A Second Look at Religious Accommodation: Re-examining the Potency of Excessive Entanglement Considerations in Light of Emerging Trends and Issues Respecting Charitable Donations to Religious Institutions

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I. INTRODUCTION

Historically, religious groups have been most effective when they have stood apart from government and critiqued the performance of government in light of their ethical traditions. When churches become cozy with the state, they lose the capacity and the will to criticize unjust policies.

— *Edd Doerr and Albert J. Menendez*[1]

The relationship between the Church and the State has always been perceived as delicate and, thus, has been the subject of much controversy over the years. Indeed, several cases exemplify how, in the union of these two institutions, each suffers, as the State may use the Church in furtherance of political aims, and the Church may effect, through the State, the establishment of a religion.[2]

This relationship has been made further complex with the advent of modern times. Increasingly, changes in society, including the continuing evolution of the role of sectarian institutions,[3] provide an explanation for the need towards a partnership. In fact, churches have already "concerned themselves with social and political issues as a necessary outgrowth of religious faith."[4] Yet the dangers contemplated in the First Amendment of the United States (U.S.) Constitution[5] remain a valid concern — "opportunities for [a] religious group to capture the state apparatus to the disadvantage of those of other faiths."[6]

Due to the complexities attendant to the changing roles of the Church and the consequent evolving nuances characterizing its relationship with the State, the interpretation of the so-called "religious clauses"[7] of the

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1. Edd Doerr & Albert J. Menendez, Church and State Quotes, *available at* http://www.humanismbyjoe.co/church-and-state-quotes/ (last accessed May 28, 2012).
2. *See* Aglipay v. Ruiz, 64 Phil. 201 (1937).
3. *See, e.g.*, Sholom D. Comay, *Role of Sectarian Institutions in Child Care*, N.Y. TIMES, Oct. 22, 1989, *available at* http://www.nytimes.com/1989/10/22/opinion/l-role-of-sectarian-institutions-in-child-care-492189.html (last accessed May 28, 2012).
4. Estrada v. Escritor, 408 SCRA 1, 84 (2003).
5. U.S. CONST. amend. I.
6. *Estrada*, 408 SCRA at 89 (citing Stephen L. Carter, *The Resurrection of Religious Freedom*, 107 HARV. L. REV. 118, 118 & 134-35 (1993)).
7. PHIL. CONST. art. III, § 5. This Section provides that "[n]o 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

Constitution has become more difficult today than in the past. In the Philippines, the courts are burdened with an additional feature arguably unique in the nation's setting — religious groups have time and again been used in political activities, whether in endorsements nearing an election or generally in curbing public opinion.[8]

The recent controversies regarding alleged donations made by a charitable institution annexed to the government in favor of certain religious leaders provide an opportunity to once again look at the constitutional pronouncements on religion vis-à-vis the changing roles of sectarian institutions.

A. The PCSO Donation Controversy

In June of 2011, several reports surfaced referring to certain religious leaders as recipients of donations made by the Philippine Charity Sweepstakes Office (PCSO).[9] The reports were based from a set of annual disclosures made by the Commission on Audit (COA) stating that from 2007-2010, endowments in the form of cash and vehicles totaling ₱6.49 million, all charged to the PCSO fund, were given.[10] Under its Charter, [11] the PCSO is mandated to allocate a percentage of its earnings to a charity fund, the disposition of

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

8. *See* Aries Rufo, Religious endorsements: Half-truths, bloated figures, with strings attached, *available at* http://archives.newsbreak-knowledge.ph/2010/05/06/religious-endorsements-half-truths-bloated-figures-with-strings-attached/ (last accessed May 28, 2012) & Gerry Baldo, *VP, Noy, Erap top endorsers for 2013 Senate race — survey*, DAILY TRIB., Apr. 18, 2012, *available at* http://www.tribuneonline.org/20120418/headlines/20120418hea1.html (last accessed May 28, 2012).

9. *See, e.g.*, RG Cruz, Arroyo son, allies deny wrong doing on PCSO donations, *available at* http://www.abs-cbnnews.com/-depth/07/04/11/arroyo-son-allies-deny-wrongdoing-pcso-donations (last accessed May 28, 2012); Perseus Echeminada, *PCSO Confrims, PNP defends sweepstakes accounts*, PHIL. STAR, July 12, 2011, *available at* http://www.philstar.com/Article.aspx?articleId=705248&publicationSubCategoryId=63 (last accessed May 28, 2012); & Evelyn Macairan, *CBCP says sorry for PCSO scandal*, PHIL. STAR, July 12, 2011, http://www.philstar.com/Article.aspx?articleId=705241 (last accessed May 28, 2012).

10. Gil C. Cabacungan, Jr., *PCSO identifies bishops who supposedly received Pajeros, cash*, PHIL. DAILY. INQ., July 1, 2011, *available at* http://newsinfo.inquirer.net/20458/pcso-identifies-bishops-who-supposedly-received-pajeros-cash (last accessed May 28, 2012).

11. An Act Providing for Charity Sweepstakes, Horse Races, and Lotteries, Republic Act No. 1169, as Amended (1954).

which shall be geared towards identified priority and health programs, among others.[12]

On the one hand, critics attacked the legality of the donations primarily on constitutional grounds,[13] saying that these took the form of appropriations of public money in favor of a religious institution,[14] an activity that is expressly proscribed by the Constitution.[15] Moreover, the controversy did not escape taints of political interpretation. It has been suggested that the donations were made in order to give a former leader some "political leverage."[16]

On the other hand, while the bishops acknowledged receipt of the vehicles, they contended that they did so only to help the poor.[17] They confessed that the vehicles were essential in order to reach far-flung areas that housed most poor communities.[18]

In the end, the bishops were cleared of any offense.[19] Speaking on behalf of the Senate Blue Ribbon Committee, Senator Teofisto L. Guingona averred that "[t]he legal test has been met — that [ ] the use of funds or vehicles was for a secular purpose, to help the people and not for religious purposes."[20]

B. Religion and the Philippine Political Setting

The interpretation given in a political fashion to the abovementioned donations cannot be deemed an arbitrary and unfounded exercise of cynicism. In the Philippines, the so-called "religious endorsements" is not a novel phenomenon. In fact,

> [r]eligious endorsements — raised a notch higher by the [*Iglesia ni Cristo* (INC)] through bloc voting — became fashionable in the 1990s when the INC, the Catholic Church[,] and the Jesus is Lord (JIL) movement ... endorsed their respective candidates in the 1992 presidential race. ... That

12. *Id.* § 6 (b).

13. Aurea Calica, *PCSO not singling out Catholic Church*, PHIL. STAR, July 3, 2011, *available at* http://www.philstar.com/Article.aspx?articleId=702150&publicationSubCategoryId=63 (last accessed May 28, 2012).

14. *Id.*

15. PHIL. CONST. art. VI, § 29 (2).

16. Cabacungan, Jr., *supra* note 10.

17. *Id.*

18. *Id.*

19. Mario B. Casayuran, *Bishops cleared*, MANILA BULL., July 13, 2011, *available at* http://www.mb.com.ph/node/326611/bi (last accessed May 28, 2012).

20. *Id.*

> election year, the JIL proved to be the biggest winner when its candidate, ... a Protestant, bagged the presidency.[21]

In the realm of Philippine politics, it has been observed that religious sects "are feared, [ ] aggressively courted, [and] [ ] among the most sought-after by political parties especially during elections. *For those wanting to be elected to office, they are considered an important factor in the winning equation.*"[22] Ultimately, it has been observed that in the country, "the clergy are highly influential."[23]

In turn, the dire effects of religious endorsements become manifest in the way religious favors allow religious groups to influence the formulation of national policies.[24] As a report enunciated, "[one] classic case [is] ... w[h]ere the bills on divorce and population planning ... died [ ] natural death[s]. [The bills were] refused [endorsement] for fear of reprisal from the Catholic Church."[25]

C. The Preferential Option for the Poor and the Rise of Faith-Based Partnerships

Against the abovementioned backdrop is a developing realization that religious institutions can be capable instruments in effectuating the goals of the government. The concept of the preferential option for the poor and the rise of faith-based partnerships give flesh to this realization.

