EN BANC

[A.M. No. P-02-1651. June 22, 2006.]
(formerly OCA I.P.I. No. 00-1021-P)

ALEJANDRO ESTRADA, *complainant*, ***vs.*** **SOLEDAD S. ESCRITOR**, *respondent*.

R E S O L U T I O N

PUNO, *J* :

While man is finite, he seeks and subscribes to the Infinite. Respondent Soledad Escritor once again stands before the Court invoking her religious freedom and her Jehovah God in a bid to save her family — united without the benefit of legal marriage — and livelihood. The State, on the other hand, seeks to wield its power to regulate her behavior and protect its interest in marriage and family and the integrity of the courts where respondent is an employee. How the Court will tilt the scales of justice in the case at bar will decide not only the fate of respondent Escritor but of other believers coming to Court bearing grievances on their free exercise of religion. This case comes to us from our remand to the Office of the Court Administrator on August 4, 2003. [1]

I. THE PAST PROCEEDINGS

In a sworn-letter complaint dated July 27, 2000, complainant Alejandro Estrada requested Judge Jose F. Caoibes, Jr., presiding judge of Branch 253, Regional Trial Court of Las Piñas City, for an investigation of respondent Soledad Escritor, court interpreter in said court, for living with a man not her husband, and having borne a child within this live-in arrangement. Estrada believes that Escritor is committing an immoral act that tarnishes the image of the court, thus she should not be allowed to remain employed therein as it might appear that the court condones her act. [2] Consequently, respondent was charged with committing "disgraceful and immoral conduct" under Book V, Title I, Chapter VI, Sec. 46(b)(5) of the Revised Administrative Code. [3]

Respondent Escritor testified that when she entered the judiciary in 1999, she was already a widow, her husband having died in 1998. [4] She admitted that she started living with Luciano Quilapio, Jr. without the benefit of marriage more than twenty years ago when her husband was still alive but living with another woman. She also admitted that she and Quilapio have a son. [5] But as a member of the religious sect known as the Jehovah's Witnesses and the Watch Tower and Bible Tract Society, respondent asserted that their conjugal arrangement is in conformity with their religious beliefs and has the approval of her congregation. [6] In fact, after ten years of living together, she executed on July 28, 1991, a "Declaration of Pledging Faithfulness." [7]

For Jehovah's Witnesses, the Declaration allows members of the congregation who have been abandoned by their spouses to enter into marital relations. The Declaration thus makes the resulting union moral and binding within the congregation all over the world except in countries where divorce is allowed. As laid out by the tenets of their faith, the Jehovah's congregation requires that at the time the declarations are executed, the couple

cannot secure the civil authorities' approval of the marital relationship because of legal impediments. Only couples who have been baptized and in good standing may execute the Declaration, which requires the approval of the elders of the congregation. As a matter of practice, the marital status of the declarants and their respective spouses' commission of adultery are investigated before the declarations are executed.[8] Escritor and Quilapio's declarations were executed in the usual and approved form prescribed by the Jehovah's Witnesses,[9] approved by elders of the congregation where the declarations were executed,[10] and recorded in the Watch Tower Central Office.[11]

Moreover, the Jehovah's congregation believes that once all legal impediments for the couple are lifted, the validity of the declarations ceases, and the couple should legalize their union. In Escritor's case, although she was widowed in 1998, thereby lifting the legal impediment to marry on her part, her mate was still not capacitated to remarry. Thus, their declarations remained valid.[12] In sum, therefore, insofar as the congregation is concerned, there is nothing immoral about the conjugal arrangement between Escritor and Quilapio and they remain members in good standing in the congregation.

By invoking the religious beliefs, practices and moral standards of her congregation, in asserting that her conjugal arrangement does not constitute disgraceful and immoral conduct for which she should be held administratively liable,[13] the Court had to determine the contours of religious freedom under Article III, Section 5 of the Constitution, which provides, *viz*:

> Sec. 5. No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.

A. RULING

In our decision dated August 4, 2003, after a long and arduous scrutiny into the origins and development of the religion clauses in the United States (U.S.) and the Philippines, we held that in resolving claims involving religious freedom (1) **benevolent neutrality** or **accommodation**, whether mandatory or permissive, is the spirit, intent and framework underlying the religion clauses in our Constitution; and (2) in deciding respondent's plea of exemption based on the Free Exercise Clause (from the law with which she is administratively charged), it is the **compelling state interest** test, the strictest test, which must be applied.[14]

Notwithstanding the above rulings, the Court could not, at that time, rule definitively on the ultimate issue of whether respondent was to be held administratively liable for there was need to give the State the opportunity to adduce evidence that it has a more "compelling interest" to defeat the claim of the respondent to religious freedom. **Thus, in the decision dated August 4, 2003, we remanded the complaint to the Office of the Court Administrator (OCA), and ordered the Office of the Solicitor General (OSG) to intervene in the case so it can**:

(a) examine the sincerity and centrality of respondent's claimed religious belief and practice;

(b) present evidence on the state's "compelling interest" to override respondent's religious belief and practice; and

(c) show that the means the state adopts in pursuing its interest is the least restrictive to respondent's religious freedom. [15]

It bears stressing, therefore, that the residual issues of the case pertained NOT TO WHAT APPROACH THIS COURT SHOULD TAKE IN CONSTRUING THE RELIGION CLAUSES, NOR TO THE PROPER TEST APPLICABLE IN DETERMINING CLAIMS OF EXEMPTION BASED ON FREEDOM OF RELIGION. **These issues have already been ruled upon prior to the remand, and constitute "the law of the case" insofar as they resolved the issues of which framework and test are to be applied in this case, and no motion for its reconsideration having been filed**. [16] The only task that the Court is left to do is to determine whether the evidence adduced by the State proves its more compelling interest. This issue involves a pure question of fact.

B. LAW OF THE CASE

Mr. Justice Carpio's insistence, in his dissent, in attacking the ruling of this case interpreting the religious clauses of the Constitution, made more than two years ago, is misplaced to say the least. Since neither the complainant, respondent nor the government has filed a motion for reconsideration assailing this ruling, the same has attained finality and constitutes the law of the case. Any attempt to reopen this final ruling constitutes a crass contravention of elementary rules of procedure. Worse, insofar as it would overturn the parties' right to rely upon our interpretation which has long attained finality, it also runs counter to substantive due process.

Be that as it may, even assuming that there were no procedural and substantive infirmities in Mr. Justice Carpio's belated attempts to disturb settled issues, and that he had timely presented his arguments, the results would still be the same.

We review the highlights of our decision dated August 4, 2003.

1. OLD WORLD ANTECEDENTS

In our August 4, 2003 decision, we made a painstaking review of Old World antecedents of the religion clauses, because "one cannot understand, much less intelligently criticize the approaches of the courts and the political branches to religious freedom in the recent past in the United States without a deep appreciation of the roots of these controversies in the ancient and medieval world and in the American experience." [17] We delved into the conception of religion from primitive times, when it started out as the state itself, when the authority and power of the state were ascribed to God. [18] Then, religion developed on its own and became superior to the state, [19] its subordinate, [20] and even becoming an engine of state policy. [21]

We ascertained two salient features in the review of religious history: First, with minor exceptions, the history of church-state relationships was characterized by persecution, oppression, hatred, bloodshed, and war, all in the name of the God of Love and of the Prince of Peace. Second, likewise with minor exceptions, this history witnessed the unscrupulous use of religion by secular powers to promote secular purposes and policies, and the willing acceptance of that role by the vanguards of religion in exchange for the favors and mundane benefits conferred by ambitious princes and emperors in exchange for religion's invaluable service. This was the context in which the unique experiment of the principle of religious freedom and separation of church and state saw its birth in American constitutional democracy and in human history. [22]

Strictly speaking, the American experiment of freedom and separation was not

translated in the First Amendment. That experiment had been launched four years earlier, when the founders of the republic carefully withheld from the new national government any power to deal with religion. As James Madison said, the national government had no "jurisdiction" over religion or any "shadow of right to intermeddle" with it. [23]

The omission of an express guaranty of religious freedom and other natural rights, however, nearly prevented the ratification of the Constitution. The restriction had to be made explicit with the adoption of the religion clauses in the First Amendment as they are worded to this day. Thus, the First Amendment did not take away or abridge any power of the national government; its intent was to make express the absence of power. [24] It commands, in two parts (with the first part usually referred to as the Establishment Clause and the second part, the Free Exercise Clause), *viz*:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. [25]

The Establishment and Free Exercise Clauses, it should be noted, were not designed to serve contradictory purposes. They have a single goal — to promote freedom of individual religious beliefs and practices. In simplest terms, the Free Exercise Clause prohibits government from inhibiting religious beliefs with penalties for religious beliefs and practice, while the Establishment Clause prohibits government from inhibiting religious belief with rewards for religious beliefs and practices. In other words, the two religion clauses were intended to deny government the power to use either the carrot or the stick to influence individual religious beliefs and practices. [26]

In sum, a review of the Old World antecedents of religion shows the movement of establishment of religion as an engine to promote state interests, to the principle of non-establishment to allow the free exercise of religion.

2. RELIGION CLAUSES IN THE U.S. CONTEXT

The Court then turned to the religion clauses' interpretation and construction in the United States, not because we are bound by their interpretation, but because the U.S. religion clauses are the precursors to the Philippine religion clauses, although we have significantly departed from the U.S. interpretation as will be discussed later on.

At the outset, it is worth noting that American jurisprudence in this area has been volatile and fraught with inconsistencies whether within a Court decision or across decisions. For while there is widespread agreement regarding the value of the First Amendment religion clauses, there is an equally broad disagreement as to what these clauses specifically require, permit and forbid. No agreement has been reached by those who have studied the religion clauses as regards its exact meaning and the paucity of records in the U.S. Congress renders it difficult to ascertain its meaning. [27]

U.S. history has produced two identifiably different, even opposing, strains of jurisprudence on the religion clauses. **First** is the standard of ***separation***, which may take the form of either (a) **strict separation** or (b) the tamer version of **strict neutrality or separation**, or what Mr. Justice Carpio refers to as the second theory of **governmental neutrality**. Although the latter form is not as hostile to religion as the former, both are anchored on the Jeffersonian premise that a "wall of separation" must exist between the state and the Church to protect the state from the church. [28] Both protect the principle of church-state separation with a rigid reading of the principle. On the other hand, the **second**

standard, the **benevolent neutrality** or **accommodation**, is buttressed by the view that the wall of separation is meant to protect the church from the state. A brief review of each theory is in order.

a. Strict Separation and Strict Neutrality/Separation

The ***Strict Separationist*** believes that the Establishment Clause was meant to protect the state from the church, and the state's hostility towards religion allows no interaction between the two. According to this Jeffersonian view, an absolute barrier to formal interdependence of religion and state needs to be erected. Religious institutions could not receive aid, whether direct or indirect, from the state. Nor could the state adjust its secular programs to alleviate burdens the programs placed on believers.[29] Only the complete separation of religion from politics would eliminate the formal influence of religious institutions and provide for a free choice among political views, thus a strict "wall of separation" is necessary.[30]

Strict separation faces difficulties, however, as it is deeply embedded in American history and contemporary practice that enormous amounts of aid, both direct and indirect, flow to religion from government in return for huge amounts of mostly indirect aid from religion.[31] For example, less than twenty-four hours after Congress adopted the First Amendment's prohibition on laws respecting an establishment of religion, Congress decided to express its thanks to God Almighty for the many blessings enjoyed by the nation with a resolution in favor of a presidential proclamation declaring a national day of Thanksgiving and Prayer.[32] Thus, ***strict separationists*** are caught in an awkward position of claiming a constitutional principle that has never existed and is never likely to.[33]

The tamer version of the strict separationist view, the ***strict neutrality*** or ***separationist*** view, (or, the ***governmental neutrality*** theory) finds basis in **Everson v. Board of Education**,[34] where the Court declared that Jefferson's "wall of separation" encapsulated the meaning of the First Amendment. However, unlike the *strict separationists*, the ***strict neutrality*** view believes that the "wall of separation" does not require the state to be their adversary. Rather, the state must be **neutral** in its relations with groups of religious believers and non-believers. "State power is no more to be used so as to handicap religions than it is to favor them."[35] The ***strict neutrality*** approach is not hostile to religion, but it is strict in holding that religion may not be used as a basis for classification for purposes of governmental action, whether the action confers rights or privileges or imposes duties or obligations. Only secular criteria may be the basis of government action. It does not permit, much less require, **accommodation** of secular programs to religious belief.[36]

The problem with the strict neutrality approach, however, is if applied in interpreting the Establishment Clause, it could lead to a *de facto* voiding of religious expression in the Free Exercise Clause. As pointed out by Justice Goldberg in his concurring opinion in **Abington School District v. Schempp**,[37] strict neutrality could lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious" which is prohibited by the Constitution.[38] Professor Laurence Tribe commented in his authoritative treatise, *viz*:

> To most observers. . . strict neutrality has seemed incompatible with the very idea of a free exercise clause. The Framers, whatever specific applications they may have intended, clearly envisioned *religion* as something special; they enacted that vision into law by guaranteeing the free exercise of religion but not,

> say, of philosophy or science. The strict neutrality approach all but erases this distinction. Thus it is not surprising that the [U.S.] Supreme Court has rejected strict neutrality, permitting and sometimes mandating religious classifications. [39]

Thus, the dilemma of the **separationist** approach, whether in the form of *strict separation* or *strict neutrality*, is that while the Jeffersonian wall of separation "captures the spirit of the American ideal of church-state separation," in real life, church and state are not and cannot be totally separate. This is all the more true in contemporary times when both the government and religion are growing and expanding their spheres of involvement and activity, resulting in the intersection of government and religion at many points. [40]

b. Benevolent Neutrality/Accommodation

The theory of ***benevolent neutrality*** or ***accommodation*** is premised on a different view of the "wall of separation," associated with Williams, founder of the Rhode Island colony. Unlike the Jeffersonian wall that is meant to protect the state from the church, the wall is meant to protect the church from the state. [41] This doctrine was expressed in **Zorach v. Clauson**, [42] which held, *viz*:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one or the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths — these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."
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> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. . . But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen their effective scope of religious influence. [43]

Benevolent neutrality recognizes that religion plays an important role in the public life of the United States as shown by many traditional government practices which, to ***strict neutrality***, pose Establishment Clause questions. Among these are the inscription of "In God We Trust" on American currency; the recognition of America as "one nation under God" in the official pledge of allegiance to the flag; the Supreme Court's time-

honored practice of opening oral argument with the invocation "God save the United States and this Honorable Court"; and the practice of Congress and every state legislature of paying a chaplain, usually of a particular Protestant denomination, to lead representatives in prayer. These practices clearly show the preference for one theological viewpoint — the existence of and potential for intervention by a god — over the contrary theological viewpoint of atheism. Church and government agencies also cooperate in the building of low-cost housing and in other forms of poor relief, in the treatment of alcoholism and drug addiction, in foreign aid and other government activities with strong moral dimension. [44]

Examples of accommodations in American jurisprudence also abound, including, but not limited to the U.S. Court declaring the following acts as constitutional: a state hiring a Presbyterian minister to lead the legislature in daily prayers, [45] or requiring employers to pay workers compensation when the resulting inconsistency between work and Sabbath leads to discharge; [46] for government to give money to religiously-affiliated organizations to teach adolescents about proper sexual behavior; [47] or to provide religious school pupils with books; [48] or bus rides to religious schools; [49] or with cash to pay for state-mandated standardized tests. [50]

(1) Legislative Acts and the Free Exercise Clause

As with the other rights under the Constitution, the rights embodied in the Religion clauses are invoked in relation to governmental action, almost invariably in the form of legislative acts.

Generally speaking, a legislative act that purposely aids or inhibits religion will be challenged as unconstitutional, either because it violates the Free Exercise Clause or the Establishment Clause or both. This is true whether one subscribes to the ***separationist*** approach or the ***benevolent neutrality or accommodationist*** approach.

But the more difficult religion cases involve legislative acts which have a secular purpose and general applicability, but may incidentally or inadvertently aid or burden religious exercise. Though the government action is not religiously motivated, these laws have a "burdensome effect" on religious exercise.

The ***benevolent neutrality*** theory believes that with respect to these governmental actions, ***accommodation*** of religion may be allowed, not to promote the government's favored form of religion, but to allow individuals and groups to exercise their religion without hindrance. The purpose of ***accommodations*** is to remove a burden on, or facilitate the exercise of, a person's or institution's religion. As Justice Brennan explained, the "government [may] take religion into account . . . to **exempt, when possible, from generally applicable governmental regulation** individuals whose religious beliefs and practices would otherwise thereby be infringed, or to create without state involvement an atmosphere in which voluntary religious exercise may flourish." [51] In the ideal world, the legislature would recognize the religions and their practices and would consider them, when practical, in enacting laws of general application. But when the legislature fails to do so, religions that are threatened and burdened may turn to the courts for protection. [52]

Thus, what is sought under the ***theory of accommodation*** is not a declaration of unconstitutionality of a facially neutral law, but an exemption from its application or its "burdensome effect," whether by the legislature or the courts. [53] Most of the free exercise claims brought to the U.S. Court are for exemption, not invalidation of the facially neutral law that has a "burdensome" effect. [54]

(2) Free Exercise Jurisprudence: Sherbert, Yoder and Smith

The pinnacle of free exercise protection and the theory of accommodation in the U.S. blossomed in the case of **Sherbert v. Verner**, [55] which ruled that state regulation that indirectly restrains or punishes religious belief or conduct must be subjected to strict scrutiny under the Free Exercise Clause. [56] According to **Sherbert**, when a law of general application infringes religious exercise, albeit incidentally, the state interest sought to be promoted must be so paramount and compelling as to override the free exercise claim. Otherwise, the Court itself will carve out the exemption.

