

The Yellow Wood: Diverging Roads on Mandatory Religious Exemption Regimes in the United States and the Philippines

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I. INTRODUCTION

*Two roads diverged in a wood, and I,
I took the one less traveled by,
And that has made all the difference.*

— Robert L. Frost¹

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A. A Note from Mr. Frost

Robert L. Frost's immortal words, written more than a century ago, have been the literary bastion for people standing on the cusp of life-changing decisions. The poem is a call to choose, to follow our own path, and to ultimately give it meaning.² His iconic poem is as powerful as it is inspirational.

Safe to say, Frost was obviously not talking about the Free Exercise Clause (FEC) and mandatory religious exemption regimes. The Author can imagine literary scholars scoffing and laughing at such a far-fetched and stretched interpretation, but those familiar with American and Philippine jurisprudence on the matter could be forgiven for interpreting the iconic poem under the aegis of esoteric gobbledygook. The Supreme Courts of the United States (U.S.) and the Philippines, in different periods of their respective histories, once stood in the yellow wood of the FEC and faced the dilemma of choosing between two diverging roads. The U.S. Supreme Court (SCOTUS) started down one road, saw its perilous path, turned on its heel, and chose the other path. The Philippine Supreme Court followed its

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1. Robert L. Frost, A Group of Poems, available at <https://www.theatlantic.com/magazine/archive/1915/08/a-group-of-poems/306620> (last accessed Oct. 31, 2017).
2. See David C. Ward, What Gives Robert Frost's "The Road Not Taken" Its Power?, available at <http://www.smithsonianmag.com/smithsonian-institution/what-gives-robert-frosts-road-not-taken-its-power-180956200> (last accessed Oct. 31, 2017).

American counterpart on the first road but, despite its perils, marched headlong. These decisions have made all the difference.

B. A Claim Against Exemptions

The religion clauses of both the U.S. and the Philippines are nearly identical. However, despite the almost exact replication of the First Amendment religion clauses in the 1987 Philippine Constitution, the interpretations of the FEC, particularly on the issue of mandatory exemptions, differ. The extent that these two jurisdictions have diverged in interpreting the FEC is both interesting and striking, especially when one considers the textual similarities and the historical ties between the U.S. and the Philippines. The Philippine Constitution mandates an approach of benevolent neutrality towards religion and allows mandatory exemptions.³ The First Amendment does not; no exemption is forthcoming against a valid and neutral law of general applicability.⁴

In this Article, the Author examines and analyzes this divergence with the end goal of showing the pitfalls of the Philippine exemption regime. The Author argues that while the Philippine Supreme Court's adoption of this mandatory exemption regime in *Estrada v. Escritor*⁵ had laudable intentions, its framework and subsequent application in Philippine FEC cases are fraught with problems.

The SCOTUS faced the same problems during its experiment with a mandatory exemption regime from 1963 to 1990. Scholars such as Professor Ira C. Lupu, Robert W. Tuttle, and William P. Marshall have identified the following problems of exemption regimes: the incompetency of courts in judging burdens on religion,⁶ the exclusion of minorities in judicial definitions of religion,⁷ the potential for inconsistent decisions due to individualized examination of exemption claims,⁸ and the broad range of

3. See *Escritor*, 408 SCRA 1, 168 (2003).

4. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) (citing *United States v. Lee*, 455 U.S. 252, 262 (1982) (J. Stevens, concurring opinion)).

5. *Estrada v. Escritor*, 408 SCRA 1 (2003).

6. IRA C. LUPU & ROBERT W. TUTTLE, *SECULAR GOVERNMENT, RELIGIOUS PEOPLE* 198-99 (2014).

7. William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 311 (1991) (citing Michael W. McConnell, *A Response to Professor Marshall*, 58 U. CHI. L. REV. 329, 330 (1991)).

8. Marshall, *supra* note 7, at 311-12.

laws susceptible to attack.⁹ Professor Lupu correctly concluded that these religious exemption regimes have the “enduring qualities” of “weakness, plasticity, erratic[,] and unpredictable bursts of religion-protective energy, and the consequent tendency to produce deep inconsistencies.”¹⁰ These “enduring qualities” are not only present in the current Philippine regime, but are in fact worse in its application.

C. Roadmap

In critiquing the Philippine regime, the Author first gives a brief overview of the textual similarities of the First Amendment and its counterpart in the Philippine Constitution. The similarity shows that both legal traditions share the fundamental constitutional value of promoting religious liberty, but at the same time, its approach in realizing this value differs in interpretation.

The Author then focuses on the lessons of the short-lived American exemption regime. The Author surveys the history of U.S. FEC exemption cases as a baseline for comparison with the Philippine approach. American jurisprudence on the subject is more developed than Philippine jurisprudence, at least in terms of the number of cases that have dealt with exemptions. American case law serves as fertile ground for identifying problems of an exemption regime and provides an appropriate backdrop to critique the Philippine regime.

After that, the Author discusses the Philippine approach to mandatory exemptions and explains the exact point of divergence between the two jurisdictions — the presence of other constitutional provisions in the Philippine Constitution which are absent in the American Constitution, that shows a constitutionally-mandated leaning or tendency towards a philosophy of benevolent neutrality.

Finally, the Author critiques the Philippine approach using the lessons of the American experience with mandatory exemptions. The critique is based on its application (or misapplication) in two Philippine Supreme Court cases decided after the adoption of benevolent neutrality. The Author applies the problems faced by the truncated American regime to argue against the use of a mandatory exemption regime in the Philippines.

9. Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 73 (2015).

10. *Id.* at 74.

II. SHARED TEXT, SHARED VALUES, AND SHARED HISTORY

The provisions of the First Amendment and the Philippine religious clauses nearly mirror each other, thus making it incredibly notable that the respective Supreme Courts have interpreted them differently. Before discussing the difference in interpretation, the Author offers a brief rundown of the similarities, both in the text, and in the values espoused by the provisions. An understanding of how both jurisdictions have the same text and protect the same values with respect to religious clauses highlights the breadth of the difference in the interpretation.

The First Amendment, particularly the FEC, protects religious liberty by preventing state interference into the realm of religion.¹¹ It has been interpreted to protect a number of constitutional values, such as religious voluntarism,¹² religious equality,¹³ equality between believers and non-believers,¹⁴ and respect for a person's religious (or irreligious) identity.¹⁵ Its Philippine counterpart protects and recognizes the same set of values.¹⁶

The root of these similarly protected values is found in the text of the religious clauses of both jurisdictions. For easy reference, both are presented side-by-side —

11. *School Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 222-23 (1963).

12. DANIEL CONKLE, *CONSTITUTIONAL LAW, THE RELIGION CLAUSES* 40 (2d ed. 2009). Religious voluntarism entails that religion should advance on its own merits without government coercion or compulsion. *Id.*

13. *Id.* at 41.

14. *Id.*

15. *Id.*

16. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 346 (2009 ed.).

U.S.	Philippines
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.] ¹⁷	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. ¹⁸

This almost exact replication of the First Amendment in the Philippine Constitution stems from the Philippines' colonial history.¹⁹ After more than 300 years as a Spanish colony, the Spanish crown ceded the Philippines to the U.S. for the grand sum of U.S. \$20 million under the Treaty of Paris.²⁰ Under the Spanish regime, Catholicism was the established religion in the Philippines.²¹ The new American constitutional system in the Philippines sought to remove the Catholic Church from its privileged position and to cause a complete separation of church and state throughout the islands.²²

The First Amendment made its first appearance in the 1935 Philippine Constitution.²³ The records of the 1934 Constitutional Convention reveal that the basic provision was accepted without any debate,²⁴ an indication

17. U.S. CONST. amend. I.

18. PHIL. CONST. art. III, § 5.

19. BERNAS, *supra* note 16, at 324-25 & 328.

20. *Id.* at 7. See also History, Treaty of Paris ends Spanish-American War, available at <http://www.history.com/this-day-in-history/treaty-of-paris-ends-spanish-american-war> (last accessed Oct. 31, 2017).

21. BERNAS, *supra* note 16, at 324.

22. *Id.*

23. Article III, Section 1 (7) of the 1935 Philippine Constitution states that “[n]o law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof, and the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.” 1935 PHIL. CONST. art. III, § 1 (7) (superseded 1973).

24. BERNAS, *supra* note 16, at 327-28. According to Philippine Constitutional Law expert Fr. Joaquin G. Bernas, the subject of discussions revolved around

that the Philippines adopted early American FEC jurisprudence.²⁵ The 1973 Constitution reproduced the said provision. It likewise added another provision on religion which states that “[t]he separation of [c]hurch and [s]tate shall be inviolable.”²⁶ The final reiteration is found in the present 1987 Constitution that retains the text of the 1935 and 1973 Constitutions and the principle of inviolability of the separation between church and state.²⁷

The Philippine Supreme Court has, in numerous instances, looked to its American counterpart for guidance, especially in cases involving the religion clauses. This is because of the textual similarity, the values that the U.S. and the Philippines’ Constitutions both espouse, and the latter’s historical link to the former.²⁸ While American jurisprudence is not controlling under Philippine law, courts still afford great weight to American jurisprudence and doctrine.²⁹ In fact, most Philippine law schools include landmark American cases on the First Amendment in their respective curricula for law students to study.³⁰

As such, one would expect that the religion clauses would be interpreted similarly or at least in the same vein. This, however, has not been the case. As will be explained in Chapter IV of this Article, the Philippine Supreme Court purposefully chose a different interpretation that would “[recognize] the religious nature of the Filipino people and the elevating influence of religion in society[.]”³¹ In doing so, the Philippine Supreme Court embraced

concessions granted to religious sects and denominations and tax exemptions for properties devoted to exclusive religious use. *Id.*

25. *Id.* at 328. Fr. Bernas further notes that “the 1935 Constitution effectively transplanted the American provision and earlier Philippine organic law and jurisprudence [—] except to the extent that they are modified, if indeed they are modified, by the [religious concessions].” *Id.*

26. 1973 PHIL. CONST. art. XV, § 15 (superseded 1987).

