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ORIGIN AND IMPACT OF GOVERNMENT REGULATIONS

JOSEPH M. FITZGERALD

As you know, the First Amendment of the Constitution of the United States provides, among other things, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This language obviously means that the church and state cannot be "formally united in an exclusive union."¹ This differs considerably from the concept of separation of Church and State in other countries. The phrase "separation of Church and State" had its beginning in the State of Virginia. The Anglican Church, which was then the state church and united to it, was finally separated from the government of Virginia through the efforts of Jefferson and Madison.

"Congress shall make no law respecting an establishment of religion" is a clear statement that the Congress of the United States shall not enact any legislation which results in "an establishment of religion." The words "separation of Church and State" are patently ambiguous, since "separation," "Church," and "State" each have many meanings. Actually, the phrase "separation of Church and State" does not appear any place in the Constitution of the United States or in the constitution of any state, as it may pertain to the relationship of the government to religion.

Madison and Jefferson, being regarded as the authors of the Bill of Rights, neither before nor after its enactment expressed any discontent with or opposition to the use of federal funds or state funds (as in Virginia) in aid of religion or religious education. To have done so would have been inconsistent with their Official Records while holding public office and while acting as Commander in Chief of the Armed Forces.

A change in the philosophy of the Supreme Court came in 1947 when Justice Rutledge, writing a dissenting opinion in the *Everson* bus case,² expressed an opinion contrary to that attributed to Jefferson and Madison expressed above. Joined by Justices Frankfurter, Jackson, and Burton, Rutledge decided, without the benefit of previous citations, that the purpose of the first amendment was to outlaw, not merely a formal relationship between church and state, but "to uproot all such relationships." He further elaborated "that the purpose of the first amendment was to create a complete and permanent separation of the spheres of religious activity

¹ J. O'NEILL, *CATHOLICS IN CONTROVERSY* (1954).

² *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof, the amendment's wording and history unite with this Court's consistent utterances, whenever attention has been fixed directly upon the question—the prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes. Legislatures are free to make and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observance.”³ Justice Rutledge here mentions the amendment's wording, history, and the Supreme Court's previous utterances. It appears that Justice Rutledge misconstrued the purpose of the amendment, since no mention was ever made in the amendment of financial support or public funds. He was unable to demonstrate any previous “consistent utterance”⁴ of the Supreme Court in support of his thesis, for there never had been any. Therefore, his argument is fallacious.

Unfortunately, the philosophy of Justice Rutledge took on a degree of credibility with some other members of the Court. In the *McCullum* case,⁵ despite the fact that the released time program established in the State of Illinois was found to be constitutional by the trial court and the supreme court of the state, and was approved by the board of education, the entire educational administration, and the parents of the children involved, the Supreme Court of the United States followed the reasoning of Justice Rutledge and struck down the statute as being unconstitutional. The reference and use of Jefferson's phrase, “wall of separation,” as a means of finding aid unconstitutional, was severely criticized by an eminent group of Protestant ministers and educators, as well as by the Catholic Bishops of the United States. James M. O'Neill, cited above, in my opinion correctly construes Jefferson's use of the phrase “a wall of separation between Church and State” as pertaining to the “rights of conscience,”⁶ and not as bearing the interpretation portrayed by Rutledge in *Everson* or by the Court in *McCullum*.

Thus, we see two philosophical theories on the meaning of the first amendment; one is buttressed by law, custom, tradition, usage, and behavior of the scribes of the first amendment—Jefferson and Madison. The second is of rather recent origin, is without any basis in law or history, either political or legal, and has become, of late, firmly adopted and considered to be the law of the land, conceived, written, and adhered to by the Founding Fathers and all who have followed them.

Many today are blinded to the fact that our system of church-state relation is unique in the world. It was not designed by our Founding Fathers to put church and state at odds, but to help the church and state to live in harmony. It is erroneous to draw from the language of the first

³ *Id.*

⁴ J. O'NEILL, *supra* note 1.

⁵ *McCullum v. Board of Educ.*, 333 U.S. 203 (1948).

