The Catholic Lawyer

Volume 25
Number 4 *Volume 25, Autumn 1980, Number 4*

Article 4

September 2017

Church-State Incursions

Patrick F. Geary, Assistant General Counsel, United States Catholic Conference

CHURCH - STATE INCURSIONS

PATRICK F. GEARY, ESQUIRE

During the course of the next two days, you are going to hear a series of speeches, each devoted to some specific problem facing the Church in America today. The common thread which runs through these speeches is that each deals with government regulation of a Church activity.

We come to these discussions, not with the purpose of fostering some narrow sectarian interest, but rather with the hope that by studying these individual problems in their particular dimension, we shall be more richly informed as to the state of the present relationship between church and state, particularly between the Church and the Federal Government.

I have been charged with the responsibility to set before you at the outset a perspective, a framework from which to stand during these discussions. It goes without saying that present difficulties, present problems did not arise overnight. Rather, these problems that confront the Church are the product of very substantial and deep-seated historical movements within the United States. These basic moving forces are not likely to alter in our lifetime. There has been, and there continues to be, significant pressure upon government to expand social control over the various meaningful entities and activities within our society. This pressure is felt most acutely by the administrative and legislative branches of government. The movements which have generated this pressure have their roots in the 19th century and have grown both in magnitude and intensity during the past 15 years.

There has been, and there continues to be, a felt necessity upon government to produce a society where important activities can be made socially responsive. This is accomplished through expansion of the democratic institutions. Activities which formerly were wholly within the private sector become socially responsible by being taken into the public sector. This process commonly goes by the name of socialization. It is not my object here to argue whether this is a good or bad process. I only put to you the reality that this process exists, that it is ongoing, that it has been ongoing, and, as far as we can determine, likely to continue. Moreover, it is our task as attorneys to deal with it successfully.

As government seeks to expand its activities into more and more

areas of economic and social life in the nation, there is an increasing frequency for government to encounter institutions maintained by religious organizations and to inquire why those institutions should be treated differently from similar nonsectarian institutions. More and more we find the question being asked by government, more particularly the legislative and administrative branches: Why should a religious hospital be treated differently from a hospital owned by the state or by some nonsectarian group? Why should an orphanage run by a church be treated differently from an orphanage run by the state? Why should corporations designed to carry out social welfare functions be treated differently from state agencies designed to do the same task? Why should health, education and welfare institutions operated by churches be treated differently from health, education and welfare institutions operated by nonsectarian institutions or by the state itself?

Many individuals in government fail to see any distinction between a church-owned charitable entity and a nonsectarian entity established ostensibly for the same purpose. In essence, of course, these institutions are not established for the same purposes. The Church has and continues to make the distinction that activities which are carried out in its name are more readily classifiable as charitable and, although operated within the routine channels of charitable activity, are nevertheless different because they are part of its religious mission. The Roman Catholic Church has steadfastly recognized itself as being different from nonsectarian institutions.

Given the secular climate in which we live, the justification for such a distinction is not readily apparent to many of those in public life. The churches, on the other hand, greet equal treatment as an infringement on free exercise of first amendment rights. The churches argue that the work they carry on which is similar to that carried on by the nonsectarian interests, is ultimately, fundamentally, and qualitatively different because it is religiously grounded, and is, in fact, a working out of their mission to the world. Furthermore, the churches argue that the various components which are engaged in this activity are fundamentally part of the institution itself.

Juxtaposed to, and to a degree set over and against, the thrust of expanding social responsibility manifested in the administrative and legislative branches of government is the thrust of the judicial interpretation of the first amendment. By and large, the judiciary has sought to keep religion in the private sector. Thus, the judiciary on the one hand has sought to keep the Church in the private sector, while the administrative and legislative branches of government, particularly the Federal Government, have been busy attempting to drag the Church activities into the public sector. There is obviously a very real tension between these two entirely different thrusts. If one were to describe society as a circle and

place within that circle government in the form of another smaller circle, the Church would lie in that area between the two circles. As government expands, the Church is pushed evermore to the fringes of that society. Both of these phenomena, that is, the thrust of the judiciary in keeping religious bodies within the private sector, and the increasing regulation of Church activities by the legislative and administrative branches of government, are significant in that they have their products and developments of historical movement.

I do not see any change in either direction in the near future. It seems to me that the legislatures are likely to continue to seek ways to influence and regulate the activities the churches are involved in. And I do not see the judiciary changing its mind with respect to its adjudications of the establishment and free exercise clauses. Nevertheless, we are not at the present time in a crisis. We are not at the present time overwhelmed beyond hope. We are not at the present time on the brink of disaster. We are, however, faced with a very serious problem. These two phenomena, one pushing the Church in one direction and the other pushing the Church in quite a different direction are not going to cease in the near future. If they both proceed at the same pace, we will eventually come to a very real crisis.

