The Catholic Lawyer

Volume 26
Number 3 *Volume 26, Summer 1981, Number 3*

Article 11

September 2017

Current Attitudes of the Courts Toward Church Properties and Liabilities

Charles M. Whelan, S.J., Professor of Law, Fordham Law School; Office of General Counsel, United States Catholic Conference

CURRENT ATTITUDES OF THE COURTS TOWARD CHURCH PROPERTIES AND LIABILITIES

CHARLES M. WHELAN, S.J.

There are three cases that I wish to discuss with you this morning: *Jones v. Wolf*,[1] a church property dispute decided by the Supreme Court; *Barr v. United Methodist Church*,[2] a church liability case currently in progress in the California courts; and finally, *Worldwide Church of God, Inc. v. California*,[3] a church accountability case that is also before the California courts and is now pending on a petition for a writ of certiorari to the United States Supreme Court.

All of these cases are of great importance for the future of church-state relations in the United States. Indeed, it is sage to predict that during the 1980's, the spotlight in the litigational arena of church-state relations will shift from the aid-to-education cases to the church property, liability, and accountability cases.

The shift will be gradual because of some very important questions that must be settled concerning various forms of public assistance to education and church-related institutions. The shift is inevitable because of the magnitude of the questions that the litigants have raised concerning church property, church liability, and church accountability. The lower courts and the bar justifiably will press the Supreme Court for guidance in these very sensitive areas.

Everyone is quite familiar with the rather long line of decisions that the Supreme Court has handed down in the area of church property disputes over the past 110 years. *Watson v. Jones*,[4] an 1871 case, is of course

---

[1] 443 U.S. 595 (1979).

[2] 90 Cal. App. 3d 259, 153 Cal. Rptr. 322 (Ct. App.), *cert. denied*, 444 U.S. 973 (1979).

[3] 623 F.2d 613 (9th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3617 (1981).

[4] 80 U.S. (13 Wall.) 679 (1871).

the seminal case and *Serbian Eastern Orthodox Diocese v. Milivojevich*,[5] decided in 1976, was the last word until *Jones v. Wolf*[6] came down last July.

The *Serbian* case ringingly reaffirmed the *Watson* principle that the decisions of ecclesiastical bodies are binding on the civil courts in church property disputes. *Jones* does not directly attack that principle, but Justice Powell states that the Court's opinion superimposes "a new structure of rules that will make the decision of these [church property] cases by civil courts more difficult."[7] The new analysis, he also says, is more likely to invite intrusions into church policy which are forbidden by the first amendment.

Justice Powell was writing in dissent, and I tell my constitutional law students at Fordham that dissenting and concurring opinions prove only what the law is not. I also tell my students that sometimes one cannot really understand an opinion of the Supreme Court without carefully reading the dissenting and concurring opinions.

The Court's majority opinion in *Jones* is such a case. The vote was 5 to 4, with Justice Blackmun writing the majority opinion. There was one dissent and no concurring opinion, but the dissent was signed by an unusual coalition of Justices—Chief Justice Burger and Justices Stewart, White, and Powell. It is very unusual to find the Chief Justice parting company with Mr. Justice Blackmun. It is even more unusual to find Justices Stewart and White together on the losing side of a 5-to-4 vote. In almost all 5-to-4 decisions of the past twenty years, Justice Stewart was on one side of the vote and Justice White was on the other. That is why they consistently have been identified as the "swing men" on the Supreme Court.

Since Justice Powell joined the Court, he has also moved into a swing position. You remember his key votes in cases like *Branzbur v. Hayes*[8] and *Regents of the University of California v. Bakke*.[9] Justice Powell's dissent in *Jones* is very important because all three swing justices signed it. It is also important because the Chief Justice signed it. Whatever else you may think about the Chief Justice after reading Woodward and Armstrong's sophomoric indictment in *The Brethren*, you should remember that the Chief Justice generally has voted on our side in the church-state cases. If, as I very much doubt, Justice Stevens were ten times the lawyer that the Chief Justice is, I still would rather see another Burger than another Stevens on the Court.