27. BERNAS, *supra* note 16, at 328.

28. *See generally* Tolentino v. Secretary of Finance, 235 SCRA 630 (1994).

29. Philippine Health Care Providers, Inc. v. Commissioner of Internal Revenue, 600 SCRA 413, 427 (2009).

30. The Philippine Bar Examinations on Political Law includes tests on religious freedom. Supreme Court of the Philippines, 2017 Bar Examinations Political and International Law (A Syllabus of the Political Law Examinations), *available at* <http://sc.judiciary.gov.ph/baradmission/2017/Political%20Law.pdf> (last accessed Oct. 31, 2017). These tests have their origin from American case law. *See, e.g.,* *Escritor*, 408 SCRA at 63-171.

31. *Escritor*, 408 SCRA at 152.

a regime previously adopted and then rejected — for good reason — by its American counterpart.

III. THERE AND BACK AGAIN: THE FIRST AMENDMENT AND MANDATORY EXEMPTIONS

The American experience has been fickle, to say the least, in terms of mandatory exemptions under the FEC. For a substantial portion of its history, the U.S. followed a relatively consistent interpretation of the FEC.³² At its simplest, the SCOTUS ruled that the FEC does not espouse a constitutional right to exemption based on religious objections to general rules of conduct imposed by the State.³³ There was, however, a blip in this interpretation that led to a period of mandatory exemptions from 1963 to 1990.³⁴ This period of mandatory exemptions ended with the landmark case of *Employment Div. v. Smith*³⁵ in 1990. Why *Smith* brought an end to this seemingly high-water mark for religious liberty reveals the problems inherent in mandatory religious exemptions. These problems and a brief history of the American exemption model are discussed below.

A. Era of Secular Analogues

The baseline for American religious exemption jurisprudence was that no exemptions should and could be granted from general laws. The earliest case involving religious exemption was *Reynolds v. United States*.³⁶ This 1878 case involved a member of the Church of Jesus Christ of Latter-day Saints who was charged with bigamy under a federal law.³⁷ The defendant argued it was his religious duty to practice polygamy.³⁸ Rejecting the defendant's defense, Chief Justice Morrison R. Waite, speaking for the SCOTUS, stated that allowing religious conduct as a defense "would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself [or herself]. Government could exist only in name under such circumstances."³⁹

32. LUPU & TUTTLE, *supra* note 6, at 198.

33. *Id.*

34. *Id.*

35. *Employment Div. v. Smith*, 494 U.S. 872 (1990).

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

37. *Id.* at 150.

38. *Id.* at 161.

39. *Id.* at 167.

In the years leading to 1963, the Court decided on cases that seemed to usher in a model of mandatory exemptions. However, a closer analysis of these cases reveal that these actually turned on more “general claims of personal liberty”⁴⁰ rather than on strict claims of religious exemptions.⁴¹ Religious liberty claims were subsumed within broader and more robust protection afforded to other liberties and rights such as free speech, equality, and parental rights — “secular analogues,” according to Professors Lupu and Tuttle.⁴²

Take for example *Pierce v. Society of Sisters*,⁴³ a 1925 case that is familiar to both American and Filipino lawyers and law students. Along with other private schools, a religious order that ran a parochial school questioned a law that required minors to attend public school.⁴⁴ The Court struck down the law not on a theory of religious liberty but on the basis of an unjust intrusion on the liberty of parents in general.⁴⁵ The case has been (correctly) viewed as a protection of parental rights rather than a decision based on mandatory religious exemption.⁴⁶ This conclusion is bolstered by the fact that not a single mention of the FEC can be found in the decision.

B. The Short-Lived Era of Religious Exemption

The SCOTUS veered away from its no-exemption approach in 1963 when it crafted a mandatory exemption model in *Sherbert v. Verner*.⁴⁷ This model lasted for nearly three decades. However, as seen in a number of cases that followed where a plaintiff actually won a mandatory exemption case, the mandatory exemption scheme’s bark was more dangerous than its bite.⁴⁸

Sherbert involved a claim for unemployment compensation brought by Adele Sherbert against South Carolina.⁴⁹ As a Seventh-Day Adventist and Saturday Sabbatarian, Sherbert claimed that her religion forbade her from

40. LUPU & TUTTLE, *supra* note 6, at 183.

41. *Id.*

42. *Id.* at 187.

43. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

44. *Id.* at 531.

45. *Id.* at 534.

46. LUPU & TUTTLE, *supra* note 6, at 184.

47. *Sherbert v. Verner*, 374 U.S. 398 (1963).

48. LUPU & TUTTLE, *supra* note 6, at 194.

49. *Sherbert*, 374 U.S. at 399-400.

working on Saturdays.⁵⁰ As a result, she lost her job and thereafter claimed unemployment benefits.⁵¹ The State refused to grant her any benefits, claiming that her unavailability for work was “without any good cause.”⁵² The SCOTUS ruled for Sherbert, stating that the denial of unemployment benefits represented a substantial burden on her practice of religion.⁵³ Only a compelling state interest may justify any substantial intrusion to the constitutionally-protected right.⁵⁴

Sherbert was decided in direct contrast to *Reynolds*. Both involved general laws and a religion-based claim, yet Sherbert was granted benefits while poor George Reynolds languished in jail.⁵⁵ While *Sherbert* cannot be seen as a strict case for exemption, as it focused on a claim for benefits under a porous definition of what “good cause” is rather than an exemption from a law,⁵⁶ it did provide a novel principle into FEC jurisprudence — that a general law may violate the FEC if it imposed substantial burdens on religious objectors.⁵⁷

This new principle would be thrust into the constitutional foundation in 1972 with *Wisconsin v. Yoder*.⁵⁸ *Yoder* pit a law that required compulsory education for children until they were 16 years of age against the Old Order Amish religious tradition of removing children from school when they reached 14 years of age.⁵⁹ The SCOTUS granted the Amish an exemption from the law, stating that the government’s compelling interest in compulsory school attendance until children were 16 was “less substantial,” considering the law would harm the Amish way of life and that the Amish were upstanding citizens anyway.⁶⁰ While this line of reasoning has received its fair share of criticism,⁶¹ *Yoder* represents the high-water mark for

50. *Id.* at 399.

51. *Id.* at 400.

52. *Id.* at 401.

53. *Id.* at 403.

54. *Id.*

55. Compare *Sherbert*, 374 U.S. at 410 with *Reynolds*, 98 U.S. at 168.

56. LUPU & TUTTLE, *supra* note 6, at 192.

57. *Id.*

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

59. *Id.* at 207.

60. *Id.* at 228.

61. LUPU & TUTTLE, *supra* note 6, at 194.

constitutional religious exemption doctrine.⁶² It essentially declared that religious objectors, who suffered substantial burdens based on government-imposed rules, even if these were general in nature, were entitled to exemptions, unless the government could prove a compelling state interest.⁶³

Yoder has been considered as the only true mandatory exemption case for two reasons.⁶⁴ First, unemployment benefit cases decided in the same vein as *Sherbert* were not strictly exemption cases, but were claims for benefits.⁶⁵ Professor Lupu rightfully considers these as “false exemption” cases.⁶⁶ Second, it was, in fact, the *only* case that the SCOTUS decided in favor of exemption, as seen in the slew of cases that followed.⁶⁷ When an Air Force regulation prevented a commissioned officer who was a Jewish rabbi to wear his yarmulke, the SCOTUS ruled against the rabbi; pertinently, there was no mention of *Yoder* in the majority decision.⁶⁸ The SCOTUS ruled in the same manner in a prison setting, stating that a prison rule preventing Muslims from attending a congregational service was “reasonably related to legitimate penological interests”⁶⁹ — an interest that is relatively easier to prove than the “compelling state interest” *Sherbert* and *Yoder* imposed on the government. The SCOTUS also noted that the mandatory exemption model did not apply to internal government actions, such as administering Social Security⁷⁰ and creating roads in government land,⁷¹ even if these actions pierced into the very core of Native American beliefs.⁷² When *Sherbert* and *Yoder* did seem to apply, the Court still ruled against a

62. *Id.* at 192–93.

63. *Id.*

64. Lupu, *supra* note 9, at 50.

65. *Id.* at 51.

66. *Id.*

67. *Id.*

68. *Goldman v. Weinberger*, 475 U.S. 503, 504–10 (1986).

69. *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (citing *Jones v. North Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 128, 130 (1977)).

70. *Bowen v. Roy*, 476 U.S. 693, 708 (1986).

71. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 442 (1988).

72. MICHAEL MCCONNELL, ET AL., *RELIGION AND THE CONSTITUTION* 222–23 (3d ed. 2011).

mandatory religious exemption, correctly finding a compelling interest in eliminating racial discrimination.⁷³

The logical aftermath of *Sherbert* and *Yoder* should have been *more* Supreme Court-mandated exemptions.⁷⁴ On paper, the exemption model promised greater religious freedom and liberty.⁷⁵ As can be seen from the cases that followed *Sherbert* and *Yoder*, this was not the case; it did not “unleash a wave of judicially mandated religious exemptions.”⁷⁶ The Court seemed to distance itself from this model — rather than apply it — as if there was something troubling with the mandatory exemption model.⁷⁷ Bubbles of dissent against the exemption model appeared to be lurking underneath these cases. Finally, in 1990, the bubbles made their way to the surface, bursting onto the scene and signaling the demise of the exemption model.