1. The Preferential Option for the Poor

The role of the Church has evolved through the times. In the 1780s, religion played a key role in social life, including areas such as health care, poor relief, and education.[26] As time passed, however, the government has become the one primarily playing this role.[27] The effects of changing roles ultimately led to collisions between secular and religious activities.

> '[W]hereas two centuries ago, in matters of social life which have a significant moral dimension, government was the handmaid of religion, today[,] religion, in its social responsibilities, as contrasted with personal faith and collective worship, is the handmaid of government.' With

21. Rufo, *supra* note 8.

22. *Id.* (emphasis supplied).

23. British Broadcasting Corporation, Philippine bishops to return donated SUVs, *available at* http://www.bbc.co.uk/news/world-asia-pacific-14143031 (last accessed May 28, 2012).

24. Rufo, *supra* note 8.

25. *Id.*

26. *Estrada*, 408 SCRA at 83.

27. *Id.* at 84 (citing Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*, 39 EMORY L.J. 149, 151-52 (1990)).

> government regulation of individual conduct having become more pervasive, inevitably some of those regulations would reach conduct that for some individuals is religious. As a result, increasingly, there may be *inadvertent collisions between purely secular government actions and religion clause values.*[28]

Moreover, the Church has begun to participate in discourse with regard to social and political issues. Such involvement has been described as "only a belated putting into practice of the teaching of the Second Vatican Council."[29] Religious opinion, in fact, is to the effect that the Church "must involve itself in the transformation of the world[.]"[30]

One of the key areas where Church and State duties appear to intertwine is in that of aiding the poor. In this regard, one of the most important teachings of the Church concerns what is called the "preferential option for the poor."[31] As articulated in Pope John Paul II's Encyclical *Centesimus Annus*, "[t]he Church's love for the poor, which is essential for her and a part of her constant tradition, impels her to give attention to a world in which poverty is threatening to assume massive proportions in spite of technological and economic progress."[32] The Encyclical furthermore recognizes the effects of espousing such a preference in the promotion of justice, explaining that "[j]ustice will never be fully attained unless people see in the poor person, who is asking for help in order to survive, not an annoyance or a burden, but an opportunity for showing kindness and a chance for greater enrichment."[33] Ultimately, the "Compendium of the Social Doctrine of the Church" summarizes the principle —

> [*T*]*he preferential option for the poor* should be reaffirmed in all its force. 'This is an option, or a *special form* of primacy in the exercise of Christian charity, to which the whole tradition of the Church bears witness. ... Today, furthermore, given the worldwide dimension which the social question has assumed, this love of preference for the poor, and the decisions which it inspires in us, cannot but embrace the immense multitudes of the hungry,

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28. *Estrada*, 408 SCRA at 84 (citing Berman, *supra* note 27, at 151-52 & Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1340 (1995)) (emphasis supplied).

29. TEODORO C. BACANI, JR., CHURCH IN POLITICS 6 (1992).

30. *Id.*

31. It has been noted that "[t]he phrase 'option for the poor,' [was] first used in a letter from Pedro Arrupe to the Jesuits of Latin America in May 1968[.]" Peter Hebblethwaite, *Liberation theology and the Roman Catholic Church*, *in* THE CAMBRIDGE COMPANION TO LIBERATION THEOLOGY 209 (Christopher Rowland ed., 2007).

32. John Paul II, *Centesimus Annus*, Encyclical Letter on the hundredth anniversary of *Rerum Novarum*, ¶ 57, May 1, 1991.

33. *Id.* ¶ 58.

> the needy, the homeless, those without health care[,] and, above all, those without hope of a better future[.]'[34]

Consequently, these documents stand as proof of how the poor hold a much esteemed position in the realm of religious teachings.

2. Faith-Based Partnerships

The participation of religion in government programs for the poor has been recognized in the U.S. through "faith-based and neighborhood partnerships."[35] Essentially, "[t]hrough this initiative[,] the federal government helps community organizations, including faith-based organizations, receive public funding to meet the needs of underserved and low-income individuals."[36] U.S. President Barack H. Obama himself recognizes the advantages of these partnerships when he mentions their goals, which include "strengthening the role of community organizations in [ ] economic recovery."[37]

A key factor in the promotion of these partnerships relates to their efficiency.

> Utilization of facilities that are already there, that are neighborhood based and utilizing volunteers makes delivery of those services far more efficient than the Government can do.
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> ...
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> Religious organizations now had federal authorization, under law, to contract directly with governmental entities to receive funding for providing social services. According to the senatorial proponents of these provisions, a key factor for their incorporation was the *cost-efficiency with*

34. Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, ¶ 182 (citing John Paul II, Pope, Roman Catholic Church, Address at the Third General Conference of the Latin American Episcopate at Puebla, Mexico (Jan. 28, 1979) (transcript *available at* http://www.vatican.va/holy_father/john_paul_ii/speeches/ 1979/january/documents/hf_jp-ii_spe_19790128_messico-puebla-episc-latam_en.html) (last accessed May 28, 2012) & John Paul II, *Sollicitudo Rei Socialis*, Encyclical Letter for the twentieth anniversary of *Populorum Progressio,* Dec. 30, 1987).

35. *See* Office of Faith-based and Neighborhood Partnerships, *available at* http://www.whitehouse.gov/administration/eop/ofbnp (last accessed May 28, 2012).

36. Eric L. Gomez, *Charitable Choice Under the Lemon Test: Historical and Empirical Support for a Constitutional Defense*, 44 COLUM. J.L. & SOC. PROBS. 353, 353 (2011).

37. *See* Office of Faith-based Neighborhood Partnerships, Policy Goals — Key Priorities for Faith-based and Neighborhood Partnerships, *available at* http://www.whitehouse.gov/administration/eop/ofbnp/policy (last accessed May 28, 2012).

> *which privatized social service programs could operate compared to similar public programs.*[38]

In fact, the contribution of these partnerships towards overall efficiency in delivering services has been one of the primary defenses put forth by scholars in the face of attacks relative to their constitutionality.[39] In the early years of this initiative, it was the belief that "partnering with faith-based organizations will allow government to leverage private resources and achieve an even larger, overarching goal of reducing government spending."[40]

Ultimately, it has been opined that "[a]cts of charity [and] ministering to the physical and spiritual needs of the poor and the sick [ ] are of common knowledge, best handled and performed by religious organizations."[41]

D. Re-examining the Non-Establishment Clause

The primary legal basis underlying the criticism against the donations stems from Section 26 (2), Article VI of the 1987 Constitution,[42] which proscribes the appropriation of public money for the benefit of a religious institution (provision on non-appropriation). Thus,

> [n]o public money or property shall be appropriated, applied, paid, or employed, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or system of religion, or of any priest, preacher, minister, other religious teacher, or dignitary as such, except when such priest, preacher, minister, or dignitary is assigned to the armed forces, or to any penal institution, or government orphanage or leprosarium.[43]

In reply to such criticism, however, it has been argued that the religious leaders who received the donations did not become the owners thereof but

38. *See* Gomez, *supra* note 36, at 363-64 (emphasis supplied).

39. *Id.* at 368-69.

40. *Id.* at 362 (citing Anne Farris et al., Roundtable on Religion & Social Welfare Policy, The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative (A Report on the Use of the Bush Administration of its Executive Power to Implement Faith-Based Initiative) 3 (2004), *available at* http://www.rockinst.org/pdf/federalism/2004-08-the_expanding_administrative_presidency_george_w_bush_and_the_faith-based_initiative.pdf (last accessed May 28, 2012)).