---

[5] 426 U.S. 696 (1976).
[6] 443 U.S. 595 (1979).
[7] *Id.* at 610 (Powell, J., dissenting).
[8] 408 U.S. 665 (1972).
[9] 438 U.S. 265 (1978).

Indeed, in the five man majority in *Jones,* there is only one justice whom we may have any reason to regard with benevolence—Justice Rehnquist. Justices Brennan, Marshall, and Stevens consistently have voted against us in the aid-to-education cases, and Justice Blackmun has voted against us far more often than not. Therefore, approach the majority opinion in *Jones* with a certain amount of trepidation.

At the very beginning of his opinion for the Court, Justice Blackmun states the issue in the case: "[t]he question for decision is whether civil courts, consistent with the First and Fourteenth Amendments to the Constitution, may resolve [church property disputes] on the basis of 'neutral principles of law,' or whether [the civil courts] must defer to the resolution of an authoritative tribunal of the hierarchical church."[10] This statement of the issue accurately reflects the division between the five man majority and the four man minority. The issue in this case is not who is entitled to the possession and enjoyment of the church property—the 164 members of the Vineville Presbyterian Church in Georgia who, together with their pastor, voted to separate from the Presbyterian Church in the United States and join the Presbyterian Church in America or, the 94 members of the Vineville Church who voted against the division from the mother church.

The Georgia courts, indeed, awarded the possession and enjoyment of the property to the 164 schismatics. By the time one finishes reading Justice Blackmun's opinion, it is clear that the five man majority has given the 94 true believers another chance to regain possession and enjoyment of the church property. Under the majority's mandate, the case went back to the Georgia courts for a determination of what it called "critical issues of state law." The majority explicitly disclaimed any view about the ultimate outcome of the controversy.

The fight then, in *Jones,* concerns the principles of law that state courts may apply in the adjudication of church property disputes. The dissenters would require the state to defer to the authoritative resolution of the dispute within the church itself. The majority would permit the states to defer, but they would also permit the states to adopt and apply "neutral principles of property law," neutral in the sense that the principles exclude any consideration by the civil courts of the doctrine, discipline, or ritual of the divided church.

Specifically, the majority opinion permits the states to adopt two so-called neutral principles. The first, the Court identifies as the trust principle and the second, the majoritarian principle.

The trust principle says that in deciding whether the property of the local church is under the control of the mother church, the state courts

---

[10] 443 U.S. at 597.

may disregard all of the religious language in the constitution of the local church and in the constitution of the mother church, and may look instead for civil law terminology that either creates or does not create a trust. Under this trust principle, the states are free to hold that unless there is sufficient civil law language to create a trust in favor of the mother church, local church property does not belong to, nor is under the supervision and control of, the mother church.

The second neutral principle that the states may adopt is a presumption that the government of the local church acts by majority rule. Again, this presumption may be overcome by sufficient civil law language. If the charter of the local church or the constitution of the mother church explicitly rejects the majoritarian principle, and does so quite clearly in language that any civil lawyer would understand, one can overcome the majoritarian principle. In the absence of such "plain English," however, the courts may hold that the vote of the majority of the church's members accurately reflects its government.

The combination of these neutral principles is justified by Justice Blackmun as removing from the court's considerations of religious doctrine, discipline, and ritual. He says in one place that the Court already has suggested in prior cases that churches should make it easier for the courts to understand where the seat of a church's authority is and how that authority is to be exercised. Justice Blackmun's opinion reflects a certain irritation with the mysteries of religious language.

What the *Jones* majority has done is to issue an invitation to the states to enact laws forcing church attorneys to write documents in a way that will be comprehended easily by the civil courts in the event that there is a schism within the local church. The majority, however, does not say that the states have to do this—it says the states may do this if they choose to do so.