So my point today is first one of recognition that the problem involved here represents a serious long-term difficulty. I should temper these remarks with the observation that the recent decision in *NLRB v. Catholic Bishop of Chicago*[1] may offer some hope that these diverse pressures may be relieved. If, in fact, the Court requires legislative and administrative branches to expressly cover churches in their programs, it seems clear that such a requirement will have a net effect of slowing down the legislative process and tend to leave the Church in the private sector more often than not. Thus, if the Court continues this line of development perhaps the collision course can be avoided.

One should point out, however, that the fundamental question involved here, which is the limit of government regulation on the one hand, and the proper role of churches in our civil society on the other, still remains to be resolved in its constitutional dimension. As a matter of fact, it can well be said that the decision in *NLRB v. Catholic Bishop of Chicago* is a monument to the difficulty of resolving the constitutional issues since in a sense, the Court avoided doing so.

I think that one of the things that we should turn our attention to is the fact that the difficulties which face churches today flow from a historical context and in that respect we should remember that the Constitution is essentially an enlightenment document. As Mr. Henry Steele Com-

---

[1] 440 U.S. 490 (1979).

mager, a noted U.S. historian, has recently reminded us, the Constitution was written by a group of men committed to the enlightenment philosophy, and is a document which has its root and spirit firmly grounded in 18th century America. One of the most important characteristics of the world view which obtained during that period is to be found in the image of the machine. The possibilities of mechanics were seen as unlimited. The 18th century mind grasped the implications of Newtonian physics and was rich in the symbolism of the cosmos as a machine.

We cannot overlook the mechanistic structure which girds the U.S. Constitution itself. The system of checks and balances was designed to operate as a machine to produce a happy equilibrium which would in turn permit a vigorous people to exploit the economic resources of their rich country. The U.S. Constitution was envisaged as a machine to drive a commercial enterprise. America was for its founders, first, foremost and above all a commercial republic. The commercial republic in its relationship with religion was, in turn, grounded in the notion that there were separate and legitimate fields of activity over which both government and religion would have exclusive control. Moreover, the expected movement and interplay between religion and government was to be controlled by government.

The two religion clauses in a sense parallel the system of checks and balances and the object of this latter system was to effect a smooth running of the civic machinery. Interplay between government and religion would run on the gears of the religion clauses, and indeed, for over a hundred years until the problem with the Mormons, the system ran very nicely.

One of the key features for the well-being of the commercial republic was that disquieting influences be avoided. And to this extent one must not forget the attitudes of the philosophs toward religion. That attitude was grounded in the belief that religion was nothing but mere superstition perpetuated by a class of clerics scheming to preserve their own place in society. Under the enlightenment view, the ignorance and superstition of religion were seen to be responsible for great civil destruction and civil war, with sectarian strife being ultimately destructive of the good order of society.

During the past 30 years American historians have nearly debunked the enlightenment view of religion. In fact, Commager's historical scholarship of the moment stresses the view that the enlightenment view of the Age of Reason with respect to religion was itself unreasonable, full of mean spirit, and invective. Despite this revisionism in the historical world, it remains true that sectarian strife was greatly feared by the Framers, if for no other reason than it might inhibit the development of the commercial republic which they envisioned.

It is true, I believe, that this fear of sectarian strife has largely condi-

tioned the American republic's attitude toward the presence of religion in American society. Moreover, it has conditioned the view of the relationship between church and state. One need not look far to find an example of the reality and indeed the impact of this view. The concurring opinion of Justice Harlan in *Walz v. Tax Commission*[2] is most instructive in this regard. Justice Harlan can by no means be described as a man full of anti-religious passion. Rather, both his work and his reputation marked him as a man of sincerity and intelligence, a judicial officer beyond repute. Nevertheless, let's listen for a moment to the fears that he expresses. He began his concurrence by stating that the religion clauses are best served by looking toward the purpose which they were designed to fulfill. As he stated: "What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that history teaches us is apt to lead to strife and frequently strain a political system to the breaking point."[3] He further stated: "[R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate regarding birth control and the abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against."[4]

Thus it seems clear that the present problems to be discussed here during the next two days are symptomatic of some fundamental problems which flow from the nature of the religion clauses. Moreover, while it is true that each of these problems has its own internal tensions, which are going to be explored by the speakers to follow, it is also true that they represent a kind of a problem which has a much deeper and more significant wellspring.