41. Commissioner of Internal Revenue v. Church of Jesus Christ "New Jerusalem," 3 SCRA 386, 390 (1961).

42. PHIL. CONST. art. VI, § 29 (2).

43. PHIL. CONST. art. VI, § 29 (2).

merely held them in trust in favor of their respective dioceses;[44] in other words, whatever benefit they derived was purely incidental.

There thus arises an issue as to whether donations by the government in favor of religious institutions, charitable in nature and in furtherance of a secular purpose, are unconstitutional for being indirect appropriations for the benefit a religion. Rooted as it is on the Non-Establishment Clause of the Constitution and because of the conflicting jurisprudential interpretations relative to such clause, the prohibition against appropriation also uproots questions with regard to the appropriate test to use in light of situations similar to the instant case.

Parenthetically, the resolution of this issue would involve an examination of two consequent dangers. On the one hand, there is the danger posed by disregarding the wall of separation between the Church and the State. On the other hand, to absolutely prohibit such donations may result in ignoring possible legitimate reasons for Church-State partnerships due to the changing roles of sectarian institutions and as exemplified by the functions of faith-based partnerships. Ultimately, because of the peculiar character of a charitable donation, the unique political setting in the Philippines, and the changing role of the Church in the modern world, a re-examination is in order.

II. GOVERNMENT APPROPRIATION AND ITS LIMITATIONS

The power to appropriate public money rests solely in the Legislature. Section 24, Article VI of the Constitution provides that "[a]ll appropriation, revenue or tariff bills, bills authorizing increase of the public debt, bills of local application, and private bills *shall originate exclusively in the House of Representatives*, but the Senate may propose or concur with amendments."[45] In addition, "[n]o money shall be paid out of the Treasury except in pursuance of an appropriation made by law."[46] Clearly, the power to appropriate public money is a legislative exercise.

While the Constitution lays the basis for the Legislature's power to appropriate, it also enumerates the restrictions relative to such power, including the prohibition on increases by Congress of the appropriations recommended by the President[47] and the rule that a provision or enactment should specifically relate to a particular provision in the general

44. Paolo Romero, *Bishops say that donated vehicles not luxurious*, PHIL. STAR, July 7, 2011, *available at* http://www.philstar.com/Article.aspx?articleId=703507&publicationSubCategoryId=63 (last accessed May 28, 2012).

45. PHIL. CONST. art. VI, § 24 (emphasis supplied).

46. PHIL. CONST. art. VI, § 29 (1).

47. PHIL. CONST. art. VI, § 25 (1).

appropriations bill,[48] among others.[49] But perhaps the most basic and essential limitation relative to the power of appropriation concerns its purpose, that is, it must have a public purpose. In this regard, *Pascual v. Secretary of Public Works*[50] is instructive —

> It is a general rule that *the [L]egislature is without power to appropriate public revenue for anything but a public purpose.* ... It is the essential character of the direct object of the expenditure which must determine its validity as justifying a tax [ ] and not the magnitude of the interest to be affected nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion. *Incidental* to the public or to the state, which results from the promotion of private interest and the prosperity of private enterprises or business, does not justify their aid by the use of public money.[51]

Discussing the point further, *Pascual* laid down a test as to whether an appropriation has a valid purpose. Hence, "[t]he test of the constitutionality of a statute requiring the use of public funds is *whether the statute is designed to promote the public interest*, as opposed to the furtherance of the advantage of individuals, although each advantage to individuals might *incidentally* serve the public."[52] Consequently, it is the primary purpose of the appropriation that needs to be public in nature, and as long as it is, any incidental benefit to any private individual or entity is immaterial.

III. APPROPRIATIONS TO RELIGIOUS INSTITUTIONS: A LOOK AT SECTION 29 (2), ARTICLE VI OF THE 1987 CONSTITUTION

Another limitation on the power of the Legislature to appropriate is one central to the religious clauses of the Constitution — the provision on non-appropriation. This provision, along with the abovementioned religion clauses of the Constitution, is adopted largely from the First Amendment of the U.S. Constitution.[53] In the Philippines, the provision on non-appropriation is a reproduction of a Section in the Jones Law, which provided that "[n]o public money or property shall ever be appropriated, applied, or used, directly or indirectly, for the use, benefit, or support of any sect, church denomination, sectarian institution, or system of religion, or for

48. PHIL. CONST. art. VI, § 25 (2).

49. *See* PHIL. CONST. art. VI, § 25.

50. Pascual v. Secretary of Public Works, 110 Phil. 331 (1960).

51. *Id.* at 340 (citing 25 R.L.C. 398-400).

52. *Id.* (citing 81 C.J.S. 1147) (emphasis supplied).

53. *Estrada*, 408 SCRA at 157.

the use, benefit or support of any priest, preacher, minister, or dignitary as such[.]"[54]

At the time the 1935 Constitution was ratified, an exception was added to what was originally contained in the Jones Law.[55] Thus, the general rule of non-appropriation to a religious institution admitted of an exception, as "when such priest, preacher, minister, or dignitary is assigned to the armed forces or to any penal institution, orphanage, or leprosarium."[56] This amendment was in response to certain allowed practices in the U.S. where chaplains were assigned to the national penitentiary[57] and to the fear that these religious officers could not be employed with compensation in the government in the absence of any exception.[58] The same provision was adopted in the 1973[59] and 1987[60] Constitutions. Notably, in explaining the exception, Commissioner Hilario G. Davide, Jr. remarked that when such an officer is assigned to any of these institutions, "he is performing a duty which ought to be a duty of the government; so, in short, for a time he is being divorced from being just an ordinary member of any sect, church, denomination, sectarian institution[,] or system of religion."[61]

A. Relevant Jurisprudence

The categorical tenor of the constitutional prohibition, however, has been relaxed in jurisprudential application.

1. *Orden de Predicadores v. Metropolitan Water District*

In *Orden de Predicadores v. Metropolitan Water District*,[62] the Court had the occasion to interpret the provision on non-appropriation when it was still embodied in the Jones Law.[63] Here, the City of Manila, through a resolution, furnished water, free of charge, for the use of the Convent of Sto.

54. *Id.* at 160 (citing JOAQUIN G. BERNAS, S.J., A HISTORICAL AND JURIDICAL STUDY OF THE PHILIPPINE BILL OF RIGHTS 153 (1971)).

55. *Estrada*, 408 SCRA at 160.

56. *Id. See also* 1935 PHIL. CONST. art. VI, § 22 (3) (superseded 1987).

57. *Estrada*, 408 SCRA at 161.

58. *Id.*

59. 1973 PHIL. CONST. art. VIII, § 18 (2) (superseded 1973).

60. PHIL. CONST. art. VI, § 29 (2).

61. JOAQUIN G. BERNAS, S.J., THE INTENT OF THE 1987 CONSTITUTION WRITERS 406 (1995 ed.) (citing II RECORD OF THE CONSTITUTIONAL COMMISSION: PROCEEDINGS AND DEBATES 193 (1987)).

62. Orden de Predicadores v. Metropolitan Water District, 44 Phil. 292 (1923).

63. *Id.* at 294.