Justice Powell's dissent opposes the majority rather vigorously. He stated that the majority disclaims any view concerning the final outcome of this case. He also stated that it is disingenuous, because under the line of cases from *Watson* to *Milivojevich,* no doubt exists that it is the 94 members who are entitled to the possession and enjoyment of this property. The schismatics, however, had been given possession and enjoyment by the Georgia court. What is really going to happen, Justice Powell stated, is that the 94 true believers are not going to get possession and enjoyment of the church. Justice Powell's dissent sharply criticizes the majority for not awarding immediate possession and enjoyment to the 94 true believers.

These 94 people were identified as true believers by the proper authorities of the Presbyterian Church in the United States. That church had exercised its power and authority through its proper tribunals to decide which of these two groups was the loyal group. It was not a difficult

decision—the schismatics had voted to secede from the Presbyterian denomination, the Presbyterian Church in America.

The second point that Justice Powell makes is that the majority's opinion is likely to cause considerable consternation among church attorneys. Many of them feel that they should redraft the basic documents of the mother and the local church in order to leave no possibility of doubt about where the locus of authority is and how it is to be exercised. Justice Powell suggested that this is not a desirable result.

He argued that the majority's position really cannot be justified by saying that these neutral principles will save courts from entanglement with religious doctrine, discipline, and ritual. That justification misreads the purpose of the first amendment. That purpose, Justice Powell states, is not to ease the burden of the judges, but to protect the liberty of the churches' exercise of religion.

Justice Powell concludes by arguing that these new evidentiary rules will result in substantial interference with denominations. He points to what he considers the certain result on remand to the Georgia court in this case. The bottom line, he says, is that the schismatics will get the property—that result violates the first amendment.

The second case that I want to discuss is *Barr v. United Methodist Church.*[11] Most of the information I have comes from one of the Methodists involved in the case. The factual background of *Barr* is rather complicated. The essence is that some Methodist corporations developed housing projects in various parts of the Southwest. Because some of the planning was not sufficiently farsighted, some very serious difficulties arose. Some people who had purchased homes in these developments were very dissatisfied. They sued not only the corporations that were directly and obviously involved in this development, but also the United Methodist Church (UMC).

The original response by the UMC was, in effect: "[w]e don't exist. We should be dismissed as a defendant because we do not exist. The term 'United Methodist Church' is pure nominalism; there really isn't any such thing in civil law." When the judge appeared before the lawyers he said: "[t]hat's rather strange, because I remember that last year or the year before, there was a bequest to the UMC, and somebody showed up to collect it." Initially, the judge denied the motion.

The lawyers became a little more sophisticated after that. They took the position that UMC exists, but it cannot be sued. They lost on that point in the California courts. The case is presently in a very complicated procedural position. The UMC lawyers applied to the United States Supreme Court for an immediate stay of the California judge's order. Justice

---

[11] 90 Cal. App. 3d 259, 153 Cal. Rptr. 322 *cert. denied*, 444 U.S. 973 (1979).

Rehnquist denied that stay because, in his view, the special rules concerning church property disputes apply only when there is a dispute within the church. If a creditor is suing the church, or if someone alleges a tort or a contract claim against a church, the first amendment does not offer any special protection.

According to the information I received from Kent Weeks, the UMC is very seriously disturbed about being a defendant in a case where the plaintiffs are seeking damages in the hundreds of millions of dollars. The fear is that when the liability issue is resolved against the UMC, the plaintiffs, in an attempt to collect on the judgment, will try to proceed through the subsidiary organizations to what they consider is the parent, and then through the parent into other subsidiaries not directly involved.

I am no expert on creditor's rights, but my own opinion is that this fear of the bridge is unrealistic. Of course, one may have to spend a great deal of money litigating to prove no such bridge exists. It can be a very expensive and anxious victory. Nevertheless, I do not see any reason to believe that the courts would permit a plaintiff to go from a parish, to a diocese, to a province and then, to another province and then, to another diocese or parish. It seems very unlikely that the assets of the Archdiocese of San Francisco could be used to pay off the judgment resulting from a parochial school fire in New York.