In this case, Sherbert, a Seventh Day Adventist, claimed unemployment compensation under the law as her employment was terminated for refusal to work on Saturdays on religious grounds. Her claim was denied. She sought recourse in the Supreme Court. In laying down the standard for determining whether the denial of benefits could withstand constitutional scrutiny, the Court ruled, *viz*:

> Plainly enough, appellee's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be **either because her disqualification as a beneficiary represents no infringement by the State of her constitutional right of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate. . . ."** [57] (*emphasis supplied*)

The Court stressed that in the area of religious liberty, it is basic that it is not sufficient to merely show a rational relationship of the substantial infringement to the religious right and a colorable state interest. "(I)n this highly sensitive constitutional area, '**[o]nly** the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" [58] The Court found that there was no such compelling state interest to override Sherbert's religious liberty. It added that even if the state could show that Sherbert's exemption would pose serious detrimental effects to the unemployment compensation fund and scheduling of work, it was incumbent upon the state to show that **no alternative means** of regulations would address such detrimental effects without infringing religious liberty. The state, however, did not discharge this burden. The Court thus carved out for Sherbert an exemption from the Saturday work requirement that caused her disqualification from claiming the unemployment benefits. The Court reasoned that upholding the denial of Sherbert's benefits would force her to choose between receiving benefits and following her religion. This choice placed "the same kind of burden upon the free exercise of religion as would a fine imposed against (her) for her Saturday worship." This germinal case of **Sherbert** firmly established the exemption doctrine, [59] *viz*:

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

Thus, **Sherbert** and subsequent cases held that when government action burdens, even inadvertently, a sincerely held religious belief or practice, the state must justify the burden by demonstrating that the law embodies a compelling interest, that no less restrictive alternative exists, and that a religious exemption would impair the state's ability

to effectuate its compelling interest. As in other instances of state action affecting fundamental rights, negative impacts on those rights demand the highest level of judicial scrutiny. After **Sherbert**, this strict scrutiny balancing test resulted in court-mandated religious exemptions from facially-neutral laws of general application whenever unjustified burdens were found. [60]

Then, in the 1972 case of **Wisconsin v. Yoder**, [61] the U.S. Court again ruled that religious exemption was in order, **notwithstanding that the law of general application had a criminal penalty**. Using heightened scrutiny, the Court overturned the conviction of Amish parents for violating Wisconsin compulsory school-attendance laws. The Court, in effect, granted exemption from a neutral, criminal statute that punished religiously motivated conduct. Chief Justice Burger, writing for the majority, held, *viz*:

> It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, **it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause**. Long before there was general acknowledgement of the need for universal education, the Religion Clauses had specially and firmly fixed the right of free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance. . .
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> The essence of all that has been said and written on the subject is that **only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion**. . .
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> . . . our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal government in the exercise of its delegated powers . . . **But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability**. . . .This case, therefore, does not become easier because respondents were convicted for their "actions" in refusing to send their children to the public high school; in this context belief and action cannot be neatly confined in logic-tight compartments. . . [62]

The cases of **Sherbert** and **Yoder** laid out the following doctrines: (a) free exercise clause claims were subject to **heightened scrutiny** or **compelling interest test** if government substantially burdened the exercise of religion; (b) heightened scrutiny or **compelling interest test** governed cases where the burden was direct, *i.e.*, **the exercise of religion triggered a criminal or civil penalty**, as well as cases where the burden was indirect, *i.e.*, the exercise of religion resulted in the forfeiture of a government benefit; [63] and (c) the Court could carve out accommodations or exemptions from a facially

neutral law of general application, whether general or criminal.

The **Sherbert-Yoder** doctrine had five main components. **First**, action was protected — conduct beyond speech, press, or worship was included in the shelter of freedom of religion. Neither Sherbert's refusal to work on the Sabbath nor the Amish parents' refusal to let their children attend ninth and tenth grades can be classified as conduct protected by the other clauses of the First Amendment. **Second**, indirect impositions on religious conduct, such as the denial of twenty-six weeks of unemployment insurance benefits to Adel Sherbert, as well as direct restraints, such as the **criminal prohibition** at issue in Yoder, were prohibited. **Third**, as the language in the two cases indicate, the protection granted was extensive. Only extremely strong governmental interests justified impingement on religious conduct, as the absolute language of the test of the Free Exercise Clause suggests. [64]

Fourth, the strong language was backed by a requirement that the government provide proof of the important interest at stake and of the dangers to that interest presented by the religious conduct at issue. **Fifth**, in determining the injury to the government's interest, a court was required to focus on the effect that exempting religious claimants from the regulation would have, rather than on the value of the regulation in general. Thus, injury to governmental interest had to be measured at the margin: assuming the law still applied to all others, what would be the effect of exempting the religious claimant in this case and other similarly situated religious claimants in the future? Together, the fourth and fifth elements required that facts, rather than speculation, had to be presented concerning how the government's interest would be harmed by excepting religious conduct from the law being challenged. [65]

Sherbert and **Yoder** adopted a balancing test for free exercise jurisprudence which would impose a discipline to prevent manipulation in the balancing of interests. The fourth and the fifth elements prevented the likelihood of exaggeration of the weight on the governmental interest side of the balance, by not allowing speculation about the effects of a decision adverse to those interests nor accepting that those interests would be defined at a higher level of generality than the constitutional interests on the other side of the balance. [66]

Thus, the strict scrutiny and compelling state interest test significantly increased the degree of protection afforded to religiously motivated conduct. While not affording absolute immunity to religious activity, a compelling secular justification was necessary to uphold public policies that collided with religious practices. Although the members of the U.S. Court often disagreed over which governmental interests should be considered compelling, thereby producing dissenting and separate opinions in religious conduct cases, this **general test established a strong presumption in favor of the free exercise of religion**. [67] Most scholars and courts agreed that under **Sherbert** and **Yoder**, the Free Exercise Clause provided individuals some form of heightened scrutiny protection, if not always a compelling interest one. [68] The 1990 case of **Employment Division, Oregon Department of Human Resources v. Smith**, [69] drastically changed all that.

Smith involved a challenge by Native Americans to an Oregon law prohibiting use of peyote, a hallucinogenic substance. Specifically, individuals challenged the state's determination that their religious use of peyote, which resulted in their dismissal from employment, was misconduct disqualifying them from receipt of unemployment compensation benefits. [70]

Justice Scalia, writing for the majority, rejected the claim that free exercise of religion required an exemption from an otherwise valid law. Scalia said that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition." [71] Scalia thus declared "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability of the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" [72]

Justice Scalia's opinion then reviewed the cases where free exercise challenges had been upheld — such as *Cantwell, Murdock, Follet, Pierce*, and *Yoder* — and said that none involved the free exercise clause claims alone. All involved "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, or the right of parents to direct the education of their children." [73] The Court said that **Smith** was distinguishable because it did not involve such a "hybrid situation," but was a free exercise claim "unconnected with any communicative activity or parental right." [74]

Moreover, the Court said that the **Sherbert** line of cases applied only in the context of the denial of unemployment benefits; it did not create a basis for an exemption from criminal laws. Scalia wrote that "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." [75]

The Court expressly rejected the use of strict scrutiny for challenges to neutral laws of general applicability that burden religion. Justice Scalia said that "[p]recisely because 'we are a cosmopolitan nation made up of people of almost conceivable religious preference,' and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." The Court said that those seeking religious exemptions from laws should look to the democratic process for protection, not the courts. [76]

Smith thus changed the test for the free exercise clause. Strict or heightened scrutiny and the compelling justification approach were abandoned for evaluating laws burdening religion; neutral laws of general applicability only have to meet the rational basis test, no matter how much they burden religion. [77]

Justice O'Connor wrote a concurring opinion sharply criticizing the rejection of the compelling state interest test, asserting that "(t)he compelling state interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling government interest 'of the highest order.'" [78] She said that strict scrutiny is appropriate for free exercise challenges because "[t]he compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society." [79]

Justice O'Connor also disagreed with the majority's description of prior cases and especially its leaving the protection of minority religions to the political process. She said that, "First Amendment was enacted precisely to protect the rights of those whose religious practice are not shared by the majority and may be viewed with hostility." [80]

Justice Blackmun wrote a dissenting opinion that was joined by Justices Brennan and Marshall. The dissenting Justices agreed with Justice O'Connor that the majority had mischaracterized precedents, such as in describing **Yoder** as a "hybrid" case rather than as one under the free exercise clause. The dissent also argued that strict scrutiny should be used in evaluating government laws burdening religion. [81]

Criticism of **Smith** was intense and widespread. [82] Academics, Justices, and a bipartisan majority of Congress noisily denounced the decision. [83] **Smith** has the rather unusual distinction of being one case that is almost universally despised (and this is not too strong a word) by both the liberals and conservatives. [84] Liberals chasten the Court for its hostility to minority faiths which, in light of **Smith's** general applicability rule, will allegedly suffer at the hands of the majority faith whether through outright hostility or neglect. Conservatives bemoan the decision as an assault on religious belief leaving religion, more than ever, subject to the caprice of an ever more secular nation that is increasingly hostile to religious belief as an oppressive and archaic anachronism. [85]

The **Smith doctrine** is highly unsatisfactory in several respects and has been criticized as exhibiting a shallow understanding of free exercise jurisprudence. [86] First, the First amendment was intended to protect minority religions from the tyranny of the religious and political majority. [87] Critics of **Smith** have worried about religious minorities, who can suffer disproportionately from laws that enact majoritarian mores. [88] **Smith**, in effect would allow discriminating in favor of mainstream religious groups against smaller, more peripheral groups who lack legislative clout, [89] contrary to the original theory of the First Amendment. [90] Undeniably, claims for judicial exemption emanate almost invariably from relatively politically powerless minority religions and **Smith** virtually wiped out their judicial recourse for exemption. [91] Second, **Smith** leaves too much leeway for pervasive welfare-state-regulation to burden religion while satisfying neutrality. After all, laws not aimed at religion can hinder observance just as effectively as those that target religion. [92] Government impairment of religious liberty would most often be of the inadvertent kind as in **Smith** considering the political culture where direct and deliberate regulatory imposition of religious orthodoxy is nearly inconceivable. If the Free Exercise Clause could not afford protection to inadvertent interference, it would be left almost meaningless. [93] Third, the **Reynolds-Gobitis-Smith** [94] doctrine simply defies common sense. The state should not be allowed to interfere with the most deeply held fundamental religious convictions of an individual in order to pursue some trivial state economic or bureaucratic objective. This is especially true when there are alternative approaches for the state to effectively pursue its objective without serious inadvertent impact on religion. [95]

At bottom, the Court's ultimate concern in **Smith** appeared to be two-fold: (1) the difficulty in defining and limiting the term "religion" in today's pluralistic society, and (2) the belief that courts have no business determining the significance of an individual's religious beliefs. For the **Smith** Court, these two concerns appear to lead to the conclusion that the Free Exercise Clause must protect everything or it must protect virtually nothing. As a result, the Court perceives its only viable options are to leave free exercise protection to the political process or to allow a "system in which each conscience is a law unto itself." [96] The Court's characterization of its choices have been soundly rejected as false, *viz*:

> If one accepts the Court's assumption that these are the only two viable options, then admittedly, the Court has a stronger argument. But the Free Exercise Clause cannot be summarily dismissed as too difficult to apply and this should not be applied at all. The Constitution does not give the judiciary the option of

simply refusing to interpret its provisions. The First Amendment dictates that free exercise of "religion" must be protected. Accordingly, the Constitution compels the Court to struggle with the contours of what constitutes "religion." There is no constitutional opt-out provision for constitutional words that are difficult to apply.

Nor does the Constitution give the Court the option of simply ignoring constitutional mandates. A large area of middle ground exists between the Court's two opposing alternatives for free exercise jurisprudence. Unfortunately, this middle ground requires the Court to tackle difficult issues such as defining religion and possibly evaluating the significance of a religious belief against the importance of a specific law. The Court describes the results of this middle ground where "federal judges will regularly balance against the importance of general laws the significance of religious practice," and then dismisses it as a "parade of horribles" that is too "horrible to contemplate."

It is not clear whom the Court feels would be most hurt by this "parade of horribles." Surely not religious individuals; they would undoubtedly prefer their religious beliefs to be probed for sincerity and significance rather than acquiesce to the Court's approach of simply refusing to grant any constitutional significance to their beliefs at all. If the Court is concerned about requiring lawmakers at times constitutionally to exempt religious individuals from statutory provisions, its concern is misplaced. It is the lawmakers who have sought to prevent the Court from dismantling the Free Exercise Clause through such legislation as the [Religious Freedom Restoration Act of 1993], and in any case, the Court should not be overly concerned about hurting legislature's feelings by requiring their laws to conform to constitutional dictates. Perhaps the Court is concerned about putting such burden on judges. If so, it would truly be odd to say that requiring the judiciary to perform its appointed role as constitutional interpreters is a burden no judge should be expected to fulfill. [97]

Parenthetically, **Smith's** characterization that the U.S. Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate" — an assertion which Mr. Justice Carpio adopted unequivocally in his dissent — has been sharply criticized even implicitly by its supporters, as blatantly untrue. Scholars who supported **Smith** frequently did not do so by opposing the arguments that the Court was wrong as a matter of original meaning [of the religion clauses] or that the decision conflicted with precedent [*i.e.* the **Smith** decision made shocking use of precedent] — those points were often conceded. [98]

To justify its perversion of precedent, the **Smith** Court attempted to distinguish the exemption made in **Yoder**, by asserting that these were premised on two constitutional rights combined — the right of parents to direct the education of their children and the right of free exercise of religion. Under the Court's opinion in **Smith**, the right of free exercise of religion standing alone would not allow Amish parents to disregard the compulsory school attendance law, and under the Court's opinion in **Yoder**, parents whose objection to the law was not religious would also have to obey it. The fatal flaw in this argument, however, is that if two constitutional claims will fail on its own, how would it prevail if combined? [99] As for **Sherbert**, the **Smith** Court attempted to limit its doctrine as applicable only to denials of unemployment compensation benefits where the religiously-compelled conduct that leads to job loss is not a violation of criminal law. And yet, this is precisely why the rejection of **Sherbert** was so damaging in its effect: the religious person was more likely to be entitled to constitutional protection when forced to choose between religious conscience and going to jail than when forced to choose between religious

conscience and financial loss. [100]

Thus, the **Smith** decision elicited much negative public reaction especially from the religious community, and commentaries insisted that the Court was allowing the Free Exercise Clause to disappear. [101] So much was the uproar that a majority in Congress was convinced to enact the Religious Freedom Restoration Act (RFRA) of 1993. [102] The RFRA was adopted to negate the **Smith** test and require strict scrutiny for free exercise claims. Indeed, the findings section of the Act notes that **Smith** "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." [103] The Act declares that its purpose is to restore the compelling interest test as set forth in **Sherbert v. Verner** and **Wisconsin v. Yoder**, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim of defense to a person whose religious exercise is substantially burdened by government. [104] The RFRA thus sought to overrule **Smith** and make strict scrutiny the test for all free exercise clause claims. [105]

In the **City of Boerne v. Flores**, [106] the U.S. Supreme Court declared the RFRA unconstitutional, ruling that Congress had exceeded its power under the Fourteenth Amendment in enacting the law. The Court ruled that Congress is empowered to enact laws "to enforce the amendment," but Congress is not "enforcing" when it creates new constitutional rights or expands the scope of rights. [107]

City of Boerne also drew public backlash as the U.S. Supreme Court was accused of lack of judicial respect for the constitutional decision-making by a coordinate branch of government. In **Smith**, Justice Scalia wrote:

> "Values that are protected against governmental interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as society believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."

By invalidating RFRA, the Court showed a marked disrespect of the solicitude of a nearly unanimous Congress. Contrary to the Court's characterization of the RFRA as a kind of usurpation of the judicial power to say what the Constitution means, the law offered no definition of Free Exercise, and on its face appeared to be a procedural measure establishing a standard of proof and allocating the duty of meeting it. In effect, the Court ruled that Congress had no power in the area of religion. And yet, Free Exercise exists in the First Amendment as a negative on Congress. The power of Congress to act towards the states in matters of religion arises from the Fourteenth Amendment. [108]

From the foregoing, it can be seen that **Smith**, while expressly recognizing the power of legislature to give accommodations, is in effect contrary to the **benevolent neutrality or accommodation** approach. Moreover, if we consider the history of the incorporation of the religion clauses in the U.S., the decision in **Smith** is grossly inconsistent with the importance placed by the framers on religious faith. **Smith** is dangerous precedent because it subordinates fundamental rights of religious belief and practice to all neutral, general legislation. **Sherbert** recognized the need to protect religious exercise in light of the massive increase in the size of government, the concerns

within its reach, and the number of laws administered by it. However, **Smith** abandons the protection of religious exercise at a time when the scope and reach of government has never been greater. It has been pointed out that **Smith** creates the legal framework for persecution: through general, neutral laws, legislatures are now able to force conformity on religious minorities whose practice irritate or frighten an intolerant majority. [109]

The effect of **Smith** is to erase entirely the concept of mandatory accommodations, thereby emasculating the Free Exercise Clause. **Smith** left religious freedom for many in the hands of the political process, exactly where it would be if the religion clauses did not exist in the Bill of Rights. Like most protections found in the Bill of Rights, the religion clauses of the First Amendment are most important to those who cannot prevail in the political process. The Court in **Smith** ignores the fact that the protections found in the Bill of Rights were deemed too important to leave to the political process. Because mainstream religions generally have been successful in protecting their interests through the political process, it is the non-mainstream religions that are adversely affected by **Smith**. In short, the U.S. Supreme Court has made it clear to such religions that they should not look to the First Amendment for religious freedom. [110]

(3) Accommodation under the Religion Clauses

A free exercise claim could result to three kinds of **accommodation**: (a) those which are found to be constitutionally compelled, i.e., required by the Free Exercise Clause; (b) those which are discretionary or legislative, *i.e.*, not required by the Free Exercise Clause but nonetheless permitted by the Establishment Clause; and (c) those which the religion clauses prohibit. [111]

Mandatory accommodation results when the Court finds that accommodation is **required** by the Free Exercise Clause, *i.e.*, when the Court itself carves out an exemption. This accommodation occurs when all three conditions of the compelling interest test are met, *i.e*, a statute or government action has burdened claimant's free exercise of religion, and there is no doubt as to the sincerity of the religious belief; the state has failed to demonstrate a particularly important or compelling governmental goal in preventing an exemption; and that the state has failed to demonstrate that it used the least restrictive means. In these cases, the Court finds that the injury to religious conscience is so great and the advancement of public purposes is incomparable that only indifference or hostility could explain a refusal to make exemptions. Thus, if the state's objective could be served as well or almost as well by granting an exemption to those whose religious beliefs are burdened by the regulation, the Court must grant the exemption. The **Yoder case** is an example where the Court held that the state must accommodate the religious beliefs of the Amish who objected to enrolling their children in high school as required by law. The **Sherbert case** is another example where the Court held that the state unemployment compensation plan must accommodate the religious convictions of Sherbert. [112]

In **permissive accommodation**, the Court finds that the State may, but is not required to, accommodate religious interests. The U.S. **Walz case** illustrates this situation where the U.S. Supreme Court upheld the constitutionality of tax exemption given by New York to church properties, but did not rule that the state was required to provide tax exemptions. The Court declared that "(t)he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." [113] Other examples are **Zorach v. Clauson**, [114] allowing released time in public schools and **Marsh v. Chambers**, [115] allowing payment of legislative chaplains from public funds. Parenthetically, the Court in **Smith** has ruled that this is the only

accommodation allowed by the Religion Clauses.