Domingo of the same city.[64] Ruling in favor of the legality of the abovementioned act, the Court averred that the free supply of water was in consideration of the act of the Convent of donating part of its lands to the City, and not on religious considerations.[65]

2. *Aglipay v. Ruiz*

It was in *Aglipay v. Ruiz*[66] that the Court had the opportunity to specifically examine the provision on non-appropriation. Here, the Director of Posts issued postage stamps in commemoration of the celebration in the City of Manila of the Thirty-third International Eucharistic Congress organized by the Roman Catholic Church.[67] Such authority was pursuant to an Act,[68] which gave the Director the power to dispose of the amount appropriated for the cost of the printing of postage stamps with new designs.[69] Subsequently, the Supreme Head of the Philippine Independent Church assailed the issuance on constitutional grounds, specifically for being in violation of the prohibition on the appropriation of public money for the benefit of a religious institution.[70]

In ruling in favor of the constitutionality of the issuance, the Court at the onset remarked that notwithstanding the principle of separation of church and state, religious freedom "is not a denial of [religion's] influence in human affairs."[71] Moreover, "in so far as it instills into the minds the purest principles of morality, its influence is deeply felt and appreciated."[72] Having said this, the Court proceeded to rule that the issuance of the postage stamps did not violate the provision on non-appropriation of the Constitution, averring that the Act authorizing the Director of Posts to appropriate in a manner advantageous to the Government did not have a religious purpose.[73] Moreover, it was "not inspired by any sectarian feeling

64. *Id.* at 293-94.

65. *Id.* at 301-02.

66. *Aglipay*, 64 Phil. at 201.

67. *Id.* at 203.

68. An Act Appropriating the Sum of Sixty Thousand Pesos and Making the Same Available Out of Any Funds in the Insular Treasury Not Otherwise Appropriated for the Cost of Plates and Printing of Postage Stamps with New Designs, and for Other Purposes, Act No. 4052 (1933).

69. *Aglipay*, 64 Phil. at 207-08.

70. *Id.* at 203.

71. *Id.* at 206.

72. *Id.*

73. *Id.* at 208.

to favor a particular church."[74] The Court elucidated on the matter further —

> the resulting propaganda, if any, received by the Roman Catholic Church, was not the aim and purpose of the Government. We are of the opinion that the Government should not be embarrassed in its activities simply because of incidental results, more or less religious in character, if the purpose had in view is one which could legitimately be undertaken by appropriate legislation. The *main purpose should not be frustrated by its subordination to mere incidental results not contemplated.*[75]

Clearly, in interpreting the prohibition, the Court looked merely at the purpose of the appropriation, rendering immaterial any incidental benefit to religion.

3. *Roman Catholic Archbishop of Manila v. Social Security Commission*

At issue in this case is whether "Catholic [c]harities, and all religious and charitable institutions and/or organizations, which are directly or indirectly, wholly or partially, operated by the Roman Catholic Archbishop of Manila"[76] are included in the compulsory coverage of the Social Security Law.[77] The Roman Catholic Archbishop of Manila argued that to include the Catholic charities under said compulsory coverage would be tantamount to a violation of the provision on non-appropriation.[78] In ruling against such contention, the Court held that the funds were not public money, but money belonging to the members of the System merely held in trust by the Government.[79] Ultimately, and even assuming that the funds constituted public money, "such payment shall be made to the priest not because he is a priest but because he is an employee."[80]

4. *Garcia v. Estenzo*

A similar ruling as that in *Aglipay* was made in *Garces v. Estenzo*.[81] Here, a barangay council passed a resolution involving the acquisition of the wooden

74. *Id.* at 209.

75. *Aglipay*, 64 Phil. at 209-10 (citing Bradfield v. Roberts, 175 U.S. 291 (1899)) (emphasis supplied).

76. Roman Catholic Archbishop of Manila v. Social Security Commission, 1 SCRA 10, 12 (1961).

77. An Act to Create a Social Security System Providing Sickness, Unemployment, Retirement, Disability and Death Benefits for Employees [Social Security Law], Republic Act 1161, § 9 (1954).

78. *Roman Catholic Archbishop of Manila*, 1 SCRA at 15.

79. *Id.* at 15-16.

80. *Id.* at 16.

81. Garces v. Estenzo, 104 SCRA 510 (1981).

image of San Vicente Ferrer to be used in the celebration of his annual feast day.[82] The funds for the acquisition were to be obtained through the sale of tickets as well as solicitations and cash donations.[83] The resolution further provided that the wooden image would be made available to Catholic parish church during the celebration of the feast day.[84]

The resolution was assailed for violating the constitutional prohibition on appropriation.[85] In addition to ruling that the funds used were private funds and not tax money,[86] the Court held that the wooden image was purchased in connection with the celebration of a town fiesta and not for the purpose of supporting a religion.[87] The Court explained that a fiesta is a "socio-religious affair[,]"[88] the celebration of which is "an ingrained tradition in rural communities."[89] Also, the Court mentioned that "[n]ot every governmental activity which involves the expenditure of public funds and which has some religious tint is violative of the constitutional provisions regarding separation of church and state, freedom of worship[,] and banning the use of public money or property."[90]

IV. AN EXAMINATION OF THE NON-ESTABLISHMENT CLAUSE AND THE PHILIPPINES' ADHERENCE TO THE BENEVOLENT NEUTRALITY TEST

One of the most renowned and heavily discussed provisions in the Constitution contains the so-called religion clauses: the Free Exercise Clause,[91] which prohibits the enactment of any law prohibiting the free exercise of religion; and the Non-Establishment Clause, [92] which prohibits the enactment of any law respecting the establishment of religion. Largely taken from the First Amendment of the U.S. Constitution,[93] these Clauses

82. *Id.* at 513.

83. *Id.* at 513-14.

84. *Id.*

85. *Id.* at 516.

86. *Id.*

87. *Garces*, at 516-17.

88. *Id.* at 517.

89. *Id.*

90. *Id.* at 518.

91. The Section provides in part: "No law shall be made ... prohibiting the free exercise [of religion]. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed." PHIL. CONST. art. III, § 5.

92. The Section provides in part: "No law shall be made respecting an establishment of religion[.]" PHIL. CONST. art. III, § 5.

93. *Estrada*, 408 SCRA at 157.

were originally given effect in the Philippines through the Jones Law.[94] At the time the 1935 Constitution was being drafted, the founders purposely retained the phraseology of these clauses "in order to adopt [their] historical background, nature, extent, and limitations[.]"[95]

The 1973 Constitution had an almost identical provision on the religious clauses as that of its predecessor.[96] Subsequently, the 1987 Constitution reproduced the provision in Section 5, Article III, thus —

> No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise clause 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.[97]

Also, the present Constitution reproduced a section originally found in the General Provisions of the 1973 Constitution,[98] stating that "[t]he separation of Church and State shall be inviolable."[99] It is now affirmed under the Constitution's Declaration of Principles and State Policies.[100]

A. A Brief Survey on U.S. Non-Establishment Clause Jurisprudence

It was in the landmark case of *Everson v. Board of Education*[101] that the U.S. Supreme Court first had a chance to directly examine the Non-Establishment Clause of the Constitution.[102] Pursuant to a New Jersey statute[103] authorizing district boards of education to make rules on the transportation of students to school, a local school board resolved to make a program under which parents of students who went to public and nonprofit private schools are to be reimbursed of their public transportation expenses to and from the schools.[104] On the ground that the program had the effect of making tax-funded reimbursements to parents whose children were enrolled in sectarian schools, the program was assailed for being in violation of the

94. *Id.* at 131.

95. *Id.* at 132 (citing 1 JOSE M. ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 150 (1949)).

96. *See* 1973 PHIL. CONST. art. IV, § 8 (superseded 1987).

97. PHIL. CONST. art. III, § 5.

98. *See* 1973 PHIL. CONST. art. XV, § 15 (superseded 1987).

99. PHIL. CONST. art. II, § 6.

100. PHIL. CONST. art. II.

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

102. *Estrada*, 408 SCRA at 104 (citing *Everson*, 330 U.S. at 1).

103. 1941 N.J. Laws 581 (U.S.).

104. *Everson*, 330 U.S. at 3.

prohibition against state support in favor of a religion.[105] In justifying the constitutionality of the subject reimbursements, the Court ruled that they were made to all students regardless of religion.[106] In addition, the reimbursements were made to the parents of the students and not to any religious institution.[107] More importantly, the Court made the following pronouncement with regard to the Non-Establishment Clause —

> The 'establishment of religion' clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can [they] pass laws which aid one religion, aid all religions, or prefer one religion over another. ... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'[108]

Subsequent cases, however, demonstrate the inclination of the Court to make different rulings depending on the circumstances of each particular case.