In any event, after I have finished the main part of my talk, I hope that any of you who have any experience with similar suits will tell us about them. We definitely need to collect all the information we can get.

Last year I was referred to the Jesuit high school in Houston which went into bankruptcy. The court appointed a trustee, who sued not only the directors of the high school, but also the New Orleans Province of the Society of Jesus for mismanagement. Again, a motion was made to have the Society of Jesus dismissed as a defendant in the case. That motion was denied. The case was finally settled by agreement among the parties—the Society no longer stood as a defendant in that case.

One of the problems that I thought was quite clear in that situation was who had the authority to represent the Society. It seemed to me that Father Arrupe should have made a decision about that. The possibility of conflict between the interests of the local unit and the parent body of the religious order was very real.

My concluding remark about this whole situation is that I do not see any legal desirability in contending that we do not exist. Our capacity to be sued as a church obviously is going to depend upon the procedural law of the state in which the suit is brought. This is an area where I am quite sure that we will have some interesting cases and we should be well prepared. Above all, as we have tried to do all along, we should share our information with each other promptly, so that we can be of the greatest possible assistance to each other.

The *Worldwide Church of God* case in California is a real nightmare. The factual background and the procedural history of that case almost defy imagination. The facts state that some dissatisfied members of the Worldwide Church of God, including Garner Ted Armstrong (the son of the founder of the church, Herbert Armstrong), went to the attorney general of California. After speaking with him, the attorney general went into the state courts and got a receiver appointed in an *ex parte* proceeding. The receiver then fired Herbert Armstrong as the head of the church. That is just the beginning of the nightmare.

The receiver subsequently was ousted because the members of the church rallied around Herbert Armstrong. Out of their own personal funds (many of them had to mortgage their homes to get this money), they put up the $3 million bond that the judge had insisted upon as a condition of removing the receiver from power. The story goes on and on, and gets more complicated.

The church leaders, of course, were absolutely appalled at suddenly being deprived of control of the church finances and employees. They also were appalled that the receiver moved into the church headquarters. They held a conference to figure out how to get the receiver out of the building legally. There was a rule in the church against smoking and the receiver was a chain smoker. So, the church leaders went back to the judge who had appointed the receiver and said, "he's smoking in our building." The judge told the receiver he could not smoke in that building. The receiver then left. That is how the leaders got their headquarters back.

The *Worldwide Church of God* has already been up to the Supreme Court on a petition for certiorari once before. The Court turned that one down—it simply went up to the Court too fast. The Church is back in the Supreme Court at the present time. No action has been taken on their petition. This time they have retained Professor Lawrence Tribe of Harvard Law School to represent them in the Supreme Court. Most of you, I am sure, at least have seen Tribe's one volume treatise on American constitutional law.

The contentions that Tribe makes and the reasons he advances for the Court to grant the writ, are as follows:

> I. The Discovery Orders Upheld Below Conflict Squarely With the Security of Personal Papers and Effects From Unreasonable Search and Seizure; With Associational Privacy; With the Free Exercise of Religion; and With the Separation of Church and State.
>
> A. The Challenged Examinations and Review of Church Records by Civil Authorities Constitutes Forbidden Entanglement.
>
> B. The Public and Coercive Character of This Investigation Infringes upon Petitioners' First Amendment Rights of Association and Religious Privacy.
>
> C. The Orders Upheld Below Lack the Factual Basis and Narrow

Scope Required by the First and Fourth Amendments.

II. The Claims of State Authority Underlying These Discovery Orders, and the State's Conduct of the Lawsuit in Which the Orders Were Entered, Are Starkly Incompatible With Rights of Private Property and Religious Autonomy.