C. *The Fall of Exemptions*

Smith heralded the demise of the short-lived exemption model,⁷⁸ with the late Justice Antonin G. Scalia at the helm, with trumpet in hand. *Smith*, like *Sherbert*, involved a claim for unemployment benefits.⁷⁹ The plaintiffs therein, however, were removed from employment because they used peyote, a substance banned under state law.⁸⁰ They argued that the use was constitutionally protected as they ingested the banned drug during a Native American religious ritual.⁸¹ Ruling against exemption, the SCOTUS held that the FEC “does not relieve an individual of the obligation to comply with a ‘[valid and neutral law of general applicability] that incidentally proscribes (or prescribes) the performance of an act that his [or her] religious belief prescribes (or proscribes).’”⁸² As long as the regulation is neutral and generally applicable, no exemption is forthcoming, even if the act is required

73. See, e.g. *Bob Jones University v. United States*, 461 U.S. 574, 578 (1983).

74. *Lupu*, *supra* note 9, at 71.

75. *Id.*

76. *LUPU & TUTTLE*, *supra* note 6, at 195.

77. *Lupu*, *supra* note 9, at 51.

78. *LUPU & TUTTLE*, *supra* note 6, at 195.

79. *Smith*, 494 U.S. at 874.

80. *Id.* at 874.

81. *Id.*

82. *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 (1982) (J. Stevens, concurring opinion) & *Minersville School District v. Board of Education*, 310 U.S. 586, 594-95 (1940)).

or forbidden by the individual's religion and even if the burden is substantial.⁸³

Smith answered the question on whether the American Constitution mandated exemptions with a resounding “no.”⁸⁴ It signaled a departure from *Sherbert* and *Yoder*, and a return to *Reynolds*.⁸⁵ *Smith* has understandably been the subject of immense criticism.⁸⁶ With its across-the-board declaration, *Smith* pulled the rug out from under the feet of religious objectors, not to mention the lawyers who practiced under the temporary regime of mandatory exemptions.⁸⁷

As a response to *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993 with the explicit purpose of “restoring the compelling interest test as set forth in [*Sherbert*] and [*Yoder*].”⁸⁸ Congress and the broad coalition of religious organization that lobbied for the RFRA believed that the *Smith* standard would harm religious minorities and ultimately infringe on religious exercise.⁸⁹ For religious liberty advocates, the answer was the restoration of the pre-*Smith* standards.⁹⁰ However, as discussed below, the restoration of the compelling state interest test through RFRA likewise restored the issues that the SCOTUS faced and resolved in *Smith*.⁹¹

83. *Smith*, 494 U.S. at 879 (citing *Reynolds*, 98 U.S. at 167; *Lee*, 455 U.S. at 263; & *Minersville School District*, 310 U.S. at 595).

84. LUPU & TUTTLE, *supra* note 6, at 195.

85. *Id.*

86. *Id.* at 196.

87. *Id.* at 198.

88. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (b) (1) (1993).

89. See Baptist Joint Committee for Religious Liberty, The Religious Freedom Restoration Act: 20 Years of Protecting Our First Freedom, *available at* <http://bjconline.org/rfra-symposium> (last accessed Oct. 31, 2017).

90. *Id.*

91. Lupu, *supra* note 9, at 72 (citing *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 435-36 (2006)). On a related note, as it currently stands, the United States has two models for resolving religious exemption claims: first, the *Smith* test, which applies to state law in the absence of stricter tests imposed either by state constitutions or state-legislated Religious Freedom Restoration Act (RFRA), and second, the compelling governmental interest under RFRA, which applies to federal law that affects religious conduct. See Lupu, *supra* note 9, at 72.

D. The Problem with Exemptions

Despite the criticism surrounding *Smith*, it has also had its fair share of supporters, and for good reason. The support for *Smith* rallies around certain problems with the exemption model — the same problems that led the SCOTUS to dispose of the model altogether. Knowing these problems is essential, especially because these are the same problems that simmer underneath the Philippine mandatory exemption model.

I. Institutional Incompetency

The mandatory exemption model of *Sherbert* and *Yoder* asks judges to “determine the weight — the religious substantiality — of the practice at issue[.]”⁹² This fundamental element of the exemption analysis poses the biggest problem. It drags courts to uncharted and prohibited waters. It is uncharted because there are no acceptable standards for a court to hinge a decision.⁹³ A judge cannot possibly see through an objector’s soul and see *how* heavy the latter is burdened by a government act. In the same vein, courts are constitutionally prohibited from questioning the truth of beliefs;⁹⁴ courts must likewise accept idiosyncratic views, regardless of its departure from a majoritarian interpretation of a religious hierarchy or sect.⁹⁵ Without any acceptable baseline to judge against, it is impossible to establish when a burden is substantial or not.⁹⁶ *Smith* understood that the mandatory exemption model was unworkable.⁹⁷ Courts have no power to determine the substantiality of an alleged burden.⁹⁸ Simply put, they are incompetent to do so.⁹⁹

According to scholar Martin S. Lederman, this problem has led to judicial deference to claimants’ assertions of burdens on religious exercises, a

92. LUPU & TUTTLE, *supra* note 6, at 199.

93. *Id.* at 200.

94. *United States v. Ballard*, 322 U.S. 78, 86 (1944).

95. *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 713 (1981).

96. LUPU & TUTTLE, *supra* note 6, at 200.

97. *See Smith*, 494 U.S. at 887. “[C]ourts must not presume to determine the place of a particular belief in religion or the plausibility of a religious claim.” *Smith*, 494 U.S. at 887.

98. LUPU & TUTTLE, *supra* note 6, at 197.

99. *Id.*

trend seen in recent RFRA cases.¹⁰⁰ Justices, well aware of the problem of evaluating religious beliefs, have shown reluctance in questioning claims.¹⁰¹ The practical result is two-fold. First, this judicial reluctance and deference have lowered the bar claimants have to hurdle.¹⁰² Second, claims have to be decided on the “back end” of RFRA, with the government having the burden to show compelling state interest and the least restrictive means to achieve it,¹⁰³ an inquiry that leads to the third problem of inconsistency.

2. Exclusion of Minorities in Judicial Definitions of Religion

Courts must, before even getting stuck in the quagmire of substantiality, consider whether the allegedly burdened belief is, in fact, religious.¹⁰⁴ Religion has been a tricky word and concept for courts to define.¹⁰⁵ This reluctance to provide a judicial definition for religion seems unfounded (especially for law students looking for something concrete to work with), but in truth, it stems from a well-founded reluctance to *not* offend constitutional values.¹⁰⁶

Determining “religion” for exemption purposes “places an official imprimatur on certain types of belief systems to the exclusion of others.”¹⁰⁷ Minority belief systems run the risk of having their followers’ exemption claims dismissed on definitional grounds.¹⁰⁸ Courts will most likely define religion using a majority-provided template,¹⁰⁹ not for any sinister motive to exclude, but for the human tendency to recognize the familiar. What are the chances that a court actually considers *La Iglesia Maradoniana*¹¹⁰ or

100. Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 YALE L.J.F. 416, 426 (2016).

101. *Id.*

102. *Id.*

103. *Id.* at 427.

104. Marshall, *supra* note 7, at 310.

105. MCCONNELL, ET AL., *supra* note 72, at 761.

106. *See* Marshall, *supra* note 7, at 310.

107. Marshall, *supra* note 7, at 310.

108. *Id.* at 311.

109. *Id.*

110. Jonathan Franklin, ‘He was sent from above’, GUARDIAN, Nov. 11, 2008, available at <http://www.theguardian.com/football/2008/nov/12/diego-maradona-argentina> (last accessed Oct. 31, 2017). *La Iglesia Maradoniana* is a congregation that worships the Argentine football player Diego Maradona as a god. *Id.*

Pastafarianism¹¹¹ a religion? Even if it does, it brings back the problem of substantial burdens which, precedent shows, courts have refused to recognize in minority religions,¹¹² *even* with prior precedent mandating recognition of idiosyncratic views.¹¹³ The question itself is problematic; constitutional values of religious freedom demand that courts not even ask it in the first place.

3. Inconsistent Decisions Due to Individualized Examination of Claims

Aside from determining the weight of the burden, courts must balance the State interest against the interest of those seeking exemptions.¹¹⁴ This results in either *ad hoc* decisions, which will not provide guidance for future controversies at all, or a patchwork regime where a particular law binds one religion but exempts another.¹¹⁵ Courts have to consider objections from *each* challenger and determine whether the State has a compelling interest as against *each* challenger.¹¹⁶ In effect, the exemption model exposes state acts to unlimited exemption claims based on the identity and beliefs of each objector.¹¹⁷

Imagine a law that is passed and is objected to by three different religions, denominations, or sects. A Catholic objector seeks exemption based on a preaching of St. Paul; a Jewish challenger objects based on the Torah; and a Muslim plaintiff relies on a verse in the Quran. Under the mandatory exemption model, the court must assess each claim, determine whether each belief is substantially burdened, and then balance the government's interest against each. This leads to unpredictable and potentially inconsistent decisions.¹¹⁸

111. Church of the Flying Spaghetti Monster, New Posts, *available at* <http://www.venganza.org> (last accessed Oct. 31, 2017). Pastafarianism is the belief that a Flying Spaghetti Monster created the world. Church of the Flying Spaghetti Monster, About, *available at* <http://www.venganza.org> (last accessed Oct. 31, 2017).

112. *See Lyng* 485 U.S. at 448.

113. *See, e.g., Thomas*, 450 U.S. at 713 (1981).

114. Marshall, *supra* note 7, at 311.

115. *Id.* at 311-12.