⁶ Letter from Thomas Jefferson to the *Danbury Baptist* (Jan. 1, 1802).

amendment a sense of hostility between the church and state. Our Founding Fathers and the Congress for 200 years have recognized the place of religion in American life and have made laws which foster mutual cooperation. Considering the joint programs between church and state, it would be a contradiction of history to say that there is an absolute and impregnable wall of separation of church and state.⁷

The very nature of the Church lends itself to controversy. Her mission is to lead men to God amidst a secular and often hostile environment. To accomplish her purposes, the Church must be able to adjust to opposing philosophies of life and even compromise, if necessary, though never the truth itself nor the principles on which it is based, being God given and unchanging.

Perhaps it is the government's increasing involvement in day-to-day life that is leading to the questionable entanglement between church and state upon which we are focusing today. This fact of adjustment and turmoil is true in relation to all facets of life. The entire question of the origin and impact of government regulation is vast in range and is such that no one can hope to treat it with anything like completeness in the short space of time allotted to me today.

As you know, it was the Legal Code of the Roman Emperor, Justin, that influenced the legal thinking of European schools for hundreds of years. It was given to a Christian world by a Christian Emperor and the Code owes not less to Moses and the scribes than it does to the Greek philosophy and Roman Jurists. It was preserved in the Catholic Church, reinterpreted by the medieval schoolmen and adapted to a different civilization by the Church's Canon lawyers. All of this entered the life of contemporary Europe—and eventually America—so that it still influences the thinking of lawyers, many of whom now, unfortunately, no longer accept the foundations on which so much of it was built. For many of these, the law is a discipline in its own right, necessary for civilized living, but intelligible by itself, without reference to the ideas which influenced those who fashioned it.

Spain, you will remember, preceded France and England as colonizers of this land by over 200 years. Although France and England both considered the conversion of the natives as one of their missions, it was the Spaniards who made it their primary reason for exploration and colonization. England fought France and Spain for control of the New World, and because of the strong influence of the Church on the government of Spain, and, to a lesser degree, in France, the conflict, in the mind of the average Englishman, was a war between England and the Church. Unfortunately, this mental aberration still endures in many circles.⁸

After the long and bitter struggle between the colonies and the Moth-

⁷ See Most Rev. Francis T. Hurley (Archbishop of Anchorage), *Editorial*, Technical Passage, June 16, 1978.

⁸ J. ELLIS, AMERICAN CATHOLICISM.

erland, the Declaration of Independence was proclaimed, and later the Constitution and the Bill of Rights were enacted. Credit for the political philosophy of these documents is freely given to the English philosopher, Locke, the so-called Father of the Age of Enlightenment.

Modern scholars are beginning to realize and are finally willing to admit that the motivating philosophical impact on our Declaration of Independence and Constitution came more from Francis de Vittoria (1480-1546), an Italian who taught at Salamanca; another, and perhaps the most noticeable, Francis Suarez (1548-1617), a Spaniard, and eminent scholastic philosopher of the 16th and 17th centuries; finally, the saintly Cardinal, St. Robert Bellarmine. Strangely enough, their influence went unheralded during the recent bicentennial celebrations, except as a footnote to history, although Suarez and Bellarmine, especially, were outspoken opponents of the Divine Right of Kings, and Bellarmine, who followed Suarez, carried on a celebrated controversy with James I of England on this very question, long before our Declaration of Independence.

We can hardly discuss problems and events of the times adequately without going back into history. With the great influx of Irish, Germans, Italians, and Poles, in the middle of the last century, and later the Spanish speaking, the nativist mentality took over, suspicion became intensified, and persecution of these minorities would soon appear in abundance. They were denied religious freedom (in the land of the free and the home of the brave), excluded from employment, and generally harassed and treated as second class citizens.