Finally, when the Court finds no basis for a mandatory accommodation, or it determines that the legislative accommodation runs afoul of the establishment or the free exercise clause, it results to a **prohibited accommodation**. In this case, the Court finds that establishment concerns prevail over potential accommodation interests. To say that there are valid exemptions buttressed by the Free Exercise Clause does not mean that all claims for free exercise exemptions are valid. [116] An example where accommodation was prohibited is **McCollum v. Board of Education**, [117] where the Court ruled against optional religious instruction in the public school premises. [118]

Given that a free exercise claim could lead to three different results, the question now remains as to how the Court should determine which action to take. In this regard, it is **the strict scrutiny-compelling state interest** test which is most in line with the **benevolent neutrality-accommodation** approach.

Under the benevolent-neutrality theory, the principle underlying the First Amendment is that freedom to carry out one's duties to a Supreme Being is an inalienable right, not one dependent on the grace of legislature. Religious freedom is seen as a substantive right and not merely a privilege against discriminatory legislation. With religion looked upon with benevolence and not hostility, benevolent neutrality allows accommodation of religion under certain circumstances.

Considering that laws nowadays are rarely enacted specifically to disable religious belief or practice, free exercise disputes arise commonly when a law that is religiously neutral and generally applicable on its face is argued to prevent or burden what someone's religious faith requires, or alternatively, requires someone to undertake an act that faith would preclude. In essence, then, free exercise arguments contemplate religious exemptions from otherwise general laws. [119]

Strict scrutiny is appropriate for free exercise challenges because "[t]he compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. [120] Underlying the compelling state interest test is the notion that free exercise is a fundamental right and that laws burdening it should be subject to strict scrutiny. [121]

In its application, the **compelling state interest** test follows a three-step process, summarized as follows:

> If the plaintiff can show that a law or government practice inhibits the free exercise of his religious beliefs, the burden shifts to the government to demonstrate that the law or practice is necessary to the accomplishment of some important (or 'compelling') secular objective and that it is the least restrictive means of achieving that objective. If the plaintiff meets this burden and the government does not, the plaintiff is entitled to exemption from the law or practice at issue. In order to be protected, the claimant's beliefs must be 'sincere', but they need not necessarily be consistent, coherent, clearly articulated, or congruent with those of the claimant's religious denomination. 'Only beliefs rooted in religion are protected by the Free Exercise Clause'; secular beliefs, however sincere and conscientious, do not suffice. [122]

In sum, the U.S. Court has invariably decided claims based on the religion clauses using either the separationist approach, or the benevolent neutrality approach. The benevolent neutrality approach has also further been split by the view that the First

Amendment requires accommodation, or that it only allows permissible legislative accommodations. The current prevailing view as pronounced in **Smith**, however, is that that there are no required accommodation under the First Amendment, although it permits of legislative accommodations.

3. Religion Clauses in the Philippine Context: Constitution, Jurisprudence and Practice

a. US Constitution and jurisprudence vis-à-vis Philippine Constitution

By juxtaposing the American Constitution and jurisprudence against that of the Philippines, it is immediately clear that one cannot simply conclude that we have adopted — lock, stock and barrel — the religion clauses as embodied in the First Amendment, and therefore, the U.S. Court's interpretation of the same. Unlike in the U.S. where legislative exemptions of religion had to be upheld by the U.S. Supreme Court as constituting *permissive accommodations*, similar exemptions for religion are **mandatory accommodations** under our own constitutions. Thus, our 1935, 1973 and 1987 Constitutions contain provisions on tax exemption of church property,[123] salary of religious officers in government institutions,[124] and optional religious instruction.[125] Our own preamble also invokes the aid of a divine being.[126] **These constitutional provisions are wholly ours and have no counterpart in the U.S. Constitution or its *amendments***. They all reveal without doubt that the Filipino people, in adopting these constitutions, manifested their adherence to the **benevolent neutrality** approach that requires **accommodations** in interpreting the religion clauses.[127]

The argument of Mr. Justice Carpio that the August 4, 2003 *ponencia* was erroneous insofar as it asserted that the 1935 Constitution incorporates the **Walz** ruling as this case was decided subsequent to the 1935 Constitution is a misreading of the *ponencia*. What the *ponencia* pointed out was that even as early as 1935, or more than three decades **before** the U.S. Court could validate the exemption in **Walz** as a form or **permissible accommodation**, we have already incorporated the same in our Constitution, as a **mandatory accommodation**.

There is no ambiguity with regard to the Philippine Constitution's departure from the U.S. Constitution, insofar as religious accommodations are concerned. It is indubitable that **benevolent neutrality-accommodation**, whether mandatory or permissive, is the spirit, intent and framework underlying the Philippine Constitution.[128] As stated in our Decision, dated August 4, 2003:

> The history of the religion clauses in the 1987 Constitution shows that these clauses were largely adopted from the First Amendment of the U.S. Constitution . . . **Philippine jurisprudence and commentaries on the religious clauses also continued to borrow authorities from U.S. jurisprudence without articulating the stark distinction between the two streams of U.S. jurisprudence** [*i.e.*, separation and benevolent neutrality]. One might simply conclude that the Philippine Constitutions and jurisprudence also inherited the disarray of U.S. religion clause jurisprudence and the two identifiable streams; thus, when a religion clause case comes before the Court, a **separationist** approach or a **benevolent neutrality** approach might be adopted and each will have U.S. authorities to support it. Or, one might conclude that as the history of the First Amendment as narrated by the Court in **Everson** supports the **separationist** approach, Philippine jurisprudence should also

> follow this approach in light of the Philippine religion clauses' history. As a result, in a case where the party claims religious liberty in the face of a general law that inadvertently burdens his religious exercise, he faces an almost insurmountable wall in convincing the Court that the wall of separation would not be breached if the Court grants him an exemption. **These conclusions, however, are not and were never warranted by the 1987, 1973 and 193 5 Constitutions as shown by other provisions on religion in all three constitutions**. It is a cardinal rule in constitutional construction that the constitution must be interpreted as a whole and apparently conflicting provisions should be reconciled and harmonized in a manner that will give to all of them full force and effect. **From this construction, it will be ascertained that the intent of the framers was to adopt a benevolent neutrality approach in interpreting the religious clauses in the Philippine constitutions**, and the enforcement of this intent is the goal of construing the constitution. [129] [citations omitted]

We therefore reject Mr. Justice Carpio's total adherence to the U.S. Court's interpretation of the religion clauses to effectively deny accommodations on the sole basis that the law in question is neutral and of general application. For even if it were true that "an unbroken line of U.S. Supreme Court decisions" has never held that "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate," **our own Constitutions** have made significant changes to accommodate and exempt religion. **Philippine jurisprudence shows that the Court has allowed exemptions from a law of general application, in effect, interpreting our religion clauses to cover both mandatory and permissive accommodations**. [130]

To illustrate, in **American Bible Society v. City of Manila**, [131] the Court granted to plaintiff exemption from a law of general application based on the Free Exercise Clause. In this case, plaintiff was required by an ordinance to secure a mayor's permit and a municipal license as ordinarily required of those engaged in the business of general merchandise under the city's ordinances. Plaintiff argued that this amounted to "religious censorship and restrained the free exercise and enjoyment of religious profession, to wit: the distribution and sale of bibles and other religious literature to the people of the Philippines." Although the Court categorically held that the questioned ordinances were not applicable to plaintiff as it was not engaged in the business or occupation of selling said "merchandise" for profit, it also ruled that applying the ordinance to plaintiff and requiring it to secure a license and pay a license fee or tax would impair its free exercise of religious profession and worship and its right of dissemination of religious beliefs "as the power to tax the exercise of a privilege is the power to control or suppress its enjoyment." The decision states in part, *viz*:

> The constitutional guaranty of the free exercise and enjoyment of religious profession and worship carries with it the right to disseminate religious information. Any restraint of such right can only be justified **like other restraints of freedom of expression** on the grounds that there is a **clear and present danger of any substantive evil which the State has the right to prevent**. (citations omitted, *emphasis supplied*)

Another case involving mandatory accommodation is **Ebralinag v. The Division Superintendent of Schools**. [132] The case involved several Jehovah's Witnesses who were expelled from school for refusing to salute the flag, sing the national anthem and recite the patriotic pledge, in violation of the Administrative Code of 1987. In resolving the religious freedom issue, a unanimous Court overturned an earlier ruling denying such

exemption,[133] using the "grave and imminent danger" test, *viz*:

> The sole justification for a **prior restraint or limitation** on the exercise of religious freedom (according to the late Chief Justice Claudio Teehankee in his dissenting opinion in German v. Barangan, 135 SCRA 514, 517) is the existence of a **grave and present danger of a character both grave and imminent, of a serious evil** to public safety, public morals, public health or any other legitimate public interest, that the State has a right (and duty) to prevent. Absent such a threat to public safety, the expulsion of the petitioners from the schools is not justified.[134] (*emphases supplied*)

In these two cases, the Court itself carved out an exemption from a law of general application, on the strength directly of the Free Exercise Clause.

We also have jurisprudence that supports permissive accommodation. The case of **Victoriano v. Elizalde Rope Workers Union**[135] is an example of the application of Mr. Justice Carpio's theory of permissive accommodation, where religious exemption is granted by a legislative act. In **Victoriano**, the constitutionality of Republic Act No. 3350 was questioned. The said R.A. exempt employees from the application and coverage of a closed shop agreement — mandated in another law — based on religious objections. A unanimous Court upheld the constitutionality of the law, holding that "government is not precluded from pursuing valid objectives secular in character even if the incidental result would be favorable to a religion or sect." Interestingly, the secular purpose of the challenged law which the Court upheld was the advancement of "the constitutional right to the free exercise of religion."[136]

Having established that **benevolent neutrality-accommodation** is the framework by which free exercise cases must be decided, the next question then turned to the test that should be used in ascertaining the limits of the exercise of religious freedom. In our Decision dated August 4, 2003, we reviewed our jurisprudence, and ruled that in cases involving purely conduct based on religious belief, as in the case at bar, the **compelling state interest test**, is proper, *viz*:

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

was the only case that employed the "**compelling state interest**" test, but as explained previously, the use of the test was inappropriate to the facts of the case.

The **case at bar** does not involve speech as in *American Bible Society*, *Ebralinag* and *Iglesia ni Cristo* where the "**clear and present danger**" and "**grave and immediate danger**" tests were appropriate as speech has easily discernible or immediate effects. The *Gerona* and *German doctrine*, aside from having been overruled, is not congruent with the **benevolent neutrality** approach, thus not appropriate in this jurisdiction. Similar to *Victoriano*, the **present case involves purely conduct** arising from religious belief. **The "compelling state interest" test is proper where conduct is involved for the whole gamut of human conduct has different effects on the state's interests: some effects may be immediate and short-term while others delayed and far-reaching**. A test that would protect the interests of the state in preventing a substantive evil, whether immediate or delayed, is therefore necessary. However, not any interest of the state would suffice to prevail over the right to religious freedom as this is a fundamental right that enjoys a preferred position in the hierarchy of rights — "the most inalienable and sacred of all human rights", in the words of Jefferson. This right is sacred for an invocation of the Free Exercise Clause is an appeal to a higher sovereignty. The entire constitutional order of limited government is premised upon an acknowledgment of such higher sovereignty, thus the Filipinos implore the "aid of Almighty God in order to build a just and humane society and establish a government." As held in *Sherbert*, only the gravest abuses, endangering **paramount interests** can limit this fundamental right. A mere balancing of interests which balances a right with just a colorable state interest is therefore not appropriate. Instead, only a compelling interest of the state can prevail over the fundamental right to religious liberty. The test requires the state to carry a heavy burden, a compelling one, for to do otherwise would allow the state to batter religion, especially the less powerful ones until they are destroyed. In determining which shall prevail between the state's interest and religious liberty, reasonableness shall be the guide. The "compelling state interest" serves the purpose of revering religious liberty while at the same time affording protection to the paramount interests of the state. This was the test used in *Sherbert* which involved conduct, *i.e.* refusal to work on Saturdays. In the end, the "compelling state interest" test, by upholding the paramount interests of the state, seeks to protect the very state, without which, religious liberty will not be preserved. [137] (*citations omitted*)

At this point, we take note of Mr. Justice Carpio's dissent, which, while loosely disputing the applicability of the **benevolent neutrality** framework and **compelling state interest** test, states that "[i]t is true that a test needs to be applied by the Court in determining the validity of a free exercise claim of exemption as made here by Escritor." This assertion is inconsistent with the position negating the benevolent neutrality or **accommodation approach**. If it were true, indeed, that the religion clauses do not *require* accommodations based on the free exercise of religion, then **there would be no need for a test** to determine the validity of a free exercise claim, as any and all claims for religious exemptions from a law of general application would fail.

Mr. Justice Carpio also asserts that "[m]aking a distinction between permissive accommodation and mandatory accommodation is more critically important in analyzing free exercise exemption claims because it forces the Court to confront how far it can

validly set the limits of religious liberty under the Free Exercise Clause, rather than presenting the separation theory and accommodation theory as opposite concepts, and then rejecting relevant and instructive American jurisprudence (such as the *Smith* case) just because it does not espouse the theory selected." He then asserts that the **Smith** doctrine cannot be dismissed because it does not really espouse the strict neutrality approach, but more of permissive accommodation.

Mr. Justice Carpio's assertion misses the point. Precisely because the doctrine in **Smith** is that only legislative accommodations are allowed under the Free Exercise Clause, it cannot be used in determining a claim of religion exemption directly anchored on the Free Exercise Clause. Thus, even assuming that the **Smith** doctrine actually espouses the theory of accommodation or benevolent neutrality, the accommodation is limited to the permissive, or legislative exemptions. It, therefore, cannot be used as a test in determining the claims of religious exemptions directly under the Free Exercise Clause because **Smith does not recognize** such exemption. Moreover, Mr. Justice Carpio's advocacy of the **Smith** doctrine would effectively render the Free Exercise protection — a fundamental right under our Constitution — nugatory because he would deny its status as an independent source of right.

b. The Compelling State Interest Test

As previously stated, the **compelling state interest test** involves a three-step process. We explained this process in detail, by showing the questions which must be answered in each step, *viz*:

> . . . **First**, "[H]as the statute or government action created a burden on the free exercise of religion?" The courts often look into the sincerity of the religious belief, but without inquiring into the truth of the belief because the Free Exercise Clause prohibits inquiring about its truth as held in **Ballard** and **Cantwell**. The sincerity of the claimant's belief is ascertained to avoid the mere claim of religious beliefs to escape a mandatory regulation. . . .
>
> xxx xxx xxx
>
> **Second**, the court asks: "[I]s there a sufficiently compelling state interest to justify this infringement of religious liberty?" In this step, **the government has to establish that its purposes are legitimate for the state and that they are compelling**. Government must do more than assert the objectives at risk if exemption is given; it must **precisely show how and to what extent those objectives will be undermined if exemptions are granted**. . . .
>
> xxx xxx xxx
>
> **Third**, the court asks: "[H]as the state in achieving its legitimate purposes used the least intrusive means possible so that the free exercise is not infringed any more than necessary to achieve the legitimate goal of the state?" The analysis requires the state to show that the means in which it is achieving its legitimate state objective is the **least intrusive means**, *i.e.*, it has chosen a way to achieve its legitimate state end that imposes as little as possible on religious liberties . . . . [138] [citations omitted]

Again, the application of the **compelling state interest** test could result to three situations of **accommodation: First, mandatory accommodation** would result if the Court finds that accommodation is **required** by the Free Exercise Clause. **Second**, if the Court finds that the State may, but is not required to, accommodate religious interests,

permissive accommodation results. **Finally**, if the Court finds that the establishment concerns prevail over potential accommodation interests, then it must rule that the **accommodation is prohibited**.

One of the central arguments in Mr. Justice Carpio's dissent is that only permissive accommodation can carve out an exemption from a law of general application. He posits the view that the law should prevail in the absence of a legislative exemption, and the Court cannot make the accommodation or exemption.

Mr. Justice Carpio's position is clearly not supported by Philippine jurisprudence. The cases of **American Bible Society, Ebralinag**, and **Victoriano** demonstrate that our application of the doctrine of **benevolent neutrality-accommodation** covers not only the grant of **permissive**, or legislative accommodations, but also **mandatory accommodations**. Thus, an exemption from a law of general application is possible, even if anchored directly on an invocation of the Free Exercise Clause alone, rather than a legislative exemption.

Moreover, it should be noted that while there is no Philippine case as yet wherein the Court granted an accommodation/exemption to a religious act from the application of general *penal* laws, permissive accommodation based on religious freedom has been granted with respect to one of the crimes penalized under the Revised Penal Code, that of bigamy.

In the U.S. case of **Reynolds v. United States**,[139] the U.S. Court expressly **denied** to Mormons an exemption from a general federal law criminalizing polygamy, even if it was proven that the practice constituted a religious duty under their faith.[140] In contradistinction, Philippine law accommodates the same practice among Moslems, through a legislative act. For while the act of marrying more than one still constitutes bigamy under the Revised Penal Code, Article 180 of P.D. No. 1083, otherwise known as the Code of Muslim Personal Laws of the Philippines, provides that the penal laws relative to the crime of bigamy "shall not apply to a person married . . . under Muslim law." Thus, by legislative action, accommodation is granted of a Muslim practice which would otherwise violate a valid and general criminal law. Mr. Justice Carpio recognized this accommodation when, in his dissent in our Decision dated August 4, 2003 and citing **Sulu Islamic Association of Masjid Lambayong v. Malik**,[141] he stated that a Muslim Judge "is not criminally liable for bigamy because Shari'a law allows a Muslim to have more than one wife."

From the foregoing, the weakness of Mr. Justice Carpio's "permissive-accommodation only" advocacy in this jurisdiction becomes manifest. Having anchored his argument on the **Smith** doctrine that "*the guaranty of religious liberty as embodied in the Free Exercise Clause does not require the grant of exemptions from generally applicable laws to individuals whose religious practice conflict with those laws*," his theory is infirmed by the showing that the **benevolent neutrality approach which allows for both mandatory and permissive accommodations** was unequivocally adopted by our framers in the Philippine Constitution, our legislature, and our jurisprudence.

Parenthetically, it should be pointed out that a "permissive accommodation-only" stance is the antithesis to the notion that religion clauses, like the other fundamental liberties found in the Bill or Rights, is a preferred right and an independent source of right.

What Mr. Justice Carpio is left with is the argument, based on **Smith**, that the test in **Sherbert** is not applicable when the law in question is a generally applicable *criminal* law.