In *McCollum v. Board of Education*,[109] members of certain religious faiths were allowed by the Board of Education to offer classes in religious instruction weekly during regular class hours.[110] The students who attended were those whose parents requested that their children be permitted to attend,[111] while the students who did not take the classes had to leave the classroom and stay at another place in the school building for their secular studies.[112] Subsequently, the "released time" program was assailed for being in violation of the Constitution.[113] In ruling that it was indeed in violation, the Court held that the release of the pupils from their duty to go to school as compelled by law on the condition that they attend religious classes involved a "utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."[114] Furthermore, there

105. *Id.* at 3-4.

106. *Id.* at 17.

107. *Id.* at 5.

108. *Id.* at 15-16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).

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

110. *Id.* at 205.

111. *Id.* at 207.

112. *Id.* at 209.

113. *Id.* at 205.

114. *Id.* at 210.

would be "close cooperation between the school authorities and the religious council in promoting religious education."[115]

The Court, however, arrived at a different ruling in *Zorach v. Clauson*,[116] which was decided four years after *McCollum* and which also involved release time programs.[117] Here, the programs enabled the students enrolled in public schools, upon permission by their parents, to leave the school premises during the school day and attend religious activities and exercises.[118] In contrast, the Court averred that while in the *McCollum*, the "classrooms were turned over to religious instructors[,]"[119] "were used for religious instruction[,] and the force of the public school was used to promote that instruction[,]"[120] the instant case "involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations."[121]

In *Abington Township School District v. Schempp*,[122] the Commonwealth of Pennsylvania required students in public schools to read at least 10 verses from the Bible at the start of each school day.[123] In this regard, a student shall only be excused from doing so upon written request of his/her parent or guardian.[124] Striking the practice of Bible reading as unconstitutional, the Court ruled that the Non-Establishment Clause requires a test, as follows —

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. ... [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[125]

The Court explained this "wholesome neutrality" as stemming

> from a recognition of the teachings of history that powerful sects or groups might bring about ... dependency of one upon the other to the end that

115. *McCollum*, 333 U.S. at 209.

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

117. *See Zorach*, 343 U.S. at 306.

118. *Zorach*, 343 U.S. at 308.

119. *Id.* at 309.

120. *Id.* at 315.

121. *Id.* at 308-09.

122. Abington Township School District v. Schempp, 374 U.S. 203 (1963).

123. *Id.* at 205.

124. *Id.*

125. *Id.* at 222 (citing *Everson*, 330 U.S. at 1 & McGowan v. Maryland, 336 U.S. 420, 442 (1961)).

> official support of the State of Federal Government would be placed behind the tenets of one or of all orthodoxies.[126]

The decision in *Schempp* was in effect a reinforcement of previous rulings.[127] Subsequently, the same ruling was upheld in *Wallace v. Jaffree*,[128] where an Alabama statute, which required all students in public schools to set aside one minute for prayer,[129] was struck down as being in violation of the Non-Establishment Clause.[130]

In *Board of Education v. Allen*,[131] the New York Education Law required local public school authorities to purchase and lend textbooks free of charge to students in public and private schools.[132] The constitutionality of the law was subsequently questioned.[133] Citing *Schempp*, the Court again emphasized the necessity for "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[134] In ruling that the law complied with this, the Court held that its express purpose was to be in furtherance of educational opportunities for the young.[135] Also, no funds were to be given to parochial schools,[136] but to the parents and their children.[137] Of worthy note is the pronouncement made by the Court that

> [p]arochial schools are performing, in addition to their sectarian function, perform the task of secular education[,] [and] ... [the Court] *cannot agree with appellants that all teaching in a sectarian school is religious*[,] or that the processes of secular and religious training that secular textbooks furnished to students are[,] in fact[,] instrumental in teaching religion.[138]

In *Meek v. Pittenger*,[139] a similar ruling as that in *Allen* was reached with regard to the loan of textbooks, as "the financial benefit ... [was] to [the]

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126. *Schempp*, 374 U.S. at 223.

127. *See* Engel v. Vitale, 370 U.S. 421 (1962) & Cantwell v. Connecticut, 310 U.S. 296 (1940).

128. Wallace v. Jaffree, 472 U.S. 38 (1985).

129. *Id.* at 40.

130. *Id.* at 61.

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

132. *Id.* at 238.

133. *Id.* at 240.

134. *Id.* at 243 (citing *Schempp*, 374 U.S. at 222).

135. *Allen*, 392 U.S. at 243.

136. *Id.* at 243-44.

137. *Id.* at 244.

138. *Id.* at 248 (emphasis supplied).

139. Meek v. Pittenger, 421 U.S. 349 (1975).

parents and children, not to [the nonpublic] schools."[140] The loan of instructional materials[141] consisting of maps, charts, periodicals, photographs, sound recordings, and other similar materials,[142] however, "*directly to qualifying nonpublic elementary and secondary schools*[,]"[143] was held to be in violation of the Non-Establishment Clause —

> [T]he primary beneficiaries ... are nonpublic schools with a predominant sectarian character.
>
> ...
>
> To be sure, the material and equipment that are the subjects of the loan ... are 'self-polic[ing], in that starting as secular, non[-]ideological and neutral, they will not change in use.' But faced with the substantial amounts of direct support ... it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even [ ] though earmarked for secular purposes, '*when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion.*[144]

Hence, as opposed to *Allen*, the Court, in *Meek*, taking all relevant considerations, recognized the extensive nature of the aid that may accrue to the religious institution.[145] This, in turn, made the benefit not incidental in character.[146]

Interestingly, the abovementioned ruling may be said to have been abandoned in *Mitchell v. Helms*.[147] Here, the Education Consolidation and Improvement Act gave federal funds to local educational agencies through the latter's state counterparts.[148] Thirty percent of the funds, however, were shown to be distributed to private religious schools.[149] The allocation was attacked on constitutional grounds, the Court, in answer, ruled that

> [i]f aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands

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140. *Id.* at 360 (citing *Allen*, 392 U.S. at 243-44).

141. *Meek*, 421 U.S. at 354.

142. *Id.* at 355.

143. *Id.* at 363 (emphasis supplied).

144. *Id.* 364-66 (citing Hunt v. McNair, 413 U.S. 734, 743 (1973)) (emphasis supplied).

145. *Meek*, 421 U.S. at 349-50.

146. *See also* Wolman v. Walter, 433 U.S. 229 (1977).

147. Mitchell v. Helms, 530 U.S. 793 (2000).

148. *Id.*

149. *Id.*

> (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion[.]'
>
> ...
>
> We viewed this arrangement ... as no different from a government issuing a paycheck to one of its employees knowing that the employee would direct the funds to a religious institution. Both arrangements would be valid, for the same reason: '[A]ny money that ultimately went to religious institutions did so *'only as a result of the genuinely independent and private choices of' individuals.*'[150]

In *Walz v. Tax Commission*,[151] the Court, in upholding the constitutionality of tax exemptions, made reference to the grant of direct subsidies, thus —

> Churches perform some functions that a State would constitutionally be empowered to perform. I refer to nonsectarian social welfare operations such as the care of orphaned children and the destitute and people who are sick. *A tax exemption to agencies performing those functions would therefore be as constitutionally proper as the grant of direct subsidies to them.*[152]

Finally, in the landmark case of *Agostini v. Felton*,[153] the Court reversed its ruling[154] in *Aguilar v. Felton*.[155] Through *Agostini*, aid given to parochial schools could now be defended as permissible under the Establishment Clause.[156] In fact, the Court departed from its previous ruling to the effect that all direct aid to the educational functions of religious schools is unconstitutional.[157] The Court reasoned that there is no difference between grants disbursed directly to the students for the latter to use for tuition and a State issuing a paycheck to one of its employees, fully aware that the latter would donate the proceeds to a religious institution.[158] Citing *Committee for*

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150. *Id.* 816-17 (citing Agostini v. Felton 521 U.S. 203, 226 (1997)) (emphasis supplied).