116. *Id.*

117. *Id.*

118. *Id.* at 313.

4. Broad Range of Laws Susceptible to Claims

Religion-based exemption claims place a wider coverage of laws susceptible to exemption claims, compared to claims based on other constitutional rights.¹¹⁹ Unlike free speech and press claims that revolve around laws that regulate communications,¹²⁰ claims for religious exemptions can be brought against a broad range of laws (and their corresponding government interests) based on an even broader gamut of religious beliefs and practices.¹²¹ These beliefs and practices extend from millennia-old religious traditions to the more novel and idiosyncratic religions, even those based on blockbuster sci-fi movies.¹²² The glaring, practical, and plausible result is that no law is safe from religious dissenters.

According to Professor Lupu, this has actually led to a judicial pullback from granting religious exemptions.¹²³ Given that exemption cases are usually decided as-applied to particular religious objectors, one would expect religious exemptions to flourish.¹²⁴ Indeed, the government would find itself hard-pressed to prove an interest compelling enough to justify requiring an objector to comply with a regulation,¹²⁵ especially if the objector is simply one person and his or her desired exemption poses no harm to third parties or to government interests.¹²⁶ However, as the cases sandwiched between *Sherbert* and *Smith* show, this has simply not been the case.

This judicial proclivity against exemptions remains under the current federal exemption regime under RFRA.¹²⁷ *Gonzales v. O Centro Espírita Beneficente União do Vegetal*,¹²⁸ a RFRA decision that ruled for religious

119. Lupu, *supra* note 9, at 72.

120. *Id.* (citing *United States v. O'Brien*, 391 U.S. 367, 376–86 (1968)).

121. Lupu, *supra* note 9, at 73.

122. *See* Temple of the Jedi Order, Doctrine of the Order, *available at* <https://www.templeofthejediorder.org/doctrine-of-the-order> (last accessed Oct. 31, 2017). Jediism is the belief that The Force — the idea of which originated from the space opera “Star Wars” — is the fundamental nature of the Universe. *Id.*

123. Lupu, *supra* note 9, at 72.

124. *Id.* at 71.

125. *Id.*

126. Lederman, *supra* note 100, at 427–28.

127. Lupu, *supra* note 9, at 71–72.

128. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

exemption for the importation of tea that contained a banned substance,¹²⁹ promised a stronger exemption regime,¹³⁰ but subsequent decisions in lower courts showed an inclination against exemptions — despite the statutory mandate allowing it.¹³¹

As seen in the next Chapter, these problems likewise plague the Philippine exemption model. Unlike the American model that found “correction” in *Smith*,¹³² the Philippine model is tied down, with little room for alteration.

IV. PHILIPPINE APPROACH

The Philippine experience of religious exemption has likewise evolved. In this manner, the Philippine experience mimics the American experience and follows the latter in an almost parallel manner — exemptions first decided under secular analogues, followed by the rise of an exemption-friendly approach that promised to provide a strong shield for religious objectors against state acts. The obvious difference is that *Smith* dispensed with the regime of religious exemptions while, as seen below, the Supreme Court of the Philippines chose a mandatory exemption regime in *Escritor*.

A. The Philippine Era of Secular Analogues

For the majority of its FEC history, the Philippine Supreme Court decided claims for religious exemption under tests used to determine the validity of restrictions on free speech, which focused on balancing danger and security with an individual’s free speech right. One of the earliest free exercise cases was *American Bible Society v. City of Manila*.¹³³ The American Bible Society challenged a Manila ordinance requiring them to pay license fees as a condition to distribute and sell bibles around the city.¹³⁴ Ruling for the American Bible Society, the Philippine Supreme Court noted that freedom of religion included the right to disseminate religious information; thus, “any restraints of such right can only be justified like other restraints of freedom of

129. *Id.* at 418.

130. *Id.* at 418-19.

131. Lupu, *supra* note 9, at 64.

132. As mentioned earlier, however, this problem was restored in the RFRA.

133. *American Bible Society v. City of Manila*, 101 Phil. 386 (1957).

134. *Id.* at 388-89.

expression on the grounds that there is a clear and present danger of any substantive evil which the State has the right to prevent.”¹³⁵

A similar test, leading to a similar result, was used as late as 1993 in *Ebralinag v. The Division Superintendent of Schools of Cebu*.¹³⁶ Children who were members of the Jehovah’s Witnesses were expelled for refusing to participate in the law-mandated flag ceremony, which included singing the Philippine National Anthem and reciting the patriotic pledge.¹³⁷ The students claimed the requirement and their subsequent expulsion violated their religious freedom.¹³⁸ The government argued against the exemption, even claiming that the “bizarre religious practices of the Jehovah’s Witnesses produce rebellious and anti-social school children and consequently disloyal and mutant Filipino citizens.”¹³⁹

Even with the dubious government argument that would have children turned into comic book characters, the case still seemed like an uphill battle for the objectors because the Philippine Supreme Court ruled *against* an exemption in a 1959 case with the exact same facts.¹⁴⁰ However, the Court ruled *for* the Jehovah’s Witnesses, mutation concerns notwithstanding.¹⁴¹ The Court found that the children’s external acts of standing silent during the ceremony did not justify their expulsion.¹⁴² The only allowable state justification in restricting their religious freedom would be the “existence of a grave and present danger of a character both grave and imminent, of a serious evil to public safety, public morals, public health[,] or any other legitimate public interest, that the State has a right (and duty) to prevent.”¹⁴³

135. *Id.* at 398 (citing 1 LORENZO M. TAÑADA & ENRIQUE M. FERNANDO, CONSTITUTION OF THE PHILIPPINES 297 (4th ed.)).

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

137. *Id.* at 260.

138. *Id.* at 264-65.

139. *Id.* at 269.

140. *See* *Gerona, et al. v. Secretary of Education, et al.*, 106 Phil. 2, 4-7 & 24-25 (1959). In this case, the Philippine Supreme Court found that there was “absolutely nothing[] objectionable, even from the point of view of religious belief” to make a child “say that he or she loves the Philippines[.]” *Gerona, et al.*, 106 Phil. at 12.

141. *Ebralinag*, 219 SCRA at 273-74.

142. *Id.*

143. *Id.* at 271 (citing *German v. Barangan*, 135 SCRA 514, 534 (1985) (Justice Teehankee, dissenting opinion)).

The exemption, however, did have a limit; if the children committed breaches of peace, the school had the authority to discipline¹⁴⁴ — a warning that had its roots in student free speech cases.¹⁴⁵

While these cases undoubtedly have religious underpinnings, the claims were resolved under free speech tests and analysis, which the Author reads to be similar to American cases pre-*Sherbert* where secular analogues were used to dispense with exemption cases. It was only in 2003 when claims for religious exemption were considered on its own and the Philippine Supreme Court crafted the current test for mandatory exemption.

B. The Era of Benevolent Neutrality: Estrada v. Escritor

Escritor is to the Philippine experience what *Sherbert* and *Yoder* were to the American exemption regime. It ushered in the era of benevolent neutrality to the Philippines with a test that closely mirrors that in *Sherbert* and *Yoder*. The case revolved around Soledad S. Escritor, a court interpreter administratively charged of and suspended for gross and immoral conduct.¹⁴⁶ The charge averred that Escritor was living with a man who was not her husband, and therefore was “committing an immoral act that [tarnished] the image of the court.”¹⁴⁷

Escritor admitted that she started living with the man while her husband was still alive but living with another woman.¹⁴⁸ In her defense, she claimed that her living arrangement was in conformity with the tenets of her congregation, the Jehovah’s Witnesses and the Watch Tower and Bible Tract Society.¹⁴⁹ As proof, she offered a document entitled Declaration of Pledging Faithfulness (Declaration).¹⁵⁰ Under the beliefs of the Jehovah’s

144. *Ebralinag*, 219 SCRA at 273.

145. Ignatius Michael D. Ingles, *Are You Sure You Want to Post That? Examining Student Social Media Use and Constitutional Rights*, 60 ATENELO L.J. 486, 503–04 (2015).

146. *Escritor*, 408 SCRA at 50–51. Immorality was a ground for discipline under the Revised Administrative Code of the Philippines. Instituting the “Administrative Code of 1987” [ADMIN. CODE], Executive Order No. 292, § 46 (b) (5) (1987).

147. *Escritor*, 408 SCRA at 50.

148. *Id.* at 51–52.

149. *Id.* at 55–57.

150. *Id.* at 51–52. The Declaration of Pledging Faithfulness (Declaration), executed 10 years into their relationship, went as follows —

I, Soledad S. Escritor, do hereby declare that I have accepted Luciano D. Quilapio, Jr., as my mate in marital relationship; that I have done

Witnesses, the Declaration permitted marital relations between congregation members who were abandoned by their respective spouses.¹⁵¹ As both Escritor and her partner were abandoned by their spouses, the Declaration under the Jehovah's Witnesses' religious doctrines was not violated.¹⁵² Under their faith, their living arrangement was free from any form of immorality.¹⁵³

The Philippine Supreme Court framed the issue as a claim for religious exemption from a generally applicable law.¹⁵⁴ After a lengthy discussion and comparison of Philippine and American jurisprudence on the religion

all within my ability to obtain legal recognition of this relationship by the proper public authorities and that it is because of having been unable to do so that I therefore make this public declaration pledging faithfulness in this marital relationship.

I recognize this relationship as a binding tie before 'Jehovah' God and before all persons to be held to and honored in full accord with the principles of God's Word. I will continue to seek the means to obtain legal recognition of this relationship by the civil authorities and if at any future time a change in circumstances make this possible, I promise to legalize this union.

