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THE FIRST AMENDMENT AND CANON LAW

BRENDAN F. BROWN*

IN THE FIRST PERIOD, from 1871 to 1898, the Supreme Court of the United States determined the relationship between the law of the state and that of the church on the basis of natural law. In 1871, the Court decided the epoch-making case of *Watson v. Jones*.¹ In that case the General Assembly of the Presbyterian Church in the United States had condemned the institution of slavery. This resulted in a schism in which each faction claimed title to the property of a local church in Kentucky. The supreme court of that state ruled that the General Assembly had exceeded its jurisdiction. Some of the parties to the dispute lived in Indiana. Because of this diversity of citizenship, the case was properly brought into the federal courts. The Supreme Court of the United States upheld the validity of the action of the General Assembly, and recognized that the title to the property in question belonged to the anti-slavery faction.

In *Watson*, the right of the individual to form a church, considered as a congregation, plus a moral entity with spiritual bonds, was admitted. Accordingly, a church may possess a governmental structure with a true juridical order, like the Roman Catholic and Presbyterian Churches, or have no law-making power, like the Baptist and Congregational Churches. If a particular church had a governmental structure, it might be of the prelatial or hierarchical type, with different echelons of superiors, like the Catholic Church, or it might be of the synodal type with different levels of authoritative bodies, as in the instance of the Presbyterian Church. If a church lacked a juridical order, then it was held together solely by spiritual and organizational bonds.

The *Watson* decision did not recognize the *legal* personality of any church, *i.e.*, no church was a legal entity so as to be recognized as an artificial person before the law with rights and duties, analogous to those

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¹ 80 U.S. (13 Wall.) 679 (1871).

of a natural person, unless it had been incorporated under civil law. All churches in the United States were expressly regarded as voluntary religious associations of individuals. The United States, therefore, made no exceptions in the ecclesiastical sphere to the general rule that all corporations are creatures of the political sovereign.

The Court in *Watson*, however, implicitly recognized that those churches with true juridical orders were *moral* persons, when it decided that their decisions were exempt from review by civil courts. Judgments of a church tribunal were to be conclusive where strictly ecclesiastical questions were involved. In the absence of fraud and duress, civil courts were obliged to accept the decisions of a church's court of last resort, even where such rulings involved property rights. The Court established this doctrine in spite of the fact that church tribunals are not agents or instrumentalities of the state, and thus the source of the obligation to obey their decisions is not to be found in the authority of the state.

According to American civil law, membership in all churches, even those with governmental powers and a legal system, begins with an implied contract. In the instances of churches of the prelatial or synodal kind, this contract creates a status which thereafter binds the members, regardless of their consent, in such matters as discipline, ecclesiastical rule, custom and law. Since this status, which was recognized by the Supreme Court in the *Watson* case, does not arise from civil law, it can come only from divine or the ecclesiastical law of a particular church. Hence, the jurisdiction of church tribunals rests on what has been described as a "higher

plane" than that of temporal authority.

The *Watson* decision, however, did not recognize the moral personalities of churches of the congregational type. The Court stated that "the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations."² Churches of the congregational type do not recognize an authority higher than that of the local church, and are in no way subject to the discipline or rule of any other body. Authority is considered by them to be moral and organizational and not juridical.

Watson v. Jones is still the law in the federal courts and in many state courts. It was a departure from the earlier judicial theory, held by a number of state courts, that members were bound to their church, whatever its type, by a contract not essentially different from other kinds of contract. However, this contract did not result in a status which obligated them to obey ecclesiastical determinations. Hence, they were free to have recourse to the civil courts.

It is significant to note that the holding in the *Watson* case was based on general law.³ The Court declared that the basis of its decision was "a broad and sound view of the . . . system of laws"⁴ and general principles of the Anglo-American legal system. These are, however, just other names for right reason or objective scholastic natural law. It was natural law, therefore, which dictated a spirit of freedom for churches and an independence from secular control or interference. Obviously, man has a natural law right and duty to belong to a church, to determine its

² *Id.* at 725.

³ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

⁴ 80 U.S. (13 Wall.) 679, 727 (1871).

type, and to be bound by an ecclesiastical juridical order.

Watson was not based on either the liberty clause of the first amendment or any other provision of the United States Constitution since it was not until 1939, sixty-eight years after *Watson*, that the Supreme Court recognized the power of the fourteenth amendment to impose the limitations of the first amendment upon the law-making authority of the respective states.