151. Walz v. Tax Commissioner of New York, 397 U.S. 664 (1970).

152. *Id.* at 708 (J. Douglas, dissenting opinion) (emphasis supplied).

153. *Agostini*, 521 U.S. at 203.

154. *Id.* at 235.

155. Aguilar v. Felton, 473 U.S. 402 (1985). In *Aguilar*, the U.S. Supreme Court "held that the Establishment Clause of the First Amendment barred the City of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program." *Agostini*, 521 U.S. at 208.

156. *Agostini*, 521 U.S. at 240.

157. *Id.* at 225.

158. *Id.* at 226.

Public Education and Religious Liberty v. Nyquist,[159] the Court enunciated that in both instances, "any money that ultimately went to religious institutions did so 'only as a result of the genuinely independent and private choices of' individuals."[160]

B. The Lemon Test

It was in the landmark case of *Lemon v. Kurtzman*[161] that the celebrated test in examining Non-Establishment Clause cases was established. Here, a Rhode Island statute permitted state officials to supplement the salaries of teachers of secular subjects through the payment of an amount not exceeding 15% of their annual salary.[162] All teachers who applied for the benefits granted under the Act were teachers in Roman Catholic schools.[163] Similarly involved was a Pennsylvania statute authorizing direct payments to nonpublic schools for the actual cost of the salaries of teachers, as well as for textbooks and other instructional materials.[164]

In resolving the issue of whether the Non-Establishment Clause has been violated, the Court enunciated a three-part test:[165]

(1) The statute must have a secular legislative purpose;[166]

(2) Its principal or primary effect must be one that neither advances nor inhibits religion;[167] and

(3) The statute must not foster an excessive government entanglement with religion.[168]

Applying the abovementioned test, the Court invalidated both the Rhode Island and the Pennsylvania laws.[169] The Court hesitated to focus on the first two tests, arguing that the laws were clear in their legislative

159. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

160. *Agostini*, 521 U.S. at 226.

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

162. *Id.* at 607.

163. *Id.* at 608.

164. *Id.* at 608.

165. Russell L. Weaver, *The Establishment Clause of the United States Constitution, in* LAW AND RELIGION: GOD, THE STATE, AND THE COMMON LAW 30 (Peter Radan et al. eds., 2005).

166. *Lemon*, 403 U.S. at 612.

167. *Id.* (citing *Allen*, 392 U.S. at 243).

168. *Lemon*, 403 U.S. at 613 (citing *Walz*, 397 U.S. at 674).

169. *Lemon*, 403 U.S. at 625.

purposes, and that the intent of both laws was not to advance religion.[170] Proceeding to discuss excessive entanglement considerations, the Court opined that three factors are to be examined: (1) the character of the institutions that are benefited,[171] (2) the nature of the aid given by the State,[172] and (3) the resulting relationship between the government and the religious institution.[173]

Ultimately, the Court found that the substantial religious character of the schools involved enhanced the probability of excessive entanglement.[174] First, the schools were close in proximity with the churches.[175] Second, approximately two-thirds of the teachers were nuns of various religious orders.[176] Both factors enhance the probability of the schools being "powerful vehicle[s] for transmitting the Catholic faith to the next generation."[177] Interestingly, the Court distinguished the case from that of *Allen* —

> We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education.
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> ...
>
> We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.[178]

Hence, a comprehensive and discriminating state surveillance will have to be employed if the abovementioned laws were to be upheld.[179] Finally, the Court discussed the danger the laws may bring relative to the "divisive political potential" of the programs — advocates of the parochial schools would champion the programs, yet those who oppose such state aid would naturally employ political techniques in order to prevail.[180] In this regard,

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170. *Id.* at 613-14.

171. *Id.* at 615.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Lemon*, 403 U.S. at 615.

176. *Id.*

177. *Id.* at 616.

178. *Id.* at 617-18.

179. *Id.* at 619.

180. *Id.* at 623.

the Court emphasized that political conflict along religious lines was one of the evils sought to be prevented by the First Amendment.[181]

Subsequent cases, however, have diverged in terms of applying the Lemon test.[182] Criticisms emerged with regard to the test's applicability in all cases.[183] It soon became clear that there were judges who became dissatisfied with the test, arguing, for instance, that it "has simply not provided adequate standards for deciding Establishment Clause cases."[184]

C. Excessive Entanglement Jurisprudence

Cases subsequent to *Lemon* illustrate the application of the excessive entanglement test.

In *Walz*, the validity of tax exemptions granted to religious institutions was at issue.[185] In ruling that the exemptions were valid, the Court argued that to deny the exemption would permit more government involvement, as the latter would be required to make valuations of the properties owned by the religious institutions.[186] Consequently, various legal processes would ensue, such as the imposition of liens and foreclosures, which would most likely allow direct confrontations between the two institutions.[187]

In *Tilton v. Richardson*,[188] the Higher Facilities Education Act provided federal construction grants for college and university facilities, but not to facilities used or to be used for sectarian instructions.[189] The U.S. Government retained a 20-year interest in any facility constructed with funds under the Act.[190] If the conditions for the grant were violated, the Government was entitled to recovery.[191] Subsequently, four church-related colleges and universities received grants under the Act;[192] these grants were

181. *Lemon*, 403 U.S. at 622 (citing Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969)).

182. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983).

183. Weaver, *supra* note 165, at 34.

184. *Wallace*, 472 U.S. at 110 (J. Rehnquist, dissenting opinion).

185. *Walz*, 397 U.S. at 666.

186. *Id.* at 674.

187. *Id.*

188. Tilton v. Richardson, 403 U.S. 672 (1971).

189. *Id.* at 675.

190. *Id.*

191. *Id.*

192. *Id.*

assailed.[193] In ruling in favor of the grants, the Court had occasion to relate excessive entanglement to the activity's purpose, arguing that

> [s]ince religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in 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. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is *minimal and indeed hardly more than the inspections that States impose over all private schools* within the reach of compulsory education laws.[194]

Significant developments in the discussion on excessive entanglement arose in *Agostini*, which, as aforesaid, overruled *Aguilar*. In *Aguilar*, the Court found as pregnant of excessive entanglement consequences the fact that there existed a system for monitoring the religious content of publicly funded classes.[195] Also, the Court observed that the program resulted in excessive entanglement when the public employees who taught at the religious school premises were required to be closely monitored in order to prevent them from inculcating religion.[196]

In addressing these issues, the Court pronounced that the factors used to assess whether there exists excessive entanglement are the same as those used to assess the effect of the government activity.[197] Therefore, the Court incorporated the excessive entanglement criterion into the second criterion of the Lemon test, which is the effects test.[198] As in *Lemon*, excessive entanglement considerations included the examination of the character of the institutions benefited, the nature of the aid given, and the resulting relationship between the government and the religious authority.[199] However, the Court emphasized that to be unconstitutional, the entanglement must at the least be excessive.[200]

In ruling that the program did not result in any excessive entanglement, the Court explained that administrative cooperation and political divisiveness

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193. *Id.* at 676.

194. *Tilton*, 403 U.S. at 687 (emphasis supplied).

195. *Aguilar*, 473 U.S. at 413.

196. *Id.*

197. *Agostini*, 521 U.S. at 232.