Stated differently, even if Mr. Justice Carpio conceded that there is no question that in the Philippine context, accommodations are made, the question remains as to how far the exemptions will be made and who would make these exemptions.

On this point, two things must be clarified: **first**, in relation to criminal statutes, only the question of mandatory accommodation is uncertain, for Philippine law and jurisprudence have, in fact, allowed legislative accommodation. **Second**, the power of the Courts to grant exemptions in general (*i.e.*, finding that the Free Exercise Clause required the accommodation, or **mandatory accommodations**) has already been decided, not just once, but twice by the Court. Thus, the crux of the matter is whether this Court can make exemptions as in **Ebralinag** and the **American Bible Society**, in cases involving criminal laws of general application.

We hold that the Constitution itself mandates the Court to do so for the following reasons.

First, as previously discussed, while the U.S. religion clauses are the precursors to the Philippine religion clauses, the **benevolent neutrality-accommodation** approach in Philippine jurisdiction is more pronounced and given leeway than in the U.S.

Second, the whole purpose of the accommodation theory, including the notion of mandatory accommodations, was to address the "inadvertent burdensome effect" that an otherwise facially neutral law would have on religious exercise. Just because the law is criminal in nature, therefore, should not bring it out of the ambit of the Free Exercise Clause. As stated by Justice O'Connor in her concurring opinion in **Smith**, "[t]here is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral towards religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." [142]

Third, there is wisdom in accommodation made by the Court as this is the recourse of minority religions who are likewise protected by the Free Exercise Clause. Mandatory accommodations are particularly necessary to protect adherents of minority religions from the inevitable effects of majoritarianism, which include ignorance and indifference and overt hostility to the minority. As stated in our Decision, dated August 4, 2003:

> . . . In a democratic republic, laws are inevitably based on the presuppositions of the majority, thus not infrequently, they come into conflict with the religious scruples of those holding different world views, even in the absence of a deliberate intent to interfere with religious practice. At times, this effect is unavoidable as a practical matter because some laws are so necessary to the common good that exceptions are intolerable. But in other instances, the injury to religious conscience is so great and the advancement of public purposes so small or incomparable that only indifference or hostility could explain a refusal to make exemptions. Because of plural traditions, legislators and executive officials are frequently willing to make such exemptions when the need is brought to their attention, but this may not always be the case when the religious practice is either unknown at the time of enactment or is for some reason unpopular. **In these cases, a constitutional interpretation that *allows* accommodations prevents needless injury to the religious consciences of those who can have an influence in the legislature; while a constitutional interpretation that *requires* accommodations extends this treatment to religious faiths**

that are less able to protect themselves in the political arena.

Fourth, exemption from penal laws on account of religion is not entirely an alien concept, nor will it be applied for the first time, as an exemption of such nature, albeit by legislative act, has already been granted to Moslem polygamy and the criminal law of bigamy.

Finally, we must consider the language of the Religion Clauses *vis-à-vis* the other fundamental rights in the Bill of Rights. It has been noted that unlike other fundamental rights like the right to life, liberty or property, the Religion Clauses are stated in absolute terms, unqualified by the requirement of "due process," "unreasonableness," or "lawful order." Only the right to free speech is comparable in its absolute grant. Given the unequivocal and unqualified grant couched in the language, the Court cannot simply dismiss a claim of exemption based on the Free Exercise Clause, solely on the premise that the law in question is a general criminal law. [143] If the burden is great and the sincerity of the religious belief is not in question, adherence to the **benevolent neutrality-accommodation** approach require that the Court make an individual determination and not dismiss the claim outright.

At this point, we must emphasize that the adoption of the **benevolent neutrality-accommodation approach** does not mean that the Court ought to grant exemptions every time a free exercise claim comes before it. This is an erroneous reading of the framework which the dissent of Mr. Justice Carpio seems to entertain. Although **benevolent neutrality** is the lens with which the Court ought to view religion clause cases, **the interest of the state should also be afforded utmost protection**. This is precisely the purpose of the test — to draw the line between mandatory, permissible and forbidden religious exercise. **Thus, under the framework, the Court cannot simply dismiss a claim under the Free Exercise Clause because the conduct in question offends a law** or the orthodox view, as proposed by Mr. Justice Carpio, for this precisely is the protection afforded by the religion clauses of the Constitution. [144] As stated in the Decision:

> . . . 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.** [145]

II. THE CURRENT PROCEEDINGS

We now resume from where we ended in our August 4, 2003 Decision. As mentioned, what remained to be resolved, upon which remand was necessary, pertained to the final task of **subjecting this case to the careful application of the compelling state interest test**, *i.e.*, determining whether respondent is entitled to exemption, an

issue which is essentially factual or evidentiary in nature.

After the termination of further proceedings with the OCA, and with the transmittal of the Hearing Officer's report,[146] along with the evidence submitted by the OSG, this case is once again with us, to resolve the penultimate question of whether respondent should be found guilty of the administrative charge of "disgraceful and immoral conduct." It is at this point then that we examine the report and documents submitted by the hearing officer of this case, and apply the three-step process of the **compelling state interest test** based on the evidence presented by the parties, especially the government.

On the **sincerity of religious belief**, the Solicitor General categorically **concedes** that the sincerity and centrality of respondent's claimed religious belief and practice are beyond serious doubt.[147] Thus, having previously established the **preliminary conditions** required by the **compelling state interest** test, *i.e.*, that a law or government practice inhibits the free exercise of respondent's religious beliefs, and there being no doubt as to the sincerity and centrality of her faith to claim the exemption based on the free exercise clause, the **burden shifted to the government** to demonstrate that the law or practice justifies a compelling secular objective and that it is the least restrictive means of achieving that objective.

A look at the evidence that the OSG has presented fails to demonstrate "the gravest abuses, endangering paramount interests" which could limit or override respondent's fundamental right to religious freedom. Neither did the government exert any effort to show that the means it seeks to achieve its legitimate state objective is the least intrusive means.

The OSG merely offered the following as exhibits and their purposes:

1. Exhibit "A-OSG" AND SUBMARKING — The September 30, 2003 Letter to the OSG of Bro. Raymond B. Leach, Legal Representative of the Watch Tower Bible and Tract Society of the Philippines, Inc.

PURPOSE: To show that the OSG exerted efforts to examine the sincerity and centrality of respondent's claimed religious belief and practice.

2. Exhibit "B-OSG" AND SUBMARKING — The duly notarized certification dated September 30, 2003 issued and signed by Bro. Leach.

PURPOSES: (1) To substantiate the sincerity and centrality of respondent's claimed religious belief and practice; and (2) to prove that the Declaration of Pledging Faithfulness, being a purely internal arrangement within the congregation of the Jehovah's Witnesses, cannot be a source of any legal protection for respondent.

In its Memorandum-In-Intervention, the OSG contends that the State has a compelling interest to override respondent's claimed religious belief and practice, in order to protect marriage and the family as basic social institutions. The Solicitor General, quoting the Constitution[148] and the Family Code,[149] argues that marriage and the family are so crucial to the stability and peace of the nation that the conjugal arrangement embraced in the Declaration of Pledging Faithfulness should not be recognized or given effect, as "it is utterly destructive of the avowed institutions of marriage and the family for it reduces to a mockery these legally exalted and socially significant institutions which in their purity demand respect and dignity."[150]

Parenthetically, the dissenting opinion of Mr. Justice Carpio echoes the Solicitor

General in so far as he asserts that the State has a compelling interest in the preservation of marriage and the family as basic social institutions, which is ultimately the public policy underlying the criminal sanctions against concubinage and bigamy. He also argues that in dismissing the administrative complaint against respondent, "the majority opinion effectively condones and accords a semblance of legitimacy to her patently unlawful cohabitation . . ." and "facilitates the circumvention of the Revised Penal Code." According to Mr. Justice Carpio, by choosing to turn a blind eye to respondent's criminal conduct, the majority is in fact recognizing a practice, custom or agreement that subverts marriage. He argues in a similar fashion as regards the state's interest in the sound administration of justice.

There has never been any question that the state has an interest in protecting the institutions of marriage and the family, or even in the sound administration of justice. Indeed, the provisions by which respondent's relationship is said to have impinged, *e.g.*, Book V, Title I, Chapter VI, Sec. 46(b)(5) of the Revised Administrative Code, Articles 334 and 349 of the Revised Penal Code, and even the provisions on marriage and family in the Civil Code and Family Code, all clearly demonstrate the State's need to protect these secular interests.

Be that as it may, the free exercise of religion is specifically articulated as one of the fundamental rights in our Constitution. **It is a fundamental right that enjoys a preferred position in the hierarchy of rights — "the most inalienable and sacred of human rights," in the words of Jefferson**. Hence, it is not enough to contend that the state's interest is important, because our Constitution itself holds the right to religious freedom sacred. The State must articulate in specific terms the state interest involved in preventing the exemption, which must be ***compelling***, for only the gravest abuses, endangering paramount interests can limit the fundamental right to religious freedom. To rule otherwise would be to emasculate the Free Exercise Clause as a source of right by itself.

Thus, it is not the State's broad interest in "protecting the institutions of marriage and the family," or even "in the sound administration of justice" that must be weighed against respondent's claim, but the State's narrow interest in refusing to make an exception for the cohabitation which respondent's faith finds moral. In other words, **the government must do more than assert the objectives at risk if exemption is given; it must precisely show how and to what extent those objectives will be undermined if exemptions are granted**.[151] This, the Solicitor General failed to do.

To paraphrase Justice Blackmun's application of the **compelling interest test**, the State's interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic. The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest, if it does not, in fact, attempt to enforce that prohibition. In the case at bar, the State has not evinced any concrete interest in enforcing the concubinage or bigamy charges against respondent or her partner. The State has never sought to prosecute respondent nor her partner. The State's asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition. Incidentally, as echoes of the words of Messrs. J. Bellosillo and Vitug, in their concurring opinions in our Decision, dated August 4, 2003, to deny the exemption would effectively break up "an otherwise ideal union of two individuals who have managed to stay together as husband and wife [approximately

twenty-five years]" and have the effect of defeating the very substance of marriage and the family.

The Solicitor General also argued against respondent's religious freedom on the basis of morality, *i.e.*, that "the conjugal arrangement of respondent and her live-in partner should not be condoned because adulterous relationships are constantly frowned upon by society";[152] and "that State laws on marriage, which are moral in nature, take clear precedence over the religious beliefs and practices of any church, religious sect or denomination on marriage. Verily, religious beliefs and practices should not be permitted to override laws relating to public policy such as those of marriage."[153]

The above arguments are mere reiterations of the arguments raised by Mme. Justice Ynares-Santiago in her dissenting opinion to our Decision dated August 4, 2003, which she offers again *in toto*. These arguments have already been addressed in our decision dated August 4, 2003.[154] In said Decision, we noted that Mme. Justice Ynares-Santiago's dissenting opinion dwelt more on the standards of morality, without categorically holding that religious freedom is not in issue.[155] We, therefore, went into a discussion on morality, in order to show that:

> (a) The public morality expressed in the law is necessarily secular for in our constitutional order, the religion clauses prohibit the state from establishing a religion, including the morality it sanctions.[156] Thus, when the law speaks of "immorality" in the Civil Service Law or "immoral" in the Code of Professional Responsibility for lawyers,[157] or "public morals" in the Revised Penal Code,[158] or "morals" in the New Civil Code,[159] or "moral character" in the Constitution,[160] the distinction between public and secular morality on the one hand, and religious morality, on the other, should be kept in mind;[161]
>
> (b) Although the morality contemplated by laws is secular, **benevolent neutrality** could allow for **accommodation** of morality based on religion, provided it does not offend compelling state interests;[162]
>
> (c) The jurisdiction of the Court extends only to public and secular morality. Whatever pronouncement the Court makes in the case at bar should be understood only in this realm where it has authority.[163]
>
> (d) Having distinguished between public and secular morality and religious morality, the more difficult task is determining which immoral acts under this public and secular morality fall under the phrase "disgraceful and immoral conduct" for which a government employee may be held administratively liable.[164] Only one conduct is in question before this Court, *i.e.*, the conjugal arrangement of a government employee whose partner is legally married to another which Philippine law and jurisprudence consider both immoral and illegal.[165]
>
> (e) While there is no dispute that under settled jurisprudence, respondent's conduct constitutes "disgraceful and immoral conduct," the case at bar involves the defense of religious freedom, therefore none of the cases cited by Mme. Justice Ynares-Santiago apply.[166] There is no jurisprudence in Philippine jurisdiction holding that the defense of religious freedom of a member of the Jehovah's Witnesses under the same circumstances as respondent will not prevail over the laws on adultery, concubinage or some other law. We cannot summarily conclude therefore that her conduct is likewise so "odious" and "barbaric" as to be immoral and punishable by law.[167]

Again, we note the arguments raised by Mr. Justice Carpio with respect to charging respondent with conduct prejudicial to the best interest of the service, and we reiterate that the dissent offends due process as respondent was not given an opportunity to defend herself against the charge of "conduct prejudicial to the best interest of the service." Indeed, there is no evidence of the alleged prejudice to the best interest of the service. [168]

Mr. Justice Carpio's slippery slope argument, on the other hand, is *non-sequitur*. If the Court grants respondent exemption from the laws which respondent Escritor has been charged to have violated, the exemption would not apply to Catholics who have secured church annulment of their marriage even without a final annulment from a civil court. First, unlike Jehovah's Witnesses, the Catholic faith considers cohabitation without marriage as immoral. Second, but more important, the Jehovah's Witnesses have standards and procedures which must be followed before cohabitation without marriage is given the blessing of the congregation. This includes an investigative process whereby the elders of the congregation verify the circumstances of the declarants. Also, the Declaration is not a blanket authority to cohabit without marriage because once all legal impediments for the couple are lifted, the validity of the Declaration ceases, and the congregation requires that the couple legalize their union.

At bottom, the slippery slope argument of Mr. Justice Carpio is speculative. Nevertheless, insofar as he raises the issue of equality among religions, we look to the words of the Religion Clauses, which clearly single out religion for both a benefit and a burden: "No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. . ." On its face, the language grants a unique advantage to religious conduct, protecting it from governmental imposition; and imposes a unique disadvantage, preventing the government from supporting it. To understand this as a provision which puts religion on an equal footing with other bases for action seems to be a curious reading. There are no "free exercise" of "establishment" provisions for science, sports, philosophy, or family relations. The language itself thus seems to answer whether we have a paradigm of equality or liberty; the language of the Clause is clearly in the form of a grant of liberty. [169]

In this case, the government's conduct may appear innocent and nondiscriminatory but in effect, it is oppressive to the minority. In the interpretation of a document, such as the Bill of Rights, designed to protect the minority from the majority, the question of which perspective is appropriate would seem easy to answer. Moreover, the text, history, structure and values implicated in the interpretation of the clauses, all point toward this perspective. Thus, substantive equality — a reading of the religion clauses which leaves both politically dominant and the politically weak religious groups equal in their inability to use the government (law) to assist their own religion or burden others — makes the most sense in the interpretation of the Bill of Rights, a document designed to protect minorities and individuals from mobocracy in a democracy (the majority or a coalition of minorities). [170]

As previously discussed, our Constitution adheres to the **benevolent neutrality** approach that gives room for accommodation of religious exercises as required by the Free Exercise Clause. [171] Thus, in arguing that respondent should be held administratively liable as the arrangement she had was "illegal *per se* because, by universally recognized standards, it is inherently or by its very nature bad, improper, immoral and contrary to good conscience," [172] the Solicitor General failed to appreciate that **benevolent neutrality** could allow for **accommodation** of morality based on religion, provided it does not

offend compelling state interests. [173]

Finally, even assuming that the OSG has proved a compelling state interest, it has to further demonstrate that the state has used the least intrusive means possible so that the free exercise is not infringed any more than necessary to achieve the legitimate goal of the state, *i.e.*, it has chosen a way to achieve its legitimate state end that imposes as little as possible on religious liberties. [174] Again, the Solicitor General utterly failed to prove this element of the test. Other than the two documents offered as cited above which established the sincerity of respondent's religious belief and the fact that the agreement was an internal arrangement within respondent's congregation, no **iota of evidence was offered**. **In fact**, the records are bereft of even a feeble attempt to procure any such evidence to show that the means the state adopted in pursuing this compelling interest is the least restrictive to respondent's religious freedom.

Thus, we find that **in this particular case and under these distinct circumstances**, respondent Escritor's conjugal arrangement cannot be penalized as she has made out a case for exemption from the law based on her fundamental right to freedom of religion. The Court recognizes that state interests must be upheld in order that freedoms — including religious freedom — may be enjoyed. In the area of religious exercise as a preferred freedom, however, man stands accountable to an authority higher than the state, and so the state interest sought to be upheld must be so compelling that its violation will erode the very fabric of the state that will also protect the freedom. In the absence of a showing that such state interest exists, man must be allowed to subscribe to the Infinite.

IN VIEW WHEREOF, the instant administrative complaint is dismissed.

SO ORDERED.

Quisumbing, Sandoval-Gutierrez, Austria-Martinez, Corona, Azcuna, Tinga, Chico-Nazario and *Garcia, JJ.,* concur.

Panganiban, C.J., joins J. Carpio dissent.

Ynares-Santiago and *Carpio, JJ.,* see dissenting opinion.

Carpio-Morales, J., I maintain my vote articulated in the dissenting opinion of J. Carpio in the Aug. 4, 2003 decision. I thus concur with his present dissent.

Callejo, J., concurs to the dissent made by Justice Carpio.

Velasco, Jr., J., took no part due to prior action of OCA.

Separate Opinions

YNARES-SANTIAGO, *J., dissenting*:

With due respect, I am unable to agree with the finding of the majority that "*in this particular case and under these particular circumstances, respondent Escritor's conjugal arrangement does not constitute disgraceful and immoral conduct*" and its decision to dismiss the administrative complaint filed by petitioner against respondent Soledad S.

Escritor.

The issue in this case is simple. What is the meaning or standard of "disgraceful and immoral conduct" to be applied by the Supreme Court in disciplinary cases involving court personnel?

The degree of morality required of every employee or official in the public service has been consistently high. The rules are particularly strict when the respondent is a Judge or a court employee.[1] Even where the Court has viewed certain cases with human understanding and compassion, it has insisted that no untoward conduct involving public officers should be left without proper and commensurate sanction.[2] The compassion is shown through relatively light penalties. Never, however, has this Court justified, condoned, or blessed the continuation of an adulterous or illicit relationship such as the one in this case, after the same has been brought to its attention.