A. The State's Claimed Source of Authority is Unconstitutional.

B. The State's Avowed Purposes in Exercising This Authority Are Unconstitutional.

1. The Judgments Below Aim Impermissibly at Supervising Spending Choices by Church Officials.

2. The Judgments Below Aim Impermissibly at Superimposing External Standards on Internal Church Relationships.

3. The Judgments Below Aim Impermissibly at Altering Church Policy and Leadership.

C. The State's Conduct of the Underlying Lawsuit Taints the Judgments Below.

III. The Trial Court's Punitive and Coercive Treatment of Each Defendant Who Challenges the Validity of the State's Discovery in any Appellate Court Violates Due Process and Federal Supremacy.

IV. The Presence of Overlapping Discovery Orders Directed to Numerous Individuals in Addition to the Church Creates an Unacceptably High Risk That Denying Judicial Review Now Would Permit only Judicial Autopsy Later.

This case is of interest to us for two reasons. If the Supreme Court grants certiorari, the United States Catholic Conference obviously will have a tremendous interest in the outcome. I hope the USCC will file a brief *amicus*. If the Court takes jurisdiction, certainly we cannot sit back and leave it to others to outline some kind of acceptable and constitutional procedure for the Supreme Court to adopt.

The problem in this kind of case is very serious. We all know that there are a number of fly-by-night religious organizations in this country. The Worldwide Church of God is not such an organization. Whatever you think of Herbert Armstrong, it is a church that has been around for many years. It is not older than he is, but he is in his eighties and he began as a young man. It has several hundred thousand members all over the world and the members have demonstrated their commitment and sincerity by tithing to this church. This is an honest-to-goodness church.

Why the attorney general of California decided to target in on this particular church is hard for me to understand. There are fly-by-night churches and there are churches set up merely to avoid taxes. Moreover, the state certainly has to have some kind of procedural mechanism for investigating charges of embezzlement of church funds or of misappropriation or misuse of church funds.

It is going to be the task of lawyers in this case to suggest procedures to the Court that would safeguard the legitimate interests of the public

and the state. The construction of such procedures is bound to involve some very difficult choices. If we leave it to the Supreme Court to construct these standards, we almost certainly will receive a less desirable answer than we would if we tried to formulate our own and then persuade the Court that it is correct.

Another reason the case is of interest to us is that, ever since this case began, the Worldwide Church of God has been engaged in a very aggressive campaign to rally the support of all the major churches in the United States. Particularly, in both appearances before the Supreme Court, the Worldwide Church of God was most anxious to get the major church denominations to file briefs *amici* in support of their petition for certiorari.

I have been in very close contact with the attorneys in the case, and I told them that I simply do not believe in lobbying the Supreme Court at the level of petition for certiorari. If the Court grants the petition, and if it is a case of major significance to us, then it is not only appropriate, but it is necessary that we be involved. The number of church-state cases being docketed in the Supreme Court calendar, however, gets larger and larger each year. The Office of General Counsel of the United States Catholic Conference has more than enough to do without reviewing every one of those to see whether a brief *amicus* should be filed at the petition of certiorari stage.

I recognize that there are many responsible religious leaders, attorneys, and organizations that disagree with my feeling and judgment on this matter. Actually, the Worldwide Church of God succeeded in getting an impressive list of church bodies to file a brief *amicus* in support of their petition for certiorari. Both the National Council of Churches of Christ in the United States of America and the Synagogue Council of America are on the brief. The Baptist Joint Committee on Public Affairs, the Lutheran Church in America, the Association of Evangelical Lutheran Churches, the United Methodist Church, William Thompson (Stated Clerk of the General Assembly of the United Presbyterian Church in the United States), and many other religious organizations signed other *amicus* briefs. The United States Catholic Conference is conspicuous in its absence from these groups. Nevertheless, I think we made the right choice—not to get involved in lobbying the Court to grant a particular petition for a writ of certiorari.

In the time that remains, I would like to hear not only any questions you may have, but I would particularly like to hear some reports about cases that you are involved with or that you know about in these areas of church property disputes, church liability or church accountability. We need to compile a really good file in these areas now and to stay on top of developments.