198. *Id.*

199. *Id.*

200. *Id.* at 233.

would be present regardless of where the services were offered.[201] With regard to the need of pervasive monitoring of the public employees to ensure that they do not inculcate religion, the Court relied in *Zobrest v. Catalina Foothills School District*[202] in holding that there no longer exists any presumption to the effect that public employees will inculcate religion simply because they are in a sectarian environment.[203] Therefore, the presumption that pervasive monitoring is required no longer applies.[204]

D. The Philippines' Treatment of the Non-Establishment Clause

In the Philippines, the most celebrated discussion on the Non-Establishment Clause is found in *Estrada v. Escritor*.[205] In this case, Soledad Escritor was investigated on alleged rumors that she was living with another man not her husband.[206] Complainant Alejandro Estrada filed a charge against her, saying that she should not be allowed to continue her employment because she committed an immoral act.[207] On the other hand, Escritor essentially argues that the religious congregation to which she is a member allowed such practice.[208]

Turning to the Non-Establishment Clause, the Court discussed that there are currently two streams of jurisprudence anchored on different interpretations of the wall of separation between the Church and the State — the separationist and the accommodationist.[209]

On the one hand, the separationist view is further divided into two streams: the strict separationist stream, where no interaction is permitted; and the strict neutrality stream, where although the state is not required to be hostile, religion still may not be used as a basis for classification for purposes of governmental action.[210] On the other hand, the accommodationist view asserts itself in the concept of benevolent neutrality, where the wall of separation is seen not as a protection of the state from the church, but a protection of the church from the state.[211] Hence, benevolent neutrality

201. *Id.* at 230.

202. Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).

203. *Agostini*, 521 U.S. at 205 (citing *Zobrest*, 509 U.S. at 12-13).

204. *Id.* at 206.

205. *Estrada*, 408 SCRA at 1 (2003).

206. *Id.* at 50.

207. *Id.*

208. *Id.* at 51.

209. *Id.* at 114.

210. *Id.* at 115.

211. *Estrada*, 408 SCRA at 117 (citing Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 159 (2003)).

allows accommodation of religion in certain instances, as it recognizes the important role it plays in public life.[212]

Amidst the debate between the advocates of the two streams, the Court made a categorical pronouncement that in the Philippines, it is the benevolent neutrality test that governs, "as [the Philippine's] constitutional history and interpretation indubitably show that benevolent neutrality is the launching pad from which the Court should take off in interpreting religion clause cases."[213]

V. ANALYSIS

A. An Examination of Philippine Jurisprudential Interpretations on Government Appropriations to Religious Institutions

As a prohibition against the appropriation of public money in favor of a religious institution, Section 29 (2), Article VI of the Constitution is primarily intended to prevent the government from establishing a religion. In *Aglipay*, the Court explained why the separation of the Church and the State is necessary —

> Without the necessity of adverting to the historical background of this principle in our country, it is sufficient to say that our history, not to speak of the history of mankind, has taught us that the union of church and state is prejudicial to both, for occasions might arise when the state will use the church, and the church the state, as a weapon in the furtherance of their respective ends and aims.[214]

In turn, as a derivative of the Jeffersonian wall of separation, the Non-Establishment Clause primarily protects two values — (1) voluntarism and (2) the insulation of the political process from interfaith dissension.[215]

Voluntarism guards the inviolability of the human conscience, seeing compulsory faith as one lacking "religious efficacy."[216] In other words, voluntarism is a value that seeks to prevent compelled religious exercise.[217] Consequently, it will be more for the benefit of society if the growth of a religious institution is caused by its own intrinsic merit and from the voluntary support of its members, without the aid of official patronage.[218] In turn, such growth will not transpire "unless the political process is insulated

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212. *Estrada*, 408 SCRA at 120.

213. *Id.* at 168.

214. *Aglipay*, 64 Phil. at 205.

215. *Estrada*, 408 SCRA at 149-50.

216. *Id.* at 149.

217. *Id.*

218. *Id.*

from religion and unless religion is insulated from politics."[219] Thus, the Non-Establishment Clause "calls for government neutrality in religious matters to uphold voluntarism and avoid breaching interfaith dissention."[220]

The wall of separation was, however, never meant to be absolute. Indeed, jurisprudence following *Aglipay* has been fairly consistent. Appropriations were allowed as long as the primary purpose remains secular in nature. The Court in *Garces* pronounced that "[n]ot every governmental activity which involves the expenditure of public funds and which has some religious tint is violative of the constitutional provisions regarding separation of church and state, freedom of worship[,] and banning the use of public money or property."[221]

B. The Philippines' Adoption of the Benevolent Neutrality Test

In categorically adopting the benevolent neutrality test, the Court, in *Estrada*, examined the totality of Philippine law and jurisprudence to justify the use of such test. For instance, the provisions on tax exemption over church property enumerated in the 1935, 1973, and 1987 Constitutions are indicative of the intent of the framers not to erect a "high and impregnable wall of separation between church and state."[222] Furthermore, citing a long line of jurisprudence, the Court emphasized that religion plays an important part in society. Hence, "[r]eligious freedom ... as a constitutional mandate[,] is not an inhibition of profound reverence for religion and is *not a denial of its influence in human affairs.*[223] Consequently, the Philippines has veered away from U.S. jurisprudence, the latter interpreting the religion clauses through a separationist or strict neutrality approach.[224] Noteworthy is the declaration of the Court to the effect that the benevolent neutrality test would be applicable in all cases interpreting the religion clauses of the Constitution.[225]

1. Determining the Potency of the Lemon Test

The inconsistent use by subsequent U.S. cases of the tests enunciated in *Lemon* raises doubts as to its remaining potency. Nonetheless, its recurrent use suggests that it continues to be the leading test used in Non-

219. *Id.*

220. *Id.* at 150 (citing JOAQUIN G. BERNAS, S.J., THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 233 (1987 ed.)).

221. *Garces*, 104 SCRA at 518.

222. *Estrada*, 408 SCRA at 167 (citing Hector A. Martinez, *The High and Impregnable Wall of Separation Between Church and State*, 37 PHIL. L.J. 748, 768-72 (1962).

223. *Aglipay*, 64 Phil. at 206 (emphasis supplied).

224. *Estrada*, 408 SCRA at 169.

225. *Id.* at 168.

Establishment cases.[226] Consequently, it continues to enunciate the "core set of principles in guiding decision-making in this area."[227]

A recent survey examined the decisions of the U.S. Supreme Court relative to Non-Establishment cases and assessed how the Lemon test, or any part of it, was used before and after *Lemon*.[228] Ultimately, the survey concluded that although not constituting a rigid standard, the Lemon test remains a guiding framework by which the decisions of the U.S. Supreme Court over the last 30 years relied.[229]

In the Philippines, the discussion on the remaining potency of the Lemon test takes an altogether different setting following the adoption of the benevolent neutrality test. As held in *Estrada*, "Philippine constitutional law has departed from the U.S. jurisprudence of employing a separationist or strict neutrality approach."[230] Nonetheless, it is submitted that the Lemon test and the benevolent neutrality test are not mutually exclusive.

2. The Lemon Test and the Benevolent Neutrality Principle: Finding a Common Ground

In *Estrada*, the Court, in adhering to the benevolent neutrality principle, discussed three types of accommodation — "those where accommodation is required, those where it is permissible, and those where it is prohibited."[231]

First, accommodation is required in order to protect the free exercise of religion and to avoid infringing on the religious liberty of another person.[232] Hence, the state has the obligation to create exceptions if such are necessary in order to prevent threatening religious convictions.[233] Second, accommodation is permissible when there is a compelling government goal that requires burdening religious exercise, through the least restrictive means.[234] In this type of accommodation, the state may, but is not required, to accommodate religion.[235] Lastly, when accommodation is prohibited,

226. Herbert M. Kritzer, *Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases*, 37 LAW & SOC'Y REV. 827, 829-30 (2003).

227. *Id.* at 830.

228. *Id.*

229. *Id.*

230. *Estrada*, 408 SCRA at 169.

231. *Id.* at 124.