Is it time to adopt a more liberal approach, a more "modern" view and a more permissive pragmatism which allow adulterous or illicit relations to continue provided the job performance of the court employee concerned is not affected and the place and order in the workplace are not compromised? When does private morality involving a court employee become a matter of public concern?

The Civil Service Law punishes public officers and employees for disgraceful and immoral conduct.[3] Whether an act is immoral within the meaning of the statute is not to be determined by respondent's concept of morality. The law provides the standard; the offense is complete if respondent intended to perform, and did in fact perform, the act which it condemns.[4]

The ascertainment of what is moral or immoral calls for the discovery of contemporary community standards. For those in the service of the Government, provisions of law and court precedents also have to be considered. The task is elusive.

The layman's definition of what is "moral" pertains to excellence of character or disposition. It relates to the distinction between right and wrong; virtue and vice; ethical praise or blame. Moral law refers to the body of requirements in conformity to which virtuous action consists. Applied to persons, it is conformity to the rules of morality, being virtuous with regards to moral conduct.[5]

That which is not consistent with or not conforming to moral law, opposed to or violating morality, and now, more often, morally evil or impure, is immoral. Immoral is the state of not being virtuous with regard to sexual conduct.[6]

The term begs the definition. Hence, anything contrary to the standards of moral conduct is immoral. A grossly immoral act must be so corrupt and false as to constitute a criminal act or so unprincipled as to be reprehensible to a high degree.[7]

Anything plainly evil or dissolute is, of course, unchangingly immoral. However, at the fringes or boundary limits of what is morally acceptable and what is unacceptably wrong, the concept of immorality tends to shift according to circumstances of time, person, and place. When a case involving the concept of immorality comes to court, the applicable provisions of law and jurisprudence take center stage.

Those who choose to tolerate the situation where a man and a woman separated from their legitimate spouses decide to live together in an "ideal" and yet unlawful union state — or more specifically, those who argue that respondent's cohabiting with a man

married to another woman is not something which is willful, flagrant, or shameless — show a moral indifference to the opinion of the good and respectable members of the community in a manner prejudicial to the public service.

Insofar as concepts of morality are concerned, various individuals or cultures may indeed differ. In certain countries, a woman who does not cover herself with a *burka* from head to foot may be arrested for immoral behavior. In other countries, near nudity in beaches passes by unnoticed. In the present case, the perceived fixation of our society over sex is criticized. The lesser degree of condemnation on the sins of laziness, gluttony, vanity, selfishness, avarice and cowardice is decried as discriminatory.

The issue in this case is legal and not philosophical. It is a limited one. Is respondent Soledad S. Escritor guilty of "disgraceful and immoral" conduct in the context of the Civil Service Law? Are there any sanctions that must be imposed?

We cannot overlook the fact that respondent Escritor would have been convicted for a criminal offense if the offended party had been inclined and justified to prosecute her prior to his death in 1998. Even now, she is a co-principal in the crime of concubinage. A married woman who has sexual intercourse with a man not her husband, and the man who has carnal knowledge of her knowing her to be married, commit the crime of adultery. [8] Abandonment by the legal husband without justification does not exculpate the offender; it merely mitigates the penalty.

The concubine with whom a married man cohabits suffers the penalty of *destierro*. [9] It is true that criminal proceedings cannot be instituted against persons charged with adultery or concubinage except upon complaint of the offended party. [10] This does not mean that no actionable offense has been committed if the offended party does not press charges. It simply cannot be prosecuted. The conduct is not thereby approved, endorsed or commended. It is merely tolerated.

The inescapable fact in this case is that acts defined as criminal under penal law have been committed.

There are experts in Criminal Law who believe that the codal provisions on adultery and concubinage are terribly outmoded and should be drastically revised. However, the task of amendment or revision belongs to Congress, and not to the Supreme Court.

Our existing rule is that an act so corrupt or false as **to constitute a criminal act** is "grossly immoral." [11] It is not merely "immoral." Respondent now asks the Court to go all the way to the opposite extreme and condone her illicit relations with not even an admonition or a slight tap on the wrist.

I do not think the Court is ready to render a precedent-setting decision to the effect that, under exceptional circumstances, employees of the judiciary may live in a relationship of adultery or concubinage with no fear of any penalty or sanction and that after being discovered and charged, they may continue the adulterous relationship until death ends it. Indeed, the decision in this case is not limited to court interpreter Soledad Escritor. It is not a *pro hac vice* ruling. It applies to court employees all over the country and to everybody in the civil service. It is not a private ruling but one which is public and far-reaching in its consequences.

In the 1975 case of *De Dios v. Alejo*, [12] the Court applied compassion and empathy but nonetheless recognized as most important a mending of ways through a total breaking of relationships. The facts in that case are strikingly similar to those in this case.

Yet, the Court required a high degree of morality even in the presence of apparently exculpating circumstances. It was stated:

> While it is permissible to view with human understanding and compassion a situation like that in which respondents find themselves, the good of the service and the degree of morality which every official and employee in the public service must observe, if respect and confidence are to be maintained by the government in the enforcement of the law, demand that no untoward conduct on his part, affecting morality, integrity and efficiency, while holding office should be left without proper and commensurate sanction, all attendant circumstances taken into account. In the instant case, We cannot close our eyes to the important considerations that respondents have rendered government service for more than thirty-three and twenty-five years, respectively, and that there is no showing that they have ever been found guilty of any administrative misconduct during all those periods. In the case of respondent Alejo, it seems rather sadistic to make her suffer the extreme penalty of dismissal from the service after she had taken care of her co-respondent's four children, giving them the needed love and attention of a foster mother after they were completely abandoned by their errant and unfaithful natural mother. Even respondent Marfil, if to a lesser degree, is deserving of compassion. **Most importantly, respondents have amply demonstrated that they recognize their mistake and have, therefore, actually mended their ways by totally breaking their relationship complained of, in order to conform with the imperatives of public interest**. (Emphasis supplied)

The standards for those in the judicial service are quite exacting.

The Court has ruled that in the case of public servants who are in the judiciary, their conduct and behavior, **from the presiding judge to the lowliest clerk**, must not only be characterized by propriety and decorum, but above all else, must be above suspicion. [13]

In *Burgos v. Aquino*, [14] it was ruled:

> The Code of Judicial Ethics mandates that the conduct of court personnel must be free from any whiff of impropriety, not only with respect to his duties in the judicial branch but also to his behavior outside the court as a private individual. There is no dichotomy of morality; a court employee is also judged by his private morals. These exacting standards of morality and decency have been strictly adhered to and laid down by the Court to those in the service of the judiciary. Respondent, as a court stenographer, did not live up to her commitment to lead a moral life. Her act of maintaining relations with Atty. Burgos speaks for itself.

Respondent Aquino was a court stenographer who was suspended for six months for maintaining illicit relations with the husband of complainant Virginia E. Burgos. The Court therein stated that a second offense shall result in dismissal.

We should not lose sight of the fact that the judicial system over which it presides is essentially composed of human beings who, as such, are naturally prey to weakness and prone to errors. Nonetheless, in *Ecube-Badel v. Badel*, [15] we imposed on respondent a suspension for six months and one day to one year with warning of dismissal should the illicit relations be repeated or continued.

In *Nalupta v. Tapec*, [16] a deputy sheriff was suspended, also for six months, for having illicit relations with a certain Cristian Dalida who begot a son by him. His wife complained and neighbors confirmed that Tapec was frequently seen leaving the house of Consolacion Inocencio in the morning and returning to it in the afternoon. Tapec and Inocencio begot two children. Consistently with the other cases, we imposed the penalty of suspension for the first offense with the graver penalty of dismissal for a second offense.

The earlier case of *Aquino v. Navarro* [17] involved an officer in the Ministry of Education, Culture and Sports who was abandoned by her husband a year after their marriage and who lived alone for eighteen years with their child. Pretending that she sincerely believed her husband to have died, she entered into a marital relationship with Gonzalo Aquino and had children by him in 1968 and 1969. Eighteen days before their third child was born on May 25, 1975, the two decided to get married. Notwithstanding the illicit relationship which blossomed into a bigamous marriage, the full force of the law was not applied on her, "considering the exceptional circumstances that befell her in her quest for a better life." Still, a penalty of six months suspension was imposed with a warning that "any moral relapse on her part will be severely dealt with."

Times are changing. Illicit sex is now looked upon more kindly. However, we should not completely disregard or overlook a relationship of adultery or concubinage involving a court employee and not order it to be terminated. It should not ignore what people will say about our moral standards and how a permissive approach will be used by other court employees to freely engage in similarly illicit relationship with no fear of disciplinary punishment.

As earlier mentioned, respondent Escritor and Luciano Quilapio, Jr. had existing marriages with their respective legitimate spouses when they decided to live together. To give an aura of regularity and respectability to what was undeniably an adulterous and, therefore, immoral relationship, the two decided to acquire through a religious ceremony what they could not accomplish legally. They executed on July 28, 1991 the "Declaration of Pledging Faithfulness" to make their relationship what they alleged it would be — a binding tie before Jehovah God.

In this case, respondent is charged not as a Jehovah's Witness but in her capacity as a court employee. It is contended that respected elders of the Jehovah's Witnesses sanction "an informal conjugal relationship" between respondent and her marital partner for more than two decades, provided it is characterized by faithfulness and devotion to one another. However, the "informal conjugal relationship" is not between two single and otherwise eligible persons where all that is missing is a valid wedding ceremony. The two persons who started to live together in an ostensible marital relationship are married to other persons.

We must be concerned not with the dogmas or rules of any church or religious sect but with the legal effects under the Civil Service Law of an illicit or adulterous relationship characterized by the facts of this case.

There is no conflict in this case between the dogmas or doctrines of the Roman Catholic Church and those of the Jehovah's Witnesses or any other church or denomination. The perceived conflict is non-existing and irrelevant.

The issue is legal and not religious. The terms "disgraceful" and "immoral" may be religious concepts, but we are concerned with conduct which under the law and

jurisprudence is proscribed and, if perpetrated, how it should be punished.

Respondent cannot legally justify her conduct by showing that it was morally right by the standards of the congregation to which she belongs. Her defense of freedom of religion is unavailing. Her relationship with Mr. Quilapio is illicit and immoral, both under the Revised Administrative Code [18] and the Revised Penal Code, [19] notwithstanding the supposed *imprimatur* given to them by their religion.

The peculiar religious standards alleged to be those of the sect to which respondent belongs can not shield her from the effects of the law. Neither can her illicit relationship be condoned on the basis of a written agreement approved by their religious community. To condone what is inherently wrong in the face of the standards set by law is to render nugatory the safeguards set to protect the civil service and, in this case, the judiciary.

The Court cannot be the instrument by which one group of people is exempted from the effects of these laws just because they belong to a particular religion. Moreover, it is the sworn mandate of the Court to supervise the conduct of an employee of the judiciary, and it must do so with an even hand regardless of her religious affiliation.

I find that respondent's "Declaration of Pledging Faithfulness" does nothing for her insofar as this administrative matter is concerned, for written therein are admissions regarding the legal impediments to her marrying Quilapio. In the said document, she even pledged to seek all avenues to obtain legal recognition by civil authorities of her union with Quilapio. [20] However, the record is silent as to *any* effort on respondent's part to effect this covenant.

The evidence shows that respondent repeatedly admitted the existence of the legal infirmities that plague her relationship with Quilapio. [21] As a court interpreter, she is an integral member of the judiciary and her service as such is crucial to the administration of justice. Her acts and omissions constitute a possible violation of the law — the very same law that she is sworn to uphold as an employee of the judiciary. How can she work under the pretense of being a contributing force to the judicial system if she herself is committing acts that may constitute breaking the law?

Respondent invokes her constitutional right to religious freedom. The separation of church and state has been inviolable in this jurisdiction for a century. However, the doctrine is not involved in this case. [22] Furthermore, the legislature made cohabitation with a woman who is not one's wife a crime through the enactment of the Revised Penal Code. [23] The legislative power has also seen fit to enact the Civil Service Law and has given said law general application.

The argument that a marital relationship is the concern of religious authorities and not the State has no basis.

In *Reynolds v. United States*, [24] the U.S. Supreme Court stated:

> It is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.

The strengthening of marriage ties and the concomitant hostility to adulterous or illicit marital relations is a primary governmental concern. It has nothing to do with the particular religious affiliations of those affected by legislation in this field.

The relations, duties, obligations and consequences of marriage are important to the morals and civilization of a people and to the peace and welfare of society. [25] Any attempt to inject freedom of religion in an effort to exempt oneself from the Civil Service rules relating to the sanctity of the marriage tie must fail.

The U.S. Supreme Court in the above-cited case of *Reynolds v. United States* [26] upheld federal legislation prohibiting bigamy and polygamy in territories of the United States, more specifically Utah. Members of the Mormon Church asserted that the duty to practice polygamy was an accepted doctrine of their church. In fact, Mormons had trekked from the regular States of the Union to what was then a mere Territory in order to practice their religious beliefs, among them polygamy. The Court declared that while it protected religious belief and opinion, it did not deprive Congress of the power to reach actions violative of social duties or subversive of good order. Polygamy was outlawed even for Mormons who considered it a religious obligation.

We must not exempt illegal conduct or adulterous relations from governmental regulation simply because their practitioners claim it is part of their free exercise of religious profession and worship.

Indeed, the Court distinguishes between religious practices, including the seemingly bizarre, which may not be regulated, and unacceptable religious conduct which should be prevented despite claims that it forms part of religious freedom.

In *Ebralinag v. Division Superintendent of Schools*, [27] we validated the exemption of Jehovah's Witnesses from coerced participation in flag ceremonies of public schools. Following the ruling in *West Virginia v. Barnette*, [28] we declared that unity and loyalty, the avowed objectives of flag ceremonies, cannot be attained through coercion. Enforced unity and loyalty is not a good that is constitutionally obtainable at the expense of religious liberty. A desirable end cannot be promoted by prohibited means.

The exemption from participation in flag ceremonies cannot be applied to the tolerance of adulterous relationships by court personnel in the name of religious freedom.

A clear and present danger of a substantive evil, destructive to public morals, is a ground for the reasonable regulation of the free exercise and enjoyment of religious profession. [29] In addition to the destruction of public morals, the substantive evil in this case is the tearing down of morality, good order, and discipline in the judiciary.

Jurisprudence on immoral conduct of employees in the civil service has been consistent. There is nothing in this case that warrants a departure from precedents. We must not sanction or encourage illicit or adulterous relations among government employees.

Soledad S. Escritor and Luciano D. Quilapio are devoted members of Jehovah's Witness. Exemptions granted under our Muslim Laws to legitimate followers of Islam do not apply to them. [30] The Court has no legislative power to place Jehovah's Witness in the same legal category as Muslims.

In *Bucatcat v. Bucatcat*, [31] it was held that conduct such as that demonstrated by the respondent is immoral and deserving of punishment. For such conduct, the respondent, another court interpreter, was dismissed from the service. It was held:

> Every employee of the judiciary should be an example of integrity, uprightness and honesty. Like any public servant, he must exhibit the highest sense of honesty and integrity not only in the performance of his official duties but in his personal and private dealings with other people, to preserve the court's good name and standing. It cannot be overstressed that the image of a court of justice is mirrored in the conduct, official and otherwise, of the personnel who work thereat, from the judge to the lowest of its personnel. Court employees have been enjoined to adhere to the exacting standards of morality and decency in their professional and private conduct in order to preserve the good name and integrity of courts of justice.

All those who work in the judiciary are bound by the most exacting standards of ethics and morality to maintain the people's faith in the courts as dispensers of justice. In *Liguid v. Camano*, [32] it was ruled:

> Surely, respondent's behavior of living openly and scandalously for over two (2) decades with a woman not his wife and siring a child by her is representative of the gross and serious misconduct penalized by the ultimate penalty of dismissal under Section 22 (c), Rule XIV of the Omnibus Rules Implementing Book IV of Executive Order No. 292 otherwise known as the Revised Administrative Code of 1987. As defined, misconduct is a transgression of some established or definite rule of action, more particularly, unlawful behavior or gross negligence by the public officer. Respondent's conduct is an example of the kind of gross and flaunting misconduct that so quickly and surely corrodes the respect for the courts without which government cannot continue and that tears apart the bonds of our polity.

Earlier, in *Navarro v. Navarro*, [33] the penalty of suspension was imposed on a court employee for maintaining illicit relations with a woman not his wife, thus:

> Time and again we have stressed adherence to the principle that public office is a public trust. All government officials and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty and efficiency, act with patriotism and justice, and lead modest lives. This constitutional mandate should always be in the minds of all public servants to guide them in their actions during their entire tenure in the government service. The good of the service and the degree of morality which every official and employee in the public service must observe, if respect and confidence are to be maintained by the Government in the enforcement of the law, demand that no untoward conduct on his part, affecting morality, integrity and efficiency while holding office should be left without proper and commensurate sanction, all attendant circumstances taken into account.

The exacting standards of ethics and morality imposed upon court judges and court employees are required to maintain the people's faith in the courts as dispensers of justice, and whose image is mirrored by their actuations. As the Court eloquently stated through Madame Justice Cecilia Muñoz-Palma:

> [T]he image of the court of justice is necessarily mirrored in the conduct, official or otherwise, of the men and woman who work thereat, from the judge to the least and lowest of its personnel — hence, it becomes the imperative sacred

duty of each and everyone in the court to maintain its good name and standing as a true temple of justice. [34]

The high degree of moral uprightness that is demanded of employees of the government entails many sacrifices that are peculiar to the civil service. By aspiring to these positions, government employees are deemed to have submitted themselves to greater scrutiny of their conduct, all in the pursuit of a professional civil service. The Court has repeatedly applied these principles in analogous cases. [35]

Immorality is punishable by suspension of six (6) months and one day to one (1) year for the first offense and dismissal for the second offense. [36] Considering that respondent's misconduct is in the nature of a continuing offense, it must be treated as a first offense, and her continued cohabitation with Luciano E. Quilapio, Jr. must be deemed a second offense, which will warrant the penalty of dismissal.

ACCORDINGLY, I vote that respondent Soledad S. Escritor is **GUILTY** of immorality and disgraceful conduct and should be **SUSPENDED** for a period of Six (6) months and One day without pay, with a warning that the continuance of her illicit cohabitation with Luciano D. Quilapio, Jr. shall be deemed a second offense which shall warrant the penalty of dismissal.

CARPIO, *J., dissenting*:

I maintain my dissent from the majority opinion as it now orders the dismissal of the administrative complaint filed by petitioner Alejandro Estrada against respondent Soledad S. Escritor.