Generally, the relationship between the law of the state and that of the church as worked out in *Watson* accommodates the position of the canon law which existed in 1871 and which was later embodied in the present Code of Canon Law. It is in accord with what are now Canons 1 and 100 insofar as these Canons implicitly declare that the Church is a *moral* person. According to Canon 1, the Church has the right and duty to establish a juridical or external order with legislative, judicial, administrative, and executive processes for those under its jurisdiction. Canon 100 provides that the Catholic Church and the Apostolic See have the *nature* of a *legal* person by divine ordinance. Implicit in this is that the church is a *moral* person—a complete, independent and sovereign society with free autonomy in the ecclesiastical sphere. Moral personality flows from the qualities of transcendence and perpetuity, in addition to perfection and self-sufficiency.

The *Watson* decision is also adaptable to what is now Canon 218. This Canon provides that the supreme power of jurisdiction in the universe resides in the Pope and that his power to rule is independent of any human authority and extends to all members of the Church. The hierarchical structure of the Catholic Church, as it ex-

isted in 1871 and later outlined in the Code, namely, in Canons 329, 1322, 1326 and 1569#1, was acceptable to American civil law according to the *Watson* case.

The Second Period: 1898-1939

In the second period, from 1898 to 1939, the relation between civil and ecclesiastical laws was decided by the Supreme Court, principally on the authority of international law under the treaty-making power. Article VI of the Constitution provides, among other things, that “this Constitution and the Laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land.” It was in light of this clause that the Supreme Court recognized not only the *moral*, but also the *legal*, personality of the Catholic Church in three famous cases. In each case, the Court held that the law made by the 1898 Treaty of Paris between Spain and the United States constituted the “Supreme Law of the Land.”

In this Treaty the executive branch of the United States government conceded the *juristic* personality of the Catholic Church and papal sovereignty, under international law, in those territorial acquisitions which were formerly under Spanish dominion. The Church had the right to acquire and possess property of all kinds, as well as to make contracts and to institute civil and criminal actions, in accordance with the “Law of the Land,” in Puerto Rico, Cuba, and the Philippines. From the very beginning of Spanish colonization in 1492, the *legal* personality of the Church, with unrestricted corporate rights, including ownership of property, had been acknowledged by a number of concordats entered into between Spain and the Papacy. International

law obliged the executive branch of the United States government to allow the continuation of the *status quo* in regard to the law of the Catholic Church in those Spanish possessions which were acquired in 1898. The treaty-making power, in turn, bound the Supreme Court of the United States to give effect to the action of the executive branch.

The first case was *Municipality of Ponce v. Roman Catholic Church*.⁵ There, the Roman Catholic Church in Puerto Rico, through the Bishop, sued the municipality of Ponce in order to obtain title to property pursuant to an act of the legislative assembly of Puerto Rico passed in 1904. This act purported "to confer original jurisdiction on the Supreme Court of Puerto Rico for the trial and adjudication of certain property claimed by the Roman Catholic Church in Puerto Rico."⁶ The defense of the municipality was that this legislation was contrary to the fourteenth amendment since it deprived it of property without due process of law. The Supreme Court of the United States, rejecting the arguments of the municipality, held that the property in question belonged to the Church. Mr. Justice Fuller wrote:

The corporate existence of the Roman Catholic Church, as well as the position occupied by the papacy, has always been recognized by the Government of the United States.

At one time the United States maintained diplomatic relations with the Papal States, which continued up to the time of the loss of the temporal power of the papacy. (*Authority omitted.*)

The Holy See still occupies a recognized position in international law, of which the courts must take judicial notice.⁷

In the *Ponce* case, therefore, the Supreme Court upheld the canonical concept of the Church's legal and moral personality, under what is now embodied in Canon 100, not, of course, on the ground of divine ordinance, but on the authority of a treaty. What was later the law of Canon 3, as to the sanctity of concordats, was therefore followed, *i.e.*, agreements entered into between the Holy See and the various nations are not abolished or modified by the Code.

Effect was given also in the *Ponce* case to what is now Canon 1499, *i.e.*, the Church can acquire temporal goods by all just means which are sanctioned in the case of others by the natural or the positive law. The ownership of goods belongs, under the supreme authority of the Apostolic See, to that legal person which legitimately acquired the goods. The *Ponce* case also gave effect to what is now Canon 1518, *i.e.*, as the Supreme Head of the Church, the Roman Pontiff is also the supreme administrator of all ecclesiastical goods; and also to what is now Canon 1517, *i.e.*, the local ordinary, the Bishop or Exarch, is charged with the administration of all ecclesiastical goods which are in his territory and which have not been removed from his jurisdiction.