232. *Id.*

233. *Id.*

234. *Id.* at 125.

235. *Id.*

"establishment concerns prevail over potential accommodation interests."[236] Consequently, it "would arrive at a strict neutrality conclusion."[237]

In the Lemon test, there are three factors to be considered in assessing Non-Establishment cases. It is submitted that the factors used in the Lemon test can be utilized as indicators affecting the level of accommodation to be made using the benevolent neutrality test — in so far as they are, they remain relevant, at least as an indicator as to whether accommodation is to be permitted. This is moreover consistent with the concept that the Lemon test is not a rigid test, but merely constitutes a framework by which the decisions on the Non-Establishment Clause are guided.[238]

Having thus argued the continuing relevance of excessive entanglement considerations, it is now timely to look at the donations in such context.

C. A Closer Look at the Donations

The PCSO is a government-owned and controlled corporation.[239] It was created by the Legislature through Republic Act No. 1169, otherwise known as "An Act Providing for Charity Sweepstakes, Horse Races, and Lotteries."[240] Government-owned and controlled corporations "[refer] to corporations organized as a stock or non-stock corporation vested with functions relating to public needs, whether governmental or proprietary in nature, and owned by the Government directly or through its instrumentalities[.]"[241] As such, it constitutes one of the institutions that collectively form the government, along with "the National Government, the local governments, and all other instrumentalities, agencies or branches of the Republic of the Philippines."[242]

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236. *Estrada*, 408 SCRA at 126.

237. *Id.*

238. Kritzer, *supra* note 226, at 830.

239. *See generally* Kilosbayan, Incorporated v. Guingona Jr., 232 SCRA 110 (1994). *See also* Presidential Communications Operations Office, Government-owned and/or Controlled Corporations, *available at* http://www.pcoo.gov.ph/dir-gocc.htm (last accessed May 28, 2012).

240. An Act Providing for Charity Sweepstakes, Horse Races, and Lotteries, Republic Act No. 1169 (1954).

241. An Act Requiring Government-owned or Controlled Corporations to Declare Dividends Under Certain Conditions to the National Government, and for Other Purposes, Republic Act No. 7656, § 2 (b) (1993).

242. An Act Establishing a Code of Conduct and Ethical Standards for Public Officials and Employees, to Uphold the Time-Honored Principle of Public Office being a Public Trust, Granting Incentives and Rewards for Exemplary Service, Enumerating Prohibited Acts and Transactions and Providing Penalties for Violations Thereof and for Other Purposes [Code of Conduct and Ethical

A donation is an act of liberality.[243] It is present when "a person disposes gratuitously of a thing or right in favor of another, who accepts it."[244] In the case of PCSO, it is allowed "to engage in health and welfare-related investments, programs, projects[,] and activities."[245] Hence, its Charter allows its funds "to make payments or grants for health programs, including the expansion of existing ones, medical assistance and services and/or charities of national character[.]"[246]

Government donations in favor of a religious institution, without any expectation of return and without any attendant condition, run at the very heart of the definition of state support. Again, in *Orden de Predicadores*, the Court discussed a class of donations called remuneratory donations —

> the donation was remuneratory; in other words, the free consumption of water is compensation by the value of more than ten thousand square meters of land which the party plaintiff had donated. Supposing that the old city council of Manila could validly purchase the necessary lands for bringing the water to the city, there is no logical reason why the said city government could not equally, instead of paying the price of the land, furnish free of charge the water that might be used by ... the donor.[247]

In the case of the PCSO donations, they cannot be described as remuneratory. The PCSO did not accept anything from the religious institution. Neither did the PCSO attach conditions relative to the use of the donations. Hence, the donations were simple in legal parlance. Consequently, there was a valid justification to attack such donations, as it had the effect of supporting a religious institution.

Nonetheless, the donations were defended for having a secular purpose. In this regard, jurisprudence on the provision on non-appropriation has interpreted such to allow incidental benefit in favor of a religious institution, provided the act has a primary secular purpose. Thus, if it can be said that the PCSO donations were for a secular purpose, being in furtherance of health programs for the poor, the inverse would be equally, if not more, true — because the donations were given directly to the religious institution without any qualification or condition relative to their use, it may be seen as primarily benefiting the institution instead of merely conferring upon it incidental benefit. Again, it is to be noted that through the act of donation,

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Standards for Public Officials and Employees], Republic Act No. 6713, § 3 (a) (1989).

243. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 725 (1950).

244. *Id.*

245. R.A. 1169, § 1.

246. *Id.* § 6 (b).

247. *Orden de Predicadores*, 44 Phil. at 306.

the religious institution acquired ownership over the objects donated. The Civil Code provides that "[o]wnership and other real rights over property are acquired and transmitted by law, by donation, by estate and intestate succession, and in consequence of certain contracts, by tradition."[248]

Moreover, using the expanded concept of benevolent neutrality, donations given to a religious institution, without any condition, violates the Non-Establishment Clause. It is to be noted that the benevolent neutrality test allows the accommodation of a religion in specific instances. Using such a framework, the donations would be prohibited, as it would create an excessive entanglement with the State when viewed in the larger context of Philippine society.

The unique political setting in the Philippines makes it a compelling state interest to, as far as practicable, prohibit direct and unconditional aid to be given to the Church, albeit the latter only being an intermediary for government programs. Again, reports establish that, in the Philippines, religion may be used in connection with political agenda. This makes the dangers relative to a "divisive political potential" more compelling. Thus, various means of government surveillance will inevitably be utilized to ensure the non-establishment of a religion. Consequently, noteworthy is the Court's pronouncement in *Estrada* that where there is a compelling state interest, accommodation should be denied.

The doctrine pronounced in *Mitchell* and *Agostini*, to the effect that the government cannot be deemed to be supporting a religion if aid is neutrally available and passes through the hands of private citizens who are thereafter free to direct the aid elsewhere, cannot be used to defend the donations in the instant case. The donations do not pass through the hands of a third party. In fact, the donations were directly given to the religious institution.

VI. CONCLUSION

In order to truly address Non-Establishment Clause concerns in the Philippines, excessive entanglement considerations should not lose its relevance, especially when it can be harmonized with the precepts underlying the benevolent neutrality principle. This is especially favorable in the Philippine setting, where entanglement between the Church and the State continues in the realm of Philippine politics.

Consequently, following the expanded benevolent neutrality approach, government charitable donations to religious institutions may be accommodated provided there are established safeguards in order to prevent any occurrence that would constitute a compelling state interest. For one, if donations to religious institutions are to be given at all, it should be to all

248. CIVIL CODE, art. 712.

religious institutions without any distinction as to the specific faith benefited. This way, the danger that a State would favor a particular religion is eliminated.

To prevent excessive entanglement, "pervasive monitoring" should be avoided. Hence, the programs to be undertaken by the religious institutions in aiding the poor should already be clearly delineated at the onset. First, limitations as to the character of the donations should be put into place. Second, standards must be developed in limiting what goods may best serve the governmental aim and at the same time ensuring that the religious institution would not primarily benefit. Moreover, the donations cannot be given to a religious leader in his personal capacity — the appropriation must be directed to the whole of the religious institution. If all these are established at the very start, that is, if they are already made fixed rules, entanglement will be lessened, and government action would then be limited to ensuring that public money is spent the way Congress intended.[249] In that case, entanglement would no longer be excessive.

Serving the needs of the poor is a legitimate state concern. It should, by all means, be encouraged, especially in a developing country like the Philippines where poverty is still prevalent. Coursing aid through a religious institution remains a promising option, especially with the continuing recognition that such would entail efficiency and cost-reduction as exemplified by the rise of faith-based organizations. In order not to waste the huge potential brought by Church-State partnerships in this area, it is inevitable that parameters relative to the government donations be developed — parameters specifically tailored to the Philippine political and religious experience.

249. Gomez, *supra* note 36, at 387.