The majority opinion relies heavily on *Sherbert v. Verner* [1] in upholding Escritor's claim of exemption from administrative liability grounded on her religious belief as a member of the Jehovah's Witnesses. This religious sect allows Escritor's cohabitation with Luciano D. Quilapio, Jr., who has a subsisting marriage with another woman.

The **compelling state interest test** espoused in *Sherbert* has been **abandoned** more than 15 years ago by the U.S. Supreme Court in the ***Employment Division v. Smith*** [2] cases. In the *Smith* cases, the U.S. Supreme Court set aside the balancing test for religious minorities laid down in *Sherbert*. Instead, the U.S. Supreme Court ruled categorically in the *Smith* cases that the guarantee of religious liberty as embodied in the Free Exercise Clause **does not require** the grant of exemptions from generally applicable laws to individuals whose religious practice conflict with those laws.

In the first ***Employment Division v. Smith*** (*Smith I*) ,[3] petitioner denied respondents' application for unemployment compensation benefits under an Oregon statute declaring ineligible for benefits employees discharged for work-related misconduct. The misconduct for which respondents were discharged from their jobs consisted of their ingesting peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church. The Oregon Supreme Court ruled that although the denials of benefits were proper under Oregon law, *Sherbert* required the Oregon Supreme Court to hold that the denials significantly burdened respondents' religious freedom in violation of the Free Exercise Clause. The Oregon Supreme Court did not attach significance to the fact that peyote possession is a felony in Oregon.

The U.S. Supreme Court vacated the Oregon Supreme Court's judgment and ordered the remand of the case for a definitive ruling on whether the religious use of peyote is legal in Oregon. **The U.S. Supreme Court deemed the legality or illegality of the**

questioned conduct critical in its analysis of respondents' claim for protection under the Free Exercise Clause.

In *Smith I*, the U.S. Supreme Court distinguished respondents' conduct with that involved in *Sherbert*, thus:

> . . . **In *Sherbert***, as in *Thomas and Hobbie v. Unemployment Appeals Comm'n of Fla.*,[4] **the conduct that gave rise to the termination of employment was perfectly legal**; indeed, the Court assumed that it was immune from state regulation.[5] **The results we reached in *Sherbert*, *Thomas* and *Hobbie* might well have been different if the employees had been discharged for engaging in criminal conduct. . . . The protection that the First Amendment provides to "*legitimate* claims to the free exercise of religion" does not extend to conduct that a State has validly proscribed.**[6] (Emphasis supplied)

In the second ***Employment Division v. Smith*** (*Smith II*),[7] the Oregon Supreme Court held on remand that respondents' religiously inspired use of peyote fell within the prohibition of the Oregon statute classifying peyote as a "controlled substance" and punishing its possession as a felony. Although the Oregon Supreme Court noted that the statute makes no exception for the sacramental use of peyote, it still concluded that the prohibition was not valid under the Free Exercise Clause.

The U.S. Supreme Court reversed the Oregon Supreme Court. The U.S. Supreme Court ruled that a claim of exemption from a generally applicable law grounded on the right of free exercise could not be evaluated under the compelling state interest test of *Sherbert*, particularly where such law does not violate other constitutional protections. The U.S. Supreme Court expressly declared:

> . . . **We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate**. . . .[8]
>
> xxx xxx xxx
>
> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press. . . .[9]
>
> Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated conduct, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert v. Verner*. . . . **In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all**. . . .[10]
>
> **Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law**. . . .[11] (Emphasis supplied)

What the *Smith* cases teach us is that the compelling state interest test in *Sherbert*

is not the correct test in determining the legitimacy of a claim of exemption from generally applicable, religion-neutral laws that have the incidental effect of burdening particular religious practice. Any such claim for exemption should be analyzed by considering whether the conduct in question is one that "the State has validly proscribed," irrespective of the sincerity or centrality of an individual's religious beliefs.

Here, Escritor is indisputably engaged in criminal conduct. Escritor's continued cohabitation with Quilapio is patently in violation of Article 334 of the Revised Penal Code on concubinage. Article 334 makes no exception for religiously sanctioned cohabitation such as that existing between Escritor and Quilapio. The majority opinion in fact concedes that the present case involves a claim of exemption "from a law of general applicability that inadvertently burdens religious exercise." [12] The majority opinion even concedes further that the conduct in question is one "which Philippine law and jurisprudence consider both immoral and illegal." [13] And yet, the majority opinion expediently brushes aside the illegality of Escritor's questioned conduct using the obsolete compelling state interest test in *Sherbert*.

The majority opinion mentions two "opposing strains of jurisprudence on the religion clauses" in U.S. history, namely, **separation or strict neutrality** and **benevolent neutrality or accommodation**. The majority opinion asserts that the framers of our 1935, 1973, and 1987 Constitutions intended to adopt a benevolent neutrality approach in interpreting the religion clauses, *i.e.*, the Establishment and Free Exercise Clauses. The majority opinion then reasons that in determining claims of exemption based on freedom of religion, this Court must adopt the **compelling state interest test** laid down by the U.S. Supreme Court in ***Sherbert***, which according to the majority, best exemplifies the benevolent neutrality approach. Hence, even as the majority opinion acknowledges that the U.S. Supreme Court in the *Smith* cases has abandoned the compelling state interest test espoused in *Sherbert*, the majority opinion dismisses this abandonment in its analysis of Escritor's free exercise exemption claim by simply labeling the *Smith* cases as exemplifying the **strict neutrality approach**.

The majority opinion blatantly ignores that whatever theory may be current in the United States — whether strict neutrality, benevolent neutrality or some other theory — the undeniable fact is what is clearly stated in *Smith II*:

> **. . . We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. . . .** [14]

Thus, from the 1879 case of *Reynolds v. U.S.* [15] on the practice of polygamy by Mormons to the 1988 and 1990 *Smith* cases on the use of prohibited drugs by native American Indians, the U.S. Supreme Court has consistently held that religious beliefs do not excuse any person from liability for violation of a valid criminal law of general application. The majority opinion simply refuses to face and accept this reality.

The present case involves conduct that violates Article 334 of the Revised Penal Code, a provision of law that no one challenges as unconstitutional. Clearly, the theories invoked in the majority opinion have no application to the present case based on an unbroken line of U.S. Supreme Court decisions. In any event, we shall discuss for **academic purposes** the merits of the theories advanced in the majority opinion.

While the majority opinion only mentions separation and benevolent neutrality, a

close reading of the major U.S. Supreme Court opinions specifically relating to the religion clauses presents three principal theories at play, namely, (a) **the strict separation or "no aid" theory**, (b) **the governmental neutrality theory**, and (c) **the accommodation or benevolent neutrality theory**.[16]

The **strict separation or "no aid" theory** holds that the establishment clause viewed in conjunction with the free exercise clause requires a strict separation of church and state and that government can do nothing which involves governmental support of religion or which is favorable to the cultivation of religious interests.[17] This theory found its first expression in the case of *Everson v. Board of Education*,[18] which espoused the "no aid" principle. Thus, the government cannot by its programs, policies, or laws do anything to aid or support religion or religious activities.[19]

Everson upheld the validity of a New Jersey statute authorizing bus fare reimbursement to parents of parochial, as well as public school children. Apparently, the strict interpretation or "no aid" theory prohibits state benefits to a particular sect or sects only, but does not prohibit benefits that accrue to all, including one or more sects. ***Everson* did not involve religiously motivated conduct that constituted a violation of a criminal statute**.

Under the **governmental neutrality theory**, the establishment clause requires government to be neutral on religious matters.[20] This theory was articulated by Mr. Justice Clark in the case of *Abington School District v. Schempp*,[21] where he stated that what the Constitution requires is "wholesome neutrality," *i.e.*, laws and governmental programs must be directed to secular ends and must have a primary effect that neither advances nor inhibits religion.[22] This test as stated by Mr. Justice Clark embodies a **theory of strict neutrality**[23] — thus, the government may not use the religious factor as a basis for classification with the purpose of advancing or inhibiting religion:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that *it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the state is firmly committed to a position of neutrality*.[24] (Italics supplied)

However, the concept of governmental neutrality can be interpreted in various ways — to some, anything but total neutrality is anathema; to others, "neutrality can only mean that government policy must place religion at neither a *special advantage* nor a *special disadvantage*."[25]

Schempp struck down a Pennsylvania law allowing the recitation of the Lord's Prayer and the reading of the Bible without comment in public schools, although the recitation and reading were voluntary and did not favor any sect. ***Schempp* did not involve religiously motivated conduct that constituted a violation of a criminal statute**.

The **accommodation theory** provides that any limitation derived from the establishment clause on cannot be rigidly applied so as to preclude all aid to religion and that **in some situations government *must*, and in other situations *may*, accommodate its policies and laws in the furtherance of religious freedom**.[26] The accommodation theory found its first expression in *Zorach v. Clauson*.[27] The U.S.

Supreme Court held in *Zorach* that a state could authorize an arrangement whereby public school children could be released one hour a week for religious instruction off the school premises. *Zorach* did not involve religiously motivated conduct that constituted a violation of a criminal statute.

In his book *Religion* and the *Constitution* published in 1964, Professor Paul G. Kauper used the term "benevolent neutrality" in the following context:

> It would be a mistake, however, to suggest that the theory of accommodation . . . is unrelated to other ideas and theories that have been developed, notably the no-aid and neutrality concepts. Rather, **accommodation, instead of being viewed as a wholly independent theory of interpretation, should be seen as a modification of the no-aid or neutrality concepts**. . . .
>
> These ideas cannot be pressed to their absolute limit. Not only must the no-aid or neutrality concept be subordinated to the necessities of free exercise, but **an area of legislative discretion must be allowed where a state may choose to advance the cause of religious freedom even at the expense of not being completely neutral**. Indeed, this may be described as **the larger or *benevolent neutrality***. [28] (Emphasis and italics supplied)

Six years later, the U.S. Supreme Court used the term "benevolent neutrality" for the first time in *Walz v. Tax Commission*. [29] In *Walz*, the U.S. Supreme Court sustained the constitutionality of tax exemption of property used exclusively for religious purposes on the basis of "benevolent neutrality," as follows:

> The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. . . .
>
> xxx xxx xxx
>
> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts **there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference**. [30] (Emphasis and italics supplied)

At issue in *Walz* was a provision in New York's Constitution authorizing property tax exemptions to religious organizations for religious properties used solely for religious worship. *Walz* did not involve religiously motivated conduct that constituted a violation of a criminal statute.

The majority opinion cited the case of *Walz* in support of its assertion that the framers of the 1935 Constitution intended to adopt the benevolent neutrality approach in the interpretation of the religion clauses, *viz.*:

> . . . With the inclusion of the church property tax exemption in the body of

> the 1935 Constitution and not merely as an ordinance appended to the Constitution, the *benevolent neutrality* referred to in the *Walz case* was given constitutional imprimatur under the regime of the 1935 Constitution. . . .
>
> The U.S. Supreme Court decided *Walz* only in 1970, more than three decades ***after*** the adoption of our 1935 Constitution. It is certainly doubtful whether the framers of our 1935 Constitution intended to give "constitutional imprimatur" to a theory of interpretation espoused in a case that was yet to be formulated. Moreover, when the U.S. Supreme Court upheld the constitutionality of church property tax exemption on the basis of "benevolent neutrality," it did so on grounds that no particular religion is singled out for favorable treatment, and partly on historical grounds that church tax exemptions have been accepted without challenge in all states for most of the nation's history. [31]

The majority opinion vigorously argues the merits of adopting the theory of accommodation in the interpretation of our Constitution's religion clauses. However, the majority opinion fails to mention that a distinction is often drawn by courts and commentators between **mandatory accommodation** and **permissive accommodation**. Mandatory accommodation is exemplified by the key idea in *Sherbert* that exemptions from generally applicable laws are required by force of the Free Exercise Clause, [32] which the majority opinion adheres to in granting Escritor's claim of free exercise exemption.

Permissive accommodation refers to exercises of political discretion that benefit religion, and that the Constitution neither requires nor forbids. [33] The U.S. Supreme Court recognized in *Smith II* that although the Free Exercise Clause did not require permissive accommodation, the political branches could shield religious exercise through **legislative accommodation**, [34] for example, by making an exception to proscriptive drug laws for sacramental peyote use.

Professor Michael W. McConnell, whose views on the accommodation theory were frequently quoted by the majority opinion, defends mandatory accommodation. [35] However, Prof. Kauper, likewise an accommodationist, favors permissive accommodation, stating that "as a general proposition, no person should be allowed to claim that because of his religion he is entitled as a matter of constitutional right to claim an exemption from general regulatory and tax laws." [36] Prof. Kauper further explains his position that religious liberty furnishes no ground for claiming immunity to laws which place reasonable restrictions on overt conduct in the furtherance of public interests protected by the state's police power, [37] as follows:

> **Where the issue** is not the use of governmental power to sanction religious belief and practices by some positive program but **the granting of exemption on religious grounds from laws of general operation, what determines whether the government is required, or permitted, to make the accommodation? While a state may appropriately grant exemptions from its general police and tax laws, it should not be constitutionally required to do so unless this immunity can properly be claimed as part of the constitutional guarantee of religious liberty**. Thus, exemptions from property tax and military service, health and labor laws should be at the discretion of government. Whether *Sherbert* carried the principle of required accommodation too far is debatable. It may well be that the court here undertook a determination of questions better left to the legislature and that in this area, . . . **the policy of granting exemptions on religious grounds should be left to legislative**

discretion. [38] (Emphasis supplied)

It is true that a test needs to be applied by the Court in determining the validity of a free exercise claim of exemption as made here by Escritor. The compelling state interest test in *Sherbert* pushes the limits of religious liberty too far, and so too does the majority opinion insofar as it grants Escritor immunity to a law of general operation on the ground of religious liberty. Making a distinction between permissive accommodation and mandatory accommodation is more critically important in analyzing free exercise exemption claims. Such limitations forces the Court to confront how far it can validly set the limits of religious liberty under the Free Exercise Clause, rather than presenting the separation theory and accommodation theory as opposite concepts, and then rejecting relevant and instructive American jurisprudence (such as the *Smith* cases) just because it does not espouse the theory selected.

Theories are only guideposts and "there is no magic formula to settle all disputes between religion and the law, no legal pill to ease the pain of perceived injustice and religious oppression, and certainly no perfect theory to bind judges or legislators." [39] The *Smith* cases, particularly *Smith II*, cannot be so easily dismissed by the majority opinion and labeled as "best exemplifying the strict neutrality approach." The *Smith* Court affirmed the power and the discretion of legislatures to enact statutory protection beyond what the Free Exercise Clause required. The U.S. Supreme Court indicated in *Smith II* that legislatures could enact accommodations to protect religion beyond the Free Exercise Clause minimum without "establishing" religion and thereby running afoul of the Establishment Clause. [40] What the *Smith* cases espouse, therefore, is not really the strict neutrality approach, but more of permissive accommodation. [41]

Even assuming that the theory of benevolent neutrality and the compelling state interest test are applicable, the State has a compelling interest in exacting from everyone connected with the dispensation of justice, from the highest magistrate to the lowest of its personnel, the highest standard of conduct. This Court has repeatedly held that "the image of a court of justice is necessarily mirrored in the conduct, official or otherwise, of the men and women who work thereat." [42] While arguably not constituting "disgraceful and immoral conduct," [43] Escritor's cohabitation with Quilapio is a patent violation of our penal law on concubinage that vitiates "the integrity of court personnel and the court itself." [44] The public's faith and confidence in the administration of justice would certainly be eroded and undermined if tolerated within the judiciary's ranks are court employees blatantly violating our criminal laws.

I therefore maintain that Escritor's admitted cohabitation with Quilapio is sufficient basis to hold her guilty of conduct prejudicial to the best interest of the service and to impose upon her the appropriate penalty.

Equally compelling is the State's interest in the preservation of marriage and the family as basic social institutions, [45] which is ultimately the public policy underlying Articles 334 and 349 of the Revised Penal Code. This Court has recognized in countless cases that marriage and the family are basic social institutions in which the State is vitally interested [46] and in the protection of which the State has the strongest interest. [47] In ***Domingo v. Court of Appeals***, [48] the Court stressed that:

> **Marriage**, a sacrosanct institution, declared by the Constitution as **an "inviolable social institution, is the foundation of the family;"** as such, **it "shall be protected by the State." . . . So crucial are marriage and the family to the stability and peace of the nation** that their "nature,

consequences, and incidents are governed by law and not subject to stipulation.

The same sentiment has been expressed in Article 149 of the Family Code:

> **The family**, being the foundation of the nation, **is a basic social institution which public policy cherishes and protects**. Consequently, family relations are governed by law and **no custom, practice or agreement destructive of the family shall be recognized or given effect**. (Emphasis supplied)

And yet, notwithstanding the foregoing compelling state interests at stake, the majority all too willingly and easily places them in jeopardy by upholding Escritor's claim of exemption. On this point, Professor William P. Marshall aptly observes that one of the problems involved in free exercise exemption analysis is that it requires the Court to weigh the state interest against the interest of the narrower class comprised only of those seeking exemption. On the other hand, in other doctrinal areas, the Court balances the state interest in the regulation at issue against the interests of the regulated class taken as a whole. Prof. Marshall persuasively argues that this leads to both unpredictability in the exemption balancing process and potential inconsistency in result "as each regulation may be subject to limitless challenges based upon the peculiar identity of the challenger." [49] Moreover, Prof. Marshall notes that the exemption balancing process necessarily leads to underestimating the strength of the countervailing state interest. [50] Indeed, the state interest in a challenged regulation will seldom be seriously threatened if only a few persons seek exemption from it. [51]

In dismissing the administrative complaint against Escritor, the majority opinion effectively condones and accords a semblance of legitimacy to her patently unlawful cohabitation with Quilapio, while in the eyes of the law, Quilapio remains married to his legal wife. This condonation in fact facilitates the circumvention by Escritor and Quilapio of Articles 334 and 349 of the Revised Penal Code on concubinage and bigamy. [52] Without having his first marriage legally dissolved, Quilapio can now continue to cohabit with Escritor with impunity. How do we reconcile this scenario with the Constitution's emphatic declaration that marriage is "an inviolable social institution"? [53]

By choosing to turn a blind eye to Escritor's criminal conduct, the majority is in fact recognizing and according judicial imprimatur to a practice, custom or agreement that subverts marriage, albeit one that is sanctioned by a particular religious sect. The majority's opinion here bestows "a credibility and legitimacy upon the religious belief in question simply by its being judicially recognized as constitutionally sacrosanct." [54] This is another problem that arises in free exercise exemption analysis — the benevolent neutrality approach fails to take into account the role that equality plays in free exercise theory. [55] While the text of the Free Exercise Clause is consistent with protecting religion from discrimination, it does not compel discrimination in favor of religion. [56] However, the benevolent neutrality approach promotes its own form of inequality when under it, exemptions are granted only to religious claimants like Escritor, whose religiously-sanctioned but otherwise illegal conjugal arrangement with Quilapio acquires a veneer of "special judicial reinforcement." [57]

Catholics may secure a church annulment of their marriage. A church annulment does not exempt Catholics from criminal or administrative liability if they cohabit with someone other than their legal spouse before their marriage is finally annulled by a civil

court. Catholics cannot legally justify before civil courts such act of concubinage on the ground that the act conforms to their religious beliefs because they have a secured a church annulment which freed them from their marital vows. If this Court condones Escritor's act of concubinage on religious grounds, then it will have to condone acts of concubinage by Catholics who have secured church annulment of their marriage even without a final annulment from a civil court. The majority pushes their opinion on a slippery slope.