The second case was *Santos v. Roman Catholic Church*,⁸ wherein the legal personality of the Catholic Church was again recognized. There, the Church sued to recover a chapel from which it had been ejected by the defendants, members of an Oglipayan community. The Supreme Court of the Philippine Islands ordered the defendants to deliver possession to the plaintiff. This decision was affirmed by the Su-

⁵ 210 U.S. 296 (1908).

⁶ *Id.* at 303.

⁷ *Id.* at 318.

⁸ 212 U.S. 463 (1909).

preme Court of the United States. Mr. Justice Holmes, writing for the majority, stated that "the only questions open are those raised by the decision that the Roman Catholic Church is entitled to the possession of the property, and they have now been answered by *Ponce v. Roman Catholic Church*, 210 U. S. 296."⁹ He continued to state that "the legal personality of the Roman Church and its capacity to hold property in our insular possessions is recognized; and the fact that such property was acquired from gifts, even of public funds, is held not to affect the absoluteness of its rights."¹⁰

The third case was *Gonzales v. Roman Catholic Archbishop of Manila*.¹¹ There, a benefice had been established in 1820, a time when a layman could hold the benefice, which carried a considerable income, and have a priest say the masses in his place. But under the Church Code, which became effective in 1918, the plaintiff, a boy of fourteen, was forbidden appointment. The Supreme Court held that the Canon Law in force at the time of the appointment, rather than that existing in 1820, controlled the rights of the parties. Since the claimant was not entitled to be appointed chaplain, he had no right to earn a living from the income of the chaplaincy. The Court wrote: "By Canon 1481 of the new Code the surplus income of a chaplaincy, after deducting expenses of the acting chaplain, must one-half be added to the endowment or capital and one-half to the repair of the church, unless there is a custom of using the whole for some common good to the diocese."¹²

⁹ *Id.* at 465.

¹⁰ *Ibid.*

¹¹ 280 U.S. 1 (1929).

¹² *Id.* at 18.

Although in *Gonzales*, the Court did not expressly recognize the legal personality of the Catholic Church, it did so impliedly by holding the Archbishop of the Philippines to be a juristic person amenable to the jurisdiction of the Philippine courts for the enforcement of legal rights. Mr. Justice Brandeis delivering the opinion of the Court wrote:

The new Codex Juris Canonici, which was adopted in Rome in 1917 and was promulgated by the Church to become effective in 1918, provides that no one shall be appointed to a collative chaplaincy who is not a cleric, Can. 1442. It requires students for the priesthood to attend a seminary; and prescribes their studies, Can. 1354, 1364. It provides that in order to be a cleric one must have had "prima tonsura," Can. 108, par. 1; that in order to have "prima tonsura" one must have begun the study of theology, Can. 976, par. 1; and that in order to study theology one must be a "bachiller," that is, must have obtained the first degree in the sciences and liberal arts, Can. 1365. It also provides that no one may validly receive ordination unless in the opinion of the ordinary he has the necessary qualifications, Can. 968, par. 1, 1464.¹³

The Third Period: 1939-1965

In the third period, from 1939 to the present time, the Supreme Court shifted the basis of the relationship between the juridical orders of church and state, in the respective states of the union, from natural law to that of the liberty clause of the first amendment. The 1939 case of *Cantwell v. Connecticut*¹⁴ involved the constitutionality of a state statute which sought to restrict the house-to-house activities of a group known as Jehovah's Witnesses. For the first time it was held that the funda-

¹³ *Id.* at 13-14.

¹⁴ 310 U.S. 296 (1940).

mental concept of liberty, embodied in the fourteenth amendment, embraced the liberties guaranteed by the first amendment. Thus, in this revolutionary and controversial case, the Court ruled that the first amendment not only bound the federal government, but also the states. From then on, the Supreme Court consistently upheld church law under the liberty clause of the fourteenth amendment, rather than the natural law.