Now a new and foreboding omen appeared on the horizon—secularism, or secularistic humanism. "This term appeared first around the middle of the last century. It seeks formation of human improvement by material means alone and would regulate life by reason alone and ennoble it by service."⁹ The secularist holds that anything that is above or beyond the present life should be entirely overlooked. The existence of God, immortality of the soul, in the mind of the secularist, cannot be answered. All motives derived from the Christian and Jewish religions are worthless. We must bear in mind that the Church is as interested in improving human life as is the secularist, but the present life cannot be looked upon as an end in itself, but as a movement toward a future life for which preparation must be made by compliance with the laws of nature and the laws of God. Hence, there can be no "compromise between the Church and Secularism."¹⁰

This secularistic movement holds tenets that are unacceptable to the great majority of American people, not just Catholics. Still, it is gathering momentum and will continue to do so, unless educated people become more aware of this ideology and fight it on its own grounds, for it is not entirely a foreign import seeking to impose on us something from outside

⁹ 12 THE CATHOLIC ENCYCLOPEDIA 676 *et. seq.*

¹⁰ *Id.*

our established society; rather, it is a growth *within* our democratic structure and, as such, is even more pernicious.

Let us examine briefly the platform of the American Secular Union and Free Thought Foundation, whose object is the separation of church and state. The platform advocates: 1. Church property shall no longer be exempt from taxation. 2. The abolition of chaplains in the Congress, armed forces, prisons, etc. 3. No further appropriations for educational or charitable institutions of a sectarian nature. 4. Prohibition against the use of the Bible for religious purposes in the public schools. 5. Discontinuance by the President and other officials of religious festivities, days of prayer and thanksgiving. 6. Abolition of a theological oath in Courts and other government departments, which shall be supplanted by a simple affirmation. 7. All laws enforcing Sunday or Sabbath observance based on religious foundations shall be abolished. 8. Laws seeking to enforce Christian morality shall be abrogated and henceforth all laws shall conform to the requirements of *natural morality*, equal rights and impartial justice. 9. Christianity (or any other religion) shall not be entitled to any preference, but our whole political system shall be conducted on a purely secular basis. All of this is a necessary conclusion of the 17th Century "Age of Enlightenment."

We need only to look at decisions of the Supreme Court of the United States over the past 25 years, in the light of the Secularist platform, to see how far we have already come on the road to an official state religion—secularistic humanism. Even though recent polls clearly demonstrate that the overwhelming majority of Americans believe in God, practice their religion, and pray daily, the Supreme Court by judicial fiat has already imposed upon our own government and its citizens a religious philosophy alien to those of Suarez, Bellarmine, and de Vittoria and even the Deists of our colonial days. (The Deist admits the existence of God and even the existence of the soul, but denies Divine providence and God's government of the World.)

The Secularist is slowly achieving his goal of "democratic conformism," the reduction of our national mentality to a "common mind," the reduction of our religious pluralism to a "common secular faith," and the refashioning of our lawmaking process, so that the only law that is recognized as valid and binding is man-made or civil legislation. It demands that the public witness of the Christian churches be silenced and draws a sharp distinction between the divinely revealed laws of God and the civil or man-made laws of the land. Public life and activity is to be regulated solely by human law. It denies natural law rights, or morality. Secularists believe in no afterlife for the soul and want those who do to relegate this belief and its subsequent interests to their private lives, never letting it be brought to bear on matters of a temporal nature. The Secularist fails to grasp the ironically inconsistent posture in which he is placed when he advocates on the one hand that there should be no state-established religion, while on the other pursuing with all vigor the concept that the state must establish that there is no Supreme Being and that all things are dependent upon man alone.

Thus, we see the demeaning example of the current President of the United States (after filling only 1% of his significant appointments with Catholics, who were significantly responsible for his election, although we number nearly 25% of the entire population) requiring of his Catholic appointees that they not permit their conscience to interfere with their political office. It would seem to me that he would want to surround himself with people who would be guided by their conscience. Can you imagine asking a Jew to disavow his attachment to Israel, or a Protestant to disregard his moral tradition in the performance of his duties? I would hope they would refuse to accept an office with such a condition precedent.

You will be relieved to know that time will not permit my discussion of how other devices are used by the government, purely to secularize our political and governmental activities—irrelevant statutes, restrictive regulations, scare tactics, rules, guidelines, directives, licenses, approvals, questionnaires, audits, inquiries, ad infinitum. Perhaps, on another occasion we can elaborate on these devices. William Ball treats the subject in depth in "The Catholic Cemetery," April, 1978.¹¹ What can the citizen do to stop the spread of secularism and the encroachment of the state on the activities of the Church?