It may well be asked how, under a well-meaning but overly solicitous grant of exemption based on the Freedom of Exercise Clause of our Constitution, an individual can be given the private right to ignore a generally applicable, religion-neutral law. For this is what the majority opinion has effectually granted Escritor in dismissing the administrative complaint against her. The accommodation of Escritor's religious beliefs under the **benevolent neutrality approach** is too high a price to pay when weighed against its prejudicial effect on the sound administration of justice and the protection of marriage and the family as basic social institutions.

Finally, there is even no claim here that concubinage is central to the religious belief of the Jehovah's Witnesses, or even a part of the religious belief of the Jehovah's Witnesses. Escritor merely claims that her live-in arrangement with a married man is, in the words of the majority opinion, "in conformity with her and her partner's religious belief." This case is not an issue of a statute colliding with centrally or vitally held beliefs of a religious denomination, as in the case of *Sherbert*. This case is about a religious cover for an obviously criminal act.

In *Sherbert*, the conduct in question was the refusal of a member of the Seventh Day Adventist Church to work on the Sabbath Day or on Saturdays, which prevented prospective employers from giving petitioner in *Sherbert* employment. Petitioner in *Sherbert* then claimed unemployment benefits, which the State denied because the law withheld benefits to those who failed without good cause to accept available suitable work. In *Sherbert*, the questioned conduct — the refusal to work on Saturdays — was part of the religious tenets of the Seventh Day Adventists. The questioned conduct in *Sherbert* was not a criminal conduct, unlike the questioned conduct of Escritor in this case. Clearly, even assuming for the sake of argument that *Sherbert* remains good law in the United States and thus has some persuasive force here, still *Sherbert* is patently inapplicable to the present case.

The positive law and the institutions of government are concerned not with correct belief but with overt conduct related to good order, peace, justice, freedom, and community welfare. [58] Hence, while there are times when government must adapt to, or acquiesce to meet the needs of religious exercise, there are also times when the exercises a religion wishes to pursue must be adapted or even prohibited in order to meet the needs of public policy. [59] For indeed, even religious liberty has its limits. And certainly, "there is a price to be paid, even by religion, for living in a constitutional democracy." [60]

Certainly, observance of provisions of the Revised Penal Code, whose validity or constitutionality are not even challenged, is a price that all religions in the Philippines must willingly pay for the sake of good order and peace in the community. To hold otherwise would, as aptly stated in ***Reynolds v. U.S.***, [61] "make the professed doctrines of religious belief superior to the law of the land," and in effect "permit every citizen to become a law unto himself." The majority opinion will make every religion a separate republic, making religion a haven for criminal conduct that otherwise would be punishable under the laws of

the land. Today concubinage, tomorrow bigamy, will enjoy protection from criminal sanction under the new doctrine foisted by the majority opinion.

Accordingly, I vote to suspend respondent Soledad S. Escritor for six months and one day without pay for conduct prejudicial to the best interest of the service. However, the suspension shall be lifted immediately upon Escritor's manifestation to this Court that she has ceased cohabiting with Luciano D. Quilapio, Jr. Moreover, respondent Escritor is warned that her continued cohabitation with Quilapio, during or after her suspension and while Quilapio's marriage with his legal wife still subsists, shall merit the penalty of dismissal from the service.

Footnotes

1. *Estrada v. Escritor*, 455 Phil. 411 (2003).

2. *Id*. at 444. Incidentally, Escritor moved for the inhibition of Judge Caoibes from hearing her case to avoid suspicion and bias as she previously filed an administrative case against him. Escritor's motion was denied.

3. *Id*. The Code provides:

Sec. 46. Discipline: General Provisions. —

(a) No officer or employee in the Civil Service shall be suspended or dismissed except for cause as provided by law and after due process.

(b) The following shall be grounds for disciplinary action:

xxx xxx xxx

(5) Disgraceful and immoral conduct; . . . .

4. *Id*. at 445.

5. *Id*. at 445, 447.

6. *Id*. at 445, 453, and 457.

7. *Id*. at 445-456. The Declaration provides:

DECLARATION OF PLEDGING FAITHFULNESS

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

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

Signed this 28th day of July 1991.

Parenthetically, Escritor's partner, Quilapio, executed a similar pledge on the same day. Both

pledges were executed in Atimonan, Quezon and signed by three witnesses. At the time Escritor executed her pledge, her husband was still alive but living with another woman. Quilapio was likewise married at that time, but had been separated in fact from his wife. *Id*. at 446.

8. *Id*. at 447-448, 452-453. Based on the testimony of Gregorio Salazar, a member of the Jehovah's Witnesses since 1985. As presiding minister since 1991, he is aware of the rules and regulations of the Congregation. An authenticated copy of the magazine article entitled, "Maintaining Marriage Before God and Men," which explains the rationale behind the Declaration, was also presented.

9. *Id*. at 449.

10. *Id*. at 452.

11. *Id*. at 449.

12. *See id*. at 447-452.

13. *Id*. at 445, 453, and 457.

14. *Id*. at 596.

15. *Id*. at 599-600.

16. *Agustin v. C.A.*, G.R. No. 107846, April 18, 1997, 271 SCRA 457; *Gokongwei v. SEC*, G.R. No. 52129, April 21, 1980, 97 SCRA 78; *Commissioner of Public Highways v. Burgos*, G.R. No. L-36706, March 31, 1980, 96 SCRA 831; *Municipality of Daet v. C.A.*, G.R. No. L-35861, October 18, 1979, 93 SCRA 503; and *People's Homesite and Housing Corp. v. Mencias*, G.R. No. L-24114, August 16, 1967, 20 SCRA 1031.

17. See discussion under *Estrada v. Escritor*, 455 Phil. 411, 458-468 (2003).

18. During primitive times, when there was no distinction between the religious and secular, and the same authority that promulgated laws regulating relations between man and man promulgated laws concerning man's obligations to the supernatural. *See id*. at 458-459.

19. This was the time of theocracy, during the rise of the Hebrew state and the Mosaic religion. *See id*. at 459-461.

20. Following the rise of Saul, and the pre-Christian Rome which engaged in emperor-worship. *See id*. at 461-462.

21. *Id*. at 462-463.

22. *Id*. at 468.

23. COHEN, WILLIAM & DANELSKI, DAVID J., CONSTITUTIONAL LAW: CIVIL LIBERTY AND INDIVIDUAL RIGHTS 565 (4th ed. 1997).

24. *Id*.

25. *See Estrada v. Escritor*, 455 Phil. 411, 479-480 (2003).

26. COHEN, WILLIAM & DANELSKI, DAVID J., CONSTITUTIONAL LAW: CIVIL LIBERTY AND INDIVIDUAL RIGHTS 575 (4th ed. 1997).

27. *Estrada v. Escritor*, 455 Phil. 411, 480 (2003), *citing* BETH, L., AMERICAN THEORY OF

CHURCH AND STATE 71 (1958).

28. *See id*. at 487, 512-516.

29. *Id*. at 515, *citing* BUZZARD, L., ERICSSON, S., THE BATTLE FOR RELIGIOUS LIBERTY 46 (1980); BETH, L., AMERICAN THEORY OF CHURCH AND STATE 71 & 72 (1958); and GROSSMAN, J.B. AND WELLS, R.S., CONSTITUTIONAL LAW & JUDICIAL POLICY MAKING 1276 (2nd ed. 1980).

30. *Id*. at 515, *citing* THE CONSTITUTION AND RELIGION 1541.

31. *See* DRAKEMAN, D., CHURCH-STATE CONSTITUTIONAL ISSUES 55 (1991), *citing* CORD, R., SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 50. Thus:

> The [separationist] school of thought argues that the First Congress intended to **allow government support of religion, at least as long as that support did not discriminate in favor of one particular religion**. . . the Supreme Court has overlooked many important pieces of history. Madison, for example, was on the congressional committee that appointed a chaplain, he declared several national days of prayer and fasting during his presidency, and he sponsored Jefferson's bill for punishing Sabbath breakers; moreover, while president, Jefferson allowed federal support of religious missions to the Indians. . . And so, concludes one recent book, "there is no support in the Congressional records that either the First Congress, which framed the First Amendment, or its principal author and sponsor, James Madison, intended that Amendment to create a state of complete independence between religion and government. In fact, the evidence in the public documents goes the other way." *Id*. at 513-514.

32. *Id*. at 514, *citing* DRAKEMAN, D., CHURCH-STATE CONSTITUTIONAL ISSUES 55 (1991), CORD, R., SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 50; AND 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, COMPILED FROM AUTHENTIC MATERIALS 949-950 (Annala, Gales, J. and Seaton, W., eds.). Only two members of U.S. Congress opposed the resolution, one on the ground that the move was a "mimicking of European customs, where they made a mere mockery of thanksgivings," the other on establishment clause concerns. Nevertheless, the salutary effect of thanksgivings throughout Western history was acknowledged and the motion was passed without further recorded discussion.

33. *Id*. at 515, *citing* Weber, P., *Neutrality and First Amendment Interpretation* in EQUAL SEPARATION 3 (1990).

34. 330 U.S. 1 (1946). It was in this case that the U.S. Supreme Court adopted Jefferson's metaphor of "a wall of separation between church and state" as encapsulating the meaning of the Establishment Clause. Said the U.S. Court: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. . . ." *Id*. at 18.

35. *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

36. *See Estrada v. Escritor*, 455 Phil. 411, 516 (2003), *citing* THE CONSTITUTION AND RELIGION 1541; and Kurland, *Of Church and State and the Supreme Court*, 29 U.CHI.L.REV. 1, 5 (1961). Parenthetically, the U.S. Court in *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990), echoed the rationale of the ***separationists***, when it held that if government acts in pursuit of a generally applicable law with a secular purpose that merely incidentally burdens religious exercise,

the First Amendment has not been offended.

37. 374 U.S. 203 (1963).

38. *Estrada v. Escritor*, 455 Phil. 411, 517 (2003), *citing* BUZZARD, L., ERICSSON, S., THE BATTLE FOR RELIGIOUS LIBERTY 60 (1980).

39. *Id*. at 517-518, *citing* Kelley, D. Strict Neutrality and the *Free Exercise of Religion* in WEBER, P., EQUAL SEPARATION 1189 (1990).

40. *Id*. at 518, *citing* 75. Monsma, S. *The Neutrality Principle and a Pluralist Concept of Accommodation*, in WEBER, P., EQUAL SEPARATION 74-75 (1990).

41. *I.e.*, the "garden" of the church must be walled in for its own protection from the "wilderness" of the world with its potential for corrupting those values so necessary to religious commitment. According to Williams, this wall is breached, for the church is in the state, and so the remaining purpose of the wall is to safeguard religious liberty. Williams' wall, therefore, would allow for interaction between church and state, but is strict with regard to state action which would threaten the integrity of religious commitment. His conception of separation is not total such that it provides basis for certain interactions between church and state dictated by apparent necessity or practicality.

See discussion of the birth of the theory in *Estrada v. Escritor*, 455 Phil. 411, 518-519 (2003).

42. 343 U.S. 306 (1951).

43. *Zorach v. Clauson*, 343 U.S. 306, 312-314 (1951).

44. *Estrada v. Escritor*, 455 Phil. 411, 521-522 (2003).

45. *Marsh v. Chambers*, 463 US 783, 792-93 (1983).

46. *Sherbert v. Verner*, 374 US 398, 403-04 (1963).

47. *Bowen v. Kendrick*, 487 US 589, 611 (1988).

48. *Board of Education v. Allen*, 392 US 236, 238 (1968).

49. *Everson v. Board of Education*, 330 US 1, 17 (1947).

50. *Committee for Public Education and Religious Liberty v. Regan*, 444 US 646, 653-54 (1980).

51. Cited in McConnel, M., *Accommodation of Religion: An Update and a Response to the Critics*, 60 THE GEORGE WASHINGTON LAW REVIEW 685, 688. *See Estrada v. Escritor*, 455 Phil. 411, 522-523 (2003).

52. *Estrada v. Escritor*, 455 Phil. 411, 482 (2003), *citing* Carter, S., *The Resurrection of Religious Freedom*, 107 HARVARD LAW REVIEW 118, 1280129 (1993).

53. *Id*. at 482, *citing* Sullivan, K., *Religion and Liberal Democracy*, 59 THE UNIVERSITY OF CHICAGO LAW REVIEW 195, 214-215 (1992).

54. *Id*.

55. 374 U.S. 398, 10 L.ed.2d 965, 83 S. Ct. 1970 (1963). *See* Johnson, Bradley C., *By its Fruits Shall Ye Know; Axson-Flynn v. Johnson: More Rotted Fruit From Employment Division v. Smith*, 80 CHI.-KENT L. REV. 1287, 1302 (2005).

56. Carmella, Angela C., *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U.L.Rev. 275, 277 (1993).

57. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

58. *Id*. at 406.

59. *Estrada v. Escritor*, 455 Phil. 411, 495 (2003), *citing* Lupu, I., *The Religion Clauses and Justice Brennan in Full*, 87 CALIFORNIA LAW REVIEW 1105, 1114, 1105 and 1110 (1999).

60. Carmella, Angela C., *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U.L. REV. 275, 277 (1993).

61. 406 U.S. 205 (1972).

62. *Id*. at 214-215, 219-220.

63. Ivan E. Bodensteiner, *The Demise of the First Amendment as a Guarantor of Religious Freedom*, 27 WHITTIER L. REV. 415,417-418 (2005). (citations omitted)

64. See Pepper, Stephen, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 B.Y.U.L. REV. 7, 30-32 (1993).

65. *Id*. at 30-32.

66. *Id*.

67. *Estrada v. Escritor*, 455 Phil. 411, 498 (2003), *citing* STEPHENS, JR., O.H. and SCHEB, II J.M., AMERICAN CONSTITUTIONAL LAW 522-523 and 526 (2nd ed. 1999).

68. Johnson, Bradley C., *By its Fruits Shall Ye Know; Axson-Flynn v. Johnson: More Rotted Fruit From Employment Division v. Smith*, 80 CHI.-KENT L. REV. 1287, 1304 (2005).

69. 494 U.S. 872 (1990).

70. CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1211 (2nd ed. 2002).

71. 494 U.S. 872, 878-889 (1990), *cited in* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1211 (2nd ed. 2002).

72. 494 U.S. 872, 879 (1990), *cited in* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1212 (2nd ed. 2002).

73. 494 U.S. 872, 881 (1990), *cited in* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1212 (2nd ed. 2002).

74. 494 U.S. 872, 882 (1990), *cited in* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1212 (2nd ed. 2002).

75. 494 U.S. 872, 884 (1990), *cited in* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1212 (2nd ed. 2002).

76. 494 U.S. 872, 888 (1990), *cited in* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1212 (2nd ed. 2002).

77. *See* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1213 (2nd ed. 2002).

78. *Employment Division v. Smith*, 494 U.S. 872, 906 (1990). (O'Connor, *J*. concurring in the judgment) This portion of her concurring opinion was supported by Justices Brennan, Marshall and Blackmun who dissented from the Court's decision; *cited in*

CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1212 (2nd ed. 2002).

79. *Id* at 903. (O'Connor, *J.* concurring in the judgment), *cited in* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1212 (2nd ed. 2002).

80. *Id.* at 902. (O'Connor, *J.* concurring in the judgment) *cited in* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1212 (2nd ed. 2002).

81. *Id.* at 908-909. (Blackmun, *J.* dissenting), *cited in* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1213 (2nd ed. 2002).

82. Tebbe, Nelson, *Free Exercise and the Problem of Symmetry*, 56 Hastings L.J. 699 (2005).

83. *Id.*

84. Aden, Steven H & Strang, Lee J., *When a "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith "Hybrid Rights Exception,"* 108 PENN. ST. L. REV. 573, 581 (2003).

85. *Id.*

86. *Estrada v. Escritor*, 455 Phil. 411, 501 (2003), *citing* McConnell, M., *Accommodation of Religion: An Update and a Response to the Critics*, 60 THE GEORGE WASHINGTON LAW REVIEW 685, 726 (1992).

87. *Id.* at 482, *citing* McCoy, T., *A Coherent Methodology for First Amendment Speech and Religion Clause* Cases, 48 VANDERBILT LAW REVIEW, 1335, 1350-1352 (1995).

88. Tebbe, Nelson, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699 (2005).

89. *Estrada v. Escritor*, 455 Phil. 411, 502 (2003), *citing* II DUCAT, C., CONSTITUTIONAL INTERPRETATION 1180 & 1191 (2000). *See also* Sullivan, K., *Religion and Liberal Democracy*, 59 THE UNIVERSITY OF CHICAGO LAW REVIEW 195, 216 (1992).

90. *Id.* at 502, *citing* McConnell, M., *Religious Freedom at a Crossroads*, 59 THE UNIVERSITY OF CHICAGO LAW REVIEW 115, 139 (1992).

91. *Id.*, *citing* Sullivan, K., *Religion and Liberal Democracy*, 59 THE UNIVERSITY OF CHICAGO LAW REVIEW 195, 216 (1992).

92. Tebbe, Nelson, *Free Exercise and the Problem of Symmetry*, 56 HASTINGS L.J. 699 (2005).

93. *Estrada v. Escritor*, 455 Phil. 411, 502 (2003), *citing* McCoy, T., *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VANDERBILT LAW REVIEW, 1335, 1350-1351 (1995).

94. *Reynolds v. U.S.*, 98 U.S. 145 (1878); *Minersville School District v. Gobitis*, 310 U.S. 586 (1940); and *Employment Division, Oregon Department of Human Resources v. Smith*, 494 U.S. 872 (1990).

95. *Estrada v. Escritor*, 455 Phil. 411, 502 (2003), *citing* McCoy, T., *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VANDERBILT LAW REVIEW, 1335, 1350-1351 (1995).