Id. Luciano D. Quilapio, Jr., Soledad's live-in partner, "executed a similar pledge on the same day." *Id.* at 52. The Court explained that "[t]he Jehovah's congregation requires that at the time the declarations are executed, the couple cannot secure the civil authorities' approval of the marital relationship because of legal impediments." *Escritor*, 408 SCRA at 58.

Once the legal impediments are lifted, the Declaration ceases to be valid, and the couple must legalize their union according to the Family Code of the Philippines. Moreover, the Declaration likewise requires the approval of the congregation's elders. *Id.* at 56.

The record showed that the Declaration of Escritor and her partner all conformed to the doctrines of the congregation. *Id.* at 59.

151. *Id.* at 51. At the time the Declaration was executed, Escritor's husband was living with another woman, while her partner's wife had been living with another man. *Id.* at 51-52.

When the case was filed, Escritor's husband had already died, but the Declaration remained valid as her partner's wife was still alive and well, causing a legal impediment for him to remarry. *Id.* at 51.

152. *Escritor*, 408 SCRA at 58.

153. *Id.*

154. *Id.* at 62. The decision states, "To resolve this issue, it is necessary to determine the sub-issue of whether or not respondent's right to religious freedom should carve out an exception from the prevailing jurisprudence on illicit relations for which government employees are held administratively liable." *Id.*

clauses,¹⁵⁵ the Philippine Supreme Court remanded the case for rehearing, ordering the application of a step-by-step framework that forms the current Philippine test for exemption claims.¹⁵⁶

The three questions of the framework are as follows:

- (1) “[H]as the statute or government action created a burden on the free exercise of religion?”¹⁵⁷
- (2) “[I]s there a sufficiently compelling state interest to justify this infringement of religious liberty?”¹⁵⁸
- (3) “[H]as the [S]tate ... used the least intrusive means possible so that free exercise is not infringed any more than necessary[?]”¹⁵⁹

The Philippine Supreme Court’s choice of this three-step framework was deliberate. It acknowledged that American jurisprudence on the exemptions were “volatile and fraught with inconsistencies[.]”¹⁶⁰ with contending standards or streams of jurisprudence — separationist and accommodationist — as the cause of these inconsistencies.¹⁶¹ On this aspect, the Court ruled that the “well-spring of Philippine jurisprudence ... is[,] for the most part, benevolent neutrality which gives room for accommodation.”¹⁶²

155. *Id.* at 63-171. *Escritor* provides a comprehensive discussion of both the American and Philippine experience with the First Amendment and its Philippine counterpart. It is a worthy effort that offers readers a detailed map of Philippine jurisprudence on the religion clauses.

156. *Id.* at 191.

157. *Escritor*, 408 SCRA at 188.

158. *Id.* at 189.

159. *Id.* at 128 (citing LYNN ROBERT BUZZARD & SAMUEL ERICSSON, *THE BATTLE FOR RELIGIOUS LIBERTY* 61 (1982)).

160. *Escritor*, 408 SCRA at 83.

161. *Id.*

162. *Id.* at 133. On the implications of benevolent neutrality, Chief Justice Reynato S. Puno, writing for the majority, offered an elegant and powerful example of judicial prose and stated that

benevolent neutrality does not mean that the Court ought to grant exemptions every time a free exercise claim comes before it. But it does mean that the Court will not look with hostility or act indifferently towards religious beliefs and practices and that it will strive to accommodate them when it can within flexible constitutional limits; it does mean that the Court will not simply dismiss a claim

Escritor was the fork in the road where Philippine jurisprudence severed any notion of separationist inclinations in favor for the path of benevolent neutrality. It is the express and explicit acknowledgment that the Philippine Constitution mandated religious exemptions. By adopting the approach of benevolent neutrality, the Philippine Supreme Court therefore mandated lower courts to look beyond the secular purposes of state acts and examine the effect these government actions had religious exercise.¹⁶³ The approach was to protect “religious realities, tradition[,] and established [religious] practice”¹⁶⁴ in reading the religion clauses.¹⁶⁵ Benevolent neutrality became the constitutionally-mandated backdrop for the religion clauses to be viewed, interpreted, and applied.¹⁶⁶

To justify the ruling, the Philippine Supreme Court pointed to other provisions in the Philippine Constitution to reveal the Filipino people’s intention to adopt the benevolent neutrality approach against the

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

Id. at 167–68 (citing Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 169 (1992)).

163. See *Escritor*, 408 SCRA at 167–68 (citing McConnell, *supra* note 162, at 169).

164. *Escritor*, 408 SCRA at 113 (citing OTIS H. STEPHENS, JR. & JOHN M. SCHEB II, *AMERICAN CONSTITUTIONAL LAW* 541 (2d ed. 1999)).

165. *Id.*

166. *Escritor*, 408 SCRA at 167–68.

separationist approach.¹⁶⁷ Despite the powerful dissent arguing that *Smith* should apply in the Philippine context,¹⁶⁸ the majority did not err in this finding.

The Philippine Constitution is, in fact, peppered with provisions on religious accommodations. To start, its Preamble implores “the aid of the Almighty God.”¹⁶⁹ It also allows public money to be appropriated to religious ministers or preachers assigned to certain government-run institutions.¹⁷⁰ It exempts churches and mosques from any type of taxation.¹⁷¹ It likewise exempts “all lands, buildings, and improvements actually, directly, and exclusively used for religious”¹⁷² purposes from any

167. *Id.* The Philippine Supreme Court likewise reviewed the deliberations in the Constitutional Conventions for the 1935, 1973, and 1987 Constitutions. *Id.* at 159-61.

168. *See Escritor*, 408 SCRA at 240 (J. Carpio, dissenting opinion).

169. PHIL. CONST. pmb. The Preamble of the Philippine Constitution provides —

We, the sovereign Filipino people, imploring the aid of Almighty God, in order to build a just and humane society, and establish a Government that shall embody our ideals and aspirations, promote the common good, conserve and develop our patrimony, and secure to ourselves and our posterity, the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution.

PHIL. CONST. pmb.

170. PHIL. CONST. art. VI, § 29. Article VI, Section 29 (2) of the Philippine Constitution provides that

[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.

PHIL. CONST. art. VI, § 29 (2).

171. PHIL. CONST. art. VI, § 28 (3). The provision states that “[c]haritable institutions, churches and parsonages or convents appurtenant thereto, mosques, non-profit cemeteries, and all lands, buildings, and improvements, actually, directly, and exclusively used for religious, charitable, or educational purposes shall be exempt from taxation.” PHIL. CONST. art. VI, § 28 (3).

172. PHIL. CONST. art. VI, § 28 (3).

type of taxation.¹⁷³ It also allows religious education in public elementary and high schools under certain conditions.¹⁷⁴ Finally, the religion clause adds a strong mandate forever allowing “[t]he free exercise and enjoyment of religion profession and worship,”¹⁷⁵ that can be read to grant a positive right to Filipinos as opposed to the traditional interpretation of the Bill of Rights as limitations against the State.¹⁷⁶

The presence of these provisions — and the absence of counterpart provisions in the American Constitution — indeed reflects the unique Philippine experience with religion. It likewise reveals an express aspiration to distinguish the Philippine religious framework from the American’s.¹⁷⁷ In the words of Chief Justice Reynato S. Puno, the Philippine approach to the Jeffersonian wall was different; it was “not a wall of hostility or indifference”¹⁷⁸ but a wall that “allows [] breaches ... to uphold religious liberty[.]”¹⁷⁹ With such powerful words, it was no surprise that when the remanded case found its way back to the Court in 2006, *Escritor* was

173. PHIL. CONST. art. VI, § 28 (3).

174. PHIL. CONST. art. XVI, § 3 (3). As regards the instruction of religion to public school, the Philippine Constitution provides that

[a]t the option expressed in writing by the parents or guardians, religion shall be allowed to be taught to their children or wards in public elementary and high schools within the regular class hours by instructors designated or approved by the religious authorities of the religion to which the children or wards belong, without additional cost to the Government.

PHIL. CONST. art. XVI, § 3 (3).

175. PHIL. CONST. art. III, § 5.

176. This second sentence of Article III, Section 5 of the Philippine Constitution has not been interpreted as much by the Philippine Supreme Court. Most of the “play” in Free Exercise Clause cases have been directed towards the first sentence, which mirrors its American counterpart.

177. *Escritor*, 408 SCRA at 160. During the deliberations regarding the provision allowing religion to be taught in schools, Fr. Bernas explicitly stated that this accommodation was necessary in the Philippine Constitution to “introduce something [] which is contrary to American practices.” *Id.* at 166 (citing 4 RECORDS OF THE CONSTITUTIONAL COMMISSION 359 (1986)).

178. *Escritor*, 408 SCRA at 166 (citing ISAGANI A. CRUZ, CONSTITUTIONAL LAW 167 (1995)).

179. *Escritor*, 408 SCRA at 167.

absolved of any wrongdoing, her conjugal arrangement deemed an allowable “breach” in Jefferson’s wall.¹⁸⁰

Like *Sherbert* and *Yoder*, *Escritor* is the high-water mark for religious exemption. Under benevolent neutrality, the Philippine Supreme Court has read the Philippine Constitution to demand religious exemptions for those burdened by government acts, even when these are neutral and generally applicable to all.¹⁸¹ Once a claimant shows that his or her religious exercise has been burdened, the onus is shifted to the government to show that a compelling state interest exists and that the means employed were the least intrusive means possible.¹⁸² While the test promises stringent protection for the religious objector, the results of two cases decided in the aftermath of *Escritor* have a rather eerie similarity to the post-*Sherbert* and *Yoder* cases.

C. The Misapplication of *Escritor*: The Current Era for Philippine Exemptions

The problems that plagued the American exemption experience were immediately seen in the cases that followed *Escritor*. Festering underneath these cases were the themes of inconsistency, problematic judicial line-drawing, and misapplication of judicial power.