Public law is frequently concerned with questions of morals. In the compulsory prayer cases, the Supreme Court made a moral judgment—for it is wrong for an individual to be deprived of the responsibility of choosing whether or not he will worship and, if the former, the precise form his worship will take. Moral judgments were made concerning racial injustices. If the churches of our country and their members insisted always on the exercise of the virtues of justice and charity, some of the cases decided by the Supreme Court would not have arisen at all.¹² In a free society and a democratic one, we must be cognizant of the need of the efforts of the churches and church-related schools to instill virtuous habits into the lives of their members and students; this is the great contribution of religion to the state.

Hopefully, virtuous people will be motivated by social justice and charity. The problems of today must be settled in the conscience of people in the body politic. In this way, there will be peace and order and the true common good of society.

In our American culture, it is clear that our religion has had much to do with making us what we are as a people. Our common values, attitudes, ideas, and assumptions have come from our religious traditions and are maintained even by those who have repudiated the religious heritage itself. Our belief in the sanctity of human and personal life, our humaneness, our sense of destiny, our belief in the natural law, and the moral law that transcends the law on the books—all these are products of our religious past.

¹¹ Ball, *The Catholic Cemetery*, April 1978.

¹² E. MORGAN, S.J. & L. TOOMEY, S.J., *THE SOCIAL CONSCIENCE OF A CATHOLIC*.

The admonition of Christ 2000 years ago "to render to Caesar the things that are Caesar's and to God the things that are God's" is as valid today as it was when He said it. Some things are purely within the realm of the State and others, in the sphere of the Church. But there are still other questions that are of mixed character, i.e. education, marriage, freedom of religion, justice, etc.. In many countries, these are settled by a Concordat between a particular government and the Holy See which settles the questions such as I have mentioned by a meeting of the wills to avert dissension between the church and state and usually carries the force of a treaty binding upon both parties. I firmly submit that we have no need for a Concordat between the United States and the Holy See, for those questions which would normally be resolved in a Concordat are protected under the Bill of Rights (the first ten amendments of the Constitution).

In the early days of our country, there were few questions involving those matters usually found in a Concordat (or the Bill of Rights) that reached the Supreme Court. One of the very early cases recognized the Treaty of Spain and the rights of the Church contained therein.¹³ A later case took cognizance of the Canon Law and its binding influence on the Church.¹⁴ A strong opinion was written by the highly regarded Justice Brandeis, in which he freely quoted the Canons. Still another was the famous *Oregon School* case recognizing that parents enjoyed the primary right of educating their children—not the state.¹⁵

Since the *Everson* and *McCullum* cases there has been a proliferation of litigation concerning a broad spectrum of matters involving the Church and its teachings. To mention just a few: school discrimination, prayer in public schools, obscenity, "one nation under God," tuition grants and other aids for private and nonpublic schools, cemetery property and regulations, charitable immunity, alleged political activity of tax exempt institutions, abortion, use of state school books, use of religious garb in public schools, aid to primary and secondary schools, aid to colleges, regulation of hospitals receiving government support, ownership of church property (where local groups secede from parent groups), when does life begin—when does it end?, meaning of integrated auxiliaries, effect of government agencies (NLRB) on our church-related institutions, obligation of church to comply with workmen compensation laws and unemployment compensation laws.

These are only a few of the questions involved and acted upon in recent years. On the horizon is always the effort to have the Supreme Court define "Church"—a task which the Congress has not undertaken; nor have government agencies been able to achieve a satisfactory definition. In the past, the Court very likely would have refused to accept jurisdiction of an internal church matter. I am not so sure that that tradition would prevail if presented today. In view of the success of the Secularists and the willing-

¹³ *Ponce v. Roman Catholic Church*, 210 U.S. 295 (1908).

¹⁴ *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929).

¹⁵ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

ness of the Court to accommodate them, we must determine to watch diligently for any further erosion of what our Founding Fathers conceived: a God-centered state, with freedom of worship available to all people living in harmony with each other.