The journey toward defining the proper relationship between church and state must begin with the recognition of the conceptual difficulties inherent in the religion clauses. First, we must recognize that the Framers' viewpoint was premised in the static condition of society. The machine that they fashioned presumed that the various parts would stay in the same relationship to one another. As a matter of fact, during the first 150 years of our national existence the various parts of the machine did by and large remain in the same relationship one to the other. Since World War II, however, there has been a major metamorphosis, if you will, of the various parts of American society. We now realize that society is not a machine but rather an organism subject to growth and development. Today, government does not exist in the limited manner envisioned in the 18th century by the Framers. America has, in a sense, ceased to be the commercial republic envisioned by the founding fathers. We live to-

---

[2] 397 U.S. 664 (1970).

[3] *Id.* at 694 (Harlan, J., concurring).

[4] *Id.* at 695 (Harlan, J., concurring).

day with a government that has been described by Professor Tribe, for instance, as an affirmative state. Despite this shift in the nature of American government, there still remains the presumption that the relationship between church and state remains in the same mold that the 18th century Framers of the Constitution set up.

Secondly, I think we must recognize that as an 18th century document the Constitution is grounded in a conception of the nature of religious experience that is really not valid. The machine of the religion clauses was grounded in the separation of the sacred from the profane. But, in reality, there is no distinction between religious experience and the other. While it is common for us to speak of the religious life, political life, economic life, social life, a life of the mind, or biologic life, there is in reality only one life. Human beings have a multiplicity of levels of activity and it is quite simply one of the mysteries of human life that these levels are all meshed together. There are no neat compartments in which economic life can be separated away from political life, or social life, or intellectual life. These human systems must all go forward simultaneously. Thus, there is ultimately a necessary interaction between civil life and religious life. While it is true that there are different kinds of activities, the actor, the human person, remains central. It is useless, a lesson socialism teaches us, to speak of distinctions between civic life and private life since government is ultimately government of men. It is, in fact, an organization of humans. So this reality is always present; government must always deal with this multiplicity of human activities.

The smaller the role government plays in societal life, however, the fewer will be its contacts with this multiplicity. Of course, the greater the role government plays in society, the more it confronts this reality. This is, in fact, the source of the "incursions" which now confront the churches. The numerous confrontations with religion have increased since World War II in direct proportion to the government's increasing role in society.

A third key element which we must recognize is that the fear of sectarian strife has been a paralyzing influence on the development of the church-state relationship. The Framers felt that there must be separate spheres of activity for government and religion because of the potential for sectarian strife. For too long, we have been reacting as a people to this phantom of fear. Ironically, the philosophs themselves made much sport of jousting with people over their imaginary fears.

Let's draw back for a moment and look at some of the realities of American civic life. In theory, the American republic is a democracy. It operates on the premise that its democratic institutions are to be ultimately and fundamentally responsible to those who live their lives under that government. The emergence of political parties in American history was not an accident. It was, in fact, a product of the institutional causal-

ity of the democratic process itself. Conflict is central to democracy. In a certain sense, it can be said that a democratic system anticipates, and in fact is itself sort of a Hegelian dialectic in its premise that the class of viewpoints ultimately produces a workable synthesis.

If one looks at American constitutional law as related to free speech, one sees the mirror of the fundamental importance of ideologic conflict in our society. Ideologic conflict is healthy and important to a vibrant democratic government. The role of churches in our society is not an easy one to define. As the impulse toward social control moves the gyre of government activity ever wider and wider, the values which are uniquely informed by the religious experience come evermore into the public sector. Churches have a valuable and important role to play in American society. They must not be deterred by fear from making such a contribution.

Justice Powell's remarks in *Wolman v. Walter*,[6] the Ohio school case, are indicative of a growing awareness among many in public life that the great fear of the Framers with respect to sectarian strife may have little real relevance to 20th century America.

Finally, I suggest we must recognize that American society is, after all, not a machine, but an organism which has potential to grow and develop. The roles of government and church are not static, but rather dynamic. This dynamism must inevitably be informed at some level by the religious experience which is common to all men.

The question is not one of how to keep the church and state separate. Rather, the question is: "How do we insure that this dynamism will be positive, and that the interaction between church and state productive?" I think the key to this lies in recognition of the fact that this dynamism will only function well if both church and government can make mature contributions. Churches must be allowed the autonomy necessary to be themselves. If churches simply allow themselves to be molded by the needs of government, then there can be no mature interaction between church and government. Government needs church to be church in the fullest sense. The dialectic process requires that both of these entities be themselves before a meaningful interaction can take place. We are disturbed about church-state incursions not because they impinge upon narrow sectarian interests but rather because they frustrate the Church's growth in understanding of itself, which necessarily and ultimately frustrates a fruitful intercourse with government.

Thank you.

---

[6] 433 U.S. 229, 263 (1977) (Powell, J., concurring in part, dissenting in part).