*Re: Request of Muslim Employees in the Different Courts in Iligan City (Re: Office Hours)*¹⁸³ was decided two years after *Escritor*. Oddly, *Escritor* and its benevolent neutrality were nowhere to be found in the decision. *Re: Office Hours* revolved, as its lengthy title suggests, around two requests by Muslims working in different courts in the southern Philippine city of Iligan.¹⁸⁴ The first request was for a change of office hours during the month of Ramadan.¹⁸⁵ The second request was to be excused from work from 10 a.m. to 2 p.m. every Friday or the Muslim Prayer Day for the rest of the year.¹⁸⁶

180. *Estrada v. Escritor*, 492 SCRA 1, 66 & 91 (2006).

181. *Id.* at 67 (citing *Escritor*, 408 SCRA at 157).

182. *Escritor*, 492 SCRA at 63 (citing Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1416-17 (1989)).

183. *Re: Request of Muslim Employees in the Different Courts in Iligan City (Re: Office Hours)*, 477 SCRA 648 (2005).

184. *Id.* at 650.

185. *Id.*

186. *Id.* at 651.

The Court granted the first request based on a presidential decree recognizing Muslim holidays.¹⁸⁷ It, however, denied the second request.¹⁸⁸ The Philippine Supreme Court noted that granting the request would diminish the prescribed government working hours.¹⁸⁹ The Philippine Supreme Court warned that religious practices should not harm the government and that granting the request would persuade and encourage other religion-based requests.¹⁹⁰ It even declared that “religious freedom does not exempt anyone with compliance with reasonable requirements of the law.”¹⁹¹ No matter how one reads (or *chooses* to read) *Re: Office Hours*, it is quite stark that this was far from the benevolent neutrality so strongly worded and advocated for in *Escritor*.¹⁹²

Benevolent neutrality was put to its biggest test in *Imbong v. Ochoa, Jr.*¹⁹³ At issue in *Imbong* was the Philippine Responsible Parenthood and Reproductive Health Act of 2012 (RH Law), a comprehensive law that sought to bring reproductive health programs and contraceptives to the public.¹⁹⁴ Knowing that such a law would be controversial to a country steeped in Catholic tradition, the Philippine Congress provided a slew of exceptions for religious objectors.¹⁹⁵ Hence, hospitals owned by religious groups, physicians, and health care providers did not have to provide family planning methods or reproductive health care services if these offended their

187. *Id.* at 657.

188. *Id.* at 658.

189. *Re: Office Hours*, 477 SCRA at 657. The Philippine Supreme Court noted that Civil Service Laws prescribed a 40-hour work week for government employees. *Id.* (citing Civil Service Commission, Omnibus Rules and Regulations Implementing Book V of The Administrative Code of 1987, Executive No. 292, rule XVII, § 5 (2000)). Granting the exemption would result in the Muslim employees working 12 hours less each month.

190. *Re: Office Hours*, 477 SCRA at 657.

191. *Id.*

192. In fact, the decision and the reasoning behind it sounded a lot like the separationist approach seen in *Reynolds* and *Smith*.

193. *Imbong v. Ochoa, Jr.*, 721 SCRA 146 (2014).

194. *Id.* at 261-62.

195. Ignatius Michael D. Ingles, *Legislating Condoms and Other Contraceptives: A Philippine Constitutional Law Perspective*, available at <http://www.iconnectblog.com/2014/10/legislating-condoms-and-other-contraceptives-a-philippine-constitutional-law-perspective> (last accessed Oct. 31, 2017).

religious beliefs.¹⁹⁶ However, these groups could only opt out if they referred their patients to other health facilities; if they refused to refer, they would be subject to fines or imprisonment.¹⁹⁷

This “duty to refer” became the subject of controversy, with various groups claiming that the mere act of referral made them complicit in the very thing they objected to.¹⁹⁸ In its defense, the government argued that said duty was an adequate compromise between the religious freedom of objectors and the right to health of would-be patients.¹⁹⁹ The Court ruled for the conscientious objectors, not only granting them an exemption, but invalidating the “duty to refer” altogether.²⁰⁰ In reaching its conclusion, the Court used the benevolent neutrality framework of *Escritor*.²⁰¹

First, it found that the “duty to refer” burdened the religious beliefs of the objectors.²⁰² The Court agreed with the complicity argument and characterized the opt-out clause as a “false compromise.”²⁰³ The objectors could not be forced to do “indirectly what they cannot do directly.”²⁰⁴ This indirect participation would make them guilty by abetting the offensive act²⁰⁵ — a rather questionable use of language from the Philippine’s Revised Penal Code.²⁰⁶

Second, the Court did not find any state interest compelling enough to justify the intrusion on the free exercise rights of the objectors.²⁰⁷ Only “an immediate and grave danger to the security and welfare of the

196. *Imbong*, 721 SCRA at 337.

197. *Id.* at 338.

198. *Id.* at 320-22.

199. *Id.* at 322-24.

200. *Id.* at 336-37.

201. *Id.* at 335.

202. *Imbong*, 721 SCRA at 335.

203. *Id.* 721 SCRA at 335.

204. *Id.* at 336.

205. *Id.*

206. “One may not be the principal, but he [or she] is equally guilty if he [or she] abets the offensive act by indirect participation.” See *Imbong*, 721 SCRA at 336 (citing *Doogan v. NHS Greater Glasgow and Clyde Health Board*, 20130 CSIH 36 (2014) (U.K.)).

207. *Id.* at 340.

community”²⁰⁸ would have risen to the level acceptable to the Court.²⁰⁹ Such danger was in-existent to mothers or couples visiting doctors and asking for reproductive health advice.²¹⁰ This in-existent danger was outweighed by the burden placed on the objector.²¹¹

To its credit, the Court did recognize a compelling state interest in protecting mothers in emergency situations.²¹² In life-threatening situations, the medical practitioner must provide reproductive health procedures to save the life of a mother, despite any burden on his or her religion.²¹³

Third, the Court said that even assuming there was a compelling state interest, the government failed to show that the RH Law was the least intrusive means to achieve its objective.²¹⁴ In fact, the Court seemed to impose a higher standard on the government, saying that it should have

208. *Id.* at 341.

209. *Id.*

210. *Id.* at 342.

211. *Id.* at 342. While the government initially argued against the application of the compelling state interest test, it later said that there was a compelling state interest in protecting the lives of pregnant mothers. *Imbong*, 721 SCRA at 341-42 & 345-46.

The government stated that there was a compelling interest in reducing maternal deaths, which is at “[15] maternal deaths per day” according to the Assistant Solicitor General, and unwanted pregnancies. *Id.* at 344-45.

The Court considered this as a mere afterthought unsubstantiated by the records. It also pointed to a World Health Organization study that showed a 48% drop in Filipino mortality rate from 1990 to 2008. *Id.* at 345 (citing Steven Ertelt, Philippines Sees Maternal Mortality Decline Without Abortion, *available at* <http://www.lifenews.com/2011/09/01/philippines-sees-maternal-mortality-decline-without-abortion> (last accessed Oct. 31, 2017)).

For the Court, this was enough to show that there was no compelling state interest, even saying that “[d]espite such revelation, the [government] still insist[s] that such number of maternal deaths constitute a compelling state interest.” *Id.* at 345.

The Author found this line of reasoning both suspect and disturbing. The Philippine Supreme Court would protect the religious freedom of one yet not consider saving the life of 15 mothers per day a compelling State interest. This reasoning is unpacked further in the following Chapter.

212. *Id.* at 345-46.

213. *Id.* at 346.

214. *Id.* at 342.

showed that “no other means” could have been employed without violating the religious freedom of objectors.²¹⁵ In any case, the Court pointed to other existing laws that protected the right to health of women.²¹⁶

D. Unheeded Advice and Lessons from the American Regime

The Philippine test is similar to *Sherbert* and *Yoder*. To recap, benevolent neutrality requires the claimant to show that his or her religious exercise was burdened by a government act. In turn, the government must show that a compelling state interest exists and that its acts are the least intrusive means to advance that interest.

As noted above, four problems characterize and dot exemption regimes: judicial incompetency to determine burdens, dangers of excluding minorities in judicial definitions of religion, inconsistent decisions due to the individualized examination of exemption claims, and a broader range of laws susceptible to attack. The way the Philippine test is worded and applied leads to the same (if not worse) problems that plagued the now defunct American exemption model.

The problem of judicial competence shall be examined first. Courts are incompetent to determine the weight a government act has on religious exercise.²¹⁷ At the outset, the Philippine test seems to assuage this concern because its test is predicated on burden alone.²¹⁸ Courts would no longer have baseline problems or feel the need to delve into dogma and doctrine to determine how heavy an objector is burdened. This, however, leads to another problem. The bar for an objector is lower — the test suggests that *any* burden will do.

This was, in fact, how it was applied in *Imbong*. The government argued that the burden imposed by the “duty to refer” was too attenuated and did not rise to a legally cognizable burden.²¹⁹ The majority simply brushed this

215. *Imbong*, 721 SCRA at 342.

216. *Id.* at 343-44 (citing An Act to Regulate the Sale, Dispensation, and/or Distribution of Contraceptive Drugs and Devices, Republic Act No. 4729, §§ 1 & 2 (1966); An Act Establishing a National Policy on Population, Creating the Commission on Population and for Other Purposes [Population Act of the Philippines], Republic Act No. 6365, § 2 (1971); & An Act Providing for the Magna Carta of Women [The Magna Carta of Women], Republic Act No. 9710, § 17 (2009)).