I would like briefly to make what I hope are practical suggestions concerning litigation, or the probability thereof, in your jurisdiction, together with some ideas which you may wish to consider before any case is lodged in court:

1. We must all recognize that some dioceses are opposed to any government regulation, while others take a more lenient attitude and are willing to readily accept some governmental regulations, such as broad definition of integrated auxiliary or the obligation to cover diocesan teachers under unemployment compensation. (This question may be moot by the time this address is printed). Some dioceses have already voluntarily covered their teachers as a gesture of social justice and good will.

2. We must carefully determine whether a government regulation is reasonable or if it in fact goes beyond the point of being reasonable.

3. Is the sociological interest aspect of the law opposed to the interest of the Church?

4. Does the regulation impose an unjustified impact on the Church's welfare?

5. If the regulation is unreasonable, is there a legislative remedy available to oppose it?

6. If litigation is to be pursued, it is recommended that contact be made with other diocesan lawyers who may have had similar experience, and certainly the Office of General Counsel of the USCC should be kept informed, particularly if the litigation may have a serious adverse effect on the Church. Particular emphasis should be placed on the delicacy of any litigation that may invite the question of defining the word "Church."

7. If the question involves one of taxation, it will be necessary to familiarize ourselves with the Anti-Injunctive and Anti-Declaratory Decree Federal Statutes.

8. If litigation is to be followed, we must carefully determine whether to proceed in the federal or state court, although some areas are dictated by law.

9. If the matter is one in which we must first exhaust all administrative remedies, be sure that the record is complete and carefully prepared. It is very likely that new questions will not be heard once the matter is filed in court. In other words, the court may not hear facts and evidence "de novo."

10. If a decision has been made to file in the federal court, ascertain that there is in fact a federal question, and that the court has jurisdiction over the matter and the parties involved.

11. Finally, when it has been determined that the time has arrived to litigate, we must carefully weigh whether an adverse ruling upholding a regulation inimical to the interest of the Church will lead to a more disastrous end than complying with the regulation itself.

I am sure these elementary points have occurred to you, but it does not hurt to refresh our minds.

Over the last quarter of a century we have seen innumerable examples of the judiciary on the one hand taking the position that it cannot make moral judgments, while on the other doing exactly that. In the infamous and tragic abortion decisions of a few years ago, the Supreme Court announced that it could not determine when human life began; but then, in the very same opinion, while totally disregarding the expert opinions of fetologists and other specialists, fixed the beginning of human life—not at the time of conception, but several months thereafter and thus entered the field of moral law, or lack of it, on the side of the Secularist. What effect the present test tube case will have, in light of the Court's opinion in the abortion cases, remains to be seen since it is acknowledged now that life does begin at least within hours, albeit in a test tube, of the union of the sperm and egg. Does not the conception of life in a test tube establish the fact that a fertilized egg has a life independent of the mother, and is therefore a separate and distinct person, and that when implanted in the womb merely grows in size?

It seems to me that we always have an obligation to express our dissent or approval at the polls. Now, however, since the judiciary has so often usurped the function of the legislature in the passage of laws, and not merely their interpretation, we have a further obligation to participate more actively in the selection of judges, for once a justice is seated, he is seated until he dies, retires, or resigns, and he is able "to indulge, with impunity, in every form of aberration and prejudice." Why should any judicial nominee not be required to respond to interrogation relating to his philosophy of law, his philosophy of government, and his interpretation of the Constitution? The ACLU, the Anti-Defamation League, NEA, the POAU, and a host of others have no hesitancy in inquiring and letting their sensitiveness be felt. It is time we did likewise, for we are without doubt the largest minority and receive no hearing. Our failure to keep ourselves informed and our failure to express ourselves in the selection of all appointees, based upon an informed conscience, may well make us guilty of "culpable vincible ignorance"—that is, ignorance which we could have overcome but did not and for which we are to blame.

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¹¹ 134 THE TWENTIETH CENTURY CATHOLIC ENCYCLOPEDIA.

¹² DECLARATION OF INDEPENDENCE (adopted July 4, 1776).

¹³ U.S. CONST. (adopted Mar. 4, 1789).