious worship. Religion as the institution is protected solely because this institution is the vehicle by which the ceremony is performed. Otherwise, the institution is not protected.

To illustrate, in the case of *Tolentino v. Secretary of Finance*,[203] it was held the removal of the tax exemption on the printing, publication or importation of books and religious articles, as well as their printing and publication does not violate the free exercise clause since the Constitution does not prohibit the imposition of generally applicable sales taxes on the sale

203. Tolentino v. Secretary of Finance, 235 SCRA 630 (1994).

of religious materials by a religious organization. Using the framework mentioned above, it can be seen that the ruling is proper since the tax does not involve any intrusion on the realm of the sacred. There is no dialectic of the sacred involved in a sale of religious merchandise since it is not a religious ceremony. As such, it is well within the sphere of profane which can be intruded upon by the State.

The next part will use this framework to answer the issue involved in religious endorsements of politicians and political ideologies.

VI. THE WALL OF SEPARATION AND RELIGIOUS ENDORSEMENTS

Is the endorsement of religious sects of political ideologies unconstitutional? Using the framework enunciated above, it is evident that the endorsement by religious groups is constitutional. There is no religious activity involved in endorsing a political candidate. It is purely a secular activity. *It is not a sacred activity but is rather a profane activity.*

The wall that separates the Church and the State should not bar religion from politics – either directly or indirectly. In fact, even if the person endorsed by a particular religious group becomes elected and subsequently becomes the medium of transmitting the religious ideologies, the remedy espoused by *McDaniel v. Paty* is not to bar religion from joining popular democratic processes but rather "*to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls.*"[204] Since the endorsements by religious groups of certain candidates are not sacred activities, the religious freedom clauses will not apply since, as stated in *Wisconsin v. Yoder*,[205] the religion clauses of the Constitution applies only in case the question is *rooted in religious belief*.[206] To be rooted in a religious belief, it should lie within the domain of the sacred. Such fact is absent in case of religious endorsements. In religious endorsements, there are no religious ceremonies involved. When a ministry endorses a particular candidate, there is no *dialectic of the sacred* involved. There is no infusion of the supernatural into natural objects such as the ballot when the minister tells his congregation whom to vote. The ballot remains as is – a profane object – a mere piece of paper that does not rise to the level of the sacred.

In answering the question, therefore, the applicable provision is not the religious freedom clauses but rather freedom of speech clause. In religious endorsements, the statements of the minister are not religious in character but can simply be regarded as a *simple speech* without regard to its religious

204. McDaniel v. Paty, 435 U.S. 618, 642 (1978) (Brennan, J., concurring) (emphasis supplied).

205. Wisconsin v. Yoder, 406 U.S. 205 (1972).

206. *Id.* at 215 (emphasis supplied).

evocations. Religious endorsements are simply political ideologies and not a religious creed. Thus, by prohibiting religious endorsement, the restraint on speech becomes unconstitutional since it amounts to illegal prior restraint. *There can be no prior restraints on the exercise of free speech expression or religion* unless such exercise poses a clear and present danger of a substantive evil which the State has the right and even the duty to prevent.[207] These have the status of preferred freedoms.[208] Even if the ban against such prior restraints will result in occasional abuses of free speech and expression — such as in the case of religious block voting — it is immeasurably preferable to experience such occasional abuses of speech and expression rather than to censor speech and expression.[209]

Most especially during election campaign period, the preferred freedom of expression calls all the more for the utmost respect when what may be curtailed is the dissemination of information to make more meaningful the equally vital right of suffrage.[210] "It is difficult to imagine how the other provisions of the Bill of Rights and the right to free elections may be guaranteed if the freedom to speak and to convince or persuade is denied and taken away."[211] To have a more meaningful right of suffrage, debate on public issues should be uninhibited, robust, and wide open in order to generate interest essential in order that elections be truly free, clean, and honest. This debate should include the right of religious groups to endorse the political candidate that they deem most qualified to serve the country.

VII. CONCLUSION

As can be seen from this Note, the right of religious groups to endorse political candidates is upheld using both the religious freedom clauses and the freedom of speech clause. There is no violation of the non-establishment clause since the wall that separates the Church and the State does not bar religion from entering the domain of politics — either directly or indirectly. Moreover, since the religious endorsement is not a religious expression but is a simple speech, it is also protected speech since prohibiting religious endorsement will amount to prior restraint on speech.

The fear that the elected candidates will support the creed of religious groups that endorsed them is not as grave compared to the chilling effect of barring speech that is contrary to the ideology of the established majority. In

207. Iglesia ni Cristo v. Court of Appeals, 259 SCRA 529, 554 (Padilla, J., concurring and dissenting).

208. Blo Umpar Adiong v. Commission on Elections, 207 SCRA 712, 715 (1992).

209. *See Iglesia ni Cristo*, 259 SCRA at 554.

210. *Blo Umpar Adiong*, 207 SCRA at 716.

211. *Id.*

a democratic society like ours, all opinions, no matter how senseless they may be are respected and are made part of the developing public sphere. Social values and ideas are developed, not through the prohibition of the expression of some, but rather, through the actual clash of ideas in the mills of public opinion.

"Both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[212] However, the separation of Church and State does not amount to suggesting that religion should be kept away from politics. When religious persons participate in developing political opinions, they do so not as ministers or priests, but rather as private citizens vested with the positive right to take part in the political process. When religious people arrive at political debates, they need not check their beliefs at the door. They may carry it and use it in developing sound political judgment.

There is a distinction between what is moral and what is legal. For some, using the Church as a vehicle to endorse one's candidacy may be morally wrong but certainly, this Note has shown that there is nothing legally wrong with it. The immorality of such act can be countered by refuting the idea in the public sphere and their platforms rejected during elections but certainly, the court of law is not the proper venue to seek redress.

The psychologist of esteemed eminence, Sigmund Freud, once opined that religious teachings should be seen as beliefs and rules suitable to the childhood of the human race.[213] For Freud, religion is the universal "obsessional" neurosis of humanity, stemming from the Oedipus Complex, out of the relationship to the father. Because of this reason, a turning-away from religion is bound to occur. Mature people allow their judgments to be guided by reason and science and not by superstition and faith.[214] Religion stems from the deep need to overcome guilt and allay fears, things a mature person can overcome without turning to the illusions posed by religion. It can thus be seen, following Freud's perspective, that the reliance for religion's guidance in the realm of politics is a sign that the Filipino people are culturally and politically immature. However, this immaturity should not be used as a basis for prohibiting religious endorsements.

A person's maturity is measured by the number of times he falls and the corresponding number of times he is able to pick himself up and shake off the dust that might have soiled him. The same is true for the Filipino people. The errors at the polls should be used as a gauge to determine the ideal leaders that the Filipino people should have.

212. Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 212 (1948).

213. PALS, *supra* note 64, at 72; *See generally* SIGMUND FREUD, THE FUTURE OF AN ILLUSION (1927).

214. PALS, *supra* note 64, at 73.