217. LUPU & TUTTLE, *supra* note 6, at 197.

218. See *Escritor*, 408 SCRA at 188.

219. *Imbong*, 721 SCRA at 334-35.

aside and took the objectors' claims of burden on face value,²²⁰ similar to the way current RFRA cases are being litigated.²²¹ Whether courts are required to determine the substantiality of a burden or the existence of a burden, the result will be the same — its incompetence to do so forces it to take the objectors' word for it.²²²

Escritor also contained unfortunate language that aggravated the issue. Courts, it said, must also examine the “sincerity of [the claimant’s] religious belief and its *centrality* in [his or] her faith[.]”²²³ The problem with an inquiry on centrality is immediately apparent. Such examination likewise presupposes a religious baseline to determine the place of the belief in the depth of one’s soul. This leads to the prohibited examination of doctrines and dogma; the forbidden determination of what beliefs are right or wrong; or what is held by the majority or what is idiosyncratic.²²⁴ Religious freedom prohibits such inquiry — in the eyes of the Constitution, all religious beliefs are held equal,²²⁵ no matter how weird, eccentric, or dangerous they are in producing “mutant” youth.

220. See *Imbong*, 721 SCRA at 335–36.

As in *Escritor*, there is no doubt that an intense tug-of-war plagues a conscientious objector. One side coaxes him [or her] into obedience to the law and the abandonment of his [or her] religious beliefs, while the other entices him [or her] to a clean conscience yet under the pain of penalty. The scenario is an illustration of the predicament of medical practitioners whose religious beliefs are incongruent with what the RH Law promotes.

The Court is of the view that the obligation to refer imposed by the RH Law violates the religious belief and conviction of a conscientious objector. Once the medical practitioner, against his [or her] will, refers a patient seeking information on modern reproductive health products, services, procedures[,] and methods, his [or her] conscience is immediately burdened as he [or she] has been compelled to perform an act against his [or her] beliefs.

Id. at 335.

221. See Lederman, *supra* note 100, at 419.

222. As noted above, this is the same issue faced by the SCOTUS in its RFRA cases. *Id.* at 426.

223. *Escritor*, 408 SCRA at 190 (emphasis supplied).

224. See, e.g., *Thomas*, 450 U.S. at 713.

225. CONKLE, *supra* note 12, at 41.

The *Imbong* dissent shows another aspect of the problem of courts in looking into religious burdens. Justice Mariano C. del Castillo's dissent in *Imbong* focused on another provision of the RH Law — the duty to provide information on reproductive health that petitioners likewise objected to.²²⁶ For Justice del Castillo, petitioners were unable to show that the “mere mention of artificial contraceptives”²²⁷ was immoral under the Catholic faith.²²⁸ He could not see how providing information regarding contraceptives could burden one's beliefs.²²⁹ While his position approached the question from a different angle, it still leads to the conclusion that this judicial exercise is one of futility, unanchored in any judicial standards.

The question on burden should not even be asked. A conclusion on its weight and existence, or even inexistence, is a forbidden inquiry.²³⁰

The second problem of defining religion is also present in the Philippine mandatory exemption regime. Defining religion for purposes of determining if it is burdened poses the problem of reinforcing majoritarian beliefs and alienating beliefs the majority might find odd or strange.²³¹ The SCOTUS is aware of this problem and has refrained from providing a catch-all definition for religion — not so with the Philippines. The Philippines has defined religion in clearly theistic terms — it is a “profession of faith to an active power that binds and elevates man to his [or her] Creator[.]”²³² Whether the Philippine Supreme Court chooses to expand this definition to include nontheistic religions remains to be seen, but the chances that it will are slim. Despite the Court's assertion that it recognizes the Philippines as a heterogeneous society,²³³ the numbers show otherwise. As of 2010, Catholicism accounted for 80% of the Philippines' population, with other religious traditions trailing far behind.²³⁴ Compared to a more religiously

226. *Imbong*, 721 SCRA at 601-04 (J. del Castillo, concurring and dissenting opinion).

227. *Id.* at 601 (emphasis omitted).

228. *Id.*

229. *Id.*

230. *Ballard*, 322 U.S. at 86.

231. See *Marshall*, *supra* note 7, at 316-17 & 319.

232. *Aglipay v. Ruiz*, 64 Phil. 201, 206 (1937).

233. See *Imbong*, 721 SCRA at 324.

234. Philippine National Statistics Office, Philippine in Figures 2014 at 27, available at https://psa.gov.ph/sites/default/files/2014%20PIF_o.pdf (last accessed Oct. 31, 2017). The rest of the country's 92 million people are identified as Muslims

diverse country like the U.S.,²³⁵ the lack of diversity in the Philippines makes the problem of alienation and acceptance more acute, especially given its deeply rooted Catholic and theistic tradition.

The relatively homogenous nature of the Philippine population's religious preferences, in a way, works to mitigate the third problem associated to mandatory religious exemption regime — the potential of inconsistent decisions based on the identity and religion of each individual claimant.²³⁶ With fewer religions represented, religion-based exemption claims are at a minimum. The probability that a general law would offend a religious tradition decreases by the number of religions present. This demographic will, of course, change as a matter of time.²³⁷ It will not be long before Philippine courts will deal with individuals with different religious traditions seeking exemptions from general laws.

In any event, mitigated or not, applying exemptions only to an individual or to certain sects raises the question of its application to individuals or sects who are similarly situated but are under different religious traditions. For example, Soledad S. Escritor was, and continues to be, exempted from the Civil Service Law provision on immorality because of the landmark case named after her. But what about an idiosyncratic religion that allows couples to live together as long as they have a video that shows a pledge of their undying love to one another? Will they be able to invoke *Escritor* as basis for their exemption?

One would argue that this issue is addressed by the principle of *stare decisis*.²³⁸ However, the test espoused in *Escritor*, specifically the first inquiry,

(5.5%), Evangelicals (2.6%), *Iglesia ni Cristo* (2.4%), Protestants (0.9%), and other religious affiliations.

235. See United States Census Bureau, Section I. Population, *available at* <https://www.census.gov/library/publications/2011/compendia/statab/131ed/population.html> (last accessed Oct. 31, 2017). As of 2008, there are Catholics (25%), Baptists (15.8%), Jewish (1.1%), and Islam (0.6%).

236. Marshall, *supra* note 7, at 316.

237. In this event, it can be argued that the second problem (reinforcing majoritarian beliefs) will, in turn, be mitigated.

238. See *Ty v. Banco Filipino Savings and Mortgage Bank*, 675 SCRA 339, 349 (2012).

Under the doctrine [of *stare decisis*], when this Court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are

precludes *stare decisis* to apply because no two objectors will ever be “substantially the same.”²³⁹ Courts are required to determine the burden on religious belief, its centrality to a claimant’s faith, and the claimant’s sincerity²⁴⁰ — an individualized examination that makes one party significantly different from another.²⁴¹ For *stare decisis* to even apply, the court will have to determine whether the couple “substantially” felt the same burden as and was as sincere as Soledad S. Escritor.²⁴² The court will also have to scrutinize whether the couple’s religious belief has “substantially the same” central position to their religious tradition as it did with the tenets of the Jehovah’s Witnesses.²⁴³ As argued earlier, these are all questions that courts should refrain from asking. Assuming that courts ask these questions, how can judges, in applying *stare decisis*, validly compare and declare that the burden on one tradition is substantially the same as another, or God forbid, that one burden weighed heavier on a religious tradition compared to another, without discriminating between religions? The situation is far from flippant. It is simply the result of the particularized examination needed for a mandatory exemption regime. It leads courts down a rabbit hole fraught with constitutional problems.

The Court seems to have skirted this issue in *Imbong* where, instead of granting exemptions to objectors, it actually declared the “duty to refer” unconstitutional and invalidated it altogether.²⁴⁴ The sad result is that now, there is no statutory duty for *anyone* to refer patients to other health care providers or physicians. In doing so, the Court failed to realize that not all objectors to contraceptive use would find the duty to refer religiously objectionable. Only the petitioners and the interests they represented found it objectionable.²⁴⁵ The Court hastily lumped those who object to contraception use but are perfectly fine with the duty to refer with those

substantially the same[,] regardless of whether the parties and property are the same.

Id.

239. See *Escritor*, 408 SCRA at 189.

240. *Id.*

241. Marshall, *supra* note 7, at 311-312.

242. See *Ty*, 675 SCRA at 349.

243. *Id.* See also *Escritor*, 408 SCRA at 55.

244. *Imbong*, 721 SCRA at 375.

245. Critics would argue that those who were not parties to the suit were represented by the petitioners in the case. On what ground? *Stare decisis*. See *Ty*, 675 SCRA at 349.

who object both to contraception and the “duty to refer.”²⁴⁶ What is left is a weaker law that allows those who have no qualms and issues with the “duty to refer” to not comply with it at all.

The Court effectively adopted the religious beliefs of the petitioners. If *Escritor* were to be applied strictly, the result would have been an exemption for the petitioners, not an invalidation of the RH Law “duty to refer” provision. The problem with exemptions was eloquently stated in *Reynolds* — it would “permit every citizen to become a law unto himself [or herself].”²⁴⁷ By invalidating the law instead of merely providing an exemption, *Imbong* went further — it permitted the religious beliefs of a few to be the law of all.²⁴⁸

Imbong shows the third problem of inconsistency at work as well. Recall that the government must show a compelling state interest to justify burdens on religious exercise.²⁴⁹ In *Imbong*, the Court found that the Philippine government did not have a compelling interest in the health of women and mothers to justify intrusion on the religious exercise of the objecting petitioners.²⁵⁰ The finding went completely against the celebrated case of *Oposa v. Factoran, Jr.*²⁵¹ where the Court declared that the right to health was an interest protected by the Philippine Constitution itself, a right that even allows an action to protect the environment.²⁵² It goes beyond question that an interest enshrined in the Constitution should be considered compelling, at the very least. And yet, the Court did not consider this interest “grave and immediate enough,”²⁵³ an interesting and inconsistent conclusion given that

246. See *Imbong*, 721 SCRA at 345-46.

247. *Reynolds*, 98 U.S. at 167.

