The Catholic Lawyer

Volume 24
Number 3 *Volume 24, Summer 1979, Number 3*

Article 7

April 2017

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Recommended Citation

Rev. Charles M. Whelan, S.J. (2017) "Origin and Impact of Government Regulations," *The Catholic Lawyer*: Vol. 24 : No. 3 , Article 7.
Available at: http://scholarship.law.stjohns.edu/tcl/vol24/iss3/7

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ORIGIN AND IMPACT OF GOVERNMENT REGULATIONS

CHARLES M. WHELAN, S.J.

Since our first meeting in 1965, we have been concerned with a great variety of legal issues. This is the first year, however, in which events have forced us to reconsider one of the most fundamental aspects of the relationship between the Church and the federal and state governments: the right of the civil government to impose its laws, enacted for the public peace, health, safety, morals, and prosperity on the agencies and institutions through which the Church carries on the redemptive mission of Christ.

In the past we have been concerned, for the most part, with affirmative action that we wanted the government to take—notably, financial assistance for the secular educational component in our elementary and secondary schools. Now we are very much concerned with actions that we do not want the government to take—notably, treating our schools (for tax and labor management purposes) as if they were exactly the same as non-religious educational institutions. There is both horror and irony in the fact that the arguments we advanced to justify public financial assistance to our schools are now being used, at least by some agencies of the federal government, to justify much greater public supervision and regulation of those schools.

The Seventh Circuit has even suggested that the government is "cruelly whipsawing" us—by holding that our schools are too religious for financial assistance, and not religious enough to escape governmental regulation. Only ten years after we won the great textbook victory in the *Allen* case of 1968, by emphasizing the substantial public and secular functions of our schools, we find ourselves now insisting that the schools are too religious to be required to file annual financial reports or to be subjected to the jurisdiction of the National Labor Relations Board.

There is no necessary contradiction in this change of emphasis. But, speaking for myself, I feel more than a little embarrassment and a great deal of unease—a sense that we are indeed in dangerous waters and that we must chart our course with extreme care. It is time for us to go back to fundamentals: to reexamine the criteria that Church lawyers should use in accepting or opposing governmental regulation of Church affairs. Only by such reexamination can we hope to avoid foundering on the fallacies of the moment. Surely we ought to think twice before picking up weapons—like Pfeffer's "profile" of the religious characteristics of our schools—that the Supreme Court has used to clobber us.

As a small contribution to this reexamination of fundamental princi-

ples, I suggest that it is essential for us to keep in mind the distinctions between three different kinds of objections that Church attorneys may interpose to an expansion of governmental regulation of Church affairs. The first type of objection is the "Church" objection; the second is the "constitutional" objection; and the third is the "public policy" objection.

The "Church" Objection:

The "Church" objection is the most fundamental of the three types. It is also the rarest, at least in this country. It is based not on the Constitution or on ordinary considerations of public policy, but on the mission that Christ has given to the Church. The Church can never accept laws that make it impossible for the Church to preach the Gospel or administer the sacraments. Given such laws, the only possible response of the Church is the response of Peter and the apostles to the Sanhedrin when they were forbidden to preach in the name of Jesus: "Obedience to God comes before obedience to men." (Acts 5:29). And if legal punishment comes to the Church for disobedience to such laws, the Church, like Peter and the apostles when flogged by order of the Sanhedrin, is "glad to have had the honor of suffering humiliation" for the sake of Jesus Christ.

At the close of the Second Vatican Council, Pope Paul VI and the other Fathers of the Council sent a message to the temporal rulers of this world. After proclaiming publicly that the Church honors the authority and sovereignty of these rulers, respects their office, and recognizes their just laws, the message goes on to say:

> And what does this Church ask of you after close to two thousand years of experiences of all kinds in her relations with you, the powers of the earth? What does the Church ask of you today? She tells you in one of the major documents of this Council. She asks of you only liberty, the liberty to believe and preach her faith, the freedom to love her God and serve him, the freedom to live and to bring to men her message of life. (*The Documents of Vatican II* [ed. Abbott-Gallagher; 1966] p. 730).