The dominating case in the sphere of church-state relations in the third period was *Kedroff v. St. Nicholas Cathedral*.¹⁵ This case resulted from a schism in the Russian Orthodox Church in the United States caused by the domination of the Russian Church in America by the Patriarch of Moscow, then suspected of being under the control of the Russian government. The schismatics prevailed upon the legislature of New York to pass special legislation which provided "that all the churches formerly administratively subject to the Moscow synod and patriarchate should for the future be governed by the ecclesiastical body and hierarchy of the American metropolitan district."¹⁶ In *Kedroff*, the plaintiff, a New York corporation, was created to acquire a cathedral for the Russian Orthodox Church in North America. It held legal title to St. Nicholas Cathedral in New York City. The defendants, clergymen appointed by the supreme authority of the Russian Orthodox Church, were sued in the New York State courts. The Court of Appeals of New York decided in favor of the plaintiff; however, the Supreme Court of the United States reversed.

¹⁵ 344 U.S. 94 (1952).

¹⁶ *Id.* at 98-99.

On the basis of the liberty clause of the first amendment, this case confirmed a long line of precedent which held that the civil law will neither interfere with the wholly spiritual and internal affairs of ecclesiastical juridical orders in general, nor with the appointment or removal of the clergy in particular. The Court wrote: "Freedom to select the clergy, where no improper methods of choice are proven . . . must now be said to have federal constitutional protection as a part of the *free exercise of religion* against state interference."¹⁷ It added that "legislation that regulates church administration, the operation of the churches, the appointment of clergy . . . prohibits the free exercise of religion."¹⁸ The Court continued by declaring:

Ours is a government which by the "law of its being" allows no statute, state or national, that prohibits the free exercise of religion. There are occasions when civil courts must draw lines between the responsibilities of church and state for the disposition or use of property. Even in those cases when the property right follows as an incident from decisions of the church custom or law on ecclesiastical issues, the church rule controls. This under our Constitution necessarily follows in order that there may be free exercise of religion.¹⁹

The *Kedroff* case gave effect to Canon 218, which in substance provides that the Pope has supreme jurisdiction over the Church in matters of faith, morals, discipline and government, and that this jurisdiction is independent of all human authority. It also gave approval to the independence of all church decisions, although the ultimate governmental authority might be

¹⁷ *Id.* at 117. (Emphasis added.)

¹⁸ *Id.* at 107.

¹⁹ *Id.* at 120-21.

located outside the United States. It should also be noted that the authority by which the Supreme Court interpreted the first amendment as applying to the states could only have arisen by introduction of a norm into the first amendment based upon a standard outside the Constitution, either that of natural law or social utility.

In the contemporary phase of the third period, the Supreme Court began to interpret the establishment clause of the first amendment so as to prevent the state from promoting belief in the basic moral values of the natural law. Within the last few years, the Supreme Court has redefined "religion" as understood in *Watson v. Jones*, in its interpretation of the establishment clause of the first amendment. In the leading case of *Engel v. Vitale*,²⁰ New York required the Board of Education of Union Free District #9, New Hyde Park, New York, to direct the school district's principal to cause the following philosophical and rationally derived affirmation to be said aloud by each class in the presence of a teacher at the beginning of the school day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country." Students were at liberty to absent themselves while this affirmation took place. The practice was declared unconstitutional on the ground that it violated the establishment clause of the first amendment, although the practice was not attacked as an "establishment," but solely as a violation of religious liberty.

According to the *Engel* decision, "religion" no longer means *Church* in the traditional sense of a congregation with a spiritual entity. To establish "religion" now means to promote belief in any trans-

cedental moral value and to express that belief. This was the test laid down by Mr. Justice Frankfurter in *McGowan v. Maryland*:²¹ "The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief."²² Thus a state officially establishes a religion when it publically fosters a quasi-ethical belief and expression. Apparently the children would not even have been constitutionally allowed to affirm their belief in the transcendental, intrinsic dignity of man or the human person (much less the Divine Being). Applying the Court's reasoning, this might lead to the formation of the religion of the Church of the Dignity of the Human Person in New York State.

In June 1963, the case of *School Dist. of Abington Township v. Schempp*²³ was decided. There, a Pennsylvania statute required the reading, without comment, of the Bible and the recitation of the Lord's Prayer by students at the beginning of the school day. Students were free to absent themselves from these exercises. The Supreme Court declared, in effect, that these practices, though very old, were unconstitutional from their very inception. Of course, if a natural law affirmation of belief in the existence of a Creator by students during school time was unconstitutional, a fortiori, a supernatural law affirmation of faith in a Judaeo-Christian source is forbidden by the first amendment.

Hence, the Supreme Court is using the doctrine of "Judicial Supremacy," based

²¹ 366 U.S. 420, 465-66 (1961).