96. Johnson, Bradley C., *By its Fruits Shall Ye Know; Axson-Flynn v. Johnson: More Rotted Fruit From Employment Division v. Smith*, 80 CHI.-KENT L. REV. 1287, 1327 (2005).

97. Bodensteiner, Ivan E., *The Demise of the First Amendment As a Guarantor of Religious Freedom*, 27 WHITTIER L. REV. 415, 419 (2005).

98. Aden, Steven H & Strang, Lee J., *When a "Rule" Doesn't Rule: The Failure of the Oregon Employment Division v. Smith "Hybrid Rights Exception"*, 108 Penn. St. L. Rev. 573, 584 (2003).

99. *See* COHEN, WILLIAM & DANELSKI, DAVID J., CONSTITUTIONAL LAW: CIVIL LIBERTY AND INDIVIDUAL RIGHTS 620-621 (4th ed. 1997).

100. *Id*.

101. *Estrada v. Escritor*, 455 Phil. 411, 502 (2003), *citing* Carter, S., *The Resurrection of Religious Freedom*, 107 HARVARD LAW REVIEW 118 (1993).

102. 42 U.S.C. §2000bb.

103. 42 U.S.C. §2000bb, Sec. (a) (4), *cited in* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1216 (2nd ed. 2002).

104. *Id*.

105. CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1212 (2nd ed. 2002).

106. *City of Boerne v. Flores*, 521 U.S. 507 (1997), *cited in* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1216 (2nd ed. 2002).

107. *City of Boerne* clearly invalidated the RFRA as applied to state and local governments, but did not resolve the constitutionality of the law as applied to the federal government. Some federal courts have expressly ruled that the RFRA is constitutional as applied to the federal government. *See* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1216 (2nd ed. 2002).

108. *See* NOONAN, JOHN T., JR. & GAFFNEY, EDWARD MCGLYNN, JR., RELIGIOUS FREEDOM: HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT 531 (2001).

109. Carmella, Angela C., *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 B.Y.U.L.Rev. 275, 278 (1993).

110. Johnson, Bradley C., *By its Fruits Shall Ye Know; Axson-Flynn v. Johnson: More Rotted Fruit From Employment Division v. Smith*, 80 CHI.-KENT L. REV. 1287, 1327 (2005).

111. *Estrada v. Escritor*, 455 Phil. 411, 526 (2003).

112. *Id*. at 527, *citing* BUZZARD, L., ERICSSON, S., THE BATTLE FOR RELIGIOUS LIBERTY 61-62 (1980).

113. *Walz v. Tax Commission*, 397 U.S. 664, 673 (1969).

114. 343 U.S. 306 (1952).

115. 463 U.S. 783 (1983).

116. McConnell, M., *Accommodation of Religion: An Update and a Response to the Critics*, 60 THE GEORGE WASHINGTON LAW REVIEW 685, 715 (1992).

117. 333 U.S. 203 (1948).

118. *Estrada v. Escritor*, 455 Phil. 411, 527 (2003), *citing* BUZZARD, L., ERICSSON, S., THE BATTLE FOR RELIGIOUS LIBERTY 61-63 (1980).

119. KMIEC, DOUGLAS W. & PRESSER, STEPHEN B., INDIVIDUAL RIGHTS AND THE AMERICAN CONSTITUTION 105 (1998).

120. *Employment Division v. Smith*, 494 U.S. 872, 903 (1990), *cited in* CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1212 (2nd ed. 2002).

121. *See, e.g.* Michael McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651 (1991) (criticizing Smith). Cited in CHEMERINSKY, ERWIN, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1213 (2nd ed. 2002).

122. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARVARD LAW REVIEW 1410, 1416-1417 (1990).

123. CONSTITUTION, (1935), Art. VI, Sec. 22, par 3(b); CONSTITUTION, (1973), Art. VI, Sec. 22(3); and CONSTITUTION, (1987), Art.VI, Sec. 28(3).

124. CONSTITUTION, (1935), Art. VI, Sec. 23(3); CONSTITUTION, (1973), Art. VIII, Sec. 18(2); and CONSTITUTION, (1987), Art. VI, Sec. 29(2).

125. CONSTITUTION, (1935) Art. XIII, Sec. 5; CONSTITUTION, (1973), Art. XV, Sec. 8(8); and CONSTITUTION, (1987), Art. XIV, Sec. 3(3).

126. "Divine Providence" in the 1935 and 1973 Constitutions; and "Almighty God" in the 1987 Constitution.

127. *Estrada v. Escritor*, 455 Phil. 411, 573-574 (2003).

128. *Id.* at 564 and 575.

129. *Id.* at 563-564.

130. *Id.* at 574. As stated in the Decision dated August 4, 2003:

> Considering the American origin of the Philippine religion clauses and the intent to adopt the historical background, nature, extent and limitations of the First Amendment of the U.S. Constitution when it was included in the 1935 Bill of Rights, it is not surprising that nearly all the major Philippine cases involving the religion clauses turn to U.S. jurisprudence in explaining the nature, extent and limitations of these clauses. However, a close scrutiny of these cases would also reveal that while U.S. jurisprudence on religion clauses flows into two main streams of interpretation — **separation and benevolent neutrality — the well-spring of Philippine jurisprudence on this subject is for the most part, benevolent neutrality which gives room for accommodation**. *Id.* at 536.

131. 101 Phil. 386 (1957).

132. G.R. No. 95770, March 1, 1993, 219 SCRA 256.

133. *Gerona v. Secretary of Education*, 106 Phil. 2 (1959). In this prior case, petitioners were also members of the Jehovah's Witnesses. They challenged a Department Order issued by the Secretary of Education implementing Republic Act No. 1265 which prescribed compulsory flag ceremonies in all public schools. In violation of the Order, petitioner's children refused to salute the Philippine flag, sing the national anthem, or recite the

patriotic pledge, hence they were expelled from school. Seeking protection under the Free Exercise Clause, petitioners claimed that their refusal was on account of their religious belief that the Philippine flag is an image and saluting the same is contrary to their religious belief. The Court denied exemption, and sustained the expulsion of petitioners' children, on the ground that "If the exercise of religious belief clashes with the established institutions of society and with the law, then the former must yield to the latter."

134. *Id*. at 270-271.

135. G.R. No. L-25246, September 12, 1974, 59 SCRA 54. *See also Basa v. Federacion Obrera*, G.R. No. L-27113, November 19, 1974, 61 SCRA 93; *Gonzalez v. Central Azucarera de Tarlac Labor Union*, G.R. No. L-38178, October 3, 1985, 139 SCRA 30.

136. *Victoriano v. Elizalde Rope Workers Union*, G.R. No. L-25246, September 12, 1974, 59 SCRA 54, 74-75. The Court stressed that "(a)lthough the exemption may benefit those who are members of religious sects that prohibit their members from joining labor unions, the benefit upon the religious sects is merely incidental and indirect." In enacting Republic Act No. 3350, Congress merely relieved the exercise of religion by certain persons of a burden imposed by union security agreements which Congress itself also imposed through the Industrial Peace Act. The Court concluded the issue of exemption by citing Sherbert which laid down the rule that when general laws conflict with scruples of conscience, exemptions ought to be granted unless some "compelling state interest" intervenes. The Court then abruptly added that "(i)n the instant case, We see no compelling state interest to withhold exemption." *Id*.

137. *Estrada v. Escritor*, 455 Phil. 411, 576-578 (2003).

138. *Id*. at 529-531.

139. 98 U.S. 145 (1878).

140. *See* KMIEC, DOUGLAS, W, & PRESSER, STEPHEN B, INDIVIDUAL RIGHTS AND THE AMERICAN CONSTITUTION 105 (1998). In this case, the issue was whether a general federal law criminalizing polygamy can be applied to a Mormon whose religion included that practice. The U.S. Court, in affirming Reynold's conviction, ruled that the prohibition of polygamy was justified by the importance of monogamous, heterosexual marriage, a practice upon which society may be said to be built, and perhaps even upon which democratic traditions depend. Thus, according to the U.S. Court, this important societal interest prevails over the countervailing religious practice of the Mormons.

141. A.M. No. MTJ-92-691, September 10, 1993, 226 SCRA 193.

142. 494 U.S. 872 (1990). (O'Connor, *J*. concurring) According to Justice O'Connor:

> . . . Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim. . . Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment never requires the State to grant a limited exemption for religiously motivated conduct.

Parenthetically, *J*. Brennan, *J*. Marshall, and *J*. Blackmun joined Parts I and II of Justice O'Connor's opinion, including the above-cited portions, but did not concur in the

judgment.

143. *See* Pepper, Stephen, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 B. Y. U. L. REV. 7, 12-13 (1993).

144. *Estrada v. Escritor*, 455 Phil. 411, 574-575 (2003).

145. *Id.*, *citing* McConnell, M., *Religious Freedom at a Crossroads*, 59(1) UNIV. OF CHICAGO LAW REVIEW 115, 169 (1992).

146. Dated May 6, 2005, by retired Associate Justice Romulo S. Quimbo, *rollo*, p. 714.

147. *Rollo*, pp. 687-689.

148. OSG Memorandum-In-Intervention, *rollo*, pp. 20-21, *citing* CONSTITUTION, Art. II, Sec. 12, which provides: "The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution."

149. *Id.* at 21, *citing* the Family Code, Art. 149, which provides: "The family, being the foundation of the nation, is a basic social institution which public policy cherishes and protects. Consequently, family relations are governed by law and no custom, practice or agreement destructive of the family shall be recognized or given effect."

150. *Id.* at 21-22.

151. *See Estrada v. Escritor*, 455 Phil. 411, 529-531 (2003).

152. OSG Memorandum-In-Intervention, *rollo*, p. 23.

153. *Id.* at 26.

154. *Estrada v. Escritor*, 455 Phil. 411, 580-595 (2003). This part of the decision addressed the issues of morality raised by Mme. Justice Ynares-Santiago and Mr. Justice Vitug, who also had a separate opinion, albeit differing in conclusion.

155. *Id.* at 580.

156. *Id.* at 586-588.

157. Rule 1.01 of the Code of Professional Responsibility provides that, "(a) lawyer shall not engage in unlawful, dishonest, **immoral** or deceitful conduct. (*emphasis supplied*)

158. Title Six of the Revised Penal Code is entitled Crimes against **Public Morals** and includes therein provisions on gambling and betting. (*emphasis supplied*)

159. The New Civil Code provides, *viz*:

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

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

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

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

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

160. Article XIV, Section 3 provides in relevant part, *viz*:

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

They shall inculcate patriotism and nationalism, foster love of humanity, respect for human rights, appreciation of the role of national heroes in the historical development of the country, teach the rights and duties of citizenship, strengthen ethical and spiritual values, develop **moral character** and personal discipline, encourage critical and creative thinking, broaden scientific and technological knowledge, and promote vocational efficiency. (*emphasis supplied*)

161. *Estrada v. Escritor*, 455 Phil. 411, 586 (2003).

162. *Id*. at 589-590.

163. *Id*. at 591.

164. *Id*. at 592.

165. *Id*. at 593.

166. *Id*. at 593-595.

167. *Id*. at 594-595.

168. *Id*. at 595-596.

169. Pepper, Stephen, *Conflicting Paradigms of Religious Freedom: Liberty Versus Equality*, 1993 B. Y. U. L. REV. 7, 12 (1993).

170. *Id*. at 51.

171. *Estrada v. Escritor*, 455 Phil. 411, 574 (2003).

172. OSG Memorandum-In-Intervention, *rollo*, p. 708.

173. *See Estrada v. Escritor*, 455 Phil. 411, 536-554 (2003).

174. *Id*. at 529-531.

YNARES-SANTIAGO, *J.*, dissenting:

1. *Lacuata v. Bautista*, A.M. No. P-94-1005, 12 August 1994, 235 SCRA 290.

2. *De Dios v. Alejo*, A.M. No. P-137, 15 December 1975, 68 SCRA 354.

3. Revised Administrative Code, Book V, Title I, Subtitle A, Section 46 (b) (5).

4. *Cleveland v. United States*, 329 U.S. 14, 67 Sup. Ct. 13 (1946).

5. Oxford Universal Dictionary, Vol. 2, p. 1280.

6. *Id*., p. 961.

7. Sibal, Philippine Legal Encyclopedia, p. 406; *Soberano v. Villanueva*, 116 Phil. 1208 (1962); *Reyes v. Wong*, A.M. No. 547, 29 January 1975, 63 SCRA 668.

8. Revised Penal Code, Art. 333.

9. Revised Penal Code, Art. 334.

10. *Quilatan v. Caruncho*, 21 Phil. 399, 403 (1912), Rules of Court, Rule 110, Section 5.

11. *Reyes v. Wong, supra*.

12. *Supra*.

13. Lacuata v. Bautista*, supra*.

14. *Supra*.

15. 339 Phil. 510 (1997).

16. A.M. No. P-88-263, 30 March 1993, 220 SCRA 505.

17. 220 Phil. 49 (1985).

18. E.O. 292, Sec. 46 (5).

19. Art. 334.

20. *Rollo*, Exhibits "1" and "2", pp. 14-15.

21. TSN, October 12, 2000, pp. 11-15.

22. Constitution, Art. II, Sec. 6; 1973 Constitution, Art. XV, Sec. 15.

23. Art. 334.

24. 98 U.S. 145; 25 L.Ed. 244 (1879).

25. *Maynard v. Hill*, 125 U.S. 190; 31 L. Ed. 654.

26. *Supra*.

27. G.R. No. 95770, 1 March 1993, 219 SCRA 256.

28. 319 U.S. 624 (1943).

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

30. Sulu Islamic Association of Masjid Lambayong v. Malik, A.M. No. MTJ-92-691, 10 September 1993, 226 SCRA 193.

31. 380 Phil. 555 (2000).

32. A.M. No. RTJ-99-1509, 8 August 2002.

33. A.M. No. OCA-00-61, 6 September 2000, 339 SCRA 709.

34. *Id.*, at 716-717; citing *Lim-Arce v. Arce*, A.M. No. P-89-312, 9 January 1992, 205 SCRA 21 and *Sy v. Cruz*, 321 Phil. 231 [1995].

35. *Benavidez v. Vega*, A.M. No. P-01-1530, 13 December 2001; *Alday v. Cruz*, A.M. No. RTJ-00-1530, 14 March 2001, 354 SCRA 322.

36. Civil Service Rules, Rule XIV, Section 23 (o).

CARPIO, J., dissenting:

1. 374 U.S. 398 (1963).

2. 485 U.S. 660 (1988) and 494 U.S. 872 (1990).

3. 485 U.S. 660 (1988).

4. Citations omitted.

5. In *Sherbert*, the appellant was discharged because she would not work on Saturday, the Sabbath Day of her faith.

6. *Employment Division v. Smith, supra* note 3 at 670-671.

7. 494 U.S. 872 (1990).

8. *Id*. at 878-879.

9. *Id*. at 881.

10. *Id*. at 882-883.

11. *Id* at 884.

12. *Estrada v. Escritor*, 455 Phil. 574 (2003).

13. *Id*. at 593.

14. *Employment Division v. Smith, supra* note 7 at 878-879.

15. 98 U.S. 145 (1878).

16. KAUPER, P., RELIGION AND THE CONSTITUTION 59 (1964). *See also* ABRAHAM, H. AND PERRY, B., FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 270 (7th ed., 1998).

17. *Id*.

18. 330 U.S. 1 (1947).

19. KAUPER, *op. cit*., at 61.

20. ABRAHAM, H. AND PERRY, B., FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 272-73 (7th ed., 1998).

21. 374 U.S. 203 (1963).

22. KAUPER, *op. cit*., at 64.

23. *Id*. at 65.

24. *Abington School District v. Schempp, supra* note 15 at 226.

25. ABRAHAM, H. AND PERRY, B., *op. cit*., at 280.

26. KAUPER, *op. cit*., at 59.

27. 343 U.S. 306 (1952).

28. *Id*. at 75.

29. 397 U.S. 664 (1970).

30. *Id*. at 668-669.

31. ABRAHAM, H. AND PERRY, B., op. cit., at Table 6.3.

32. Ira C. Lupu, *The Trouble with Accommodation*, 60(3) GEO. WASH. L. REV. 743, 751 (1992).

33. *Id*.

34. Anne Y. Chiu, *When Prisoners Are Weary and Their Religious Exercise Burdened, RLUIPA Provides Some Rest for their Souls*, 79 WASH. L. REV. 999 (2004). In this article, Chiu defines "legislative accommodation" as a statute enacted by the legislature to lift a neutral, generally applicable burden on religion imposed by the government.

35. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60(3) GEO. WASH. L. REV. 685, 687-688 (1992).

36. KAUPER, *op. cit.*, at 17.

37. *Id*. at 38.

38. *Id*. at 78-79.

39. WEBER, P., EQUAL SEPARATION: UNDERSTANDING THE RELIGION CLAUSES OF THE FIRST AMENDMENT 154 (1990).

40. Anne Y. Chiu, *op. cit*.

41. Ira C. Lupu, *op. cit.*, at 751, note 33.

42. *Villaraza v. Atienza*, 195 Phil. 383, 390 (1981).

43. *See* Dissenting Opinion, *J*. Carpio in *Escritor v. Estrada*, op. cit., *see* note 12.

44. *Ganaden v. Bolasco*, 64 SCRA 50, 53 (1975).

45. Section 2, Article XV and Section 12, Article II, 1987 Constitution.

46. *Goitia v. Campos-Rueda*, 35 Phil. 252 (1919); *Brown v. Yambao*, 102 Phil. 168, 172 (1957).

47. *Arroyo, Jr. v. Court of Appeals*, G.R. Nos. 96602 and 96715, 203 SCRA 750,761 (1991).

48. G.R. No. 104818, 226 SCRA 572, 584 (1993).

49. William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 311-312 (1991).

50. *Id*.

51. *Id*.

52. Bigamy is an illegal marriage by contracting a second or subsequent marriage before the first marriage has been legally dissolved. It is interesting to note that, while Escritor and Quilapio both executed a "Declaration of Pledging Faithfulness," such execution was unaccompanied by any religious ceremony officiated by a presiding minister of the Jehovah's Witnesses. Precisely, such ceremony would have constituted a violation of Article 352 of the Revised Penal Code prohibiting the performance of an illegal marriage ceremony by priests or ministers of any religious denomination or sect.

53. Section 2, Article XV, 1987 Constitution.

54. William P. Marshall, *op. cit.*, at 322-23.

55. *Id*. at 319.

56. *Id*. at 325.

57. *Id*.

58. KAUPER, *op. cit*., at 83.

59. WEBER, P., *op. cit*., at 150.

60. *Id*. at 47.

61. 98 U.S. 145, 167 (1878).