This call of the Second Vatican Council for legal freedom to carry on the redemptive mission of Christ is not a call for exemption from every regulatory law that civil society adopts. As many other conciliar and papal documents demonstrate, the Church recognizes the right and duty of civil governments to regulate temporal affairs. Accordingly, the Church has always accepted and supported laws designed to promote the public peace, health, safety, morals, and prosperity. Such laws may indirectly render the Church's work more complicated or more expensive; but the only law to which the Church objects precisely as the Church is a law that denies the Church the basic right to preach the Gospel and administer the sacraments. The Church proclaims that its members are citizens of two worlds, bound by the laws of both. Christ came to save us, not to exempt us.

The Constitutional Objection:

As lawyers, we have the task of translating the Church's divine claim to freedom for its redemptive mission into constitutional, statutory, common, and administrative law. We also have the task of maximizing practical freedom for the Church by utilizing existing rules of law and advocating new rules. This task is obviously difficult and complicated, and it is inevitable that there will be differences of opinion among us from time to time about whether it is better to use an existing rule of law or seek to change it. As Archbishop Jean Jadot, the Apostolic Delegate, reminded us in his address to this Association three years ago:

> There will be times when the complexities of the problems you face will leave you uncertain of the best course to follow. In such circumstances, the Council urges you "to enlighten one another through honest discussion, preserving mutual charity and caring, above all, for the common good." (*Proceedings of the Eleventh National Meeting of Diocesan Attorneys,* May 1975, pp. 4-5).

These remarks of Archbishop Jadot are particularly pertinent to the problems we face in selecting constitutional principles to urge before the Supreme Court. I will give just one pressing example: the use of the argument based on excessive entanglement. In my opinion, it would be a great mistake for us to embed this argument any deeper than it already is in the wall of separation between church and state.

As a matter of semantics, of course, "excessive entanglement" defines itself as unconstitutional. Anything is wrong in excess. But because the principle of excessive entanglement is relatively new in our constitutional law and has been used by the Supreme Court to frustrate sound developments in state educational policy, I think we should be skeptical about the utility of developing new applications of the principle. The tendency of the principle is to isolate the Church from close contact with governmental agencies and political processes. But such contact is essential if the Church is to be really free to carry on the redemptive work of Christ. The Church transcends the world, but the Church is very much in the world. If a particular law or regulation interferes directly with the teaching or worship of the Church, it would be better, in my opinion, to argue that such interference is directly proscribed by the free exercise clause than to argue that there has been an "excessive entanglement" of church and state.

It is in the nature of constitutional principles that they can be changed only by the agreement of three-fourths of the states or five justices of the Supreme Court. When we select constitutional principles in our work before the courts and the legislatures, we ought to be reasonably sure that the principles will serve us well over the long run. The Church has always believed in a great deal of contact and collaboration between the secular and spiritual powers. The Church, moreover, has no objection in principle to reasonable regulation of its temporal affairs by the civil government. Such regulation is objectionable only when it actually interferes with the

preaching of the Gospel or the administration of the sacraments. In my opinion, therefore, it would be a mistake for us to promote the development of a constitutional principle that governmental regulation of the temporal affairs of the Church is, or creates an unconstitutional danger of, excessive entanglement between church and state.

The Public Policy Objection:

As citizens of two worlds, we must share responsibility for the temporal as well as the spiritual welfare of our fellow men. Accordingly, we should never forget that we are not limited to theological or constitutional considerations in appraising the acceptability of various laws or proposals for new laws. We are both free and obliged to use all of the ordinary arguments employed in the shaping of public policy. I sometimes suspect that we would make more progress if we relied less on the Constitution and more on common sense and widely held conceptions of the general welfare.

Public policy arguments, of course, are generally addressed to legislatures and regulatory bodies rather than to the courts. But a great deal of our work today is in the legislatures and the regulatory bodies; and we know that the courts themselves—and especially the Supreme Court—are not insensitive to arguments based on public policy. If we have a good reason for wanting to be exempt from a particular law of general application, we ought to develop that reason as consistent with the public policy of the particular law in question or as consistent with other, overriding considerations of public policy.

Inevitably, there will be many differences of opinion among us, as well as in the nation at large, over what is and is not desirable or important public policy. It is essential, however, for us as Catholic lawyers to engage in this debate. Our Faith and our Constitution do not answer most of the practical questions with which we are confronted. As citizens of two worlds, we have a duty to both God and Caesar to use our intelligence, our energy, and our talents to improve the temporal and spiritual well-being of the Church and of all our fellow men.