248. *Imbong*, 721 SCRA at 345-46.

249. *Escritor*, 408 SCRA at 190.

250. *Imbong*, 721 SCRA at 341-42.

251. *Oposa v. Factoran, Jr.*, 224 SCRA 792 (1993).

252. *Id.* at 805. In this case, the Philippine Supreme Court declared that Article II, Section 15 of the Philippine Constitution is a self-executing provision with no need for an implementing law to be enforceable. Said Section reads, “[t]he State shall protect and promote the right to health of the people and instill health consciousness among them.” *Id.* & PHIL. CONST. art. II, § 15.

On the basis of the finding, the Philippine Supreme Court granted children-petitioners with the legal capacity to sue on behalf of succeeding generations on the basis of intergenerational responsibility. *Oposa*, 244 SCRA at 802-03.

253. See *Imbong*, 721 SCRA at 342. On this point, the Philippine Supreme Court labors to make a temporal distinction between the effect on the person seeking

it once considered the right to health (and the right to healthful ecology) an interest compelling enough that affects even “generations yet unborn.”²⁵⁴ It seems the Court drew an extremely thin line between the unborn and “generations yet unborn,” if there was indeed a line to be possibly drawn in the first place.

The *Imbong* majority also seems to say that the right to health of the unborn and the pregnant mothers is not a compelling governmental interest, given that maternal deaths have decreased in the past two decades.²⁵⁵ Its reasoning and subsequent conclusion has disturbing implications. The health of the unborn, the Court seems to say, must bow down to the dictates of conscience of another. Justice Estela M. Perlas-Bernabe voices the same concern in her dissent in *Imbong*. She rightfully concludes that the “State has a compelling interest to protect its citizen’s right to health and life. The denial (or the threat of denial) of these rights even only against one ... is enough to conclude that the second parameter of scrutiny has been

help and the physician who objects. For the majority, there is “no immediate danger to the life or health” of the person seeking medical help. *Imbong*, 721 SCRA at 342 (emphasis omitted). “After all,” the Philippine Supreme Court says,

a couple who plans the timing, number[,] and spacing of the birth of their children refers to a future event that is contingent on whether or not the mother decides to adopt or use the information, product, method[,] or supply given to her or whether she even decides to become pregnant at all. On the other hand, the burden placed upon those who object to contraceptive use is immediate and occurs the moment a patient seeks consultation on reproductive health matters.

Id.

254. See *Oposa*, 224 SCRA at 802-03.

255. See *Imbong*, 721 SCRA at 345.

As an afterthought, [the government] eventually replied that the compelling state interest was “[15] maternal deaths per day, hundreds of thousands of unintended pregnancies, lives changed[.]” [The government], however, failed to substantiate this point by concrete facts and figures from reputable sources.

The undisputed fact, however, is that the World Health Organization reported that the Filipino maternal mortality rate dropped to 48[%] from 1990 to 2008, although there was still no RH Law at that time. Despite such revelation, the proponents still insist that such number of maternal deaths constitute a compelling state interest.

Id. at 344-45.

passed.”²⁵⁶ The majority, however, saw otherwise; they even seemed shocked that the government insisted on curbing maternal deaths as a compelling state interest.²⁵⁷ After all, the majority seems to posit, maternal deaths *did* decrease by 48%.²⁵⁸ But to echo the sentiments of Justice Perlas-Bernabe, is the life of one not compelling enough?

Under *Imbong*, a compelling state interest only exists in emergency situations.²⁵⁹ By invalidating the “duty to refer” but mandating the physicians to treat mothers in emergency situations (over their objections), the Court seems to have drawn another very thin line to accommodate a group that has *already* been given a legislative accommodation. In effect, the Court concludes that the health of the unborn and mothers is only a compelling state interest when that mother is close to death. In all other cases, the State has no compelling interest to protect — a conclusion that runs against the Philippine Constitution’s mandate to “protect and promote the right of health of the people,”²⁶⁰ a general protection for every Filipino’s right of health, regardless of their sex, gender, creed, wealth, educational status, and definitely regardless of how far along they are in their pregnancy.²⁶¹

The Court’s application of benevolent neutrality in *Imbong* leaves us with a contradicting framework for the right to health — clear proof of the problem of inconsistency that hounds exemption regimes. For actions to protect the environment, the health of “generations yet unborn” is constitutionally protected.²⁶² But thanks to *Imbong*, with laws to protect the health of the unborn and the pregnant mother, it is not; it is only protected once the mother is in an emergency situation. The Constitution does not categorize or draw lines, and yet, the Court did in the name of religious freedom.

256. *Id.* at 719 (J. Perlas-Bernabe, concurring and dissenting opinion).

257. *See Imbong*, 721 SCRA at 342.

258. *Id.* at 345.

259. *Id.* at 345-46.

260. PHIL. CONST. art. II, § 15.

261. The Philippine Constitution has likewise refused to apply the standards in *Roe v. Wade* in terms of periods of pregnancy. Article II, Section 12 of the Philippine Constitution declares that the State shall “equally protect the life of the mother and the life of the unborn from conception.” PHIL. CONST. art. II, § 12. The framers enshrined this protection as a reaction to *Roe*. BERNAS, *supra* note 16, at 84.

262. *Oposa*, 224 SCRA at 803.

The dizzying results and pernicious effects of the benevolent neutrality framework highlight the problem of inconsistency brought about by weighing compelling state interests against the interests of a few objectors — a lynchpin of a mandatory exemption regime. The chance of misapplication is likely, as was the case in *Imbong*. A facial invalidation leads to the religious beliefs of a group being placed in a higher pedestal than the religious beliefs of others. Assuming that the regime is used in an as-applied basis (as required by the very nature of its inquiry), the government is put at a considerable disadvantage, at least on paper, in having to prove a compelling state interest. And *even* if it does have a previously recognized compelling state interest, that same interest could be considered lacking against the religious interests of a few objectors.

Re: Office Hours and *Imbong* show the fourth problem of the broad range of laws susceptible to exemption claims. The former dealt with the Administrative Code of the Philippines,²⁶³ while the latter involved a law focused on reproductive health.²⁶⁴ These two laws did not, in any way, even mention religion, save for the accommodation given to religious objectors in the RH Law. The Author likewise reads *Re: Office Hours* as the judicial pullback Professor Lupu sees as the effect of the problem.²⁶⁵ *Re: Office Hours* did not even apply, much less mention, the benevolent neutrality that was mandated by the Philippine Supreme Court just two years before. As a matter of policy, the decision was unsurprising, considering how allowing the request for less working hours would have crippled the workforce in the courts. But good policy or not, the Court should have at least applied the *Escritor* test as a matter of law. To have done so would have arguably brought about the same end, as the Court has previously recognized the importance of keeping the government machinery available for the public.²⁶⁶ *Re: Office Hours* is, in both reasoning and result, similar to U.S. cases that held that free exercise does not allow an individual to dictate on the internal affairs of the government.²⁶⁷ As the SCOTUS delineated areas where the exemption regime would not apply,²⁶⁸ *Re: Office Hours* shows that the Philippine

263. *Re: Office Hours*, 477 SCRA at 257.

264. *Imbong*, 721 SCRA at 261.

265. See Lupu, *supra* note 9, at 72.

266. See *Manila Public School Teachers Asso. v. Laguio, Jr.*, 200 SCRA 323, 344 (1991) (J. Feliciano, dissenting opinion).

267. *Bowen*, 476 U.S. at 708.

268. See *Bob Jones University*, 461 U.S. at 578.

Supreme Court, already in the early years of its own exemption regime, has done the same.

V. CONCLUSION

Almost 15 years into the Philippines' experiment with a mandatory exemption regime, the same seeds and themes that eventually led to the demise of the American mandatory exemption regime can already be seen. *Re: Office Hours* shows an early attempt by the Philippine Supreme Court to place the situation outside the sphere of religious exemption, similar to most of the SCOTUS cases from 1963 to 1990. *Imbong* highlighted the fundamental problems and dangers in applying a mandatory exemption regime.

The SCOTUS was well aware of these problems and came out with *Smith* as a solution. Unlike the American experience, however, it seems that there is no turning back in the yellow wood from the path of benevolent neutrality for the Philippines. A *Smith*-like Philippine decision seems far-fetched. The Philippine Constitution, through its religion-friendly provisions, clearly shows a philosophy that espouses accommodation rather than strict separation. Whether for better or worse, the hands of Philippine courts are tied. To stifle the inherent problems of the mandatory exemption regime, the Philippine Supreme Court may, in the future, engage in the same line-drawing and categorizing the SCOTUS did from 1963 to 1990. Of course, the result of judicial line-drawing is the very evil Professor Lupu warned against — a regime of “weakness, plasticity, erratic and unpredictable bursts of religion-protective energy, and the consequent tendency to produce deep inconsistencies.”²⁶⁹ Nonetheless, it seems that this is the price Filipinos have to live with — a legacy of the “religious nature of Filipinos.”²⁷⁰ If and when the Philippine Supreme Court is faced with the similar cases and issues that the SCOTUS faced during its own experiment with a mandatory exemption regime, how it deals or pulls back on this approach in the future will be interesting, to say the least.

269. Lupu, *supra* note 9, at 74.

270. *Escritor*, 408 SCRA at 167.