²² *Ibid.*

²³ 374 U.S. 203 (1963).

²⁰ 370 U.S. 421 (1962).

on the authority of natural law, or at least some moral norm espoused by the Constitution, to devitalize the ideal of natural law. That is why Mr. Justice Brennan in the *Abington* case, upholding Mr. Justice Frankfurter's insight in the *McGowan* case, refers to the situation as a paradox, *i.e.*, the Court seems to, but actually does not, contradict itself by praising the fact that we are a people whose institutions rest on basic moral values, and yet paralyzes the state from promoting those values. It is respectfully submitted that the situation does not entail a paradox, but a flat contradiction.

It is manifest that these three cases are contrary to the spirit of Canon 1373, which, of course, purports to be binding only upon Catholic schools. The Canon implicitly favors the teaching of the natural moral values to all children, in providing that "in every elementary school the children must, according to their age, be instructed in Christian doctrine."

Conclusion

Further devitalizing of natural law values, either as such, or as a part of the spiritual laws of the various churches, by the Supreme Court may well disturb an essential jural postulate of American civilization. The only essential difference between the civilization of the United States and that of the Communist Bloc is the jural postulate of the intrinsic, immutable, and transcendental dignity of the human person. But the survival of that postulate is now being imperiled more than ever before because of the growing ascendancy of the forces of secularism. The Supreme Court is currently paralyzing the authority of the state to protect that postulate, while giving lip service to the great importance of religion for the common good. From the

foundation of the Republic, there has always been a union of church and state, *i.e.*, the church of the natural law, if one may be permitted to use the word "church" in the sense implicitly given to it by the Court in recent years. The Court now seeks to disestablish that church.

It is ironic that the Court has discouraged a *laissez-faire* attitude on the part of the state in economic areas of the common good and social justice. Dedication to the ideal of liberty has not prevented this. But in the sphere of the first amendment, dedication to that ideal appears to have been so great as to identify the establishment clause with the liberty clause. Of course, the movement of the legal philosophy of the Supreme Court away from the philosophy of natural law—first, to that of the neo-Kantian ideal of freedom, read into the liberty clause of the first amendment, and secondly, to that of social utility—apparently has not yet endangered the holding in *Watson v. Jones*. If the Court should find, however, that social utility dictated that this case should be overruled, it would be quite easy to do so by a new interpretation of the liberty clause. It would only be necessary for the Court to find that the decision in *Watson* now impedes religious liberty by its upholding a coercive, ecclesiastical jurisdiction repugnant to the Constitution. This would be a serious blow to hierarchical churches.

The purpose of the philosophical affirmation prescribed for the public school children of New York was not to inculcate the truth or falsity of any particular theological system, but rather to impress upon such children, as American citizens, the ultimate source of their obligations toward state and society. Manifestly, the source of that

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obligation was in an "Almighty God" (discovered from the order of the external world, the principle of cause and effect and an analysis of the great inner world of the subjective; not a God who had revealed any specific supernatural truth—the area of great historic conflict and bloodshed which the Constitution's drafters sought to avoid).

There is a striking analogy between the decisions of the Supreme Court in the early thirties, in the field of economic social justice, and those in the early sixties, in the sphere of the promotion of the common good by preservation of the ideal of the sacredness of the individual. In the early thirties the Court interpreted the Constitution so as to deter the state—by interposing the abstract concept of individual liberty—from effectuating economic social justice. Now the Court is preventing the

state from fostering, without coercion or compulsion, that underlying ideal upon which economic social justice, as well as civil rights, rests. A massive public opinion, however, in the later thirties after the attempt to "pack the Court" had failed, finally caused the members of the Court to adopt a sociological legal philosophy. The analogy will be complete if and when a correspondingly overwhelming public opinion is exhibited, sufficient to cause the Court to apply the natural law philosophy of the founding fathers in the area of the first amendment.

It is, of course, more difficult for the public to become aware of the long range socially disastrous consequences of the *Engel* case, as compared to those cases which had immediate adverse economic social consequences. It is submitted, however, that the necessary public opinion will be generated when the public perceives the *Engel* case in its true light—a decision

which must eventually result in total secularism and a rejection of human responsibility, not merely toward the God of revealed religion, the God of reason, but also toward preserving the immutable, absolute, intrinsic, and transcendental in-

violability of man as distinct in quality from brute creation. The final issue, therefore, is whether a nation which believes that man is no different from a baboon, or a grain of sand, can continue to maintain the free American way of life.